NORTH CAROLINA REPORTS

Vol. 254

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1960
SPRING TERM, 1961

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1961

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				" Eq.	"	62	"

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1960.
SPRING TERM, 1961.

CHIEF JUSTICE:

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ASSOCIATE JUSTICES:

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CARLISLE W. HIGGINS,
WILLIAM B. RODMAN, JR.,
CLIFTON L. MOORE.

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SUSIE SHARP	Reidsville.
J. B. CRAVEN, JR.	Morganton.
W. JACK HOOKS	Kenly

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

SUPERIOR COURTS, SPRING TERM, 1961

FIRST DIVISION

FIRST DISTRICT
Judge Parker

Camden—April 10.
Chowan—April 3; May 1†.
Currituck—Jan 23†; Mar. 6.
Dare—Jan. 16†; May 29.
Gates—Mar. 27; May 22†.
Pasquotank—Jan. 9†; Feb. 20*(2); Mar. 20†; May 8†(2); June 5*; June 12†.
Perquimans—Jan. 30†; Mar. 13†; Apr. 17.

SECOND DISTRICT
Judge Bone

Beaufort—Jan. 23*; Jan. 30; Feb. 20† (2); Mar. 13*; May 8†(2); June 12†; June 26.
Hyde—May 22.
Martin—Jan. 9†; Mar. 20; Apr. 10†(2); May 29†(2); June 19.
Tyrrell—Apr. 24.
Washington—Jan. 16*; Feb. 13†; Apr. 3†; May 1*.

THIRD DISTRICT
Judge Pittman

Carteret—Mar. 13†; Apr. 3; May 1†; June 12(2).
Craven—Jan. 9(2); Feb. 6†(3); Mar. 13 (a); Apr. 10; May 8†(2); May 29(2).
Pamlico—Jan. 23(a)(2).
Pitt—Jan. 23†; Jan. 30; Feb. 27†(2); Mar. 20(2); Apr. 17†; Apr. 24; May 22; May 29†(a); June 26.

FOURTH DISTRICT
Judge Morris

Duplin—Jan. 23*; Feb. 13†(2); Mar. 13† (2); Apr. 3*; Apr. 24†.
Jones—Mar. 6; May 15†.
Onslow—Jan. 9(2); Feb. 27; Mar. 27†; May 22(2).
Sampson—Jan. 30(2); Apr. 10†(2); May 1*; May 8†; June 5†(2).

FIFTH DISTRICT
Judge Paul

New Hanover—Jan. 16*; Jan. 23†(2); Feb. 13†(2); Feb. 27*(2); Mar. 13†(2); Apr. 10*; Apr. 17†(2); May 8†(2); May 22*; May 29†(2); June 12*; June 19†(2).
Pender—Jan. 9; Feb. 6†; Mar. 27; May 1†.

SIXTH DISTRICT
Judge Bundy

Bertie—Feb. 13(2); May 15(2).
Halifax—Jan. 30(2); Mar. 6†(2); May 1; May 29†(2); June 12*.
Hertford—Feb. 27; April 17(2).
Northhampton—April 3(2).

SEVENTH DISTRICT
Judge Stevens

Edgecombe—Jan. 23*; Feb. 27*(2); Mar. 27†(a)(2); Apr. 24*; June 5(2).
Nash—Jan. 9*(a); Jan. 30†; Feb. 6*; Mar. 13†(2); Apr. 10*(2); May 22†(2).
Wilson—Jan. 9†(2); Feb. 13*(2); Mar. 13†(a)(2); Mar. 27*(2); May 8*(2); June 19†(2).

EIGHTH DISTRICT
Judge Mintz

Greene—Jan. 9†; Feb. 27; May 1.
Lenoir—Jan. 16*; Feb. 13†(2); Mar. 20 (2); Apr. 17†(2); May 22†(2); June 19* (2).
Wayne—Jan. 23*; Jan. 30†(2); Mar. 6† (2); Apr. 3*(2); May 8†(2); June 5†(2).

SECOND DIVISION

NINTH DISTRICT
Judge Hall

Franklin—Feb. 6*; Feb. 20†(2); Apr. 24 †(2); May 15*.
Granville—Jan. 23; Apr. 10(2).
Person—Feb. 13; Mar. 27†(2); May 29†.
Vance—Jan. 16*; Mar. 6*; Mar. 20†; June 19*; June 26†.
Warren—Jan. 9*; Jan. 30†; Mar. 13†; May 8†; June 5*.

TENTH DISTRICT
Judge Carr

Wake—Jan. 9†(2); Jan. 9*(a); Jan. 16† (a)(2); Jan. 23*(2); Feb. 6†(2); Feb. 13† (a)(2); Feb. 20*(2)! Mar. 6†(2); Mar. 20* (2); Mar. 27†(a)(2); Apr. 3†(2); Apr. 17† (2); Apr. 17*(a)(2); May 8†(2); May 8* (a); May 22†(2); June 5*(2); June 5†(a) (2); June 19†(2); June 26*(a).

ELEVENTH DISTRICT
Judge McKinnon

Harnett—Jan. 9*; Jan. 16†(a)(2); Feb. 20†(2); Mar. 20*; Apr. 24†(2); May 22*; May 29†; June 12†(2).
Johnston—Jan. 16†(2); Jan. 30†(a)(2); Feb. 13; Feb. 20(a); Mar. 6†(2); Apr. 3† (2); Apr. 17*; May 8†(2); June 5; June 26*.
Lee—Jan. 30*; Feb. 6†; Mar. 27*; May 8†(a)(2); May 29*(a).

TWELFTH DISTRICT
Judge Hobgood.

Cumberland—Jan. 9*(2); Jan. 23†(2); Feb. 6*(2); Feb. 20†(2); Mar. 6†(a); Mar. 13*; Mar. 27*; Apr. 3†(2); Apr. 17*(2); May 1†(a); May 8†(2); May 22*(2); June 5†(2); June 19*(2).
Hoke—Jan. 9(a); Mar. 6†; May 1.

THIRTEENTH DISTRICT
Judge Bickett

Bladen—Feb. 20; Mar. 20†; Apr. 24; May 22†.
Brunswick—Jan. 23; Feb. 27†; May 1†; May 15.
Columbus—Jan. 9†(2); Jan. 30*(2); Mar. 6†(2); May 8*; June 19.

FOURTEENTH DISTRICT
Judge Williams

Durham—Jan. 9*; Jan. 16†(2); Jan. 30*; Feb. 6†(2); Feb. 20*(2); Mar. 6†(2); Mar. 20*; Mar. 27*(2); Apr. 10†(2); Apr. 24*; May 1†(2); May 15*(2); May 29†(2); June 12*; June 19*(2).

FIFTEENTH DISTRICT
Judge Clark

Alamance—Jan. 9†(2); Feb. 6†(2); Mar. 6*(2); Apr. 3†; Apr. 17†(2); May 8*; May 22†(2); June 12*(2).
Chatham—Jan. 30†; Feb. 27(a); Mar. 20 †; May 15; June 5†.
Orange—Jan. 23†; Feb. 27*; Mar. 27†; May 1*; June 26†.

SIXTEENTH DISTRICT
Judge Mallard

Robeson—Jan. 9†(2); Jan. 23*(2); Feb. 27†(2); Mar. 13*; Mar. 27†(2); Apr. 10* (2); Apr. 24†; May 8*(2); May 22†(2); June 12*(2).
Scotland—Feb. 6†; Mar. 20; May 1†; June 26.

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Johnston

Caswell—Feb. 27†; Mar. 27*(a).
Rockingham—Jan. 23*(2); Mar. 6†(2); Mar. 20*; Apr. 17†(2); May 15†; June 12* (2).
Stokes—Feb. 6*; Apr. 3*; Apr. 10†; June 26.
Surry—Jan. 9*(2); Feb. 13†(2); Mar. 27; May 1*(2); June 5.

EIGHTEENTH DISTRICT
Schedule A—Judge Olive

Guilford Gr.—Jan. 9†(2); Jan. 23†(2); Feb. 6*(2); Feb. 27†(2); Apr. 17†(2); May 15*(2); June 12†(2).
Guilford, H.P.—Feb. 13*(a); Feb. 20† Mar. 13*; Mar. 20†(2); Apr. 3*; May 1†; May 8*; May 29*.

Schedule B—Judge Gambill

Guilford Gr.—Jan. 9*(2); Feb. 6†(2); Feb. 20†; Feb. 27*(2); Mar. 13†(2); Mar. 27*; Apr. 3†(2); Apr. 17*(2); May 1†(2); May 29†(2); June 12*(2).
Guilford H.P.—Jan. 9†(a); Jan. 23*; Jan. 30†; May 22†; June 26†.

NINETEENTH DISTRICT
Judge Gwyn

Cabarrus—Jan. 9*; Jan. 16†; Mar. 6†(2); Apr. 24(2); June 12†(2).
Montgomery—Jan. 23*; May 22†(2).
Randolph—Jan. 30*; Feb. 6†(2); Apr. 3*; Apr. 10†(2); May 29†(a)(2); June 26*.
Rowan—Feb. 20(2); Mar. 20†(2); May 8(2).

TWENTIETH DISTRICT
Judge Preyer

Anson—Jan. 16*; Mar. 6†; Apr. 17(2); June 12*; June 19†.
Moore—Jan. 23†; Jan. 30*; Mar. 13†; May 1*; May 22†.
Richmond—Jan. 9*; Feb. 13†; Mar. 20† (2); Apr. 10*; May 29†(2).
Stanly—Feb. 6†; Apr. 3; May 15†.
Union—Feb. 20(2); May 8.

TWENTY-FIRST DISTRICT
Judge Crissman

Forsyth—Jan. 9(2); Jan. 23†(3); Feb. 6(a)(2); Feb. 13†‡; Feb. 20†(2); Mar. 6 (2); Mar. 20†(3); Apr. 10(2); Apr. 24†(3); May 15(2); May 15†(a)(2); May 29†(2); June 12(2); June 19†(a)(2).

TWENTY-SECOND DISTRICT
Judge Armstrong

Alexander—Mar. 13; Apr. 17.
Davidson—Jan. 23†(a); Jan. 30; Feb. 20† (2); Mar. 20(a); Apr. 3†(2); May 1; June 5†(2); June 26.
Davie—Jan. 23*; Mar. 6†; Apr. 24.
Iredell—Feb. 6(2); Mar. 20†; May 22(2).

TWENTY-THIRD DISTRICT
Judge Phillips

Alleghany—Jan. 30; Apr. 24.
Ashe—Apr. 3*; May 29†.
Wilkes—Jan. 16†(2); Jan. 30(a); Feb. 20†(2); Mar. 13*(2); May 1†(2); June 5 (2); June 19†(2).
Yadkin—Jan. 9; Feb. 6(2); May 15.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge McLean

Avery—May 1(2).
Madison—Feb. 6†; Feb. 27; Mar. 27†(2); May 29*(2); June 26†.
Mitchell—Apr. 10(2).
Watauga—Jan. 23*; Apr. 24*; June 12† (2).
Yancey—Mar. 6(2).

TWENTY-FIFTH DISTRICT
Judge Pless

Burke—Feb. 20; Mar. 13(2); June 5(2).
Caldwell—Jan. 23†(2); Feb. 27(2); Mar. 27†(2); May 22(2); June 19†(a)(2).
Catawba—Jan. 9†(2); Feb. 6(2); Apr. 10 (2); Apr. 24†(2); June 19†(2).

TWENTY-SIXTH DISTRICT
Schedule A—Judge Patton

Mecklenburg—Jan. 9*(2); Jan. 23†(2); Feb. 6†(3); Feb. 27†(2); Mar. 13*(2); Mar. 27†(2); Apr. 10*(2); Apr. 24†(2); May 8† (2); May 22†(2); June 5†(2); June 19*(2).

Schedule B—Judge Huskins

Mecklenburg—Jan. 9†(2); Jan. 23†(2); Feb. 6†; Feb. 13*(2); Feb. 27†(2); Mar. 13†(2); Mar. 27†(2); Apr. 10†(2); Apr. 24† (2); May 8*(2); May 22†(2); June 5†(2); June 19†(2).

TWENTY-SEVENTH DISTRICT
Judge Farthing

Cleveland—Jan. 30; Mar. 27†(2); May 1 (2).
Gaston—Feb. 6†(2); Feb. 27*(2); Mar. 13†(2); Apr. 10†(a)(2); Apr. 24*; May 29† (2); June 12*.
Lincoln—Jan. 16(2); May 15(2).

TWENTY-EIGHTH DISTRICT
Judge Campbell

Buncombe—Jan. 9*(2); Jan. 23†(3); Feb. 13*(2); Feb. 27†(3); Mar. 20†(a); Mar. 20* (a)(2); Mar. 27†(3); Apr. 17*(2); May 1† (3); May 15*(a)(2); May 22†(a)(2); June 5†(3); June 12*(a).

TWENTY-NINTH DISTRICT
Judge Clarkson

Henderson—Feb. 13(2); Mar. 20†(2); May 8*; May 29†(2).
McDowell—Jan. 9*; Feb. 27†(2); Apr. 17*; June 12(2).
Polk—Jan. 30; Feb. 6†(a); June 26.
Rutherford—Jan. 16†*(2); Mar. 13*†; Apr. 24†*(2); May 15*†(2).
Transylvania—Jan. 30†(a); Feb. 6*; Apr. 3(2).

THIRTIETH DISTRICT
Judge Froneburger

Cherokee—April 3(2); June 26†.
Clay—May 1.
Graham—Mar. 20; June 5†(2).
Haywood—Jan. 9†(2); Feb. 6(2); May 8†(2).
Jackson—Feb. 20(2); May 22.
Macon—Apr. 17(2).
Swain—Mar. 6(2).

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* Indicates criminal term.
† Indicates civil term.
No designation indicates mixed term.

(a) Indicates judge to be assigned.
No number indicates one week term.
‡ 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.

CASES REPORTED

PAGE

A

Abernethy v. Hospital Care Assoc. 346
Adams v. Godwin 632
Adler v. Curle 502
Aeroglide Corp., Blount-Midyette Co. v. 484
Aircraft Co., Jones v. 323
Air Harbor Flying Service, Inc. Flying Club v. 775
Aldridge S. v. 297
Alford v. McGehee 675
Allen v. Currie, Commissioner of Revenue 636
Alverson, Carringer v. 204
Aviation, Inc., Brittain v. 697

B

Baker v. Murphrey 506
Bailey, Rhyne v. 467
Bailey, S. v. 380
Baptist Church v. Simms 148
Barefoot, S. v. 308
Barker, Green v. 603
Barney, S. v. 463
Bauman, Wagner v. 594
Bazemore v. Board of Elections 398
Bell, Gillikin v. 244
Berry Coal & Oil Co., Bullard v. 756
Bertie County Board of Elections, Bazemore v. 398
Bistany v. McGee 326
Blades, Williams v. 353
Blair, Caudell v. 438
Blount-Midyette Co. v. Aeroglide Corp. 484
Board of Education, Construction Co. v. 311
Board of Education, Gay v. 622
Board of Elections, Bazemore v. 398
Bone, Darden v. 599
Boyce, Howard v. 255
Bradley v. Pritchard 175
Brantley, S. v. 308
Brevoort, Mason v. 619

PAGE

Brewer v. Green 615
Bright, S. v. 226
Brittain v. Aviation, Inc. 697
Brotherhood, Coach Lines v. 60
Brown, Hines v. 447
Brown, Steele v. 677
Brown, Stockwell v. 662
Buick Co. v. Motors Corp. 117
Bullard v. Oil Co. 756
Burell, S. v. 317
Butler Lumber Co., Daniel v. 504
Byrnes v. Ryck 496

C

Camden County, Cuthrell v. 181
Camp, Ramsey v. 443
Canoy, Sanitary District v. 630
Cappa Flying Club, Inc. v. Flying Service 775
Carolina Coach Co., Utilities Commission v. 319
Carolina Coach Co., Utilities Commission v. 668
Carringer v. Alverson 204
Carter, S. v. 475
Carteret County, Sheriff of, Chadwick v. 389
Casstevens v. Membership Corp. 746
Caudell v. Blair 438
Chadwick v. Salter 389
Charlotte Chemical Laboratories, Inc., Greene v. 680
Charlotte City Coach Lines v. Brotherhood 60
Church v. College 717
City of Lumberton, Wishart v. 94
City of Winston-Salem, Moss v. 480
Clark, Lynn v. 460
Clarkson, McIntyre v. 510
Cline, In re Estate of 634
Cloud, S. v. 313
Coach Co., Utilities Commission v. 668
Coach Lines v. Brotherhood 60
Coach Co., Utilities Commission v. 319
Cole, York v. 224
College, Church v. 717

PAGE

Collins v. Simms 148
Commissioner of Insurance, Insurance Co. v. 168
Commissioner of Motor Vehicles, Honeycutt v. 607
Commissioner of Revenue, Allen v. 636
Commissioner of Revenue, Finance Co. v. 129
Commissioner of Revenue, Power Co. v. 17
Commissioner of Revenue, Stiles v. 197
Construction Co. v. Board of Education 311
Construction Co., Heuay v. 252
Construction Co., Moore v. 464
Cox, In re Will of 90
Creel v. Gas Co. 324
Curle, Adler v. 502
Currie, Commissioner of Revenue, Allen v. 636
Currie, Commissioner of Revenue, Finance Co. v. 129
Currie, Commissioner of Revenue, Power Co. v. 17
Currie, Commissioner of Revenue, Stiles v. 197
Cuthrell v. Camden County 181

D

Daniel v. Lumber Co. 504
Darden v. Bone 599
Dawson Construction Co. v. Board of Education 311
Deal v. Leisure Lads, Inc. 328
Diocese v. Sale 218
Douglas Aircraft Co., Jones v. 323
Drainage District, In re 155

E

Eastham, Greitzer v. 752
Electric and Power Co. v. Currie 17
Electric Co., Jenkins v. 553
Elkin, Walker v. 85
Elliott v. Goss 508
English, Nix v. 414
Episcopal Church v. Sale 218

F

Faizan v. Insurance Co. 47

PAGE

Faust, S. v. 101
Finance Co. v. Currie, Commissioner of Revenue 129
First Presbyterian Church of Raleigh v. College 717
Flying Club v. Flying Service 775
Flying Service, Flying Club v. 775
Fox, Johnson v. 454
Fox, S. v. 97
Foye, S. v. 704
Frazier, S. v. 226
Frizzelle, S. v. 457
Furr v. Overcash 611

G

Gas Co., Creel v. 324
Gas Co., Utilities Commission v. 536
Gas Co., Utilities Commission v. 734
Gay v. Board of Education 622
General Motors Corp., Buick Co. v. 117
Giles, S. v. 499
Gillikin v. Bell 244
Gillikin v. Guaranty Co. 247
Gillikin v. Indemnity Co. 250
Gillikin v. Springle 240
Godfrey, Gregory v. 215
Godwin, Adams v. 632
Godwin v. Vinson 582
Gold, Commissioner of Insurance, Insurance Co. v. 168
Goss, Elliott v. 508
Grain Dealers Mutual Ins. Co., Faizan v. 47
Grantham, Maxwell v. 208
Gray v. Insurance Co. 286
Great American Insurance Co. v. Gold 168
Green v. Barker 603
Green, Brewer v. 615
Greene v. Laboratories, Inc. 680
Gregory v. Godfrey 215
Greitzer v. Eastham 752
Grindstaff v. Watts 568
Guss, S. v. 349
Guaranty Co., Gillikin v. 247

H

Haddock, S. v. 162

PAGE

Halifax Construction Co., Heuay v. 252
Harbison, Rutherford v. 236
Haven Creek Baptist Church v. Simms 148
Hawkins, S. v. 678
Helton v. Stevens Co. 321
Henderson v. Insurance Co. 329
Herring v. Humphrey 741
Heuay v. Construction Co. 252
High, S. v. 772
Highway Commission, Jacobs v. 200
Highway Commission, Templeton v. 337
Hines v. Brown 447
Home Security Life Insurance Co., Jones v. 407
Honeycutt v. Scheidt, Com'r. of Motor Vehicles 607
Hospital Care Assoc., Abernethy v. 346
Howard v. Boyce 255
Hoyle, Rudisill v. 33
Hughes, In re 434
Humphrey, Herring v. 741
Hunnings, S. v. 772
Hutchens v. Southard 428
Hyde County Board of Education, Construction Co. v. 311

I

Indemnity Co., Gillikin v. 250
In re Drainage District 155
In re Estate of Cline 634
In re Hughes 434
In re Orr 723
In re Will of Cox 90
In re Will of Sessoms 369
Insurance Co., Faizan v. 47
Insurance Co. v. Gold, Commissioner of Insurance 168
Insurance Co., Gray v. 286
Insurance Co., Henderson v. 329
Insurance Co., Jones v. 407
Insurance Co., Kirk v. 651
Insurance Co., Rhinehardt v. 671
Insurance Co., Richardson v. 711

J

Jacobs v. Highway Commission 200
Jarrett v. R. R. 493

PAGE

Jenkins v. Electric Co. 553
Jennings, S. v. 760
Johnson v. Fox 454
Jones v. Aircraft Co. 323
Jones v. Insurance Co. 407
Jones v. Mathis 421
Jones, Rouse v. 575
Jones v. Saunders 644
Jones, S. v. 351
Jones, S. v. 380
Jones, S. v. 450
Joyce, Pope v. 629

K

Kirk v. Insurance Co. 651

L

Laboratories, Inc., Greene v. 680
Leftwich Electric Co., Jenkins v. 553
Leisure Lads, Inc., Deal v. 328
Lenoir Finance Co. v. Currie 129
Liberty Life Insurance Co., Richardson v. 711
Linkous v. Millner 782
"Links" of Danville, Va., v. Millner 782
Lowe v. Lowe 631
Lowe, S. v. 631
Lumber Co., Daniel v. 504
Lumberton, Wishart v. 94
Lynn v. Clark 460
Lynn, Woolard v. 679

Mc

McArthur v. Stanfield 627
McGee, Bistany v. 326
McGehee, Alford v. 675
McIntyre v. Clarkson 510
McKinnon, Utilities Commission v. 1

M

Maides, S. v. 223
Mason v. Brevoort 619
Mathis, Jones v. 421
Maxwell v. Grantham 208
Membership Corp., Casstevens v. 746
Menzel v. Menzel 353
Miller, S. v. 765

PAGE

Millner, Linkous v. 782
Moore v. Construction Co. 464
Moore, Smith v. 186
Morgan v. Spindale 304
Motors Corp., Buick v. 117
Moss v. Winston-Salem 480
Murphrey, Baker v. 506

N

Nationwide Mutual Insurance Co., Kirk v. 651
Nix v. English 414
North Asheboro-Central Falls Sanitary District v. Canoy 630
North Asheboro-Central Falls Sanitary District v. Stowe 635
North Carolina Mutual Life Ins. Co., Rhinehardt v. 671

O

Ohio Farmers Indemnity Co., Gillikin v. 250
Oil Co., Bullard v. 756
Orr, *In re* 723
Overcash, Furr v. 611

P

Parks, Taylor v. 266
Parrish, S. v. 301
Peace College v. College 717
Peeden v. Tait 489
Peoples Bank & Trust Co., Smith v. 588
Perquimans County Drainage District, *In re* 155
Perry, S. v. 772
Piedmont Aviation, Inc., Brittain v. 697
Piedmont Natural Gas Co., Creel v. 324
Piedmont Natural Gas Co., Utilities Commission v. 536
Piedmont Natural Gas Co., Inc., Utilities Commission v. 734
Pittman, Waters v. 191
Pope v. Joyce 629
Powell, S. v. 231
Power Co. v. Currie, Commissioner of Revenue 17
Pridgen v. Uzzell 292

PAGE

Priest v. Thompson 673
Prince v. Smith 768
Pritchard, Bradley v. 175
Pritchard v. Scott 277
Propst Construction Co., Moore v. 464

R

R.R., Jarrett v. 493
Railroad Trainmen, Brotherhood of, Coach Lines v. 60
R.R., Utilities Commission v. 73
Ramsey v. Camp 443
Reel, S. v. 778
Reeves v. Taylor-Colquitt Co. 342
Rhinehardt v. Insurance Co. 671
Rhyne v. Bailey 467
Richardson v. Insurance Co. 711
Riddle v. Riddle 780
Rochester American Insurance Co., Henderson v. 329
Rouse v. Jones 575
Rudisill v. Hoyle 33
Rutherford v. Harbison 236
Ryck, Byrnes v. 496

S

St. Andrews Presbyterian College, Inc., Church v. 717
Sale, Diocese v. 218
Salter, Chadwick v. 389
Sampson, S. v. 97
Sanitary District v. Canoy 630
Sanitary District v. Stowe 635
Saunders, Jones v. 644
Scheidt, Commissioner of Motor Vehicles, Honeycutt v. 607
Scott, Pritchard v. 277
Sessoms, In re Will of 369
Sheriff of Carteret County, Chadwick v. 389
Simms, Collins v. 148
Smith v. Moore 186
Smith, Prince v. 768
Smith v. Trust Co. 588
Southard, Hutchens v. 428
Southern R.R., Jarrett v. 493
Southern Railway Co., Utilities Commission v. 73
Springle, Gillikin v. 240
Spindale, Morgan v. 304

	PAGE
Stanfield, McArthur v.	627
S. v. Aldridge	297
S. v. Bailey	380
S. v. Barefoot	308
S. v. Barney	463
S. v. Brantley	308
S. v. Bright	226
S. v. Burell	317
S. v. Carter	475
S. v. Cloud	313
S. v. Faust	101
S. v. Fox	97
S. v. Foye	704
S. v. Frazier	226
S. v. Frizzelle	457
S. v. Giles	499
S. v. Guss	349
S. v. Haddock	162
S. v. Hawkins	678
S. v. High	772
S. v. Hunnings	772
S. v. Jennings	760
S. v. Jones	351
S. v. Jones	380
S. v. Jones	450
S. v. Lowe	631
S. v. Maides	223
S. v. Miller	765
S. v. Parrish	301
S. v. Perry	772
S. v. Powell	231
S. v. Reel	778
S. v. Sampson	97
S. v. Strickland	658
S. v. Stroud	765
S. v. Tessnear	211
S. v. Williams	704
S. v. Wyatt	220
S. ex rel Carringer v. Alverson	204
S. ex rel Utilities Commission v. Coach Co.	319
S. ex rel Utilities Commission v. Coach Co.	668
S. ex rel Utilities Commission v. Gas Co.	536
S. ex rel Utilities Commission v. Gas Co.	734
S. ex rel Utilities Commission v. McKinnon	1
S. ex rel Utilities Commission v. R.R.	73
State Capital Life Insurance Co., Gray v.	286
State Highway Commission, Jacobs v.	200
State Highway Commission, Templeton v.	337
Steele v. Brown	677
Stevens Co., Helton v.	321
Stiles v. Currie, Commissioner of Revenue	197
Stockwell v. Brown	662
Stowe, Sanitary District v.	635
Strickland, S. v.	658
Stroud, S. v.	765

T

Tait, Peeden v.	489
Taylor v. Parks	266
Taylor-Colquitt Co., Reeves v.	342
Templeton v. Highway Commission	337
Tessnear, S. v.	211
Thompson, Priest v.	673
Timberlake v. Williams	466
Toomes v. Toomes	624
Town of Elkin, Walker v.	85
Town of Spindale, Morgan v.	304
Trust Co., Smith v.	588

U

United States Fidelity & Guaranty Co., Gillikin v.	247
Utilities Commission v. Coach Co.	319
Utilities Commission v. Coach Co.	668
Utilities Commission v. Gas Co.	536
Utilities Commission v. Gas Co.	734
Utilities Commission v. McKinnon	1
Utilities Commission v. R.R.	73
Uzzell, Pridgen v.	292

V

Vinson, Godwin v.	582
Virginia Electric and Power Co. v. Currie	17

	PAGE
W	
Wagner v. Bauman	594
Wake County Board of Education, Gay v.	622
Waldron Buick Co., Motors v.	117
Walker v. Elkin	85
Waters v. Pittman	191
Watts, Grindstaff v.	568
Wilkes Telephone Membership Corp., Casstevens v.	746
Willetts v. Willetts	136
Williams v. Blades	353
Williams, S. v.	704
Williams, Timberlake v.	466
Williams v. Williams	729
Winston-Salem, Moss v.	480
Wishart v. Lumberton	94
Woolard v. Lynn	679
Wyatt, S. v.	220
Y	
York v. Cole	224

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

S. v. Davis, 253 N.C. 86. Petition for *certiorari* denied 20 March 1961.

Power Company v. Currie, Comr. of Revenue, 254 N.C. 17. Petition for *certiorari* denied 19 June 1961.

CASES CITED

A

Abbitt v. Gregory....196 N.C. 9....220
Adams v. Board of Education....248 N.C. 506....432
Adams v. Godwin....252 N.C. 471....633
Adams v. Joyner....147 N.C. 77....159
Aiken v. Sanderford....236 N.C. 760....603
Airport Authority v. Johnson..226 N.C. 1....305
Aldridge v. Hasty....240 N.C. 353....432, 666
Alexander v. Alexander....210 N.C. 281....45
Allen v. Allen....244 N.C. 446....629, 631
Allen v. R.R. ....120 N.C. 548....203
Allen v. Salley ....179 N.C. 147....758
Allen v. Seay ....248 N.C. 321....649
Allison v. Sharp....209 N.C. 477....402, 403
Ammons v. Insurance Co....245 N.C. 655....499
Andrews v. Andrews ....253 N.C. 139....43, 45, 210, 211
Andrews v. Assurance Society....250 N.C. 476....179
Andrews v. Bruton ....242 N.C. 93....120, 421
Andrews v. Lovejoy ....247 N.C. 554....283
Arnett v. Yeago....247 N.C. 356....744
Arvin v. McClintock....253 N.C. 679....495, 612
Assurance Society v. Ashby....215 N.C. 280....413, 673
Assurance Co. v. Gold....248 N.C. 288....171
Assurance Co. v. Gold....249 N.C. 461....132, 171
Atkins v. Transportation Co....224 N.C. 688....564

B

Badders v. Lassiter....240 N.C. 413....449
Bailey v. McGill ....247 N.C. 286....464
Bailey v. McLain ....215 N.C. 150....92
Baker v. Murphrey....250 N.C. 346....506
Ball v. Assurance Corp....206 N.C. 90....332
Ballard v. Ballard....230 N.C. 629....650
Ballinger v. Thomas....195 N.C. 517....691
Bank v. Dew ....175 N.C. 79....426
Bank v. Duffy ....156 N.C. 83....203
Bank v. Harrington ....193 N.C. 625....184
Bank v. Hotel Co....147 N.C. 594....161
Bank v. Mitchell ....203 N.C. 339....194
Bank v. Phillips ....236 N.C. 470....499
Barbour v. Scheidt, Commissioner of Motor Vehicles....246 N.C. 169....762
Barco v. Owens....212 N.C. 30....43
Barefoot v. Rulnick....252 N.C. 483....226
Barfield v. Hill....163 N.C. 262....598
Bargeon v. Transportation Co....196 N.C. 776....690
Barnes v. Highway Comm....250 N.C. 378....339
Barnette v. Woody....242 N.C. 424....601, 738

Barwick v. Rouse....245 N.C. 391....190, 191
Bath v. Norman....226 N.C. 502....263, 264
Batson v. Bell....249 N.C. 718....605
Bass v. Bass....229 N.C. 171....144
Baxley v. Cavenaugh....243 N.C. 677....606
Beaman v. R.R....238 N.C. 418....495
Beard v. Sovereign Lodge....184 N.C. 154....152
Beaver v. Paint Co....240 N.C. 328....484
Belhaven v. Hodges....226 N.C. 485....605
Belk v. Belk....175 N.C. 69....650
Bell v. Lacey....248 N.C. 703....690, 691, 694, 695, 697
Bennett v. Attorney General....245 N.C. 213....229
Berry v. Lumber Co....183 N.C. 384....420
Best v. Utley....189 N.C. 356....650
Biggs v. Biggs....253 N.C. 10....299
Blackmore v. Winders....144 N.C. 212....203, 204
Blalock v. Hart....239 N.C. 475....492, 666
Blanton v. Dairy....238 N.C. 382....606
Blowing Rock v. Gregorie....243 N.C. 364....53, 68
Blue v. Blue....79 N.C. 69....161
Blue v. Wilmington....186 N.C. 321....96, 426
Board of Education v. Deitrick....221 N.C. 38....688
Board of Education v. Mann....250 N.C. 493....312
Board of Managers v. Wilmington....237 N.C. 179....523, 533
Boone v. Boone....217 N.C. 722....72
Boozer v. Assurance Society....206 N.C. 848....179
Bost v. Metcalfe....219 N.C. 607....690
Bottling Co. v. Shaw....232 N.C. 307....133
Bowen v. Darden....241 N.C. 11....144
Bowen v. Lumber Co....153 N.C. 366....605
Bowie v. Trucker....197 N.C. 671....426
Bowling v. Burton....101 N.C. 176....203
Bowles v. Graded Schools....211 N.C. 36....96
Bowman v. Greensboro....190 N.C. 611....690
Boyce v. Gastonia....227 N.C. 139....303
Boyd v. R.R....200 N.C. 324....666
Boykin v. R.R....211 N.C. 113....432
Bradfford v. Cook....232 N.C. 699....472
Bradham v. Trucking Co....243 N.C. 708....449
Bradley v. Bradley....245 N.C. 483....190
Brady v. Beverage Co....242 N.C. 32....13
Brady v. R.R....222 N.C. 367....745
Brick Co. v. Hodgin....190 N.C. 582....283
Bridges v. Graham....246 N.C. 371....296, 297, 455, 456
Briggs v. Raleigh....195 N.C. 223....307
Brinson v. Insurance Co....247 N.C. 85....716
Brinson v. Mabry....251 N.C. 435....617, 618
Brittingham v. Stadiem....151 N.C. 299....570
Brothers v. Jernigan....244 N.C. 441....733
Brown v. Candler....236 N.C. 576....96
Brown v. Commissioners....173 N.C. 598....522

Brown v. Estates Corp.....239 N.C. 595.....586, 587
Brown v. Glass .....229 N.C. 657.....285
Brown v. Hodges .....233 N.C. 617.....605
Brown v. R.R. .....208 N.C. 423.....445, 446
Bryant v. Barber.....237 N.C. 480.....16
Buchanan v. Smawley.....246 N.C. 592.....626
Buckner v. Anderson.....111 N.C. 572.....598
Buchan v. Shaw.....238 N.C. 522.....172, 173
Bullock v. Crouch .....243 N.C. 40.....758, 759
Bullock v. Insurance Co.....200 N.C. 642.....180
Bundy v. Powell.....229 N.C. 707.....495, 612
Bunting v. Cobb.....234 N.C. 132.....217
Bumgardner v. R.R.....132 N.C. 438.....289
Burgess v. Kirby.....94 N.C. 575.....367
Burton v. Peace.....206 N.C. 99.....650
Burwell v. Sneed.....104 N.C. 118.....284
Butler v. Allen.....233 N.C. 484.....619
Butner v. Spease.....217 N.C. 82.....581, 666

C

Cagle v. Hampton.....196 N.C. 470.....45
Calcutt v. McGeachy.....213 N.C. 1.....395
Cameron v. McDonald.....216 N.C. 712.....693
Campbell v. Currie,
Commissioner of Revenue.....251 N.C. 329.....57
Campbell v. Laundry.....190 N.C. 649.....744
Canestrino v. Powell.....231 N.C. 190.....426, 696
Cannon v. Blair .....229 N.C. 606.....649, 650
Cannon v. Cannon .....225 N.C. 611.....642
Cannon v. Wilmington .....242 N.C. 711.....202
Capp v. Lynch.....243 N.C. 18.....703
Carmon v. Dick.....170 N.C. 305.....190, 282
Carpenter v. Carpenter.....244 N.C. 286.....265
Carrigan v. Dover.....251 N.C. 97.....450
Carringer v. Alverson.....254 N.C. 204.....513
Carroll v. Herring.....180 N.C. 369.....43
Carroway v. Chancey.....47 N.C. 170.....598
Carstarphen v. Plymouth.....180 N.C. 26.....96
Carter v. Rountree .....109 N.C. 29.....367, 754
Carter v. Shelton .....253 N.C. 558.....434, 618
Carter v. Vann .....189 N.C. 252.....605
Carver v. Leatherwood.....230 N.C. 96.....190, 282, 283, 285
Castle v. Threadgill.....203 N.C. 441.....719
Casualty Co. v. Lawing.....223 N.C. 8.....39
Cato v. Hospital Care Assoc.....220 N.C. 479.....413
Caudle v. R.R.....202 N.C. 404.....432
Caughron v. Walker.....243 N.C. 153.....581
Chadbourn v. Johnston.....119 N.C. 282.....261
Chambers v. Allen.....233 N.C. 195.....499
Chavis v. Brown.....174 N.C. 122.....263
Chavis v. Insurance Co.....251 N.C. 849.....413
Chemical Co. v. Bass.....175 N.C. 426.....266

Childress v. Motor Lines.....235 N.C. 522..... 419
Cherry v. R.R. .....185 N.C. 90..... 40
Cherry v. Wollard .....244 N.C. 603..... 366
Chewning v. Mason.....158 N.C. 578..... 44
Clark v. Emerson.....245 N.C. 387..... 580
Clark v. Freight Carriers.....247 N.C. 705..... 688
Clark v. Sweaney.....176 N.C. 529..... 571
Clay v. Insurance Co.....174 N.C. 642..... 291
Claywell v. McGimpsey.....15 N.C. 89..... 194
Cleeland v. Cleeland.....249 N.C. 16..... 437
Clement v. Harrison.....193 N.C. 825..... 195
Cleve v. Adams.....222 N.C. 211..... 93, 263
Clodfelter v. Wells.....212 N.C. 823..... 419
Clontz v. Krimminger.....253 N.C. 252.....450, 490, 495, 612
Clothing Store v.
Ellis Stone & Co.....233 N.C. 126.....689, 690
Coach Lines v. Brotherhood.....254 N.C. 60..... 720
Coastal Highway v.
Turnpike Authority.....237 N.C. 52.....208, 523, 535
Cobb v. Clegg .....137 N.C. 153..... 72, 719
Cobb v. Commissioners .....122 N.C. 307..... 133
Coffey v. Greer.....241 N.C. 744..... 605
Coker v. Coker.....224 N.C. 450..... 92
Cole v. Koonce.....214 N.C. 188..... 495
Coleman v. R.R.....153 N.C. 322..... 495
Coley v. Phillips.....224 N.C. 618..... 289
Collins v. Casualty Co.....172 N.C. 543..... 348
Collins v. Highway Commission.237 N.C. 277.....154, 161
Columbus County v. Thompson..249 N.C. 607..... 726
Columbus County v. Thompson..249 N.C. 607..... 266
Commissioners v. Bank .....181 N.C. 347..... 522
Commissioners v. Pruden .....178 N.C. 394..... 522
Conley v. Pearce-Young-
Angel Co.....224 N.C. 211..... 580
Conley v. Pearce-Young-
Angel Co.....224 N.C. 211..... 432
Connor v. Ridley.....248 N.C. 714..... 144
Construction Co. v.
Electrical Workers Union.....246 N.C. 481..... 626
Cook v. Mebane.....191 N.C. 1..... 300
Cooley v. Baker.....231 N.C. 533..... 491
Corporation Commission v.
Mfg. Co.....185 N.C. 17..... 552
Cotton Co. v. Hobgood .....243 N.C. 227.....183, 185
Cotton Mills v. Local 578.....251 N.C. 218..... 436
Cotton Mills v.
Textile Workers Union.....238 N.C. 719..... 70
Council v. Dickerson's Inc.....233 N.C. 472.....688, 689, 690
Cover v. McAden.....183 N.C. 641..... 592
Cox v. Freight Lines.....236 N.C. 72..... 621
Cox v. Lee .....230 N.C. 155..... 580
Craddock v. Brinkley.....177 N.C. 125..... 93, 627
Craver v. Spaugh.....226 N.C. 450..... 755

Crawford v. Willoughby....192 N.C. 269.... 622
Creech v. Creech....222 N.C. 656.... 144
Crotts v. Transportation Co....246 N.C. 420.... 666
Crouse v. Vernon....232 N.C. 24.... 488
Crowell v. Air Lines....240 N.C. 20.... 691
Cudworth v. Insurance Co....243 N.C. 584.... 348
Culbreth v. Britt Corp....231 N.C. 76.... 592
Cunningham v. Dillard....20 N.C. 485.... 249
Cuthbertson v. Burton....251 N.C. 457.... 693
Cuthbertson v. Insurance Co....96 N.C. 480.... 412

D

Dail v. Hawkins ....211 N.C. 283.... 693
Dail v. Taylor ....151 N.C. 284.... 770
Daniel v. Gardner....240 N.C. 249.... 687
Daniels v. Homer....139 N.C. 219....396, 397
Darden v. Boyette ....247 N.C. 26.... 44, 640
Darden v. Matthews ....173 N.C. 186.... 45
Davidson v. Arledge....97 N.C. 172.... 598
Davis v. Bottling Co....228 N.C. 32.... 770
Davis v. Davis ....236 N.C. 208.... 648
Davis v. Davis ....246 N.C. 307.... 39, 42
Davis v. Lawrence ....242 N.C. 296.... 272
Davis v. R.R. ....134 N.C. 300.... 733
Davis v. Retail Stores Inc....211 N.C. 551.... 246
Davis v. Rhodes ....231 N.C. 71.... 203
Day v. Commissioners....191 N.C. 780.... 522
Dean v. Construction Co....251 N.C. 581.... 744
Dennis v. Raleigh....253 N.C. 400.... 513
Development Co. v. Braxton....239 N.C. 427.... 174
Dobias v. White....240 N.C. 680.... 751
Dorman v. Goodman....213 N.C. 406.... 184
Dorsey v. Mining Co....177 N.C. 60.... 442
Doyle v. Brown....72 N.C. 393.... 262
Drum v. Bisaner....252 N.C. 305....495, 562, 563, 565
Duke v. Shaw....247 N.C. 236.... 173
Duncan v. Carpenter....233 N.C. 422.... 68
Dyche v. Patton....56 N.C. 332.... 244

E

Early v. Tayloe....219 N.C. 363.... 43
Eason v. Dortch....136 N.C. 291.... 152
Eason v. Spence....232 N.C. 579.... 303
Edwards v. Hunter....246 N.C. 46.... 720
Elder v. Johnston....227 N.C. 592.... 43
Eldridge v. Mangum....216 N.C. 532.... 87
Electric Supply Co. v. Burgess....223 N.C. 97.... 67
Electric Co. v. Insurance Co....229 N.C. 518.... 713
Eledge v. Light Co....230 N.C. 584.... 688
Elizabeth City v. Aydlette....201 N.C. 602.... 89
Eller v. Board of Education....242 N.C. 584.... 396
Elliott v. Goss ....250 N.C. 185.... 650
Elliott v. Killian ....242 N.C. 471.... 475

Ely v. Norman....175 N.C. 294.... 183
England v. Garner....90 N.C. 197.... 262
Enloe v. Bottling Co....208 N.C. 305.... 770
Ervin v. Mills Co....233 N.C. 415.... 490
Etheridge v. Etheridge....222 N.C. 616.... 432
Evans v. Junior Order....183 N.C. 358.... 290
Ezzell v. Merrill....224 N.C. 602.... 40

F

Faircloth v. Insurance Co....253 N.C. 522.... 756
Faircloth v. R.R. ....247 N.C. 190.... 495
Fallins v. Insurance Co....247 N.C. 72....348, 654
Ferrell v. Highway Commission..252 N.C. 830.... 202
Finance Co. v. Currie,
Commissioner of Revenue....254 N.C. 129.... 521
Finance Co. v. Pittman ....253 N.C. 550.... 515
Finance Co. v. Trust Co....213 N.C. 369.... 93
Fitzgerald v. R.R....141 N.C. 530....560, 566, 567
Flake v. News Co....212 N.C. 780.... 246
Fleming v. Twiggs....244 N.C. 666.... 619
Fletcher v. Commissioners of
Buncombe ....218 N.C. 1....517, 523
Fletcher v. Trust Co....220 N.C. 148.... 291
Flowers v. King....145 N.C. 234.... 265
Floyd v. Dickey....245 N.C. 589.... 603
Flythe v. Coach Co....195 N.C. 777.... 322
Ford v. Insurance Co....222 N.C. 154.... 179
Fortune v. Hunt....149 N.C. 358.... 733
Fowle v. Ham....176 N.C. 12.... 183
Fowler v. Fowler....190 N.C. 536.... 93, 154
Fox v. Commissioners ....244 N.C. 497....208, 513
Fox v. Scheidt, Commissioner
of Motor Vehicles....241 N.C. 31.... 609
Franklin County v. Jones....245 N.C. 272....365, 366
Frazier v. Gas Co....247 N.C. 256.... 566
Freeman v. Commissioners of
Madison ....217 N.C. 209.... 513
Freeman v. Thompson ....216 N.C. 484.... 691
Furr v. Moss....52 N.C. 525.... 249

G

Gafford v. Phelps....235 N.C. 218....437, 727
Gaither v. Hospital ....235 N.C. 431.... 281
Gaither Corp. v. Skinner....238 N.C. 254.... 688
Gallimore v. Highway Comm. ...241 N.C. 350.... 202
Gallimore v. Highway Comm. ...241 N.C. 350....339, 340
Gardiner v. May....172 N.C. 192....262, 263, 755
Gardner v. Price....242 N.C. 592.... 369
Garris v. Byrd ....229 N.C. 343.... 284
Garris v. Scott ....246 N.C. 568.... 649
Gatlin v. Tarboro....78 N.C. 119.... 133
Gaulden v. Insurance Co....246 N.C. 378.... 655

Gaylord v. Gaylord....150 N.C. 222.... 143
Gennett v. Insurance Co....207 N.C. 640.... 180
Gerringer v. Garringer....223 N.C. 818.... 648
Gibson v. Insurance Co....232 N.C. 712.... 13, 738
Gilchrist v. McLaughlin....29 N.C. 310.... 598
Gillam v. Cherry....192 N.C. 195.... 152
Gilliam v. Watkins....104 N.C. 180.... 42
Gillikin v. Gillikin ....248 N.C. 710.... 425
Gillikin v. Gillikin ....252 N.C. 1.... 365
Glenn v. Board of Education....210 N.C. 525.... 515
Glenn v. Raleigh ....246 N.C. 469.... 499
Glisson v. Glisson....153 N.C. 185....365, 367, 368
Godwin v. Cotton Co....238 N.C. 627.... 191
Godwin v. R.R. ....220 N.C. 281.... 495
Goldman v. Kossove....253 N.C. 370.... 254
Goldsboro v. R.R. ....241 N.C. 216.... 523
Goldsboro v. R.R. ....246 N.C. 101....483, 738
Gossett v. Ins. Co....208 N.C. 152.... 588
Graham v. Floyd ....214 N.C. 77.... 366
Graham v. R.R. ....240 N.C. 338.... 191
Grant v. Royal....250 N.C. 366.... 619
Green v. Kitchin....229 N.C. 450....305, 307
Grier v. Woodside....200 N.C. 759.... 572
Griffith v. Griffith....240 N.C. 271.... 437
Groome v. Davis ....215 N.C. 510.... 580
Groome v. Leatherwood ....240 N.C. 573.... 92
Gurganus v. McLawhorn....212 N.C. 397.... 39, 442
Guy v. Baer ....234 N.C. 276....312, 313
Guy v. Insurance Co....206 N.C. 118.... 180

H

Haddock v. Leary....148 N.C. 378.... 598
Haneline v. Casket Co....238 N.C. 127.... 655
Hanes v. Shapiro ....168 N.C. 24.... 560
Hanes v. Utilities Co....191 N.C. 13.... 300
Hanford v. McSwain....230 N.C. 229.... 755
Hanrahan v. Walgreen Co....243 N.C. 268.... 456
Hamilton v. Lumber Co....160 N.C. 47....299, 300
Hampton v. West....212 N.C. 315.... 45
Hardee v. Rivers....228 N.C. 66.... 44
Hardy v. Miles....91 N.C. 131.... 41
Harper v. Harper....225 N.C. 260.... 419
Harrell v. Scheidt, Commissioner of Motor Vehicles....243 N.C. 735.... 610
Harrington v. Rice....245 N.C. 640.... 265
Harris v. Bennett ....160 N.C. 339.... 369
Harris v. Durham ....185 N.C. 572.... 96
Harris v. Greyhound Corp.....243 N.C. 346.... 70
Harris v. Insurance Co....204 N.C. 385.... 291
Harris v. Raleigh ....251 N.C. 313.... 605
Harrison v. Hargrove ....109 N.C. 346.... 368
Harrison v. Hargrove ....120 N.C. 96.... 368
Harrison v. Harrison ....106 N.C. 282.... 367

Harrison v. R.R. ....229 N.C. 92.... 146
Hartley v. Smith....239 N.C. 170.... 271
Harvell v. Scheidt, Commissioner of
Motor Vehicles....249 N.C. 699.... 610
Hatcher v. Allen ....220 N.C. 407.... 193
Hatcher v. Clayton ....242 N.C. 450.... 428
Hatcher v. Faison ....142 N.C. 364....262, 263, 265, 266
Hawes v. Refining Co....236 N.C. 643.... 492
Hawkins v. Simpson....237 N.C. 155.... 499
Hayes v. Ricard ....251 N.C. 485.... 425
Hayes v. Ricard ....245 N.C. 687.... 196
Haynes v. Gas Co....114 N.C. 203.... 559
Haywood v. Haywood....79 N.C. 42.... 39
Heefner v. Thornton....216 N.C. 702.... 43
Heilig v. Insurance Co....222 N.C. 231.... 413
Helms v. Collins....200 N.C. 89.... 45
Henderson v. Gill ....229 N.C. 313.... 133
Henderson v. R.R. ....159 N.C. 581....566, 567
Herring v. Williams....158 N.C. 1.... 45
Hetfield v. Baum....35 N.C. 394.... 190
Heuay v. Construction Co....254 N.C. 252.... 495
High v. R.R....248 N.C. 414.... 495
Highway Comm. v. Black ....239 N.C. 198.... 340
Highway Comm. v. Hartley ....218 N.C. 438....339, 340
Hill v. Casualty Co....252 N.C. 649.... 349
Hill v. Commissioners ....190 N.C. 123....517, 522
Hill v. Insurance Co....207 N.C. 166.... 179
Hill v. Lopez ....228 N.C. 433.... 579
Hinshaw v. Pepper....210 N.C. 573.... 449
Hinson v. Dawson....241 N.C. 714.... 588
Hoge v. Lee....184 N.C. 44.... 605
Hogsed v. Pearlman....213 N.C. 240.... 704
Holcomb v. Holcomb....192 N.C. 504.... 754
Holland v. Smith ....224 N.C. 255.... 45
Holland v. Utilities Co....208 N.C. 289....444, 445, 446, 447
Hollingsworth v. Burns....210 N.C. 40.... 434
Holmes v. Sanders....246 N.C. 200.... 437
Holt v. Holt....232 N.C. 497.... 140
Hooper v. Tallassee Power Co....180 N.C. 651.... 184
Horne v. Edwards....215 N.C. 622.... 244
Hoskins v. Currin....242 N.C. 432....437, 727
Houston v. Monroe....213 N.C. 788.... 328
Howard v. Carman ....235 N.C. 289.... 499
Howard v. Howard ....200 N.C. 574.... 419
Hughes v. Fields....168 N.C. 520.... 194
Huneycutt v. Commissioners....182 N.C. 319....517, 522
Hunt v. Davis ....248 N.C. 69....226, 678
Hunt v. Fidelity Co....174 N.C. 397.... 332
Huntley v. Express Co....191 N.C. 696.... 750
Hunsucker v. Chair Co....237 N.C. 559.... 691
Huskins v. Hospital....238 N.C. 357.... 71, 72
Hutchens v. Southard....254 N.C. 428.... 472

I

Ice Company v. R.R. ....125 N.C. 17.... 262
Ice Cream Co. v. Ice Cream Co...238 N.C. 317.... 126
Idol v. Street....233 N.C. 730.....207, 208, 515, 517, 523, 535
Ingram v. Smoky Mountain Stages, Inc....225 N.C. 444.... 690
Inman v. WOW....211 N.C. 179.... 413
In re Application for Reassignment ....247 N.C. 413.... 57
In re Assessments ....243 N.C. 494.... 523
In re Drainage District....228 N.C. 248.... 159
In re Gibbons ....245 N.C. 24.... 726
In re Gibbons ....247 N.C. 273.... 437
In re Harris ....183 N.C. 633.....516, 517, 519, 530, 531, 532, 534, 535
In re Hege ....205 N.C. 625.... 39
In re McWhirter ....248 N.C. 324.... 437
In re O'Neal ....243 N.C. 714.... 563
In re Parker ....225 N.C. 369.... 764
In re Prevatt ....223 N.C. 833.... 230
In re Sams ....236 N.C. 228.... 726
In re Smith ....218 N.C. 462.... 763
In re Watson ....157 N.C. 340.... 229
In re Will of Brock ....229 N.C. 482.... 92
In re Will of Covington ....252 N.C. 551.... 639
In re Will of Hedgepeth ....150 N.C. 245.... 376
In re Will of Morrow ....234 N.C. 365.... 376
In re Will of Roberts ....251 N.C. 708.... 378
In re Will of Wall ....223 N.C. 591.... 733
In re Will of Williams ....234 N.C. 228.... 378
In re Wingler ....231 N.C. 560.... 533
Insurance Association v. Parker ....234 N.C. 20.... 689
Insurance Co. v. Grady ....185 N.C. 348.... 756
Insurance Co. v. Shaffer ....250 N.C. 45.... 87
Insurance Co. v. Unemployment Compensation Comm....217 N.C. 495....172, 173, 174
Irby v. R.R....246 N.C. 384....495, 690
Isley v. Brown....253 N.C. 791.... 146

J

Jackson v. Parks ....220 N.C. 680.... 588
Jackson v. Stancil ....253 N.C. 291.... 700
Jacobs v. Highway Commission..254 N.C. 200.... 462
James v. Pretlow....242 N.C. 102.... 484
Jamison v. Charlotte....239 N.C. 682.... 96, 307
Jarrell v. Snow....225 N.C. 430.... 394
Jarvis v. Souther....251 N.C. 170.... 726
Jenkins v. Insurance Co....222 N.C. 83.... 179
Jennings v. Shannon....200 N.C. 1.... 730
Jernigan v. Jernigan....236 N.C. 430.... 491
Johnson v. Asheville ....196 N.C. 550.... 690

Johnson v. Assurance Society.....239 N.C. 296..... 179
Johnson v. Bell .....234 N.C. 522..... 492
Johnson v. Board of Education..241 N.C. 56..... 13
Johnson v. Heath .....240 N.C. 255..... 379
Johnson v. Johnson .....229 N.C. 541..... 649
Johnson v. Meyer's Co.....246 N.C. 310..... 289
Johnson v. Pate .....90 N.C. 334..... 426
Johnson v. R.R. .....163 N.C. 431.....495, 496, 588
Johnson v. Sidbury .....225 N.C. 208..... 755
Jones v. Bailey .....246 N.C. 599..... 300
Jones v. Balsley .....154 N.C. 61..... 592
Jones v. Brinson .....231 N.C. 63..... 144
Jones v. Brinson .....238 N.C. 506..... 749
Jones v. Coleman .....188 N.C. 631..... 650
Jones v. Douglas Aircraft.....253 N.C. 482..... 323
Jones v. Fullbright .....197 N.C. 274..... 45
Jones v. Insurance Co.....210 N.C. 559..... 704
Jones v. Sugg .....136 N.C. 143..... 46
Jordan v. Maynard.....231 N.C. 101..... 687
Journigan v. Ice Co.....233 N.C. 180..... 588
Joyner v. Dail.....210 N.C. 663..... 579
Junge v. MacKnight .....135 N.C. 105..... 152
Junge v. MacKnight .....137 N.C. 285..... 152
Justice v. Scheidt, Commissioner
of Motor Vehicles.....252 N.C. 361..... 53
Jyachosky v. Wensil.....240 N.C. 217..... 272

K

Kadis v. Britt.....224 N.C. 154..... 126
Kanupp v. Land.....248 N.C. 203..... 284
Kearney v. Thomas.....225 N.C. 156.....731, 733
Keaton v. Taxi Co.....241 N.C. 589..... 472
Kellogg v. Thomas.....244 N.C. 722..... 473
Kendrick v. Dellinger.....117 N.C. 491..... 733
Kenney v. Hotel Co.....194 N.C. 44..... 442
King v. King .....225 N.C. 639..... 263
King v. McRackan .....168 N.C. 621.....194, 195
King v. Powell .....220 N.C. 511..... 444
King v. Powell .....252 N.C. 506..... 578
King v. Rudd .....226 N.C. 156.....152, 230
Kinross-Wright v.
Kinross-Wright .....248 N.C. 1..... 727
Kinsland v. Adams.....172 N.C. 765..... 244
Kirkpatrick v. McCracken .....161 N.C. 198..... 598
Kirkpatrick v. Currie .....250 N.C. 213..... 173
Kiser v. Power Co.....216 N.C. 698..... 559
Klassett v. Drug Co.....227 N.C. 353..... 344
Kornegay v. Goldsboro.....180 N.C. 441.....517, 521

L

Ladd v. Ladd .....121 N.C. 118..... 203
Lake v. Express Co.....249 N.C. 410..... 495

Lancaster v. Insurance Co.....153 N.C. 285.....655, 656
Land Bank v. Davis.....215 N.C. 100.....152, 154
Lane v. Bryan .....246 N.C. 108..... 456
Lane v. Chatham .....251 N.C. 400..... 570
Lansdell v. Winstead .....76 N.C. 366..... 41
Lamb v. Boyles .....192 N.C. 542..... 770
Lamm v. Crumpler .....240 N.C. 35.....144, 509
Lassiter v. Board of Elections.....248 N.C. 102.....401, 406, 515, 528
Leach v. Page.....211 N.C. 622..... 39
Ledford v. Lumber Co.....183 N.C. 614..... 300
Lee v. Assurance Society.....211 N.C. 182..... 179
Lee v. McCracken .....170 N.C. 575..... 152
Lee v. Pearce .....68 N.C. 76..... 141
Leonard v. Garner .....253 N.C. 278.....495, 614
Leonard v. Insurance Co.....212 N.C. 151..... 180
Leonard v. Maxwell .....216 N.C. 89..... 133
Lemon v. Lumber Co.....251 N.C. 675..... 770
LeRoy v. Saliba .....182 N.C. 757..... 46
Lewis v. Archbell .....199 N.C. 205..... 446
Lewis v. Frye .....207 N.C. 852..... 446
Lewis v. Watson .....229 N.C. 20..... 499
Lieb v. Mayer.....244 N.C. 613..... 588
Lilly & Co. v. Saunders.....216 N.C. 163.....515, 521
Lincoln v. R.R.....207 N.C. 787..... 495
Linville v. Nissen.....162 N.C. 95..... 571
Lloyd v. Insurance Co.....200 N.C. 722..... 657
Loftin v. Kornegay.....225 N.C. 490..... 143
Long v. Long.....73 N.C. 370..... 605
Lookabill v. Regan.....245 N.C. 500..... 606
Lovegrove v. Lovegrove.....237 N.C. 307..... 751
Loving v. Whitton.....241 N.C. 273..... 692
Lowie & Co. v. Atkins.....245 N.C. 98..... 601
Lumber Co. v. Branch .....158 N.C. 251..... 587
Lumber Co. v. Cedar Works.....158 N.C. 161.....190, 282
Lumber Co. v. Hunt .....251 N.C. 624..... 71
Lumber Co. v. Lumber Co.....169 N.C. 80..... 605
Lumber Co. v. Pamlico County..250 N.C. 681..... 204
Lutz Industries, Inc. v.
Dixie Home Stores.....242 N.C. 332.....561, 563, 565
Lynn v. Clark.....252 N.C. 289.....460, 572

Mc

McBryde v. Lumber Co.....246 N.C. 415..... 40
McClamrock v. Packing Co.....238 N.C. 648..... 450
MacClure v. Casualty Co.....229 N.C. 305..... 332
McCombs v. Trucking Co.....252 N.C. 699..... 419
McCoy v. Justice.....199 N.C. 602..... 244
McCracken v. Clark.....235 N.C. 186..... 191
McDaniel v. Quakenbush.....249 N.C. 31.....153, 720
McGee v. Crawford.....205 N.C. 318..... 570
McGehee v. McGehee.....190 N.C. 476..... 640
McGuinn v. High Point.....219 N.C. 56..... 96
McKinley v. Hinnant .....242 N.C. 245.....202, 462

McKinney v. Sutphin ....196 N.C. 318.... 730
McLaurin v. McLaurin ....106 N.C. 331.... 367
McLeod v. Gooch....162 N.C. 122.... 755
McMichael v. Proctor....243 N.C. 479.... 639
McNair v. Richardson....244 N.C. 65....559, 745
McNeill v. McNeill....223 N.C. 178....141, 142, 648
McPherson v. Williams....205 N.C. 177.... 191

M

Mabry v. Brown....162 N.C. 217.... 45
Mallard v. Patterson....108 N.C. 255.... 642
Mallette v. Cleaners, Inc....245 N.C. 652.... 474
Manley v. News Co....241 N.C. 455....120, 421, 593
March v. R.R....151 N.C. 160.... 426
Mar-Hof Co. v. Rosenbacker....176 N.C. 330....125, 127
Marshall v. Insurance Co....246 N.C. 447....656, 657
Martin County v. Trust Co....178 N.C. 26....307, 522
Mason v. R.R. ....214 N.C. 21.... 750
Mason v. Stephens ....168 N.C. 370.... 445
Massie v. Hainey....165 N.C. 174.... 262
Mattingly v. R.R....253 N.C. 746....490, 566
Manufacturing Co. v. Hodgins ..192 N.C. 577.... 283
Manufacturing Co. v. Horn ....203 N.C. 732.... 46, 441
Medlin v. Insurance Co....220 N.C. 334....179, 180
Mehaffey v. Insurance Co....205 N.C. 701....291, 292
Memorial Hospital v.
Wilmington ....237 N.C. 179.... 208
Menzel v. Menzel....250 N.C. 649.... 93, 355
Mercantile Co. v. Mt. Olive....161 N.C. 121.... 133
Meroney v. Cherokee Lodge....182 N.C. 739.... 190
Merrell v. Kindley ....244 N.C. 118.... 619
Merrill v. Merrill ....92 N.C. 657.... 41
Messick v. Hickory....211 N.C. 531.... 588
Mewborn v. Assurance Corp....198 N.C. 156.... 332
Miller v. Grimsley ....220 N.C. 514.... 420
Miller v. State ....237 N.C. 29.... 318
Milling Co. v. Highway Comm....190 N.C. 692.... 341
Mills v. Commissioners ....175 N.C. 215....517, 522
Mills v. Mills ....195 N.C. 595.... 91
Mills v. Moore ....219 N.C. 25.... 253
Mitchell v. Melts....220 N.C. 793.... 495
Mizzell v. Ruffin....118 N.C. 69.... 203
Mobley v. Griffin ....104 N.C. 112.... 194
Monroe v. Niven ....221 N.C. 362.... 93, 264, 266
Montgomery v. Blades....217 N.C. 654....688, 760
Moore v. Crosswell ....240 N.C. 473.... 738
Moore v. Fowle ....139 N.C. 51.... 367
Moore v. Gulley ....144 N.C. 81.... 244
Moore v. WOOW, Inc....253 N.C. 1.... 62, 66
Morris v. Gentry....89 N.C. 248.... 368
Morrisey v. Hill....142 N.C. 355.... 238
Mortgage Co. v. Long ....205 N.C. 533.... 749
Mortgage Co. v. Long ....206 N.C. 477.... 751

Moskin Bros. v. Swartzberg.....199 N.C. 539..... 126
Moseley v. R.R.....197 N.C. 628..... 495
Muncie v. Insurance Co.....253 N.C. 74.....332, 334

N

Narron v. Musgrave.....236 N.C. 388..... 369
Nash v. Tarboro.....227 N.C. 283..... 305
Nesbitt v. Gill.....227 N.C. 174..... 133
Newbern v. Leary.....215 N.C. 134..... 602
Newbern v. Hinton.....190 N.C. 108..... 592
Newman v. Coach Co.....205 N.C. 26..... 491
Newsome v. Surratt.....237 N.C. 297..... 691
Newton v. Chason.....225 N.C. 204..... 159
Nichols v. McFarland.....249 N.C. 125..... 601
Norris v. Johnson.....246 N.C. 179..... 695
Nowell v. Hamilton.....249 N.C. 523..... 246

O

Ogburn v. Sterchi Brothers
Stores, Inc.....218 N.C. 507..... 703
O'Neal v. Wake County.....196 N.C. 184..... 172
Osborne v. Coal Co.....207 N.C. 545..... 745
Overton v. Boyce .....252 N.C. 63..... 257
Owens v. Voncannon.....251 N.C. 351..... 262

P

Paper Co. v. McAllister.....253 N.C. 529..... 125
Parker v. Wilson.....247 N.C. 47.....254, 297, 455
Patillo v. Lytle.....158 N.C. 92..... 266
Patrick v. Morehead.....85 N.C. 62..... 43
Patterson v. R.R.....214 N.C. 38..... 688
Patton v. Dail.....252 N.C. 425..... 566
Pate v. Hospital.....234 N.C. 637..... 755
Peagram v. King.....9 N.C. 605..... 244
Peel v. Calais.....224 N.C. 421..... 367
Peeler v. Casualty Co.....197 N.C. 286.....332, 334
Penland v. Church.....226 N.C. 171..... 749
Perkins v. Langdon .....233 N.C. 240..... 420
Perkins v. Sykes .....233 N.C. 147..... 755
Peterson v. Power Co.....183 N.C. 243..... 566
Petty v. Insurance Co.....212 N.C. 157..... 673
Phelps v. McCotter.....252 N.C. 66..... 703
Piland v. Taylor.....113 N.C. 1..... 508
Pinnix v. Griffin.....221 N.C. 348.....588, 759
Pritchett v. Supply Co.....153 N.C. 344..... 281
Plemmons v. Murphy.....176 N.C. 671..... 648
Polansky v. Insurance Ass'n.....238 N.C. 427..... 296
Pollock v. Household of Ruth....150 N.C. 211..... 290
Poston v. Bowen .....228 N.C. 202..... 144
Potter v. Potter .....251 N.C. 760.....190 281
Powell v. Lloyd.....234 N.C. 481..... 582

Presnell v. Beshears....227 N.C. 279.... 152
Pridgen v. Uzzell....254 N.C. 292....455, 456, 564
Proctor v. Highway
Commission....230 N.C. 687....202, 339, 340
Provision Co. v. Daves....190 N.C. 7.... 533
Pruett v. Inman....252 N.C. 520.... 492
Pruitt v. Taylor....247 N.C. 380....152, 154
Prudential Insurance Co. v.
Forbes....203 N.C. 252.... 185
Putnam v. Publications....245 N.C. 432.... 484

R

R.R. Connection Case....137 N.C. 1.... 79
R.R. v. Greensboro....247 N.C. 321.... 720
R.R. v. Thrower....213 N.C. 637.... 749
Raleigh v. Durfey....163 N.C. 154.... 96
Ramsbottom v. R.R....138 N.C. 38.... 253
Ramsey v. Nebel....226 N.C. 590.... 442
Rawls v. Henries....172 N.C. 216.... 368
Reed v. Engineering Co....188 N.C. 39....517, 523
Reeves v. Staley....220 N.C. 573.... 492
Reid v. Holden....242 N.C. 408.... 759
Realty Co. v. Planning Board....243 N.C. 648.... 670
Reid v. Johnston....241 N.C. 201.... 153
Restaurant, Inc. v. Charlotte....252 N.C. 324.... 719
Rheinhardt v. Yancey....241 N.C. 184.... 96
Rhyne v. Lipscombe....122 N.C. 650.... 751
Richter v. Harmon....243 N.C. 373.... 727
Riddle v. Artis....243 N.C. 668.... 581
Riggs v. Motor Lines....233 N.C. 160....580, 666, 667
Roach v. Durham....204 N.C. 587....133, 521
Roach v. Insurance Co....248 N.C. 518.... 713
Roberts v. Hill....240 N.C. 373.... 271
Roberts v. Moore....185 N.C. 254.... 750
Roberts v. Saunders....192 N.C. 191.... 45
Robertson v. Aldridge....185 N.C. 292.... 571
Robinson v. Highway Comm....249 N.C. 120.... 339
Rodman v. Gaylord....52 N.C. 262.... 605
Rogers v. Green....252 N.C. 214.... 253
Roller v. Allen....245 N.C. 516.... 394
Rotan v. State....195 N.C. 291....172, 173
Rubber Co. v. Crawford....253 N.C. 100.... 726
Rushing v. R.R....149 N.C. 158.... 588
Russ v. Woodard....232 N.C. 36.... 693

S

Sale v. Highway Commission....242 N.C. 612....396, 487, 488
Sales Co. v. Weston....245 N.C. 621.... 640
Sams v. Board of
Commissioners....217 N.C. 284.... 208
Sanitary District v. Canoy....252 N.C. 749.... 630
Sanitary District v. Canoy....254 N.C. 630.... 678

Sawyer v. Cowell....241 N.C. 681.... 751
Scarboro v. Insurance Co....242 N.C. 444.... 713
Scarborough v. Insurance Co....244 N.C. 502.... 291
Schas v. Insurance Co....166 N.C. 55.... 412
Scott v. Bryan ....210 N.C. 478.... 444
Scott v. Insurance Co....208 N.C. 160.... 291
Scott v. Jordan ....235 N.C. 244.... 640
Sea Food Co. v. Way....169 N.C. 679.... 125
Seaford v. Insurance Co....253 N.C. 719.... 655
Seawell v. Fishing Club....249 N.C. 402....195, 605
Shaffer v. Gaynor ....117 N.C. 15.... 598
Shaffer v. Hahn ....111 N.C. 1.... 598
Shaver v. Shaver ....244 N.C. 309.... 155
Shaw v. Public-Service Corp....168 N.C. 611.... 559
Shearin v. Lloyd....246 N.C. 363.... 145
Shelton v. R.R....193 N.C. 670.... 300
Sherrill v. R.R....140 N.C. 252.... 495
Sherrod v. Battle....154 N.C. 345.... 605
Shimer v. Traub....244 N.C. 466.... 592
Shue v. Scheidt, Commissioner of Motor Vehicles....252 N.C. 561.... 432
Shuford v. Phillips....235 N.C. 387.... 592
Shultz v. Young....25 N.C. 385.... 605
Shute v. Shute....176 N.C. 462.... 126
Simmons v. Box Co....148 N.C. 344.... 93
Simmons v. Morse ....51 N.C. 6.... 246
Simpson v. Oil Co....217 N.C. 542.... 770
Simpson v. R.R. ....154 N.C. 51.... 346
Simms v. Sampson....221 N.C. 379....152, 154
Singletary v. Nixon....239 N.C. 634.... 564
Sircey v. Rees' Sons....155 N.C. 296....444, 447
Skinner v. Jernigan ....250 N.C. 657.... 272
Skinner v. Thomas ....171 N.C. 98.... 396
Skinner v. Transformadora ....252 N.C. 320.... 243
Skipper v. Cheatham ....249 N.C. 706.... 593
Skipper v. Yow ....240 N.C. 102.... 194
Slade v. Sherrod....175 N.C. 346....444, 445
Slaughter v. Insurance Co....250 N.C. 265....654, 672
Small v. Utilities....200 N.C. 719....559, 565
Smith v. Kappas ....218 N.C. 758....695, 696
Smith v. Mears ....218 N.C. 193.... 45
Smith v. Moore ....142 N.C. 277.... 290
Smith v. Moore ....254 N.C. 186....282, 285
Smith v. Rawlins ....253 N.C. 67....433, 472, 495
Smith v. Smith ....249 N.C. 669....313, 622
Snipes v. Estates Administration, Inc....233 N.C. 777.... 40
Snyder v. Maxwell....217 N.C. 617.... 133
Solon Lodge v. Ionic Lodge....245 N.C. 281.... 46, 281
Sonotone Corp v. Baldwin....227 N.C. 387.... 126
Southport v. Stanly....125 N.C. 464.... 96
Sowers v. Marley....235 N.C. 607.... 456
Spears v. Randolph....241 N.C. 659.... 633

Speedway, Inc. v. Clayton.....247 N.C. 528..... 208
Spicer v. Goldsboro.....226 N.C. 557..... 96
Sprinkle v. Reidsville.....235 N.C. 140.....152, 230
Spruill v. Nixon.....238 N.C. 523..... 190
Stallings v. Spruill.....176 N.C. 121..... 756
Stansel v. McIntyre.....237 N.C. 148..... 572
Stamey v. Membership Corp.....249 N.C. 90..... 420
S. v. Albarty .....238 N.C. 130..... 309
S. v. Alston .....215 N.C. 462..... 387
S. v. Anderson .....222 N.C. 148.....278, 316
S. v. Andrews .....246 N.C. 561.....213, 385
S. v. Ardrey .....232 N.C. 721..... 111
S. v. Artis .....227 N.C. 371..... 107
S. v. Ashburn .....187 N.C. 717.....385, 386
S. v. Avent .....253 N.C. 580..... 99
S. v. Ballenger .....247 N.C. 216.....531, 532, 535
S. v. Banks .....247 N.C. 745..... 310
S. v. Barber .....113 N.C. 711..... 386
S. v. Barley .....240 N.C. 253..... 464
S. v. Beachum .....220 N.C. 531..... 109
S. v. Benson .....183 N.C. 795.....106, 107
S. v. Bittings .....206 N.C. 798..... 106
S. v. Blackley .....138 N.C. 620..... 222
S. v. Bowman .....230 N.C. 203..... 299
S. v. Bowman .....231 N.C. 51..... 298
S. v. Bowser .....214 N.C. 249.....106, 107, 110
S. v. Boyd .....223 N.C. 79..... 479
S. v. Brady .....237 N.C. 675..... 214
S. v. Bridgers .....233 N.C. 577..... 710
S. v. Buffkin .....209 N.C. 117..... 107
S. v. Bunton .....247 N.C. 510..... 387
S. v. Burell .....252 N.C. 115..... 317
S. v. Burnett .....179 N.C. 735..... 229
S. v. Burnett .....242 N.C. 164..... 236
S. v. Bryson .....173 N.C. 803..... 452
S. v. Call .....121 N.C. 643..... 521
S. v. Carter .....129 N.C. 560..... 133
S. v. Carter .....233 N.C. 581.....115, 116
S. v. Chavis .....231 N.C. 307..... 107
S. v. Choate .....228 N.C. 491..... 460
S. v. Church .....229 N.C. 718..... 478
S. v. Cole .....202 N.C. 592..... 310
S. v. Cole .....241 N.C. 576..... 233
S. v. Cole .....249 N.C. 733..... 767
S. v. Cook .....207 N.C. 261..... 352
S. v. Cox .....153 N.C. 638..... 107
S. v. Cox .....244 N.C. 57..... 311
S. v. Crisp .....244 N.C. 407..... 113
S. v. Crook .....115 N.C. 760..... 762
S. v. Cuthrell .....235 N.C. 173..... 233
S. v. Daughtry .....236 N.C. 316..... 13
S. v. Davis .....157 N.C. 648..... 134
S. v. Davis .....253 N.C. 86.....115, 767

S. v. Davis ....253 N.C. 224....222, 773
S. v. DeMari ....227 N.C. 657.... 236
S. v. Denny ....249 N.C. 113.... 710
S. v. Dewer ....65 N.C. 572.... 453
S. v. Dilliard ....223 N.C. 446.... 601
S. v. Dixon ....215 N.C. 161....208, 516, 520, 527, 528, 531, 533, 534, 535
S. v. Dockery ....238 N.C. 222.... 107
S. v. Doughtie ....238 N.C. 228.... 779
S. v. Downey ....253 N.C. 348.... 706
S. v. Early ....232 N.C. 717.... 113
S. v. Edmundson ....244 N.C. 693.... 224
S. v. Evans ....198 N.C. 82.... 107
S. v. Faulkner ....241 N.C. 609.... 309
S. v. Felton ....239 N.C. 575.... 534
S. v. Ferguson ....238 N.C. 656.... 501
S. v. Franklin ....248 N.C. 695.... 767
S. v. Francis ....157 N.C. 612.... 213
S. v. Fulcher ....184 N.C. 663.... 479
S. v. Furley ....245 N.C. 219.... 661
S. v. Furmage ....250 N.C. 616.... 533
S. v. Gaddy ....166 N.C. 341.... 316
S. v. Gardner ....226 N.C. 310.... 768
S. v. Gibbs ....234 N.C. 259.... 310
S. v. Gibson ....233 N.C. 691....115, 116
S. v. Glidden Co....228 N.C. 664.... 394
S. v. Godette ....188 N.C. 497.... 501
S. v. Godwin ....211 N.C. 419.... 351
S. v. Godwin ....224 N.C. 846.... 300
S. v. Grainger ....223 N.C. 716.... 236
S. v. Grant ....104 N.C. 908.... 222
S. v. Gregory ....223 N.C. 415.... 310
S. v. Greer ....162 N.C. 640....316, 478
S. v. Greer ....238 N.C. 325.... 310
S. v. Green ....119 N.C. 899.... 453
S. v. Green ....126 N.C. 1032.... 133
S. v. Green ....251 N.C. 40.... 299
S. v. Griggs ....223 N.C. 279.... 39
S. v. Haddock ....254 N.C. 162.... 706
S. v. Hairston ....222 N.C. 455.... 767
S. v. Hale ....231 N.C. 412.... 385
S. v. Hall ....240 N.C. 109....276, 775
S. v. Hammonds ....216 N.C. 67.... 107
S. v. Hampton ....210 N.C. 283.... 246
S. v. Haney ....19 N.C. 390.... 385
S. v. Harper ....236 N.C. 371.... 501
S. v. Harris ....213 N.C. 648.... 224
S. v. Harris ....223 N.C. 697.... 107
S. v. Harrison ....239 N.C. 659....660, 676
S. v. Hatcher ....210 N.C. 55.... 167
S. v. Hawkins ....214 N.C. 326.... 107
S. v. Hedrick ....236 N.C. 727.... 768
S. v. Helms ....247 N.C. 740.... 309

S. v. Henderson ..... 206 N.C. 830 386
S. v. Herring ..... 201 N.C. 543 385
S. v. Hightower ..... 226 N.C. 62 660
S. v. Hill ..... 236 N.C. 704 276
S. v. Hooker ..... 243 N.C. 429 ..... 385, 386
S. v. Holland ..... 83 N.C. 624 385
S. v. Holland ..... 234 N.C. 354 214
S. v. Hoover ..... 252 N.C. 133 676
S. v. Horne ..... 191 N.C. 375 533
S. v. Howell ..... 218 N.C. 280 479
S. v. Hudson ..... 218 N.C. 219 107
S. v. Humbles ..... 241 N.C. 47 661
S. v. Ipock ..... 242 N.C. 119 767
S. v. Jackson ..... 218 N.C. 373 ..... 309, 310
S. v. Johnson ..... 109 N.C. 852 161
S. v. Johnson ..... 199 N.C. 429 164
S. v. Johnson ..... 226 N.C. 266 662
S. v. Johnson ..... 247 N.C. 240 224
S. v. Jones ..... 242 N.C. 563 309
S. v. Kelly ..... 216 N.C. 627 ..... 385, 387
S. v. Kelly ..... 243 N.C. 177 104
S. v. King ..... 222 N.C. 137 224
S. v. Kluckhohn ..... 243 N.C. 306 113
S. v. Knight ..... 84 N.C. 789 249
S. v. Lamm ..... 232 N.C. 204 ..... 107, 110
S. v. Layton ..... 204 N.C. 704 768
S. v. Lea ..... 203 N.C. 13 221
S. v. Liles ..... 78 N.C. 496 309
S. v. Lockey ..... 198 N.C. 551 521
S. v. Love ..... 236 N.C. 344 163
S. v. Lueders ..... 214 N.C. 558 527
S. v. Lyon ..... 89 N.C. 568 246
S. v. McClure ..... 166 N.C. 321 106
S. v. McDaniels ..... 219 N.C. 763 609
S. v. McIntire ..... 115 N.C. 769 246
S. v. McKeithan ..... 203 N.C. 494 386
S. v. McLamb ..... 236 N.C. 287 13
S. v. McNeill ..... 225 N.C. 560 276
S. v. Mangum ..... 245 N.C. 323 479
S. v. Matheson ..... 225 N.C. 109 107
S. v. Maynard ..... 247 N.C. 462 387
S. v. Melton ..... 187 N.C. 481 111
S. v. Miller ..... 97 N.C. 484 385
S. v. Miller ..... 197 N.C. 445 106
S. v. Miller ..... 237 N.C. 427 ..... 235, 610
S. v. Miller ..... 231 N.C. 419 310
S. v. Minton ..... 234 N.C. 716 710
S. v. Morgan ..... 226 N.C. 414 310
S. v. Morgan ..... 246 N.C. 596 ..... 773, 775
S. v. Moore ..... 104 N.C. 714 515
S. v. Moore ..... 222 N.C. 356 660
S. v. Moore ..... 240 N.C. 749 502
S. v. Mumford ..... 252 N.C. 227 610

S. v. Mundy ....243 N.C. 149.... 163
S. v. Nat ....51 N.C. 114.... 114
S. v. Norman ....237 N.C. 205....533, 773
S. v. Oil Co....205 N.C. 123.... 426
S. v. Payne ....213 N.C. 719....106, 107
S. v. Pennell ....232 N.C. 573.... 109
S. v. Peters ....107 N.C. 876.... 213
S. v. Peterson ....226 N.C. 255.... 276
S. v. Phelps ....242 N.C. 540....249, 660
S. v. Phillips ....240 N.C. 516....221, 222
S. v. Powers ....34 N.C. 5.... 246
S. v. Proctor ....213 N.C. 221.... 660
S. v. Rawley ....237 N.C. 233.... 478
S. v. Ray ....220 N.C. 40.... 479
S. v. Reddick ....222 N.C. 520.... 351
S. v. Reddick ....222 N.C. 520.... 385
S. v. Rhodes ....252 N.C. 438.... 767
S. v. Robbins ....243 N.C. 161.... 167
S. v. Roberson ....215 N.C. 784.... 385
S. v. Robertson ....166 N.C. 356.... 107
S. v. Rogers and S. v. Foster....252 N.C. 499.... 164
S. v. Rooks ....207 N.C. 275.... 773
S. v. Rowe ....155 N.C. 436.... 115
S. v. Shade ....115 N.C. 757.... 213
S. v. Shouse ....166 N.C. 306.... 107
S. v. Sigmon ....190 N.C. 684.... 501
S. v. Simmons ....192 N.C. 692.... 501
S. v. Simmons ....240 N.C. 780.... 164
S. v. Simons ....179 N.C. 700....452, 453
S. v. Simpson ....244 N.C. 325....104, 108
S. v. Sloan ....238 N.C. 547.... 773
S. v. Smith ....223 N.C. 457....387, 452
S. v. Smith ....237 N.C. 1....109, 214
S. v. Snead ....228 N.C. 37.... 234
S. v. Spencer ....239 N.C. 604.... 767
S. v. Spivey ....132 N.C. 989.... 110
S. v. Stephens ....244 N.C. 380.... 164
S. v. Stevens ....244 N.C. 40....385, 661
S. v. Stevenson ....109 N.C. 730.... 133
S. v. Stone ....241 N.C. 294.... 710
S. v. Stone ....245 N.C. 42....235, 610
S. v. Strickland ....229 N.C. 201.... 299
S. v. Surles ....230 N.C. 272.... 167
S. v. Swaringen ....249 N.C. 38.... 235
S. v. Taylor ....213 N.C. 521.... 107
S. v. Tew ....234 N.C. 612.... 300
S. v. Thornton ....251 N.C. 658.... 222
S. v. Todd ....222 N.C. 346....214, 479
S. v. Towery ....239 N.C. 274.... 134
S. v. Townsend ....86 N.C. 676.... 246
S. v. Turner ....170 N.C. 701.... 224
S. v. Vann ....162 N.C. 534.... 767
S. v. Walker ....249 N.C. 35.... 310

S. v. Walker ....251 N.C. 465.... 115
S. v. Wallace ....203 N.C. 284.... 385
S. v. Warren ....230 N.C. 299.... 609
S. v. Warren ....252 N.C. 690.... 515
S. v. Washington ....234 N.C. 531....111, 351
S. v. Watson ....222 N.C. 672.... 107
S. v. Watts ....224 N.C. 771.... 479
S. v. White ....246 N.C. 587....235, 610, 773
S. v. Whitley ....208 N.C. 661.... 222
S. v. Williams ....185 N.C. 643.... 386
S. v. Williams ....209 N.C. 57....532, 535
S. v. Williams ....253 N.C. 337.... 779
S. v. Wood ....247 N.C. 125.... 610
S. v. Wrenn ....198 N.C. 260.... 768
S. v. Yow ....227 N.C. 585.... 214
S. *ex rel* Taylor v. Racing Assoc. ....241 N.C. 80.... 208
Stathopoulous v. Shook....251 N.C. 33.... 614
Staton v. Staton ....148 N.C. 490.... 159
Steamboat Co. v. Transportation Co....166 N.C. 582.... 487
Steelman v. Benfield....228 N.C. 651....166, 601, 629, 631, 779
Stegall v. Sledge....247 N.C. 718....455, 456
Stephens v. Childers....236 N.C. 348....755, 756
Stockwell v. Brown....254 N.C. 662....677, 678
Story v. Slade ....199 N.C. 596.... 183
Story v. Story ....221 N.C. 114.... 437
Stump v. Long....82 N.C. 616.... 262
Styres v. Bottling Co....239 N.C. 504.... 770
Suddreth v. Charlotte....223 N.C. 630.... 394
Suggs v. Braxton....227 N.C. 50.... 593
Sugg v. Engine Co....193 N.C. 814.... 730
Supply Co. v. Rozzell....235 N.C. 631.... 606
Surety Corp. v. Sharpe....232 N.C. 98.... 303
Sutherland v. McLean....199 N.C. 345.... 754
Swain v. Goodman....183 N.C. 531.... 426
Swartzberg v. Insurance Co....252 N.C. 150....146, 238, 412
Sweetheart Lake, Inc. v. Light Co....211 N.C. 269.... 77

T

Taft v. Casualty Co....211 N.C. 507.... 656
Tate v. Mott ....96 N.C. 19.... 365
Taylor v. Commissioners ....55 N.C. 141.... 307
Taylor v. Hatchery Inc....251 N.C. 689.... 759
Taylor v. Meadows ....175 N.C. 373.... 598
Taylor v. Rierson ....210 N.C. 185.... 689
Taylor v. Stewart ....172 N.C. 203.... 571
Taylor v. Taylor ....228 N.C. 275.... 43, 211
Tea Co. v. Maxwell....199 N.C. 433.... 133
Teer Co. v. Hitchcock Corp....235 N.C. 741.... 749
Terrace, Inc. v. Indemity Co....243 N.C. 595.... 694

Thigpen v. Insurance Co.....204 N.C. 551..... 179
Thigpen v. Trust Co.....203 N.C. 291..... 39
Thomas & Howard Co. v. Insurance Co.....241 N.C. 109..... 13
Thomas v. Motor Lines.....230 N.C. 122..... 492
Thomas-Yelverton Co. v. State Capital Life Insurance Co.....238 N.C. 278..... 413
Thomason v. Ballard & Ballard Co.....208 N.C. 1..... 770
Thompson v. Lassiter .....246 N.C. 34..... 572
Thompson v. R.R. .....147 N.C. 412..... 601
Threadgill v. Faust.....213 N.C. 226..... 442
Tocci v. Nowfall.....220 N.C. 550..... 185
Tolbert v. Insurance Co.....236 N.C. 416.....412, 673
Topping v. Board of Education..248 N.C. 719..... 312
Topping v. Board of Education..249 N.C. 291..... 312
Travis v. Duckworth .....237 N.C. 471.....271, 272
Travis v. Johnston .....244 N.C. 713..... 602
Triplett v. Lail.....227 N.C. 274..... 280
Trust Co. v. Bank .....166 N.C. 112..... 733
Trust Co. v. Currie .....190 N.C. 260..... 184
Trust Co. v. Green .....238 N.C. 339..... 217
Trust Co. v. Grubb .....233 N.C. 22..... 642
Trust Co. v. Jones .....210 N.C. 339..... 642
Trust Co. v. Wolfe .....245 N.C. 535..... 210
Turner v. Power Co.....167 N.C. 630..... 559
Tyler v. Howell.....192 N.C. 433..... 300
Tyson v. Ford .....228 N.C. 778.....450, 580
Tyson v. Highway Commission..249 N.C. 732..... 203
Tyson v. Mfg. Co.....249 N.C. 557..... 770

U

University v. Lassiter.....83 N.C. 38..... 261
Utilities Commission v. Casey ..245 N.C. 297..... 79
Utilities Commission v. Fleming .....235 N.C. 660..... 5
Utilities Commission v. Greensboro .....244 N.C. 247..... 9, 548
Utilities Commission v. Kinston .....221 N.C. 359..... 77
Utilities Commission v. Mead Corp.....238 N.C. 451.....739, 740
Utilities Commission v. Municipal Corporations.....243 N.C. 193.....739, 740
Utilities Commission v. R.R. .....254 N.C. 73..... 321
Utilities Commission v. R.R. .....238 N.C. 701..... 78
Utilities Commission v. R.R. .....233 N.C. 365..... 77
Utilities Commission v. R.R. .....235 N.C. 273..... 78
Utilities Commission v. State ..239 N.C. 333..... 552
Utilities Commission v. Trucking Co.....223 N.C. 687..... 79

V

Vaughn v. Booker.....217 N.C. 479..... 572

Vaughan v. Commissioners.....118 N.C. 636..... 96
Veazey v. Durham.....231 N.C. 354..... 46
Vincent v. Corbett.....244 N.C. 469..... 144
Voncannon v. Hudson Belk Co...236 N.C. 709..... 45

W

Waddell v. Carson .....245 N.C. 669..... 29
Walker v. Story .....253 N.C. 59..... 195
Wall v. Bain .....222 N.C. 375.....432, 473, 665
Wall v. England .....243 N.C. 36..... 693
Walston v. Greene.....247 N.C. 693..... 432
Walters v. Bridgers.....251 N.C. 289.....141, 648, 649
Warlick v. Lowman .....103 N.C. 122..... 285
Warlick v. Lowman .....104 N.C. 403..... 285
Warren v. Land Bank.....214 N.C. 206..... 703
Watters v. Parrish.....252 N.C. 787.....296, 564, 664
Weaver v. Jones.....82 N.C. 440..... 265
Webb v. Hall.....18 N.C. 278..... 598
Weddington v. Insurance Co.....141 N.C. 234..... 413
Weddington v. Weddington .....243 N.C. 702..... 437
Welborn v. Lumber Co.....238 N.C. 238..... 605
Wellons v. Lassiter.....200 N.C. 474..... 693
Wells v. Clayton .....236 N.C. 102..... 281
Wells v. Insurance Co.....211 N.C. 427.....412, 672
Wessell v. Rathjohn.....89 N.C. 377..... 648
West v. Jackson.....198 N.C. 693.....185, 186
Whaley v. Taxi Co.....252 N.C. 586..... 325
Whitaker v. Raines.....226 N.C. 526..... 755
White v. Coghill .....201 N.C. 421.....284, 285
White v. Price .....237 N.C. 347..... 633
White v. R.R. .....216 N.C. 79..... 495
White v. Snow .....71 N.C. 232..... 154
Whitehurst v. Abbott.....225 N.C. 1..... 91, 194
Whiteside v. McCarson.....250 N.C. 673..... 272
Whitford v. Insurance Co.....163 N.C. 223..... 290
Whitson v. Frances.....240 N.C. 733..... 456
Whitt v. Rand.....187 N.C. 805..... 253
Wiggins v. Pender .....132 N.C. 628..... 592
Wiggins v. Rogers .....175 N.C. 67..... 598
Williams v. Cooper .....222 N.C. 589..... 533
Williams v. Dunn .....158 N.C. 399..... 446
Williams v. Express Lines.....198 N.C. 193..... 492
Williams v. Highway
Commission .....231 N.C. 71..... 203
Williams v. Johnson .....112 N.C. 424..... 262
Williams v. Mickens .....247 N.C. 262..... 745
Williamson v. Williamson.....245 N.C. 228..... 379
Willoughby v. Stevens.....132 N.C. 254..... 426
Wilmington v. Schutt.....228 N.C. 285..... 869
Wilson v. Chandler .....238 N.C. 401..... 755
Wilson v. Finance Co.....239 N.C. 349..... 633
Wilson v. Pearson .....102 N.C. 290..... 41
Windley v. McCliney.....161 N.C. 318..... 153

Winfield v. Smith....230 N.C. 392.... 579
Winston-Salem v. Coach Lines....245 N.C. 179.... 9
Wood v. Oxford....97 N.C. 227.... 307
Woodard v. Clark ....234 N.C. 215....161, 217
Woodard v. Harrell ....191 N.C. 194.... 598
Woodley v. Gregory....205 N.C.280.... 183
Woody v. Barnett....235 N.C. 73.... 189
Wooten v. Order of Odd Fellows ....176 N.C. 52.... 290
Wrenn v. Graham....236 N.C. 719.... 688
Wynne v. Conrad....220 N.C. 355.... 368
Wyatt v. Equipment Co....253 N.C. 355.... 770

Y

Yarborough v. Park Commission ....196 N.C. 284....208, 513, 517
Youngblood v. Bright....243 N.C. 599.... 670

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1960

STATE OF NORTH CAROLINA EX REL NORTH CAROLINA UTILITIES COMMISSION v. MRS. RUBY Q. McKINNON AND R. F. HUNT, D/B/A SAFETY TRANSIT COMPANY, ROCKY MOUNT, NORTH CAROLINA, A PARTNERSHIP; AND MOORE BROTHERS TRANSPORTATION COMPANY, INC., A CORPORATION.

(Filed 3 February, 1961.)

1. Utilities Commission § 2—

The Utilities Commission has jurisdiction upon complaint or *ex mero motu* to determine whether any motor carrier is operating in violation of statutory regulations, including whether or not a carrier exempt from its jurisdiction is actually operating within the exemptive provisions of the statute and, if not, to enter orders to enforce compliance. G.S. 62-121.47 (2), G.S. 62-121.48 (11).

2. Same: Carriers § 1—

An intracity carrier, even though exempt from regulation by the Utilities Commission, is a common carrier. G.S. 62-121.46 (5) (15).

3. Same—

An intracity carrier, holding a certificate of exemption from the Utilities Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission except as to rates and controversies with respect to extensions and services. G.S. 62-121.47 (1), G.S. 62-122.1.

4. Carriers § 2: Utilities Commission § 2—

While an exempt intracity carrier may not contract generally with

respect to charter trips, G.S. 62-121.52 (9), it may contract for charter trips for transportation of persons beyond the limits of the territory in which it is authorized to operate provided requests for such services originate within its territory, and provided such charter trips come within the exemptive provisions of the Act. G.S. 62-121.47 (a) (f) (h).

5. Utilities Commission § 3—

The Utilities Commission should not reverse its interpretation of a statute, adhered to over a long period of years, unless it clearly appears that its original interpretation was in error. Whether the statute should be amended is a legislative and not a judicial question.

6. Carriers § 2: Utilities Commission § 2—

A county or city board of education has the right to contract with an exempt intracity carrier for transportation of athletic teams or school bands to and from scheduled events, and such charter trips are exempt from supervision of the Utilities Commission. G.S. 62-121.47 (1) (a), G.S. 115-35 (4).

7. Same—

An exempt intracity carrier may use the same bus for charter trips to or from religious services, and charter transportation of *bona fide* employees of an industrial plant to and from places of their regular employment, and may also use for such charter trips a bus ordinarily used in its regular business of intracity transportation of passengers G.S. 62-121.47 (3). The use of "and/or" disapproved.

8. Appeal and Error § 1—

The Supreme Court will not ordinarily pass upon a question not presented by the record.

9. Courts § 3: Utilities Commission § 2—

Any carrier whose operations are adversely affected by operations of another carrier in violation of law may institute an action in the Superior Court against such carrier. G.S. 62-121.72 (2).

APPEAL by respondents from *Burgwyn, Emergency Judge,* December Civil Term, 1959, of NASH.

This proceeding originated before the North Carolina Utilities Commission on 31 January 1956 as the result of a petition and complaint filed with the North Carolina Utilities Commission by Atlantic Greyhound Corporation, Carolina Coach Company, Queen City Coach Company, Seashore Transportation Company, Smoky Mountain Stages, and Southern Coach Company, against Mrs. Ruby Q. McKinnon and Dr. R. F. Hunt, doing business as Safety Transit Company, hereinafter referred to as Safety. All the petitioners and complainants were common carriers of passengers by motor vehicle, operating over their respective franchise routes within the State of North Carolina, under certificates of public convenience and necessity

issued by the North Carolina Utilities Commission, hereinafter referred to as Commission, pursuant to the terms of the Bus Act of 1949 (General Statutes, Chapter 62, Article 6C).

Carolina Coach Company and Seashore Transportation Company serve the City of Rocky Mount and vicinity. The other petitioners and complainants are, like Carolina Coach Company and Seashore Transportation Company, authorized to originate charter trips at points along their respective franchise routes and by reason thereof are interested in the subject matter of the controversy.

Safety is engaged in intracity or urban bus service under a franchise issued by the City of Rocky Mount and pursuant to a certificate of exemption granted by the Commission. In addition, Safety operates within residential and commercial zones adjacent to and a part of the City of Rocky Mount, which said zones have been established by the Commission. Safety does not hold any certificate of public convenience and necessity or contract carrier permit granted by the Commission. On two occasions since the enactment of the Bus Act of 1949, Safety has petitioned the Commission to grant it a certificate of public convenience and necessity as a common carrier. Both of these petitions were denied, but in lieu thereof the Commission extended the commercial and residential zones in which Safety could operate under its franchise granted by the City of Rocky Mount.

It is alleged in the petition and complaint that Safety is actively soliciting and handling charter parties originating in Rocky Mount and vicinity without any legal authority to do so and in violation of the Bus Act of 1949 and Rules and Regulations of the Commission promulgated thereunder, particularly G.S. 62-121.46 (1); 62-121.47 (1); 62-121.52 (9), and Rules 27 and 28. The Commission was requested to order Safety "and any other exempted intracity carriers or municipal operators," to cease and desist from the handling of charter trips; to conduct an investigation under G.S. 62-121.47 (2) to determine whether Safety "or any other exempted intracity carriers or municipal operators," purporting to operate under the provisions of the Bus Act exempting them from regulation (G.S. 62-121.47), are in fact so operating, and to enter such orders as may be necessary to enforce compliance with such provisions; and to enter an appropriate order defining the authority of exempted intracity carriers or municipal operators.

Safety answered, denying that its activities were conducted in violation of the Bus Act of 1949. Safety incorporated in its answer the contents of a letter written on 8 September 1955 to its attorney by E. A. Hughes, Jr., Director of Motor Passenger Transportation

for the Commission, which letter was authorized by the Commission and in pertinent part reads as follows: "G.S. 62-121.47 — Pursuant to your verbal request the Attorney General was asked for a ruling on certain portions of the above section of the Bus Act of 1949. To be more specific, he was asked whether or not a carrier such as your client, Safety Transit Company, who operates under (h) of Paragraph 1 of said section could also engage in the types of transportation permitted under (a) and (f) of said paragraph. I quote from the ruling of the Attorney General: ' * * * It is my opinion that a carrier operating under (h) of this paragraph may also engage in the types of transportation permitted under (a) and (f) of said paragraph. It is also my opinion that such exempted carrier is not required to file rates covering the transportation in which he may engage under (a) and (f).'

"Under this ruling it appears clear that Safety Transit Company may transport students of the public school system of North Carolina while said students are under control of the school, a teacher, athletic director or other agent of the school without any additional authority from this Commission. It further appears that there are no territorial restrictions for such operations and that the same would apply to the transportation of persons to and from religious services."

Safety likewise incorporated in its answer a ruling interpreting the Bus Act of 1949, and sent to all contract carriers of passengers over the signature of Fred C. Hunter, Commissioner, on 1 September 1949, which in pertinent part is as follows: "Attention is also directed to Section 5 of the Bus Act. This section describes the various transportation services in which a carrier may engage without making an application therefor, and without any authority therefor insofar as the Utilities Commission is concerned. The services described in this section are exempt from the Bus Act. That means that a carrier may engage in any one, or more, or all of these services if and when he pleases, so long as he limits his operations to the particular services set out in said Section 5." Section 5 is now codified as G.S. 62-121.47.

Safety admitted that as a result of the above letter dated 8 September 1955, and the ruling by the Commission on 1 September 1949, it did transport "students of the public school system of North Carolina while said students were under the control of the school teachers, athletic director, or other agent of the school, and trips for religious groups to and from religious services * * *." It denied that it actively engaged in the solicitation of charter trips except those mentioned above.

On 15 February 1956 the Commission issued its order of investi-

gation, which was legally served upon Safety and other carriers listed in Exhibit B, consisting of 29 carriers, including the respondent Moore Brothers Transportation Company, Inc. of High Point, North Carolina.

The general investigation into the proper construction of G.S. 62-121.47, docketed as "No. EB-1," and the petition and complaint against Safety, docketed as "No. B-115, SUB 4," were consolidated for hearing and on 20 March 1956 were heard together before the Commission.

Upon the evidence appearing in the record, including the pleadings introduced in evidence, as well as the exhibits and documents made a part of the record, the Commission found the facts as set out in the record, drew its conclusions of law and entered an order which in pertinent part is as follows:

"(a) * * * (The Commission held it had jurisdiction in this proceeding and the right to enter appropriate orders therein.)

"(b) That under the provisions of subsection (9) of G.S. 62-121.52 sole and exclusive right to operate to any place in this State pursuant to charter party or parties or charter trips, as defined in subsection (3) of G.S. 62-121.46, is vested in common carriers by motor vehicle transporting passengers under a certificate issued by the Commission, which said charter party or parties or trips must originate on each such carrier's routes and according to the rules and regulations adopted pursuant to the Bus Act of 1949; that the only exception to the charter party rights of common carriers of passengers by motor vehicle are the charter party rights now existing in favor of certain carriers which exist and have been acquired under the so-called 'grandfather' clause of the Bus Act of 1949, as set forth in the case of *Utilities Commission v. Fleming*, 235 N.C. 660.

"(c) That exempted carriers operating under the provisions of G.S. 62-121.47 are not authorized by law to operate to any place in this State pursuant to charter party or parties or trips except that a carrier operating under the provisions of G.S. 62-121.47 (h), which is engaged in the transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities as such zones are fixed and limited by the Commission, is authorized to operate to any place within its authorized municipality or the residential and commercial zones adjacent thereto, pursuant to charter party or parties, provided such charter

party or parties originate within such municipality or zones and are operated to a place or places within such municipality or zones.

"(d) That the transportation of pupils enrolled in public schools operated, conducted and administered by any county or city administrative unit and the transportation of all persons employed in the operation of such schools is regulated and limited by the provisions of Article 22 of Chapter 115 of the General Statutes, Cumulative Supplement of 1955 (Chapter 1372 of the Session Laws of 1955), and the use and operation of school buses is specifically controlled and limited by G.S. 115-183, Cumulative Supplement of 1955; that the various county boards of education and city administrative units are authorized to contract for transportation of persons and pupils as set forth in G.S. 115-190, Cumulative Supplement of 1955, but insofar as exempted carriers are concerned county boards of education and city administrative units are not authorized and empowered as governmental functions to secure and engage in the usual type of school charter services, including the transportation of athletic teams, bands, educational tours and pupils to and from athletic events; that principals of schools in the public school system, teachers, band directors and athletic directors are not authorized as governmental functions to engage in and secure the services of exempted carriers operating under the provisions of G.S. 62-121.47 for the purpose of transporting athletic teams, bands, educational tours and pupils to and from athletic events, and county boards of education and city administrative units are not authorized by law to confer authority upon such principals, teachers, band directors and athletic directors to secure the services of exempted carriers for such purposes; that intracity carriers, such as Safety and carriers of like kind and type, may engage in charter party or parties or trips within the limits set forth above in paragraph (c).

"(e) That the only government transportation that exempted carriers may engage in under the provisions of G.S. 62-121.47 (1) (a) is the transportation of passengers for and under the control of the governments or governmental units therein set forth and when governments or governmental units or subdivisions have been authorized to contract for the type of transportation requested and sought by such governments, units or subdivisions thereof.

"(f) That all carriers using buses or motor vehicles for the transportation of passengers to or from religious services shall use such buses or motor vehicles solely for such type of transportation and said buses or motor vehicles shall not be used for any other purposes or for any other type of transportation other than the transportation

of passengers to or from religious services; that no carrier is authorized to use or shall use any bus, buses or motor vehicles for both types of transportation, that is, the use of vehicles for the transportation of passengers to or from religious services and also the use of the same vehicles for the transportation of bona fide employees of an industrial plant to and from their regular employment.

"(g) That the transportation of passengers to or from religious services shall be confined to religious services or 'divine services' as explained and defined in this Order and the General Conclusions thereof, and no exempted carrier is authorized under the provisions of G.S. 62-121.47 (3) to transport passengers by motor vehicle to church picnics, church recreational meetings or other outings to lakes and beaches sponsored by churches or Sunday schools, nor is such exempted carrier authorized to transport members of churches or Sunday schools to collateral or auxiliary meetings sponsored by churches or Sunday schools but which do not fall within the meaning or definition of religious services or 'divine services' as defined in the General Conclusions of this Order.

"(h) That on and after the effective date of this Order, Safety and all intracity carriers similarly situated shall cease and desist from operating to any place in this State pursuant to charter party or parties or trips and shall cease from transporting passengers by motor vehicle according to such charter party or parties in accordance with the terms and mandate of this Order, except such charter party or parties as are permitted under Paragraph (c) of this Order.

"(i) That on and after the effective date of this Order all exempted carriers operating under the provisions of G.S. 62-121.47 shall cease and desist from transporting passengers by motor vehicle pursuant to charter party or parties or trips as commanded and set forth in this Order, and all carriers shall cease and desist from transporting passengers to or from religious services except in motor vehicles devoted and used solely and exclusively for the transportation of passengers to and from such religious services, and such motor vehicle shall not be used for any other form of transportation or transportation purpose.

"(j) That copies of this Order shall be sent to or served upon the parties to this proceeding and their counsel by the Chief Clerk of the North Carolina Utilities Commission.

"Issued by Order of the Commission.

"This the 1st day of August, 1956."

The respondents herein appealed to the Superior Court. The matter was heard at the December Term 1959 of the Superior Court of

Nash County and it was stipulated by and between the parties through their counsel that the court might take the appeal under advisement and render judgment out of term and out of the county, and out of the district. All the exceptions of the appellants were overruled and the order of the Commission affirmed. The judgment was entered on the 21st day of July 1960. The respondents appeal to this Court, assigning error.

Attorney General Bruton, Asst. Attorney General Burns for the Utilities Commission, appellee.

Arch T. Allen for Carolina Coach Company and Southern Coach Company, appellees.

D. L. Ward for Seashore Transportation Company, appellee.

James L. Newsom for Atlantic Greyhound Corporation, appellee.

Samuel Behrends, Jr., for Queen City Coach Company and Smoky Mountain Stages, appellees.

Martin & Whitley for Safety Transit Company and for Moore Brothers Transportation Company, Inc., appellants.

DENNY, J. The appellants assign as error the court's refusal to sustain their exceptions to the Commission's conclusions of law to the effect that it had jurisdiction of the subject matter and parties in this proceeding and had the power to make the requested investigation and to enter appropriate orders therein.

In our opinion, the Commission has the jurisdiction, under G.S. 62-121.45, G.S. 62-121.47 (2), and G.S. 62-121.48 (11), to investigate upon complaint or upon its own initiative without complaint, to determine whether any motor carrier is operating in violation of the provisions of the Bus Act of 1949, as amended. Naturally, such jurisdiction would include an exempted carrier, to determine whether or not its actual operations are under the exemptive provisions of the statute and, if not, to enter orders to enforce compliance. G.S. 62-121.47 (2). This assignment of error is overruled.

The appealing respondents also assign as error the court's refusal to sustain their exception to the conclusion of law set forth in section (b) of the order hereinabove set out. The appellants contend that the Commission erred in its conclusion of law in that it overlooked or ignored the provisions of G.S. 62-121.47 with respect to the rights of exempted carriers. We think the position of the respondents is well taken. In our opinion, an exempted intracity carrier is a common carrier within the meaning of the Bus Act of 1949. As used in the Act, G.S. 62-121.46 (15), the word "person" denotes "a corpo-

ration, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, * * *;" and in G.S. 62-121.46 (5) the term "common carrier by motor vehicle" signifies "any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers for compensation over regular routes and between fixed termini." We know of no provision in the law or any rule or regulation issued by the Commission that would justify or sustain a ruling that an exempted carrier under G.S. 62-121.47 (1) (h) may not engage also in the other exempted activities set out in (a) and (f) of section 1 therein. Therefore, we hold that an intracity carrier, holding a certificate of exemption issued by the Commission and a franchise from the city or town in which it operates, is exempt from control of the Commission except as to rates and controversies with respect to extensions and services. G.S. 62-121.47 (1) and G.S. 62-122.1. *Winston-Salem v. Coach Lines*, 245 N.C. 179, 95 S.E. 2d 510; *Utilities Commission v. Greensboro*, 244 N.C. 247, 93 S.E. 2d 151. We concur in the view that an exempted intracity carrier under G.S. 62-121.47 (1) (h) cannot qualify under the provisions of G.S. 62-121.52 (9) with respect to the transportation of charter parties generally. Such exempted carrier must confine its transportation to the type of transportation service or services expressly exempted in G.S. 62-121.47.

The pertinent parts of G.S. 62-121.47 read as follows: "(1) Nothing in this article shall be construed to include persons and vehicles engaged in one or more of the following services if not engaged at the time or other times in the transportation of other passengers by motor vehicle for compensation: (a) Transportation of passengers for or under the control of the United States government, or the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State; * * * (f) transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services; (g) transportation of *bona fide* employees of an industrial plant to and from their regular employment; (h) transportation of passengers when the movement is within a town or municipality exclusively, or within contiguous towns or municipalities and within a residential and commercial zone adjacent to and a part of such town or municipality or contiguous towns or municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone. * * *

"(3) None of the provisions of this section nor any of the other provisions of this article shall apply to motor vehicles used solely

for the transportation of passengers to and from religious services and/or the transportation of *bona fide* employees of an industrial plant to and from places of their regular employment."

The appellants also assign as error the failure of the court below to sustain their exception to the conclusion of law set out in paragraph (c) of the order hereinabove set out, in that the conclusion and order prohibit intracity carriers, operating under G.S. 62-121.47 (h), from transporting charter parties to any part of the State outside the town or municipality, including the residential and commercial zones adjacent thereto as fixed by the Commission. The Commission held that such carrier is authorized to transport charter parties from one part of its operating area to another within the municipality or the adjacent zones which have been fixed by the Commission, but not beyond those limits.

In our opinion, there is nothing in the Bus Act of 1949 or in the rules and regulations of the Commission, to support such a conclusion. Certainly the Commission did not think intracity carriers were so limited territorily on 1 September 1949, the date on which it issued its statement with respect to section 5 of the Bus Act of 1949 (now codified as G.S. 62-121.47), the pertinent part of which ruling is set out hereinabove. It is well to note that Rule 27, which the petitioning complainants cite and allege these respondents are violating, was promulgated by the Commission on 4 August 1950, nearly five years before the letter written by the Director of Motor Passenger Transportation for the Commission, dated 8 September 1955, which letter, according to the Commission's findings in this proceeding, was written pursuant to the direction of the Commission to the attorney of the respondent Safety. That letter expressly informed Safety that a carrier operating under (h) of G.S. 62-121.47 might also engage in the types of transportation under (a) and (f) of said paragraph.

We know of nothing in the Bus Act of 1949, or in any amendment thereto or in the decisions of this Court relative thereto, that supports or warrants such a complete reversal of interpretation of the exemptive provisions of G.S. 62-121.47. The complete reversal of the interpretation of a statute which has been adhered to over a long period of years by the Commission, should not be made unless it clearly appears its original interpretation was in error; and in our opinion the original interpretation given to the statute under consideration was correct. If the statute should be amended in this respect it should be done by the Legislature and not by judicial interpretation.

Therefore, we hold that an exempted intracity carrier, under G.S.

62-121.47 (h), has no territorial limitations as to the transportation of passengers under subsections (a) and (f) of said statute, where the request for such services arises within the area for which such carrier holds a certificate of exemption from the Commission and a franchise from the municipality in which it operates or within any additional zone or zones adjacent thereto which have been fixed by the Commission.

The appellants likewise assign as error the refusal of the court below to sustain their exception to that portion of the Commission's order set out hereinabove as paragraph (d) thereof. The evidence below is to to the effect that Safety admits that, in addition to engaging in the transportation of passengers under subsection (h) of G.S. 62-121.47, it has also engaged in the transportation of athletic teams and bands of school units, which teams and bands were under the control of a political subdivision of the State, and that it has also transported parties to and from religious services.

While it is true that Article 22 of Chapter 115, which governs the operation of school buses, makes no provision one way or the other for the transportation of athletic teams or school bands, it is equally true that school bands and athletic teams are under the control of the school authorities. Therefore, in our opinion, the board controlling such activities would have the inherent right to contract for such transportation as might be necessary to transport its athletic teams and its bands to and from such events as have been scheduled under the supervision of school authorities and that such transportation would be exempt under subsection (a) of G.S. 62-121.47 (1).

G.S. 115-35 (4) reads as follows: "Power to Regulate Extra Curricular Activities. — County and city boards of education shall make all rules and regulations necessary for the conducting of extra curricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education."

In our opinion, the phrase "without assuming liability therefor" was inserted for the purpose of making it clear that such governing authorities were not waiving governmental immunity from torts, and does not restrict the power of such boards to contract for transportation or other required items necessary in connection with duly approved interscholastic activities. Furthermore, Article 22 of Chapter 115 (Chapter 1372 of the Session Laws of 1955) of the General Statutes, Cumulative Supplement of 1955, was ratified on 26 May

1955 and made effective from and after that date. Therefore, the provisions of Chapter 1372 of the Session Laws of 1955 were in effect on 8 September 1955, when the letter from the Director of Motor Passenger Transportation for the Commission was written to Safety's attorney, advising him that his client, Safety Transit Company, could engage in the identical services the Commission now says it cannot engage in. Moreover, in said letter it was expressly stated that there were no territorial restrictions on the exempted services under subsections (a) and (f) of G.S. 62-121.47 (1). Likewise, in the communication sent out by the Commission on 1 September 1949, it was stated that exempted carriers might engage in any or in all exempted activities under section 5 (G.S. 62-121.47) of the Act and no territorial limitation was imposed on exempted carriers. This communication also stated: "The services described in this section are exempt from the Bus Act."

The respondents further assign as error the failure of the court below to sustain their exceptions to paragraph (f) of the Commission's order set out hereinabove.

The facts involved in this proceeding raise no question whatever that calls for an interpretation of section (3) of G.S. 62-121.47. We would not comment thereon but for the fact that in our opinion this section has been erroneously construed by the Commission.

Section (3) of the above statute reads as follows: "None of the provisions of this section nor any of the other provisions of this article shall apply to motor vehicles used solely for the transportation of passengers to or from religious services and/or in the transportation of *bona fide* employees of an industrial plant to and from places of their regular employment."

The above portion of the statute does not state that all carriers using buses or motor vehicles for the transportation of passengers to or from religious services shall use such buses or motor vehicles solely and exclusively for such transportation, as stated by the Commission in paragraph (i) of its order.

In our opinion, the primary object in enacting section (3) of G.S. 62-121.47 was to make certain that where churches or Sunday schools or others owned a bus and used it solely for the transportation of passengers to or from religious services, such operation was to be completely free from supervision or regulation by the Commission. Likewise, it was intended that where a person, firm or corporation owned a bus and used it solely for the transportation of *bona fide* employees of an industrial plant to and from their regular employment, such transportation service was also intended to be wholly

free from supervision and regulation by the Commission. But the ruling below, to the effect that the same bus cannot be used to carry people to and from religious services and to transport *bona fide* employees of an industrial plant to and from their work, is not authorized by such section. Unfortunately, the Legislature tied the two types of services together by the use of that oft condemned and ambiguous term "and/or," which contains both the conjunctive "and" and the disjunctive "or." If the statute read: used solely for the transportation of passengers to and from religious services or in the transportation of *bona fide* employees of an industrial plant, etc., we would concur in the interpretation placed thereon by the Commission. But, since the statute is worded as it is, we hold that a bus may be used solely for the transportation of passengers to and from religious services and for the transportation of *bona fide* employees of an industrial plant to and from their regular employment; that is, the sole use may include both types of services. We again disapprove the use of the term "and/or" in statutes, warrants, and bills of indictment. *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320; *S. v. McLamb*, 236 N.C. 287, 72 S.E. 2d 656; *S. v. Daughtry*, 236 N.C. 316, 72 S.E. 2d 658; *Johnson v. Bd. of Education*, 241 N.C. 56, 84 S.E. 2d 256; *Thomas & Howard Co. v. Insurance Co.*, 241 N.C. 109, 84 S.E. 2d 337; *Brady v. Beverage Co.*, 242 N.C. 32, 86 S.E. 2d 901.

The appellants likewise assign as error the failure of the court below to sustain their exceptions to paragraph (g) of the Commission's order set out hereinabove. The respondents contend that the definition given in the order as to the meaning of "religious services," is too restrictive and is contrary to the legislative intent. In view of the absence of any finding of fact to the effect that these appellants or either one of them is violating the provisions of subsection (f) of G.S. 62-121.47 (1), we reserve passing on this question until it is presented in a case upon findings of fact supported by competent evidence tending to support an alleged violation of such exempted service or services. In support of this view, we point out the testimony of E. A. Hughes, Jr., Director of Motor Passenger Transportation of the Commission, in the hearing below: "Q. Do you have any information now that any of the haulers are violating the provisions or manner of hauling as set forth in your letter of September 8, 1955? A. No, sir, I don't have any such information."

The respondents assign as error the failure of the court below to sustain their exception to the order of the Commission hereinabove set out in paragraph (i) thereof, in that the Commission ordered all intracity carriers operating under the provisions of G.S. 62-121.47,

from and after the effective date of the order, to cease and desist from transporting passengers by motor vehicle pursuant to charter party or parties or trips, as commanded and set forth in the order, and all carriers to cease and desist from transporting passengers to and from religious services, except motor vehicles devoted and used solely and exclusively for the transportation of passengers to and from such services, and that such motor vehicle was not to be used for any other form of transportation or transportation purpose.

We think the Commission clearly failed to make a distinction between the provisions contained in G.S. 62-121.47 (1) and subsection (f) thereof and the provisions contained in section (3) of said statute.

In our opinion, subsection (f) of the above statute, which reads, "transportation by motor vehicles used exclusively for the transportation of passengers to and from religious services," is susceptible to the interpretation that such vehicle at the time it is being used to transport passengers to and from religious services is limited to that service and is not permitted to pick up and discharge passengers for compensation in going to and from such services.

It appears to us that to require a carrier, who may use a bus costing anywhere from ten to twenty thousand dollars or more in the exempted service authorized in subsection (f) of the above statute, to sequester such bus from its fleet of buses and not use it for any other form of transportation or transportation purpose, is such an unrealistic and impractical requirement from an economic standpoint, it cannot be in conformity with legislative intent. It is certain that such restriction or limitation on the use of a carrier's equipment, cannot be justified by logic or common sense. *Interstate Commerce Commission v. Dunn* (C.C.A. 5th), 166 F 2d 116; *Interstate Commerce Commission v. Service Trucking Co.* (C.C.A. 3rd), 186 F 2d 400; *Atlantic Coast Line R.R. Co. v. Boyd* (Florida 1958), 102 So. 2d 709.

In *Interstate Commerce Commission v. Dunn, supra,* the defendant used the trucks in question for hauling for hire goods in intrastate commerce under a certificate issued him by the State of Georgia. He used these same trucks for hauling in interstate commerce loads of baled cotton. It was this latter activity against which the Interstate Commerce Commission sought an injunction unless the defendant secured a certificate of public convenience and necessity or other authority. The defendant claimed exemption from interstate commerce control under the provisions of the Federal Motor Carriers Act, 49 U.S.C.A., section 303 (b) (6), which reads as follows: " (b) Vehicles excepted from operation of law. — Nothing in this chapter, except the provisions of section 304 of this title relative to qualifi-

cations and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), *if such motor vehicles are not used in carrying any other property, or passengers, for compensation.*" (Italics added.)

The above section had been amended 29 June 1938 by deleting the world "exclusively" following "used" and adding the italicized portion. The District Court held the trucks exempted because "the vehicles used by the defendant in carrying baled cotton in interstate commerce are not at the same time used in carrying any other property for compensation." The Commission in its brief said: "We contend that it makes no difference whether the 'other property' is carried 'at the same time' or *at some other time,* or whether it is moving in intrastate or in interstate commerce." The Circuit Court said: "Its (Interstate Commerce Commission's) contention is that a single use at any time of a truck for the carriage of 'other property' for hire excludes the truck from the exemption, we suppose so long as its ownership is unchanged. This is so unreasonable and so crippling both to intrastate carriage for hire and to the free interstate carriage of the privileged commodities, and even contrary to the general policy of the legislation, that it cannot be the true legislative intent. * * * Dunn, in 1946, used his five trucks to make nineteen interstate hauls, less than four trips in a year for each truck. Are they all disqualified in 1947 from serving the privileged commodities in finding a market beyond the State under the exemption? Can they ever be purified from the taint of having hauled other property for hire? Did Congress intend to create any such taint? We do not think so."

The Circuit Court of Appeals, in 1951, in the case of *Interstate Commerce Commission v. Service Trucking Co., supra,* followed the *Dunn* case, *supra,* in the interpretation of the exemptive provisions of the same statute.

Likewise, in the case of *Atlantic Coast Line R.R. Co. v. Boyd, supra,* the State of Florida passed an Act exempting certain motor carriers from the control of the Florida Railroad and Public Utilities Commission while engaged exclusively in transporting exempted materials, among them a product known as dolomite. The legal question involved was identical to that before us, except it involved the transportation of goods and materials, while our statute involves the transportation of passengers to and from religious services. The Florida Court said: "It is our view that the transportation of dolomite, alone, of the pro-

ducts in question, is within the excluded jurisdiction and then only when the vehicles employed are used exclusively to take it from the place where it is mined to the consumer or grower. And in making this statement we do not purpose to adopt the restricted definition of the word 'exclusively' for which the petitioners contend. It would not, in our opinion, be fair or sensible to hold that a vehicle used to transport an occasional load of dolomite from the mine to the grower or consumer would have to remain idle when not actually put to such use. We concur in the interpretation of the Commission that when a vehicle at any given time is employed in carrying dolomite on such a trip the load must consist entirely of dolomite or dolomite and other exempt materials."

In G.S. 62-121.44, the Legislature, in its declaration of policy, among other things, said: " * * * to foster a coordinated State-wide motor carrier service; to conform with the national transportation policy and the Federal Motor Carrier Act insofar as the same may be found practical and adequate for application to intrastate commerce; * * *."

We hold that the restrictions sought to be put on the use of equipment pursuant to the provisions of subsection (f) of G.S. 62-121.47 (1), are without warrant of law. Therefore, the cease and desist orders with respect thereto, contained in the order of the Commission, were erroneously entered.

It might be well to note that when an exempted carrier is operating in violation of the exemptive provisions of G.S. 62-121.47, any other carrier adversely affected thereby may institute an action in the Superior Court against such exempted carrier, pursuant to the provisions of section (4) of the above statute and G.S. 62-121.72 (2), as was done in *Bryant v. Barber*, 237 N.C. 480, 75 S.E. 2d 410.

We have sought to discuss and consider only the pertinent questions raised by the record which we deem essential to the proper disposition of this case. We do not think the evidence or the findings of fact with respect thereto, support any conclusion of law to the effect that these respondents are operating in violation of the exemptive provisions of G.S. 62-121.47.

Therefore, the order of the Commission is hereby set aside and this cause remanded to the end that an order may be entered in accord with this opinion.

Error and remanded.

VIRGINIA ELECTRIC AND POWER COMPANY v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 3 February, 1961.)

1. Taxation § 29—

In allocating for taxation by this State a part of the net income of a unitary business operating in several states, a statutory formula that results in an approximation rather than precision is sufficient in view of the administrative impossibility of allocating specifically the profits earned from the business within the State.

2. Same: Taxation § 38c—

In an action by a corporation operating a unitary business in several states to recover a part of income tax paid by it to this State on the ground that the formula used in ascertaining its income attributable to its business in this State resulted in excessive taxation, the burden is on the corporation to show by clear and cogent evidence that the formula used resulted in excessive taxation.

3. Same—

The formula used for fixing the rates which a unitary utility operating in several states may charge its customers in this state, and the formula used in allocating for income tax purposes the income of such utility from its operations within this State, relate to entirely different matters involving different factors, and the formula for rate making purposes is not material in determining the fairness of the formula used in the allocation of income.

4. Same: Constitutional Law §§ 24, 27— Evidence held not to show that allocation of income for taxation by this State was not fair or was burden on interstate commerce.

Plaintiff is a unitary utility operating in several states. It filed petition with the Tax Review Board requesting it be permitted to allocate its income for taxation by this State in accordance with its accounting system which maintained a separate schedule for expenses and revenues from operations in this State, G.S. 105-134-II(4) (b), or, in the event such relief could not be granted, that it be authorized to allocate income in this State either by substituting the wage factor for the gross receipts factor, or by adding the wage factor to the gross receipts factor as permitted by G.S. 105-134-II(4) (a). The Board held that the gross receipts formula was inequitable under the particular circumstances and permitted plaintiff to allocate its income by adding the wage factor to the gross receipts factor. Plaintiff paid the tax computed on this basis under protest and sued to recover the difference between the tax so computed and the tax computed on the separate accounting formula. Plaintiff introduced evidence to the effect that its rates everywhere are the same, that in this State it averaged 10 customers per mile of line, while in its operations in other states it had 24 customers per mile, that it had a larger capital investment per customer in North Carolina than elsewhere and that its revenue per kilowatt hour was less in this State than in the other states in which it operated. *Held:* Plaintiff had requested in the alternative the very formula used by the Board, and

has failed to show by clear and cogent evidence that the formula used was intrinsically arbitrary or produced an unreasonable result or that the income tax computed under the formula deprived it of property without due process of law or constituted an unconstitutional burden on interstate commerce, and judgment that it recover nothing will not be disturbed. Federal Constitution, Art. I, § 8(3) and the Fourteenth Amendment to the Federal Constitution.

5. Same—

In allocating for taxation by this State a part of the net income of a unitary business operating in this State and several other states, it is not required that its equipment appropriately employed in this State be equally productive with that employed in the other states, but the mutual dependency of the interrelated activities in furtherance of the entire business sustains an apportionment formula which results in a reasonable approximation of its income earned here, it being required only that the formula not be intrinsically arbitrary or produce an unreasonable result.

6. Appeal and Error § 38—

An exception not brought forward and discussed in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiff from *Hobgood, J.*, Second May 1960 Regular Civil Term of WAKE.

Civil action, by virtue of G.S. 105-267, against the State Commissioner of Revenue to recover an additional income tax of $46,521.43, plus $3,721.71 interest, totaling $50,243.14, for the year 1953, paid under protest.

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

The facts found by the judge, which are material and essential to a decision of this appeal, are summarized, except when quoted:

Virginia Electric and Power Company, hereafter called VEPCO, is a Virginia corporation engaged in the year 1953 in the business of generating electricity, and transmitting, distributing and selling the same in the States of Virginia, West Virginia, and the northeastern part of North Carolina. It distributes gas only in the Hampton Roads area of Virginia. (The undisputed evidence, though not incorporated in the findings of fact, shows that the North Carolina Tax Review Board by Administrative Order No. 27 held that the operation of the gas business by VEPCO in Virginia was not a part of the company's unitary business in North Carolina, and directed that net income from such part of its business be excluded from income apportionable to North Carolina).

On 9 April 1954, following an extension of time given by defendant

to file its income tax return for 1953, VEPCO, pursuant to the provisions of G.S. 105-134, II, Foreign Corporations, 3, in force in 1953, filed a North Carolina income tax return based on the statutory allocation formula there set forth. This return stated that VEPCO'S total gross income for 1953 was $79,911,518.00, its total allowable expenses for the year $62,206,103.00, its total net income, electric department, $17,705,415.00, the proportion taxable in North Carolina 7.302351%, $1,292,911.00, its total tax due at 6%, $77,574.66. VEPCO paid no tax on this return.

On the same day VEPCO filed another North Carolina income tax return stating its total gross income for 1953 was $5,835,719.00, its total allowable expenses for the year $5,518,605.00, its total net income $317,114.00, proportion taxable in North Carolina 100%, its total tax due at 6% $19,026.84, interest due $52.13, total amount due $19,078.97. VEPCO paid to the State on this return $19,078.97.

(These returns were introduced in evidence by VEPCO. The return upon which no tax was paid is plaintiff's Exhibit 1, and the return upon which $19,078.97 was paid is its Exhibit 2. We have stated the contents of these returns somewhat more fully than set forth in the findings to avoid setting them forth later. We believe what we have done is in the interest of clarity).

At the time VEPCO paid to the State of North Carolina income tax in the amount of $19,078.97, it "filed a petition with the North Carolina Tax Review Board asking authority to pay its tax on a separate accounting basis or, in the alternative, on the basis of substitution of the payroll formula for the gross receipts formula or, as a third alternative, in the event neither of the first two alternatives was granted, to allow VEPCO to pay an income tax to the State of North Carolina for the year 1953 based on the substitution of the average of the gross receipts and payroll ratios for the statutory formula provided in G.S. 105-134-II(3)."

This is the petition summarized in the findings of fact:

"1. The Company is a Virginia corporation duly qualified to do business in North Carolina. It conducts an electric utility business in Northeastern North Carolina. Its principal North Carolina office is located at Williamston.

"2. The Company is subject to the North Carolina income tax. As a foreign corporation, it is required, in accordance with North Carolina General Statutes, §105-134-II, to 'pay annually an income tax equivalent to six per cent of a proportion of its entire net income' determined in accordance with the gross re-

ceipts formula contained in paragraph (3) of that subsection. If the Company's entire net income from electric operations for 1953 were apportioned in accordance with this formula, net income of $1,292,911 would be allocated to North Carolina and the tax would be $77,574.66. The details of this computation are shown on Exhibit 1. The Company believes that such apportionment operates to subject it to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within North Carolina for the reasons herein stated. The Company's service area in North Carolina covers the extreme northeastern section of the state which is predominantly agricultural and, as a consequence, thinly populated. The largest incorporated community served in North Carolina is Roanoke Rapids with a population of 8,156 (1950 census). By contrast the Company serves most of the major population centers in Virginia, including the Richmond, Petersburg, Hopewell area; the Norfolk, Portsmouth, Newport News area; and the Arlington, Alexandria, Fairfax area. The Company during 1953 had uniform rates throughout the territory served, with minor exceptions not here material. As a consequence it is obvious that the Company's operations are relatively more profitable in Virginia than in North Carolina. To further illustrate this point there were 24 customers per mile of distribution line in Virginia and West Virginia at December 31, 1953 as compared with 10 in North Carolina. The investment in distribution facilities in North Carolina per customer amounted to $401 at December 31, 1953 as compared with an investment of only $266 in Virginia and West Virginia. Any additional evidence furnished comparing the operations of the Company in Virginia and West Virginia with North Carolina could only add weight to the Company's contention that the apportionment of net income to North Carolina on the basis of the gross receipts formula prescribed in §105-134-II(3) of the North Carolina General Statutes must operate to subject it to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within North Carolina.

"3. The Company maintains in its books of account a detailed allocation of receipts and expenditures attributable to its North Carolina operations. These detailed allocations, in the opinion of the Company, reflect more clearly than the applicable allocation formula or alternative formulas prescribed by the statute the income attributable to the business of the Company in North

Carolina. A statement of this computation is shown on Exhibit 2. Net income in 1953 from North Carolina operations so determined would be $317,114, and the tax would be $19,026.84 The Company is of the view that the separate accounting method is proper and best reflects its income and earnings attributable to North Carolina and that the Board should permit the Company to follow the separate accounting method as authorized by §105-134-II-(4) of the North Carolina Statutes in filing its return.

"4. The Company has ascertained the ratio of all salaries, wages, commissions and other compensation paid or incurred by it in North Carolina for services during 1953 to total salaries, wages, commissions and other compensation paid by it in connection with its electric business. If the factor so determined were substituted for the gross receipts factor and applied to the Company's 1953 net income from its electric operations, as authorized by §105-134-II-(4) of the North Carolina Statutes net income of $892,031 would be allocated to North Carolina and the resulting tax would be $53,521.86. The details of this computation are shown on Exhibit 3, Section I. The Company submits that allocation on this basis, while not as just, fair or proper as the separate accounting basis, is obviously more equitable in view of the facts of this case than allocation by the gross receipts factor.

"5. If the wage factor were averaged with the gross receipts factor rather than substituted for such factor, as set forth in paragraph 4 above, and applied to the Company's 1953 net income from its electric operations, as authorized by §105-134-II-(4) of the North Carolina Statutes net income of $1,092,471 would be allocated to North Carolina and the resulting tax would be $65,548.27, as shown on Exhibit 3, Section II. While the allocation on this basis is not as just, fair or proper as the separate accounting method or as equitable as the use of the wage factor alone it is, nonetheless more equitable than allocation by use of the gross receipts factor alone.

"THE COMPANY, accordingly, petitions the Board for relief as follows:

"(1)That the Board authorize the Company to file its return and pay its income tax for 1953 in accordance with the separate accounting method shown on Exhibit 2 as permitted by General Statutes, §105-134-II-(4) (b); or

"(2) If the prayer contained in (1) is not granted: (a) the Board

authorize the Company to file its return and pay its income tax for 1953 in accordance with the allocation based on the substitution of the wages factor for the gross receipts factor as permitted by General Statutes, §105-134-II (4) (a), as shown on Exhibit 3, Section I; or (b) in the alternative the Board authorize the Company to file its return and pay its income tax for 1953 in accordance with the allocation based on the average of the wages and gross receipts factors as permitted by General Statutes, §105-134-II (4) (a), as shown on Exhibit 3, Section II."

We insert the petition here rather than later on in the interest of clarity. It is dated 9 April 1954.

"For the year 1953, the total gross receipts of VEPCO from its Electric Operations everywhere was $79,904,007, and its total gross receipts in North Carolina were $5,834,871, or 7.302351% of its gross receipts from all of its Electric Operations; the total payroll of VEPCO for its Electric Operations everywhere was $19,246,057, and its total payroll in North Carolina for that year was $969,651, or 5.038180% of its total payroll for Electric Operations everywhere; that the average of VEPCO'S gross receipts and payroll ratios for the State of North Carolina for the year 1953 was 6.170266%."

"The Tax Review Board of North Carolina is an administrative agency duly created and established by the General Assembly of North Carolina and was, at all times relevant to this action, vested with the authority and power under G.S. 105-134-II(4) of varying within limitations the statutory income apportionment formula applicable to any particular multi-state corporation upon a showing by 'clear, cogent and convincing proof' that the applicable statutory allocation or apportionment formula would subject the taxpayer ' . . . to taxation on a greater portion of its net income than is reasonably attributable to business earnings within this State . . .' and upon a further showing by the petitioning taxpayer that it is, by the same standard of proof, entitled to the relief prayed for."

"The Tax Review Board, after hearing on June 28, 1955, issued its Administrative Order No. 27 permitting VEPCO to substitute for the statutory gross receipts formula applicable to it the average of the gross receipts and payroll ratios, thus granting VEPCO'S third alternative prayer for relief in its petition filed with the Tax Review Board. This resulted in allocated North Carolina net income for the tax year 1953 of $1,092,471 and in total income tax due North Carolina of $65,548.27. The plaintiff duly filed exceptions to the decision of the Tax Review Board, which exceptions were overruled by the Board.

The decision of the Tax Review Board was not appealed to the Superior Court."

This is the decision of the North Carolina Tax Review Board, which is referred to in the finding of fact, and which we insert here rather than later in the interest of clarity:

"At a meeting of the TAX REVIEW BOARD held in the City of Raleigh on July 29, 1955, the full membership of the Board formally considered the *Exceptions to Findings* which were filed with the Board on July 27, 1955, on behalf of the Virginia Electric and Power Company pursuant to G.S. 105-163, such exceptions having been made to the findings and determinations of the Tax Review Board, insofar as they relate to the income years 1953, 1954 and subsequent years, contained in Administrative Order No. 27 entered June 28, 1955.

"In giving full consideration to the matter, the Board at the aforesaid meeting found and determined:

"1. That Virginia Electric and Power Company (hereinafter referred to as the Company) filed separate petitions before the Tax Review Board on November 30, 1953, April 12, 1954, and March 16, 1955 concerning the allocation of its net income for the income years 1952, 1953 and 1954 respectively. That after hearings had been duly held on said petitions, the Board, at a meeting on June 28, 1955 gave full consideration to evidence, contentions and arguments as set forth in the above-mentioned petitions and hearings, and entered its Administrative Order No. 27 covering taxable years 1952, 1953, 1954 and subsequent years, granting the taxpayer-company one of its alternative prayers for relief.

"2. That in each of the said petitions, the Company requested that it be authorized to report income to this State on the basis of separate accounting as permitted by G.S. 105-134, II, 4(b), or, in the event such relief could not be granted, that it be authorized to allocate income to this State either by substituting the wage factor for the gross receipts factor, or by adding the wage factor to the gross receipts factor, as permitted by G.S. 105-134, II, 4(a).

"3. That on the basis of all the evidence, contentions and arguments set forth in the petitions, records, and hearings, the Board concluded that the applicable statutory provision, G.S. 105-134, II, 3, which required the Company to apportion its income according to the gross receipts formula described therein, had operated and would so operate as to subject the Company to taxation in this State on a greater portion of its net income than could reasonably be attributed to business or earnings within this State.

"4. That accordingly, the Board, in its Administrative Order No.

27, granted to the Company the alternative relief requested in each of its petitions, by authorizing the Company to allocate its income for income tax purposes on the basis of a ratio obtained by adding a salaries and wages factor to the gross receipts factor as permitted by G.S. 105-134, II, 4(a).

"5. And, that although such relief was in accordance with one of the alternative prayers for relief asked by the Company in each of its above-mentioned petitions, on July 27, 1955, the Company filed formal exceptions to the findings and determinations of the Board, as they relate to income years 1953, 1954 and subsequent years, contained in Administrative Order No. 27, on the grounds:

"'(1) The allocation of net income to North Carolina on the basis of the arithmetical average of the gross receipts ratio and the salaries and wages ratio subjects the Company to income taxation by North Carolina on a greater portion of its net income than is reasonably attributable to business or earnings within the State of North Carolina.

"'(2) The Company employs on its books of account a detailed allocation of receipts and expenditures which reflects more clearly than any allocation formula prescribed by G.S. Sec. 105-134 the income attributable to its business within the State of North Carolina. Such separate accounting best reflects the income and earnings of the Company attributable to North Carolina. The Board was in error in refusing to permit the determination of income subject to the North Carolina income tax on the basis of such separate accounting method rather than on the basis of an allocation formula.'

"The TAX REVIEW BOARD, having formally passed upon the above-quoted exceptions pursuant to G.S. 105-163, hereby makes the following rulings:

"1. That the Board was correct in its finding as stated in Administrative Order No. 27 that the application of the formula required by G.S. 105-134, II subsection 3 has operated and will so operate as to subject the Company to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within this State, and

"2. That the Board was correct in finding that the allocation of the Company's net income to North Carolina on the basis of the arithmetical average of the gross receipts ratio and the salaries and wages ratio

"(a) more accurately reflects the Company's net income attributable to this State than does the applicable statutory formu-

la (i. e. the formula required by G.S. 105-134, II subsection 3), and

"(b) more accurately reflects the Company's net income attributable to this State than would the substitution of the salaries and wages factor for the gross receipts factor, as authorized by G.S. 105-134, II subsection 4(a), and

"3. That therefore, the Board was acting within its authority as set out in G.S. 105-134, II subsection 4 in granting its Administrative Order No. 27 the aforementioned relief, for which the petitioner asked in its alternative prayer for relief, and to which the Board found the petitioner entitled."

Whereupon, defendant assessed VEPCO with additional State income tax for 1953 in the amount of $46,521.43 ($65,548.27 less $19,026.84 makes $46,521.43), plus $3,721.71 for interest, for a total of $50,243.14. Plaintiff paid this additional State income tax, and has followed the statutory procedure to sue for its recovery.

The separate accounting system devised by VEPCO was developed primarily for rate making purposes with some adjustments for income tax purposes. It has been accepted for rate making purposes by the three States in which it operates. This separate accounting system is based upon numerous and varying allocation formulas, some of which are based upon a combination of allocations.

The electrical operation of VEPCO is an integrated system with unity of ownership, management, and production and distribution of electrical power. It is not known by VEPCO whether a unit of electric energy generated in North Carolina or in Virginia will be sold in Virginia, West Virginia or North Carolina; nor in which States expense items such as leakage occur, nor to which State such a leakage item should be charged. The electric business done by VEPCO in North Carolina contributes to the success of the over-all electric operations of VEPCO in the three States.

VEPCO has failed to show by clear, cogent and convincing proof that the allocation formula (allocation based on the average of the wages and gross receipts factors as permitted by G.S. 105-134-II, 4) which the State Tax Review Board permitted it to use, as requested by it in one of its alternative prayers for relief in its petition for review of apportionment of net income, year 1953, filed with the State Tax Review Board, (and above set forth), subjects VEPCO to taxation by North Carolina on a greater proportion of its net income than is reasonably attributable to its earnings or business in North Carolina.

VEPCO has failed to show that the State Tax Review Board abused its statutory discretion, or acted arbitrarily, or unlawfully in per-

mitting it to use the allocation formula it requested in one of its alternative prayers for relief as above set forth.

VEPCO has failed to show by clear, cogent and convincing proof that its separate accounting system reflects more clearly the income attributable to its business in North Carolina than does the allocation formula, which the State Board of Tax Review permitted it to use at its request, as above set forth.

Based upon its findings of fact the judge made the following conclusions of law:

"1. That VEPCO was not entitled to base its income tax return and payment of its income tax for the year 1953 on its separate accounting method.

"2. That the Tax Review Board did not abuse the discretion vested in it by the General Assembly and did not act arbitrarily, unreasonably or unlawfully in permitting VEPCO to use an alternative allocation formula based upon the arithmetical average of its gross receipts and salaries and wages ratios in determining the portion of its income reasonably attributable to its business or earnings within North Carolina for income tax purposes for the year 1953.

"3. That the Commissioner of Revenue, in assessing the additional income tax which VEPCO seeks to recover by this action, had no alternative other than to follow the order of the Tax Review Board permitting VEPCO to use the alternative formula in computing the portion of its net income reasonably attributable to its North Carolina business for the 1953 income tax year.

"4. That the action of the Tax Review Board and the defendant's assessment were in compliance with G.S. 105-134, and such action and the section on which it was based, do not constitute, as applied to the plaintiff, an undue burden on interstate commerce in violation of the Fourteenth Amendment or the Commerce Clause of the United States Constitution.

"5. That the plaintiff, VEPCO, is not entitled to recover anything by this action."

Whereupon, the judge adjudged and decreed that VEPCO recover nothing, and dismissed the action, taxing VEPCO with the costs.

From the judgment VEPCO appealed.

W. T. Joyner, W. T. Joyner, Jr., John W. Riely, Joyner & Howison, Hunton, Williams, Gay, Powell & Gibson for plaintiff, appellant.

T. W. Bruton, Attorney General, Peyton B. Abbott, Assistant Attorney General, Lucius W. Pullen, Assistant Attorney General, and Thomas L. Young, Assistant Attorney General for the State.

PARKER, J. The standard to be applied in a suit to recover a state tax paid under protest is set forth in G.S. 105-267. The relevant part of the statute is: "If upon the trial it shall be determined that such tax or any part thereof . . . , was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases."

G.S. 105-134 in effect during the year 1953 is applicable here, not G.S. 105-134 as it now appears due to changes made in later years by the Legislature. VEPCO'S brief is based on G.S. 105-134 in force for the year 1953.

Since VEPCO operates in three States, its net income must be allocated to North Carolina. A state in attempting to put upon a business extending into several states "its fair share of the burden of taxation" is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders," *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113, 65 L. Ed. 165, and as a matter of practical tax administration it has been "declared that 'rough approximation rather than precision' is sufficient," *International Harvester Co. v. Evatt,* 329 U.S. 416, 422, 91 L. Ed. 390, 395.

The statutory allocation formula applicable to VEPCO for the year 1953 is set forth in G.S. 105-134-II-3, in force in 1953 as follows: "The total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state during the income year to its gross receipts for such year within and without the state."

For the year 1953 VEPCO filed a state income tax return in accord with the above statutory allocation formula showing tax due at 6% (G.S. 105-134-II-3) in the amount of $77,574.66. It did not pay this tax. The State Tax Review Board, after considering VEPCO'S petition for review of apportionment of net income for the year 1953, in accordance with the powers vested in it by G.S. 105-134-II-4, upheld its contention that the statutory allocation formula, G.S. 105-134-II-3, has operated and will operate so as to subject VEPCO to taxation on a greater portion of its net income than is reasonably attributable to its business or earnings within the State. Whereupon, the State Board of Tax Review, acting pursuant to the powers vested in it, held that the allocation of VEPCO's net income to North Carolina on the basis of the arithmetical average of the gross receipts ratio and the salaries and wages ratio, as requested by VEPCO in its petition to the State Board of Tax Review in one of its prayers for alternative relief, and which would show a tax due to North Carolina in the sum of $65,548.27, more accurately reflects VEPCO'S net in-

come reasonably attributable to North Carolina than does the statutory allocation formula required by G.S. 105-134-II-3, and more accurately reflects VEPCO'S net income reasonably attributable to this State than would the substitution of the salaries and wages factor as authorized by G.S. 105-134-II-4. Defendant assessed VEPCO with an income tax of $65,548.27, less the amount of $19,078.97 it had already paid on one of the income tax returns it filed, for the year 1953, in accordance with the allocation formula based on the gross receipts ratio and the salaries and wages ratio. It is to be noted that VEPCO in its petition, above set forth, states in respect to the allocation formula of its net income to North Carolina on the basis of the arithmetical average of the gross receipts and the salaries and wages ratio: "While the allocation on this basis is not as just, fair or proper as the separate accounting method or as equitable as the use of the wage factor alone it is, nonetheless more equitable than allocation by use of the gross receipts factor alone." VEPCO in this petition does not state, nor even intimate, that a State income tax levied in accord with this allocation formula would be excessive, or levied in accord with this allocation formula would be on a greater portion of its net income than is reasonably attributable to its business or earnings within this State.

VEPCO in its brief states two questions are presented for decision: One, was not the income tax exacted by defendant for the year 1953 excessive? Two, was not the exaction of the tax a deprivation of VEPCO'S property without due process of law and an unconstitutional burden on interstate commerce?

Norfolk & W. R. Co. v. North Carolina, 297 U.S. 682, 80 L. Ed 977, was an action to recover back the amount of a state income tax paid by an interstate railroad company as having been improperly assessed. The Court said: "We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence."

Butler Brothers v. McColgan, 315 U.S. 501, 86 L. Ed. 991, was a suit to recover back a corporate franchise tax. In that case the Court says: "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed."

VEPCO contends that the tax assessed under the allocation formula of the gross receipts ratio and the salaries and wages ratio is shown by its evidence to be excessive. Its evidence falls into two categories.

First. Its territory in northeastern North Carolina is largely agricultural and thinly settled. Its territory in Virginia includes the

largest metropolitan areas. Its rates everywhere are the same. There are 24 customers per mile outside of North Carolina, and 10 in North Carolina. Investment in distribution facilities per customer is $401.00 in North Carolina, and $266.00 elsewhere. Each added dollar of investment means more taxes and depreciation, which must be deducted to reach net income. Revenue per kilowatt hour was $1.50 in North Carolina and $1.96 elsewhere. Taxes are heavier in North Carolina. Practically all of its generating facilities are in Virginia.

Second. VEPCO maintains in its books of account a detailed allocation of receipts and expenditures attributable to its North Carolina operations, which shows a net income of $317,114.00, and an income tax due to North Carolina for 1953 of $19,026.84.

A. M. Clement, assistant treasurer of VEPCO, testified that VEPCO keeps a detailed allocation of receipts and expenses which shows the income attributable to its business in North Carolina, and that the State Utilities Commission considered the earnings of VEPCO thus shown in the rate case in which increases were granted in June 1954. That the test used in the rate case was the 12 months ended 30 September 1953. The data presented in the rate case were prepared on the same separate accounting basis for 1953. The rate of return is based on investment of VEPCO, and not on reproduction cost. The witness was asked a number of other questions in respect to whether the State Utilities Commission accepted these figures, but the judge sustained objections to the questions, though he permitted the witness to put his answers in the record. VEPCO excepted to the judge's rulings, but did not bring forward the exceptions, and discuss them in its brief. Under our rules such exceptions are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 563; *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222.

Robert S. Boyd, manager of the appraisal division of Stone & Webster Engineering Corporation, testified for VEPCO as an expert on matters of allocation of income. He expressed the opinion that the use of the formula insisted upon by defendant would attribute to North Carolina more income than is reasonably attributable to its operations in North Carolina, and in consequence would attribute to North Carolina income earned outside of North Carolina. He further stated that, in his opinion, VEPCO'S books of account showing a detailed allocation of receipts and expenditures attributable to North Carolina would allot to North Carolina its proper share of VEPCO'S net income.

John Deere Plow Co. v. Franchise Tax Board, 38 Cal. 2d 214, 238 P. 2d 569, appeal dismissed for want of a substantial federal question,

343 U.S. 939, 96 L. Ed. 1345, was an action to recover an additional franchise tax assessed against it for the year 1938, based upon income for the year 1937. Plaintiff argued that the formula used operated to distort the productivity of its California business, and cannot work properly in reasonably reflecting the proportionate part of the unitary income attributable to California. In reply to this argument, the Court said: "But in so arguing plaintiff fails to take into account the underlying concept of formula apportionment in the allocation of income from a unitary business: that the unitary income is derived from the functioning of the business as a whole, to which the activities in the various states contribute; and that by reason of such interrelated activities in the integrated overall enterprise, the business done within the state is not truly separate and distinct from the business done without the state so as reasonably to permit of a segregation of income under the separate accounting method rather than use of the formula method in assigning to the taxing state its fair share of taxable values."

VEPCO distributes gas only in the Hampton Roads area of Virginia. The North Carolina Tax Review Board by Administrative Order No. 27 held that this distribution of gas was not a part of VEPCO'S unitary business, and directed that any net income from such gas business be excluded from income attributable to North Carolina.

In the apportionment of a unitary business the formula used must give adequate weight to the essential elements responsible for the earning of the income, and must not include income unconnected with the unitary business, but its propriety in a given case does not require that the factors appropriately employed be equally productive in the taxing state as they are for the business as a whole. Varying conditions in the different states wherein the integrated parts of the whole business function must be expected to cause individual deviation from the general average of the factors in the formula equation in all the different states wherein the integrated parts of the whole business function, and yet the mutual dependency of the interrelated activities in furtherance of the entire business sustains the apportionment process. *John Deere Plow Co. v. Franchise Tax Board, supra; Ford Motor Co. v. Beauchamp,* 308 U.S. 331, 84 L. Ed. 304; In the matter of *The North American Cement Corporation v. Graves,* 243 App. Div. 834, 278 N.Y.S. 920; in Court of Appeals 269 N.Y. 507, 199 N.E. 510; judgment affirmed, 299 U.S. 517, 81 L. Ed. 381; *Crane Co. v. Carson,* 191 Tenn. 353, 234 S.W. 2d 644, cert. den., 340 U.S. 906, 95 L. Ed. 655.

There is "no necessary inconsistency between the accuracy and fairness of the taxpayer's accounting and the different result obtained by the formula method of allocating income," *Edison California Stores v. McColgan,* 30 Cal. 2d 472, 483, 183 P. 2d 16, 23, since "a particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a state seeks to tax values created by business within its borders," *Butler Brothers v. McColgan,* 315 U.S. 501, 507, 86 L. Ed. 991, 996, so that for "taxation purposes the one does not impeach the other," *Edison California Stores v. McColgan, supra,* at page 483 in the California reports, at page 23 in the Pacific Reporter.

It seems the only requirement is that the allocation formula used be not intrinsically arbitrary or produce an unreasonable result. Such was the situation in the case of *Hans Rees' Sons v. State of North Carolina ex rel. Maxwell,* 283 U.S. 123, 75 L. Ed. 879, where the Court recognized the unitary character of the business as a manufacturer and selling enterprise extending into several states and to which a formula method of apportionment was appropriate, but refused to approve the particular formula employed for the reason that it consisted simply of the property factor and failed to give proper weight to the extensive activities of the company without the state, so that the result reached was unreasonable. See *Butler Brothers v. McColgan,* 17 Cal. 2d 664, 678, 111 P. 2d 334, 341, affirmed 315 U.S. 501, 86 L. Ed. 991.

VEPCO in its complaint has no allegation of any kind in respect to the consideration by the State Utilities Commission in fixing rates for its services of its books of account wherein are kept a detailed allocation of receipts and expenses showing the income attributable to its business in North Carolina. Neither has it favored us in its brief with any argument or discussion as to how such consideration is material here. The fixing of rates by the State Utilities Commission to be charged by VEPCO in North Carolina for its services, and the establishment by North Carolina of an allocation formula so that VEPCO will bear its fair share of the burden of taxation in North Carolina, are entirely different matters, and involve different factors.

VEPCO in the petition which it filed with the North Carolina Tax Review Board asking authority to pay its income tax to North Carolina on a separate accounting basis or, in the alternative, on the basis of substitution of the payroll formula for the gross receipts formula or, as a third alternative, in the event neither of the first two alternatives was granted, to allow it to pay an income tax to North Caro-

lina for the year 1953 on the substitution of the average of the gross receipts and payroll ratios for the statutory formula, which petition is set out in full in the statement of facts, sets forth a large part of the facts shown in the first category of its evidence at the hearing before Judge Hobgood. It is reasonable to assume that the additional facts shown in the first category of its evidence before Judge Hobgood was known by VEPCO when it filed this petition. In this petition there is no suggestion or intimation that if VEPCO was allowed to use the third alternative, the tax imposed would be excessive or the taxing of income not fairly attributable to its business in North Carolina. In this petition it is apparent that VEPCO took the position that though it could show by a separate accounting system, its activities in North Carolina were less profitable than those without North Carolina, and what the net earnings in North Carolina was according to its separate accounting system, it did not preclude the use of a formula as a method of apportionment of its unitary income. It is also apparent that VEPCO, when it requested that it be permitted to use the formula here used by defendant, thoroughly recognized the fact that its electric business in North Carolina was an integrated unit in its whole electric business, providing the advantages of a unitary business through unity of ownership, unity of operation by centralized purchasing, management, advertising and accounting, and unity of use in the centralized executive force and general system of operation.

Analyzing the evidence in the record before us, we are of the opinion, and so hold, that VEPCO has not carried the burden "to make manifest by clear and cogent evidence" *(Norfolk & W. R. Co. v. North Carolina, supra)* that the additional income tax here imposed is excessive, or that it taxes VEPCO on net income not reasonably attributable to its business in North Carolina, or that the State Tax Review Board abused its statutory discretion, or acted arbitrarily or unlawfully in permitting it to use an allocation formula it requested permission to use. The income tax computed by defendant here on VEPCO for the year 1953 is not open to constitutional objections as operating to tax extraterritorial income in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, or as being an unconstitutional burden on interstate commerce.

There is competent evidence to support the essential findings of fact, which findings support the conclusions of law made by the hearing judge. It therefore follows that the trial judge properly sustained the

additional income tax for 1953 assessed against VEPCO by defendant. All VEPCO'S assignments of error are overruled.

The judgment is

Affirmed.

HELEN CRUTCHFIELD RUDISILL, DELLA MAE TROTTER KERNODLE, AND EUGENE G. SHAW, ADMINISTRATOR, C.T.A., D.B.N., OF THE ESTATE OF J. M. CRUTCHFIELD v. LAWRENCE T. HOYLE, EXECUTOR OF THE ESTATE OF PEARL TROTTER CRUTCHFIELD AND GUILFORD NATIONAL BANK OF GREENSBORO, TRUSTEE UNDER THE WILL OF PEARL T. CRUTCHFIELD.

(Filed 3 February, 1961.)

1. Executors and Administrators § 36—

In an action by an administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix to recover assets of the estate, the demurrer of an additional defendant, upon failure of allegation that such additional defendant had ever received or accepted any funds of the estate from the executrix, is properly allowed.

2. Same—

Where an executrix, who is also a beneficiary under the will, dies without filing a final account, an action by the administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix, alleging that the executrix squandered and misapplied a large part of the estate, failed to properly account therefor, and filed no final accounting, is in the nature of an action to surcharge and falsify the account, and the Superior Court has concurrent original jurisdiction with the clerk. G.S. 28-147.

3. Pleadings § 13—

After answer has been filed, a demurrer on the ground of misjoinder of parties and causes of action cannot be considered unless the answer is withdrawn by leave of court.

4. Pleadings § 18—

Objection on the ground of misjoinder of parties and causes of action or on the ground of defect of parties must be raised by demurrer, and an attempt to raise the question in the prayer for relief contained in the answer may be disregarded.

5. Same: Executors and Administrators § 36—

Allegations to the effect that the executrix of the estate, who was also a beneficiary, squandered and misapplied the assets of the estate and died without making final settlement and that the executrix, as beneficiary under the will, did not take the property of the estate absolutely

or in fee, with demand for accounting, states but a single cause of action, a construction of the will being necessary solely to determine whether an accounting is necessary and, if so, the course and extent of the accounting

6. Pleadings § 12—

Upon demurrer, a pleading will be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

7. Executors and Administrators § 36—

An action against the personal representative of a deceased executrix upon allegations that the executrix had squandered and misapplied the assets of the estate and had failed to file a final account, is properly brought by the administrator, c.t.a., d.b.n., and while the ultimate beneficiaries of the estate are not necessary parties, they are proper parties, and their joinder is not a defect.

8. Same—

Where, in an action by an administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix of the estate, upon allegations that the executrix had squandered and misapplied assets of the estate, there is no demand against the executrix' transferees, such transferees are not necessary parties, even though the transfer was attempted by the will of the executrix.

9. Same: Wills § 39—

Ordinarily the court will not construe a will on demurrer, but in an action by an administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix alleging that the executrix had misapplied the funds of the estate with demand for accounting, and alleging that the executrix as beneficiary did not take property of the estate absolutely or in fee, a construction of the will is necessary to determine whether an accounting is necessary, and upon demurrer the court must construe the will in order to proceed in the action.

10. Wills §§ 33a, 33f, 33g—

As a general rule, a general devise or bequest to a named person, with power of disposition, transfers the property in fee or absolutely, and a subsequent limitation over to another of "whatever is left" will be held void as repugnant to the absolute gift.

11. Same—

The will in suit devised and bequeathed all property of the estate to testator's wife "for and during the term of her natural life" with power to the wife to sell any portion of the property if in her opinion it was necessary for her proper support and maintenance, with limitation over to beneficiaries of the property remaining unused or unconsumed at the time of the wife's death. *Held:* The wife took a life estate only in the property, and the power to dispose of any or all of the property was limited to the purpose of support and maintenance, and the ultimate beneficiaries took a vested remainder in any of the property undisposed of by the beneficiary during her lifetime.

12. Executors and Administrators § 36: Reference § 3—

In an action against a personal representative for an accounting, the trial court has authority to order a compulsory reference, a long and complicated account being involved. G.S. 1-189(1), G.S. 28-147.

13. Appeal and Error § 3—

An appeal from an order of compulsory reference in a case within the purview of the reference statute is premature and fragmentary, and must be dismissed.

14. Reference § 4—

Where pleas in bar to plaintiff's demand for an accounting are determined adversely to defendant upon defendant's demurrer, the court may proceed to order a compulsory reference, notwithstandng defendant's plea that he had made a final settlement, since this is not a plea in bar preventing a compulsory reference.

On *certiorari* from *Preyer, J.*, May 30, 1960 Term of GUILFORD.

This is an action instituted by plaintiffs Rudisill and Kernodle, claiming as devisees and legatees under the will of J. M. Crutchfield, and plaintiff Shaw, administrator D.B.N., c.t.a, of the J. M. Crutchfield estate, against defendant Hoyle, executor of the will of Pearl T. Crutchfield, and defendant Bank, trustee under the will of Pearl T. Crutchfield, for a construction of the will of J. M. Crutchfield and for an accounting. The action was commenced 5 January 1959.

The complaint is in substance as follows (numbering ours):

(1). J. M. Crutchfield, a resident of Guilford County, died testate 3 June 1945. His will, dated 26 May 1945, was admitted to probate 9 June 1945 in Guilford County.

(2). The will of J. M. Crutchfield follows — only material parts are given verbatim:

I. Provision made for payment of debts, funeral expenses and costs of administration.

"II. After the payment of the sums provided for in Item One, I give, devise and bequeath all the residue of my property of every sort, kind and nature, both real and personal, to my beloved wife, Pearl T. Crutchfield, for and during the term of her natural life, giving and granting to my said wife the power to sell any and all of my real estate, at her discretion, without the joinder of any other person, if in her opinion, the sale of same should be necessary for her proper support and maintenance; she to be the sole judge of the necessity of such sale; and upon such sale to execute to the purchaser, or purchasers, deed or deeds conveying the premises sold in fee simple, and my said wife shall have the right to use the proceeds of sales as seems best to her.

"III. I give, devise and bequeath in equal shares to my adopted daughter, Helen Rudisill, wife of T. R. Rudisill, and to my wife's niece, Della Mae Trotter Kernodle, wife of John F. Kernodle, a vested remainder in fee simple in and to all of my property of every kind and nature, remaining unused or unconsumed, or converted into other property at the time of her death."

IV. Authority given Pearl T. Crutchfield to lease real estate "for such term of years as to her seems proper, even though such term of years should extend beyond her natural life."

V. Pearl T. Crutchfield is appointed executrix and granted authority "for the purpose of settling . . . estate . . . to sell any property, and to do any act which, in her opinion, is for the best interest of . . . estate."

(3). Pearl T. Crutchfield qualified as executrix on 11 June 1945 and filed inventory 9 November 1945 showing: Personal property, $44,193.48; 6 parcels of real estate, $141,300.00; and claims filed against the estate, $35,698.24 — all having been paid except an item of $12,091.73.

(4). Executrix filed an annual account 24 January 1947 showing receipts, $71,456.85 and numerous disbursements. This account was not audited and approved by the Clerk of Superior Court. No final account has ever been filed.

(5). Pearl T. Crutchfield died 11 March 1958 leaving a will and codicil thereto. These were admitted to probate as her last will and testament 18 March 1958. Lawrence T. Hoyle was named executor and qualified as such 19 March 1958. The will purported to set up a trust and named the Guilford National Bank as trustee. Hoyle, executor, filed an inventory showing: Personal property, $18,074.01, and real property, $39,125.00. The real property is worth much more.

(6). On 9 July 1958 Eugene G. Shaw qualified as administrator D.B.N., c.t.a., of the J. M. Crutchfield estate. On 14 October 1958 he requested Hoyle, executor, to file a final account of the J. M. Crutchfield estate, which had never been closed. Hoyle, executor, filed a purported account 23 October 1958 showing only the following assets remaining in the J. M. Crutchfield estate: note of John R. Taylor and accured interest, $1531.25, and bank balance, $40.28.

(7). Pearl T. Crutchfield occupied a fiduciary position with respect to the property of the J. M. Crutchfield estate. She should have filed a final account "at the expiration of two years from the date of her qualification as provided by . . . (G.S. 28-121) and she should thereafter have held said property and funds as trustee for" herself and the individual plaintiffs, Rudisill and Kernodle.

(8). Pearl T. Crutchfield deposited funds of the estate in her personal account and expended them without regard to the rights of the individual plaintiffs. Over a ten-year period she deposited a total of $214,906.66. Practically all of these deposits were from rents and property of the J. M. Crutchfield estate. Instead of limiting the use of the funds to her necessary support and maintenance, she squandered and gave away a large part of the estate without the knowledge or consent of the individual plaintiffs. She contrived to get title in her own name to a one-half interest in lands belonging to the estate, sold the property for $30,000.00 and failed to account for the proceeds. She made a $3,000.00 loan to a nephew and it was secured by a deed of trust; she later discharged the debt and cancelled the deed of trust without receiving payment. Many small loans and gifts were made to friends and relatives — there has been no accounting therefor. She gave $2,566.74 to the Rehobeth Church and made a loan to John Taylor in the sum of $13,260.87 secured by second mortgages on G. I. houses.

(9). J. M. Crutchfield intended to give his property to Pearl T. Crutchfield "for the term of her natural life." Her power of disposal "was limited to such disposition as was necessary for her proper support and maintenance." Upon her death the remainder became the property of the individual plaintiffs.

Plaintiffs pray for construction of the will, an accounting, judgment for the amount due, and a reference of the cause for purpose of accounting.

There are numerous pleadings including answers, replies, further answers and demurrers.

Hoyle, executor, demurred on the grounds that the court has no jurisdiction of the cause of action, there is a misjoinder of parties and causes, and the complaint does not allege facts sufficient to constitute a cause of action.

Bank, trustee, demurred *ore tenus* on the ground that the complaint does not allege facts sufficient to state a cause of action against it.

The cause came on for hearing upon the demurrers at term 9 June 1960 and was heard. It was agreed that judgment might be entered either in or out of term.

Judgments were filed 3 August 1960.

The demurrer *ore tenus* of Bank, trustee, was sustained, and it was provided "that the plaintiffs have thirty (30) days to amend their complaint as against said bank, if they so desire."

As to the demurrer of Hoyle, executor, the judgment is, in part, as follows:

". . . (T)he Court is of the opinion, and so rules:

"(1) That this Court has jurisdiction of the above entitled action; (II) that there is no misjoinder of parties or causes; (III) that the will of J. M. Crutchfield granted a life estate only to Pearl Trotter Crutchfield and not a fee simple estate, and that the powers granted to her in said will (did) not enlarge her life estate to a fee simple estate and did not confer upon her an unlimited power to dispose of property belonging to said estate or the income therefrom; that the devise and bequest to said Pearl T. Crutchfield was not unlimited, but limited to her for life and such life tenant, notwithstanding her extensive powers of beneficial use, occupied a fiduciary relationship with the plaintiff remaindermen with respect to the estate of the said J. M. Crutchfield with the duty to maintain for said remaindermen so much thereof as was not required for her support and maintenance;

"NOW, THEREFORE, IT IS ORDERED that the demurrer of the defendant, Lawrence T. Hoyle, be and the same is hereby overruled and his prayer for dismissal of the action is denied."

The court also ordered that the cause be referred for the taking of evidence and stating the account, and Charles T. Boyd was named referee.

Hoyle, trustee, filed exceptions and petitioned the Supreme Court for *certiorari*. The petition was granted 6 September 1960.

Sapp & Sapp for Lawrence T. Hoyle, Executor, appellant.

Eugene G. Shaw and Frazier & Frazier for plaintiffs, appellees.

Chas. M. Ivey, Jr., for Guilford National Bank of Greensboro, Trustee, appellee.

MOORE, J. The record does not disclose that plaintiffs excepted to the judgment sustaining the demurrer *ore tenus* of defendant Bank. We do not understand that this ruling is prejudicial to defendant Hoyle. So the correctness of that judgment is not before us. However, a brief comment seems appropriate. The complaint does not allege that the Bank ever received or accepted any money or other property pursuant to the purported trust, nor that the Bank as trustee has in its possession or under its control any of the assets of the J. M. Crutchfield estate. Upon the present state of the record it would appear that the demurrer *ore tenus* was properly sustained and the rights of plaintiffs preserved by permission given to amend the complaint as against the Bank, trustee, should they be so advised. Defendant Hoyle's as-

signments of error will be considered on the basis that the Bank, trustee, is not a party to the action.

Defendant Hoyle, executor (hereinafter referred to as defendant), contends that the superior court has no jurisdiction of the cause of action for that "the jurisdiction of the subject matter is in the Probate Court." We do not agree.

In final analysis this is an action for an accounting and settlement of the J. M. Crutchfield estate and is in the nature of a bill in equity to surcharge and falsify such accounts as were filed. *Thigpen v. Trust Co.*, 203 N.C. 291, 165 S.E. 720. G.S. 28-147 provides: "In addition to the remedy by special proceedings, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require."

"Construing this statute (G.S. 28-147), which originated as section 6, Chapter 241, Act of 1876-77, there are numerous decisions relating to administration of estates in which it is held that the superior court is therein given concurrent jurisdiction with the probate courts, that is, clerks of Superior Court in actions of class mentioned in the statute. See *Haywood v. Haywood,* 79 N.C. 42; . . . *Leach v. Page,* 211 N.C. 622, 191 S.E. 349; *Gurganus v. McLawhorn,* 212 N.C. 397, 193 S.E. 844; (and many other cases cited). . . . That the statute is not confined to actions pertaining to final settlement in the administration of estates is shown in the case of *Haywood v. Haywood, supra; Leach v. Page, supra; Gurganus v. McLawhorn, supra.*" (Parentheses ours). *Casualty Co. v. Lawing,* 223 N.C. 8, 14, 25 S.E. 2d 183.

The authority of the Superior Court to entertain administration suits and for the settlement of estates is well recognized. Proceedings to compel a settlement may be begun before the Clerk or an action may be commenced in Superior Court. *Davis v. Davis,* 246 N.C. 307, 309, 98 S.E. 2d 318; *State v. Griggs,* 223 N.C. 279, 25 S.E. 2d 862; *In re Hege,* 205 N.C. 625, 172 S.E. 345. The Superior Court has jurisdiction of the instant cause of action.

Defendant further contends that there is a misjoinder of parties and causes of action.

Defendant filed answer in this cause 10 June 1959 and a further answer 21 July 1959. These pleadings have not been withdrawn. The demurrer was filed by defendant 6 June 1960. "Generally speaking, a demurrer may not be entertained after the answer is filed unless

by leave of court the answer is withdrawn, because a defendant is not permitted to answer and demur to one cause of action at the same time. (Citing cases). But this ruling does not apply when objection is entered to the jurisdiction of the court or to the complaint on the ground that it does not state facts sufficient to constitute a cause of action." *Cherry v. R. R.*, 185 N.C. 90, 91, 116 S.E. 192. See also G.S. 1-134; *McBryde v. Lumber Co.*, 246 N.C. 415, 419, 98 S.E. 2d 663; *Ezzell v. Merrill*, 224 N.C. 602, 606-7, 31 S.E. 2d 751.

Strictly speaking the question of misjoinder should be raised by demurrer. G.S. 1-127 and G.S. 1-133. Defendant attempts to raise the question in the prayer for relief contained in the answer. This does not require us to consider it, but we think a brief discussion may be in order.

The complaint states only one cause of action. It alleges in substance that J. M. Crutchfield by will devised and bequeathed to his wife, Pearl T. Crutchfield, a life estate in all his property, with remainder in fee to plaintiffs Rudisill and Kernodle, and appointed his wife executrix, that the executrix squandered and misapplied a large part of the estate, failed to properly account therefor, filed no final accounting, and died without closing the estate. A construction of the will is necessary to determine whether plaintiffs are entitled to an accounting and, if so, the course and extent of the accounting. The will is the basis of the rights, if any, of plaintiffs to an accounting and judgment, and not a matter distinct from the settlement of the estate. In determining the effect of a pleading its allegations are to be liberally construed with a view to substantial justice between the parties. G.S. 1-151.

Plaintiffs allege that Pearl T. Crutchfield, executrix of the estate of J. M. Crutchfield, squandered and misapplied the assets of the estate, that she died without having settled the estate, and that the estate has not been closed. "Upon the death of an administrator, the administrator d.b.n. should bring an action for an accounting against the administrator of the deceased administrator, and upon his refusal to do so, the next of kin may do so." Strong: N. C. Index, Vol. 2, Executors and Administrators, s. 32, p. 346.

In *Snipes v. Estates Administration, Inc.*, 223 N.C. 777, 28 S.E. 2d 495, it was alleged that the administrator of Bruce Snipes, deceased, misapplied funds belonging to the estate and died without making a proper final settlement. The next of kin of Bruce Snipes brought an action against the personal representative of the deceased administrator for an accounting and settlement. With leave of court they made the administrator d.b.n. of the Snipes estate a party de-

fendant. The defendants appealed from the refusal of the lower court to dismiss the action on the ground that it should have been instituted by the administrator d.b.n., and upon the further ground that the court granted the motion of plaintiffs to make the administrator d.b.n. a party defendant. This Court affirmed the rulings of the trial court and quoted from the opinion in *Merrill v. Merrill,* 92 N.C. 657, as follows: "It is well settled upon principle and authority, that the law does not vest the title to the property of a person who dies intestate in his next-of-kin, but in his administrator. If the administrator should die before he had completed the administration, the title to such property does not vest in his administrator, but in the administrator *de bonis non* of the first intestate, and so on indefinitely, until the estate in the hands of the first, or some subsequent administrator *de bonis non,* shall be completely settled and distributed according to law. The next-of-kin of the intestate, cannot proceed against the administrator of his deceased administrator for a settlement and their distributive shares; they must go against the administrator *de bonis non* of the intestate whose distributees they are, and plainly, because the title to the assets, in whatever shape to be distributed, is in him. . . . This action did not necessarily abate — they might have made the admnistrator *de bonis non* a party defendant; indeed, they ought to have done so, as he was the only person whom they could then properly sue — the law vested the title to the assets in him, and to him they must look for their distributive shares." The Court then said: "Consequently, under the facts disclosed on this record and in view of the character of the relief sought, it is proper but not mandatory that the administrator d.b.n. shall bring the action, but it is necessary for him to be a party to the action, either as the plaintiff or as a party defendant, in order to prevent a dismissal thereof. *Wilson v. Pearson,* 102 N.C., 290, 9 S.E., 707; *Hardy v. Miles,* 91 N.C., 131; *Lansdell v. Winstead,* 76 N.C., 366. The better, and more orderly, procedure is for the next of kin to bring such action only after the administrator d.b.n. has refused to do so. However, we are not advertent to any case, and the appellants cited none, where this Court had dismissed an action of this character brought by the next of kin, for lack of necessary parties, where the administrator d.b.n. was named a party defendant." The opinion concluded: ". . . (T)he order of the Court below refusing to dismiss the action and granting plaintiff's motion to make . . . administrator d.b.n. of the estate of Bruce Snipes, deceased, a party defendant, should be Affirmed."

An action to enforce the settlement and distribution of unadministered assets in the hands of a former administrator or executor must

be prosecuted by an administrator *de bonis non. Gilliam v. Watkins,* 104 N.C. 180, 10 S.E. 183. "An action to compel an executor to account and make settlement is necessarily a suit in the nature of a creditor's action. (Citing cases). Executors are jointly liable for maladministration. They are necessary parties. All others interested in the settlement of the estate — creditors of the testator, as well as his legatees and other beneficiaries of the estate — are at least proper parties and in some instances may be necessary parties." *Davis v. Davis, supra.*

It is clear that Shaw, administrator d.b.n., c.t.a., of the J. M. Crutchfield estate, and Hoyle, executor of the Pearl T. Crutchfield estate, are necessary parties in the instant case, and plaintiffs Rudisill and Kernodle are at least proper parties.

This action pertains to the estate of J. M. Crutchfield. The complaint makes reference to certain persons, not parties to the action, with whom Pearl T. Crutchfield had transactions, but no relief is asked against them. Upon the present state of plaintiffs' pleadings it does not appear that the devisees, legatees and beneficiaries under the will of Pearl T. Crutchfield are necessary parties to the action.

Defendant's demurrer on the grounds of misjoinder of parties and causes and defect of parties is overruled.

Defendant further contends that the complaint does not allege facts sufficient to constitute a cause of action. He insists that the will of J. M. Crutchfield grants to Pearl T. Crutchfield in fee simple all of the property of the testator, and that she was under no duty as executrix or otherwise to account to plaintiffs. On the other hand, plaintiffs assert that the will conferred upon her only a life estate in the property, with certain powers of disposition.

Ordinarily the Court will not construe a will on demurrer. But here the will must be interpreted and construed before further proceedings are possible. There is no contention that Exhibit "A" attached to the complaint is not a true and correct copy of the will of J. M. Crutchfield.

Defendant cites and discusses a long line of decisions in this and other jurisdictions in support of his interpretation of the will. He relies on what is sometimes referred to as the "rule of Kent." This rule has been stated as follows: "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 analagous 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." 17 A.L.R. 2d. Anno: Absolute Grant — Purported limitation, s. 5, p. 36.

This rule, in appropriate cases, has been consistently applied in this jurisdiction. *Andrews v. Andrews,* 253 N.C. 139, 143, 116 S.E. 2d 436, and cases there cited. The case most often referred to in defendant's brief is *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368. There the will devised property to A, B, C, and D to do with as they liked. There is no mention of a life estate. In a later item it is provided: "I wish that after . . . the death" of A, B, C, and D "whatever property there is left shall go to my niece . . . and her husband . . ." The Court said: "It is provided by G.S., 31-38, that when real estate is devised to any person, the same shall be held and construed a devise in fee simple, unless such devise shall, in plain and express language 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. *Elder v. Johnston,* 227 N.C. 592; *Early v. Tayloe,* 219 N.C. 363, 13 S.E. (2d), 609. Consequently an unrestricted or indefinite devise of real property is regarded as a devise in fee simple. *Heefner v. Thornton,* 216 N. C., 702, 6 S.E. (2d), 506; *Barco v. Owens,* 212 N.C., 30, 192 S.E., 862. And so, also, is a devise generally to one person with limitation over to another of 'whatever is left' at the death of the first taker. *Patrick v. Morehead,* 85 N.C., 62; *Carroll v. Herring,* 180 N.C., 369, 104 S.E. 892. In the case last cited, it is said: "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.' . . ."

The provisions of the will of J. M. Crutchfield do not come within the rule relied on by defendant. The provisions of this will may be paraphrased as follows: To W for life; W to have power to convey any or all real estate in fee if in her opinion it is "necessary for her proper support and maintenance," she to have the right to use the proceeds "as seems best to her"; to R and K a vested remainder in fee simple in all property "remaining unused or unconsumed, or converted into other property" at W's death.

These provisions differ from the *Taylor* case, in that: (1) The terms of the devise and bequest to Pearl T. Crutchfield in the first instance are not appropriate to carry the fee — they limit the gift to a life estate; and (2) The power given Pearl T. Crutchfield to convey is not absolute, but is limited to the purpose of providing what is "necessary for her proper support and maintenance." It is true that she is

to be the judge of what is necessary and is unrestricted in the expenditure of the proceeds of the sales for the purpose of proper support and maintenance. Yet, Item II does not authorize any sale or expenditure of proceeds except for proper support and maintenance, according to the opinion and discretion of Pearl T. Crutchfield.

There was a will of similar purport in *Darden v. Boyette,* 247 N.C. 26, 100 S.E. 2d 359. The will granted to testator's wife "for and during her natural life" all property, with full power to dispose of same by deed or will in fee simple. Such property as remained undisposed of at the wife's death was granted to testator's heirs at law *per stirpes.* In interpreting these provisions the Court said: "A life estate devised in clear and express words to testator's wife is not enlarged to a fee by power given to the life tenant to use the life estate in any way or manner she may see fit, where a remainder over is given by express words in the will of any of his property left undisposed of by his wife during her life, at her death, to his then heirs at law."

The facts are similar in *Hardee v. Rivers,* 228 N.C. 66, 44 S.E. 2d 476. There it is said: "The estate devised being specifically limited to the life of the devisee, the power of disposition does not enlarge the estate devised or convert it into a fee. (Citing cases). One is property, the other is power. Neither limits or enlarges the other." p. 68.

Another case of analagous factual situation is *Chewning v. Mason,* 158 N.C. 578, 74 S.E. 357. The Court reasoned as follows: "It has been held that a devise to A, with power to dispose at pleasure, is considered as conveying *property,* not as conferring *power;* for the words of power will not be permitted to take away what, without them, is expressly given. 2 Prest. on Est., 81, 82; 13 Ves., 453. But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different; for the express estate for life negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest. . . . We may, therefore, take the rule to be settled that where lands are devised to one generally, and to be at his disposal, this is a fee in the devisee; but where they are devised to one expressly for life, and afterwards to be at his disposal, only an estate for life passes to the devisee, with a bare power to dispose of the fee. . . . ' . . . (b)y the overwhelming weight of authority, no fee results from the union of the life estate and the power, but both remain distinct, and the limitation over is good unless defeated by the exercise of the power by the life tenant.' Gardner on Wills, p. 476." pp. 581-582.

Accordant: *Andrews v. Andrews, supra; Voncannon v. Hudson Belk Co.,* 236 N.C. 709, 73 S.E. 2d 875; *Holland v. Smith,* 224 N. C. 255, 29 S.E. 2d 888; *Smith v. Mears,* 218 N.C. 193, 10 S.E. 2d 659; *Hampton v. West,* 212 N.C. 315, 193 S.E. 290; *Alexander v. Alexander,* 210 N.C. 281, 186 S.E. 319; *Helms v. Collins,* 200 N.C. 89, 156 S.E. 152; *Jones v. Fullbright,* 197 N.C. 274, 148 S.E. 229; *Cagle v. Hampton,* 196 N. C. 470, 146 S.E. 88; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Darden v. Matthews,* 173 N.C. 186, 91 S.E. 835; *Mabry v. Brown,* 162 N.C. 217, 78 S.E. 78; *Herring v. Williams,* 158 N.C. 1, 73 S.E. 218.

It is our opinion that J. M. Crutchfield intended that his wife have only a life estate. The devise and bequest to her were stated in item II to be "for the term of her natural life." Further terms of the will bear out this intention. In item IV testator conferred on her authority to lease the real estate "for such term of years as to her seems proper, even though such term of years should extend *beyond her natural life.*" (Emphasis added.) In item V he granted to her, as executrix, for the purpose of settling the estate "full power and authority to sell any property, and to do any act which, in her opinion, is for the best interest of my (his) estate." He clearly intended for her a life estate, and that she, as executrix, should preserve and settle the estate.

We hold that the will in the instant case devised and bequeathed to Pearl T. Crutchfield only a life estate in the property of J. M. Crutchfield, with power to dispose of any or all of the property in fee, either individually or as executrix, for the purposes stated in the will. It devised and bequeathed to Helen Rudisill, testator's adopted daughter, and Della Mae Trotter Kernodle, the wife's niece, a vested remainder in equal shares and in fee "in and to all . . . property . . . remaining unused or unconsumed, or converted into other property at the time of her (the wife's) death." The wife's individual power of disposition was limited to conveyance of any or all real estate which, in her opinion, "should be necessary for her proper support and maintenance" — she to be the judge of the necessity and to have the right to use the proceeds as seemed best to her for her proper maintenance and support. As executrix she was authorized for the purpose of settling the estate to sell any property and to do any act which, in her opinion, was for the best interest of the estate.

After ruling upon defendant's demurrer the court recites that it appears "on the face of the complaint that the trial of the issues of fact raised by the pleadings requires the examination of a long account," and appoints a referee to hear evidence, state the account,

and report his findings of fact and conclusions of law to the court. Defendant assigns as error this compulsory reference of the cause.

The examination of a long account is one of the purposes for which a compulsory reference may be ordered. G.S. 1-189(1); *Manufacturing Co. v. Horn,* 203 N.C. 732, 733, 167 S.E. 42. In an action against an administrator for an accounting, it is contemplated that the cause may be referred. G.S. 28-147. If appropriate procedure is followed, a compulsory reference does not deprive the litigants of their constitutional right to a jury trial on the issues of fact raised by the pleadings and by their exceptions to the referee's findings of fact. *Solon Lodge v. Ionic Lodge,* 245 N.C. 281, 289, 95 S.E. 2d 921.

The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court. *Veazey v. Durham,* 231 N.C. 354, 356, 57 S.E. 2d 375. The court by its interpretation of the will having ruled in substance that plaintiffs are entitled to an accounting of the administration of the J. M. Crutchfield estate, an appeal from the order of compulsory reference, before judgment upon the report of the referee, is premature and fragmentary and must be dismissed. *LeRoy v. Saliba,* 182 N.C. 757, 108 S.E. 303.

Defendant contends that the order of reference was improperly entered for the reason that there are pleas in bar which might, as preliminary matters, determine the entire action and make an accounting unnecessary. The purported pleas in bar are: (1) want of jurisdiction, (2) misjoinder of parties and causes, (3) that Pearl T. Crutchfield was the owner in fee of all the property of the J. M. Crutchfield estate, and (4) the allegation of defendant that he has filed a final account. The rulings on the demurrer dispose of the first three of these. An allegation by defendant that a final settlement has been made is not such a plea in bar as to prevent a reference. *Jones v. Sugg,* 136 N.C. 143, 48 S.E. 575. We find the order of reference not only proper but sufficient.

The judgment of the court below is affirmed and the cause is remanded for further proceedings according to law.

Affirmed.

EUGENE FAIZAN v. GRAIN DEALERS MUTUAL INSURANCE COMPANY.

(Filed 3 February, 1961.)

1. Insurance § 54—

The Motor Vehicle Safety-Responsibility Act of 1953 (G.S. 20-279.1 to G.S. 20-279.39) applies to drivers whose licenses have been suspended and relates to the restoration of drivers' licenses, while The Vehicle Financial Responsibility Act of 1957 (G.S. 20-309 to G.S. 20-319) applies to all motor vehicle owners and relates to the registration of motor vehicles, and the two Acts are complementary and the latter does not repeal or modify the former, but incorporates portions of the former by reference, and the two Acts are to be construed *in pari materia* so as to harmonize them and give effect to both.

2. Insurance § 61—

Since The Vehicle Financial Responsibility Act of 1957 has specific provision for notice of cancellation, G. S. 20-310, provision for notice of cancellation under The Motor Vehicle-Safety Responsibility Act of 1953, G.S. 20-279.22, had no application to the cancellation of a policy issued pursuant to the 1957 Act.

3. Same—

A policy of insurance issued pursuant to The Vehicle Financial Responsibility Act of 1957 may be canceled, pursuant to its contractual provisions, 15 days after notice of cancellation has been mailed to insured, and it is not required that notice of cancellation should be given the Commissioner of Motor Vehicles 20 days before termination, but only that such notice be given the Commissioner within 15 days after cancellation. G. S. 20-310.

4. Administrative Law § 4: Statutes § 5b—

The interpretation placed upon a statute by the officer or agency charged with its administration will be given due consideration by the courts, although if the administrative interpretation is in conflict with that of the courts, the latter will prevail.

5: Insurance § 61— Where insured fails to meet conditions of offer for renewal, policy in effect is canceled by insured.

Where, more than 15 days prior to the expiration date of a policy issued pursuant to The Vehicle Financial Responsibility Act of 1957, insurer sends insured notice of the expiration date with offer to renew the policy if payment of premium is made by the premium due date, no further notice to insured is required, and the fact that insurer thereafter sends notice of cancellation which, through clerical error, states an erroneous expiration date transpiring after the accident imposing liability on insured, is immaterial and does not impose liability on insurer, insured having failed to accept the offer of renewal by paying the premium on or before the due date.

APPEAL by plaintiff from *McKinnon, J.*, March 1960 Term of PERSON.

This is a civil action, instituted 12 November 1959.

Plaintiff was the owner of an automobile. At approximately 2:30 A. M. on 22 February 1959, it was involved in an accident while being operated by George Washington Talley. As a result of the accident Hassel Nicks Rudd was injured.

Defendant Insurance Company had issued to plaintiff an automobile liability insurance policy covering the automobile involved in the accident. The policy provided coverage of $10,000.00 for bodily injury liability to one person, a total of $20,000.00 bodily injury liability to all persons injured in an accident in which the automobile might be involved, and $5,000.00 property damage liability for each accident. The policy also obligated defendant Insurance Company to defend actions for recovery of damages resulting from the use of the automobile. According to the terms of the policy the period of coverage terminated at 12:01 A.M. on 22 February 1959 — approximately two and one-half hours prior to the accident above referred to.

Rudd brought suit against Faizan, plaintiff herein, and Talley, driver of the automobile, to recover damages for the injuries suffered by him in the accident. Faizan gave Insurance Company notice of the suit. The Insurance Company denied liability and refused to defend the action on the ground that the policy had expired. Faizan defended the action at his own expense and paid his attorneys $700.00 in fees. At the trial Rudd recovered of Faizan and Talley, jointly and severally, $5,000.00 damages. The verdict and judgment established that Faizan was responsible for the negligence of Talley. Talley's insurer paid the judgment on 14 March 1960.

The transactions with respect to the insurance policy issued by defendant Insurance Company to plaintiff are set out in the numbered paragraphs which follow:

(1). In February 1958 Faizan went to the office of Allen-Gates Insurance Agency in Roxboro, N. C., and asked for the issuance of an automobile liability insurance policy. He had been unable to secure insurance through regular channels. He needed insurance in order to obtain registration tags for his automobile and to comply with the Motor Vehicle Responsibility Act of 1957. His operator's license had not been suspended or revoked, and there were no outstanding judgments or damages against him by reason of an automobile accident. On his behalf the Agency sent an application to the North Carolina Automobile Assigned Risk Plan in Raleigh. The risk was duly assigned to defendant Insurance Company and the policy above referred to was issued by it, effective 22 February 1958. About 21 February 1958, at the time of issuance of the policy, defendant prepared and sent to

the Commissioner of Motor Vehicles Form "FS-1 — North Carolina Certificate of Insurance," advising that the policy had been issued. In consequence plaintiff obtained tags for his car.

(2). The Allen-Gates Insurance Agency was not an agent of defendant, but the policy was issued through it. Under these circumstances the Agency is referred to as "producer," in administrative parlance. The premium was paid. In January 1959, pursuant to the rules of the Assigned Risk Plan, defendant sent plaintiff a notice advising that the policy would expire on 22 February 1959 and that in order to renew it plaintiff would have to pay renewal premium in advance and not later than 5 February 1959, which date was designated as the "premium due date." The notice stated the amount of the premium and advised: "Under the terms of the Automobile Assigned Risk Plan, we will renew your policy if payment is received by the premium due date. If we do not receive payment by that date we will assume you no longer desire coverage under the Assigned Risk Plan, and will so notify the producer of record and the Assigned Risk Plan." Plaintiff received this notice in January 1959. A copy was sent to and received by the producer (Allen-Gates Agency) in January 1959. Plaintiff failed to pay the premium on or before 5 February 1959 and did not tender payment thereof at any time thereafter.

(3). On 9 February 1959 defendant wrote a letter to the producer and advised that the premium had not been received and the file was being closed as permitted by the Automobile Assigned Risk Plan. The letter stated: "If assured cannot obtain coverage elsewhere, it will be necessary that he re-apply to the Plan." A copy of the letter was sent to the Plaintiff. Producer and plaintiff received the letter and copy after 9 February 1959 and prior to 22 February 1959.

(4). On 9 February 1959 defendant prepared and mailed to plaintiff a "Notice of Termination of Automobile Insurance" in words and figures as follows:

"Policy Number
AC 478 206

Effective Date and Hour of
Termination: February 24, 1959,
at 12:01 A. M,. Standard Time.

GRAIN DEALERS MUTUAL INSURANCE COMPANY, in accordance with the provisions of the Vehicle Financial Responsibility Act of the State of North Carolina, hereby gives notice to: EUGENE FAIZAN, 115 HILL STREET, ROXBORO, NORTH CAROLINA, that its Policy hereinabove designated

will not be renewed and all insurance afforded by said Policy and any renewal certificates and endorsements relating thereto, unless otherwise sooner terminated, will cease at and from the date and hour mentioned above.

UNDER THE PROVISIONS OF THE VEHICLE RESPONSIBILITY ACT OF THE STATE OF NORTH CAROLINA 'PROOF OF FINANCIAL RESPONSIBILITY IS REQUIRED TO BE MAINTAINED CONTINUOUSLY THROUGHOUT THE REGISTRATION PERIOD AND OPERATION OF A MOTOR VEHICLE WITHOUT MAINTAINING SUCH PROOF OF FINANCIAL RESPONSIBILITY IS A MISDEMEANOR.' "

This notice was received by plaintiff after 9 February 1959 and before 22 February 1959.

(5). Within 15 days after 22 February 1959 defendant prepared and sent to the Commissioner of Motor Vehicles notice that the insurance had terminated on 22 February 1959. The notice was on Form "FS-4 — North Carolina Notice of Termination," promulgated by the Commissioner of Motor Vehicles in the administration of the Vehicle Responsibility Act of 1957.

Plaintiff instituted this action for recovery of his liability ($5,000.00) in the Rudd suit and $700.00 attorneys fees paid by him for defense of the action.

Plaintiff and defendant waived trial by jury and agreed that the court might hear the evidence, make findings of fact and conclusions of law, and enter judgment.

After finding the facts hereinbefore recited, the court made the following conclusions of law and entered the following judgment:

CONCLUSIONS OF LAW

"1. That the automobile liability insurance policy issued by defendant to plaintiff was issued pursuant to the Assigned Risk Plan permitted under the laws of the State of North Carolina; that it was applied for and issued to enable plaintiff to comply with the provisions of the Vehicle Financial Responsibility Act of 1957 and to permit the registration of his 1953 Oldsmobile automobile.

"2. That the insurance coverage afforded by this contract of insurance expired on February 22, 1959, at 12:01 A. M., pursuant to express provisions of the policy.

"3. That the termination of the contract of insurance resulted from its expiration by its express provisions and by the failure

of plaintiff to pay the premium for a renewal policy within the time specified by defendant or at any time, and was not terminated by the insurer within the meaning of G.S. 20-310; that the defendant was not required to give plaintiff any notice other than that given as found above.

"4. That defendant did give notice to the Commissioner of Motor Vehicles within fifteen days after the termination of the contract of insurance in compliance with the requirements of G.S. 20-310; that defendant was not required by G.S. 20-279.22 to give notice to the Commissioner of Motor Vehicles of the termination of this contract of insurance prior to its termination.

"5. That the contract of insurance between defendant and plaintiff was not extended beyond the date and time stated therein by any provision of law or by any act or failure to act by defendant.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover nothing of the defendant, and that the defendant be, and it is forever discharged of any and all liability to the plaintiff by reason of the matters and things alleged in the complaint and the defendant shall recover its costs from the plaintiff."

Plaintiff appealed and assigned errors.

Daniel K. Edwards and Claude Bittle for plaintiff.

Smith, Moore, Smith, Schell & Hunter and Richmond G. Bernhardt, Jr., for defendant.

MOORE, J. There are two questions for decision in this case: (1) Was the coverage period of the policy of liability insurance, issued by defendant to plaintiff, extended by reason of the failure of defendant to comply with the notice of termination provisions of G.S. 20-279.22? (2) Was the coverage period extended by the terms of the notice of termination mailed by defendant to plaintiff on 9 February 1959?

The answer to these questions requires an examination of pertinent statutes.

The first enactment by the General Assembly relating to Financial responsibility of motorists is contained in Chapter 116, Public Laws of 1931 (G.S. 20-197 to G.S. 20-211). This 1931 Act was expressly repealed by the "Motor Vehicle Safety and Responsibility Act" of 1947. S.L. 1947, c. 1006 (G.S. 20-224 to G.S. 20-279).

The 1947 Act was revised and superseded by "The Motor Vehicle

Safety-Responsibility Act of 1953," which, as amended, is still in force. S.L. 1953, c. 1300 (G.S. 20-279.1 to G.S. 20-279.39). In addition the General Assembly has enacted "The Vehicle Financial Responsibility Act of 1957." S. L. 1957, c. 1393 (G.S. 20-309 to G.S. 20-319).

A brief analysis of the 1953 and 1957 Acts is necessary to an understanding of the controversy in this case. We consider and discuss here only those phases of these Acts which pertain to the factual situation here presented. As used in this opinion the word "Commissioner" means Commissioner of Motor Vehicles, and "Department" means Department of Motor Vehicles.

(a). The 1953 Act.

This Act applies to those persons whose driver's licenses have been suspended by reason of violations of motor vehicle statutes, failure to pay and discharge judgments for damages resulting from ownership or operation of motor vehicles, or failure to prove financial responsibility where damages have been occasioned by the ownership or operation of motor vehicles. It is provided that such persons, where they are otherwise entitled to restoration of driver's licenses, must prove financial responsibility before such licenses may be restored. The financial responsibility must then be maintained for two years. One method of proving and maintaining financial responsibility is to obtain automobile liability insurance as defined by, and in compliance with, G.S. 20-279.21. Upon delivery of a certificate (Form SR-22) by insurer to the Commissioner, showing that there is insurance coverage in accordance with the Act, driver's license may be issued to the applicant. The Act contains an Assigned Risk Plan under which a person who is required to file proof of financial responsibility and is unable to obtain the insurance through ordinary methods, may obtain coverage. G.S. 20-279.34. The Commissioner assigns the risk to an insurance company licensed to do business in the State, and the company must accept the risk. Such risk, under the rules of the Department, is designated a "certified assigned risk." An insurance policy issued in accordance with the requirements of the 1953 Act "shall not be cancelled or terminated until at least twenty (20) days after a notice of cancellation or termination of the insurance . . . shall be filed in the office of the Commissioner . . . ." G.S. 20-279.22. The Commissioner has the duty of administering the 1953 Act and is empowered to make rules and regulations for its administration and enforcement. The Commissioner handles the administration of this Act through the Driver's License Division of the Department.

(b). The 1957 Act.

This Act requires proof of financial responsibility by all motor vehicle owners who apply to the Department for North Carolina

registration certificates and plates. Financial responsibility may be shown by procurement of automobile liability insurance. Before a motor vehicle may be registered and registration plates obtained, a certificate of insurance coverage (FS-1) must be delivered by an insurer to the Commissioner. "The owner of each registered motor vehicle shall maintain proof of financial responsibility continuously throughout the period of registration . . . . When insurance with respect to any motor vehicle is terminated by cancellation or failure to renew, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the department. . . ." The provisions of the 1953 Act "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" the 1957 Act. G.S. 20-314. Under the 1957 Act a person, though his driver's license has not been suspended, may, if he is unable to obtain liability insurance through regular channels, apply for and procure such insurance through the Assigned Risk Plan. In such case the risk is denominated a "non-certified assigned risk." No insurance furnished under the provisions of the 1957 Act "shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured . . . . Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. . . . Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner . . . not later than fifteen (15) days following the effective date of such cancellation or other termination." G.S. 20-310. The Commissioner has the duty to administer the Act and is authorized to make rules and regulations for the administration and enforcement thereof. The Commissioner administers this Act through the Registration Division of the Department.

The 1953 Act is not in any respect repealed or modified by the 1957 Act. Both Acts are in full force and effect. Portions of the 1953 Act are incorporated in the 1957 Act by reference. Both Acts relate to the same subject — financial responsibility of motorists. "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible." *Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E. 2d 898; *Justice v. Scheidt*, 252 N.C. 361, 363, 113 S.E. 2d 709.

The 1953 Act applies to a limited class of motorists — those whose

driver's licenses have been suspended. These motorists must show financial responsibility as a condition precedent to restoration of their driver's licenses. The 1957 Act applies to an unlimited class — all motor vehicle owners. Before obtaining periodic registration certificates and plates for vehicles, they must prove financial responsibility. One Act relates to restoration of driver's license, the other to motor vehicle registration. Insofar as possible the two Acts are administered by the Commissioner separately — the 1953 Act through the Driver's License Division, the 1957 Act through the Registration Division.

The Assigned Risk Plan handles applications of persons from either or both classes where the required insurance cannot be obtained through regular channels. But the assigned risks are handled differently for the two classes of persons. Persons affected by the 1953 Act must obtain SR-22 certificates and the risks are designated "certified assigned risks." Under the 1957 Act motor vehicle owners using the Assigned Risk Plan must furnish FS-1 certificates and the risks are denominated "non-certified assigned risks."

Plaintiff in the case at bar is not of the class to which the 1953 Act applies. His driver's license was not suspended. His insurer furnished an FS-1 certificate and his assigned insurance policy was designated "non-certified assigned risk." The Department issued him registration certificate and plate for his automobile. The procedure was in accordance with the 1957 Act, and properly so.

The first question for decision is whether or not defendant insurer was required to give the notice prescribed by G.S. 20-279.22 before the period of coverage of plaintiff's policy of insurance could be terminated. This section (part of the 1953 Act) provides that when an insurer has certified a policy under G.S. 20-279.19 or G.S. 20-279.20 it may not be terminated until at least twenty days after notice of termination has been filed in the office of the Commissioner.

Plaintiff contends that G.S. 20-314 incorporated G.S. 20-279.22 in the 1957 Act. G.S. 20-314 stipulates that the provisions of the 1953 Act "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 the 1957 Act. (Emphasis added) In other words the insurance policies and insurers' certificates required by both Acts are defined by the 1953 Act.

Plaintiff argues that the notice required by G.S. 20-279.22 is a reasonable and necessary adjunct to the 1957 Act, that this section is applicable to both insurer and insured and would prevent an insured from cancelling his policy before proper notice had been given, and

that this section does not conflict with the notice provisions of the 1957 Act, and would tend to assure continuous coverage.

It is true that G.S. 20-279.22 pertains generally to "maintaining proof of financial responsibility" and, if the 1957 Act had no provisions for notice of termination of insurance coverage, it might well be considered a part of the 1957 Act. However, the 1957 Act has separate, distinct and specific provisions for notice of termination. It is our opinion that G.S. 20-279.22 has no application to insurance policies issued pursuant to the 1957 Act, and therefore no application to the policy involved in this case.

Under the 1957 Act (specifically G.S. 20-310) no policy may be cancelled by insurer until fifteen days after mailing a notice of cancellation to insured; and notice of cancellation shall be mailed to Commissioner within fifteen days following the effective date of cancellation. In our opinion the Legislature did not intend that there should be two notices to the Commissioner — a notice twenty days before termination and another within fifteen days after termination. The 1953 Act deals with a class that poses a greater risk on the highways than motor vehicle owners generally. Therefore, to better assure continuous coverage, the General Assembly provided for notice to Commissioner as a condition precedent to cancellation of insurance policies of the former class. Furthermore, it is contemplated that insurance coverage under the 1953 Act be maintained for only two years, provided there has been no conviction or forfeiture of bond requiring further suspension of license during the two-year period; and it is contemplated that the two-year coverage be continuous and that there be no termination of coverage without the prior knowledge of the Commissioner. It is true that the provisions for notice of termination under the 1957 Act (G.S. 20-310) do create the possibility of an hiatus of fifteen days or more in insurance coverage. The Legislature undertook to bridge the gap by making it a misdemeanor for an owner to fail to surrender forthwith his registration certificate and plate upon cancellation or failure to renew his policy. However, the possibility of gaps between periods of coverage still remains. We believe that the Legislature was advertent to this possibility and accepted it as the lesser of two hardships. The difference in the types of persons generally to which the two Acts apply should be kept in mind. The great majority of motor vehicle owners have, even before the passage of the Act, maintained good safety records and financial responsibility. If a notice such as is required under the 1953 Act was imposed under the 1957 Act, it would either increase all liability insurance rates or would subject all policy holders to cancellation of their coverage on failure to prepay premiums more than twenty

days prior to the end of the extant coverage period. In other words, it would change the manner of conducting insurance business and in many instances engender ill feelings on the part of policyholders toward their insurers and result in frequent change of insurance carriers. The course chosen by the Legislature seems to have been the more reasonable. In any event the 1957 Act will be null and void from and after 15 May 1961 unless re-enacted. G.S. 20-319. If the law is re-enacted the General Assembly may desire to reconsider the provision as to notice of termination in the light of the Department's experience. The rules and practice of the Commissioner on this question of notice are in accord with the opinion we have expressed. It is clear that the insurer in the instant case gave the Commissioner notice within fifteen days after the date of termination in compliance with the 1957 Act. G.S. 20-279.22 has no application, and notice thereunder was not required.

This brings us to the final question, as to whether the following provision of G.S. 20-310 applies to the policy in the instant case: "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew *by the insurer* until at least fifteen (15) days after mailing a notice of termination to the named insured . . . . Time of the effective date and hour of termination stated in the notice shall become the end of the policy period." (Emphasis added.)

Defendant admits that it mailed to plaintiff on 9 February 1959 a notice of termination in which it is stated: "Effective Date and Hour of Termination: February 24, 1959, at 12:01 A. M., Standard Time." If, under the circumstances of this case, this notice was required, there was insurance coverage at the time of the accident because of the date of termination specified.

Defendant contends that the sending of the notice and the date of termination inserted were clerical errors, no notice to the insured was required by the terms of G.S. 20-310, and the fact that the notice was sent imposes no liability in this case. Defendant insists that the termination was not an act of the *insurer*, but was an act of the insured in failing and refusing to accept defendant's offer to renew the policy. Defendant points out that the pertinent provision of the statute applies only to "cancellation or failure to renew by the *insurer*."

Pursuant to the rules and regulations of the Assigned Risk Plan, defendant by mail advised plaintiff in January 1959 that the policy would expire 22 February 1959, and that in order to renew it he must pay the premium in advance by 5 February 1959, gave the amount of premium, and stated that if premium had not been paid

by 5 February it would be assumed he did not desire coverage. It also advised that if premium was not paid by 5 February 1959 plaintiff would have to apply through the Assigned Risk Plan if he desired further insurance coverage. Plaintiff did not pay the renewal premium on the date specified and did not tender the premium at any later date. He applied through the Assigned Risk Plan for further insurance, but the policy thus obtained (from another insurer) was not in effect at the time of the accident in question.

Defendant's contentions with respect to the interpretation of G.S. 20-310 are in accord with the rules and regulations promulgated by the Commissioner. The Commissioner's handbook of rules entitled "Insurance Handbook (Rev. Nov. 15, 1958): The 1957 Vehicle Financial Responsibility Law" has the following instructions and interpretations:

> "Advance notice to the insured must be given before termination is possible. This is required in every instance (flat cancellations, mid-term cancellations and non-renewals) where the termination is by the *insurer,* and that includes switching of companies by agents. It is only when the insured cancels or fails to renew that there is no obligation on the part of the insurer to give advance notice." S. IX (A), p. 5.
>
> "Upon the termination of insurance notice of such termination shall be sent by the insurer to the Financial Security Section, Department of Motor Vehicles *not later* than 15 days following the effective date of such termination. This includes flat cancellations, mid-term cancellations, and non-renewals. It makes no difference whether the termination is at the company's or insured's request." S. IX (B), p. 6.

The interpretation by the department responsible for the administration of a legislative act is helpful to a court when called upon to construe legislative language. *In re Application for Reassignment,* 247 N.C. 413, 420, 101 S.E. 2d 359. The construction placed upon legislation by the officer charged with administration thereof will be given due consideration by the courts, although such construction is not controlling. If there should be a conflict between administrative interpretation and the interpretation of the courts, the latter will prevail. *Campbell v. Currie,* 251 N.C. 329, 333, 111 S.E. 2d 319.

Our 1957 Act was apparently copied from the New York Law with slight modifications. On the matter under discussion the New York statute provides: "No contract of insurance or renewal thereof for which a certificate of insurance has been filed with the Commissioner shall be terminated by cancellation by the insurer or failure to renew

by the insurer until at least twenty days after mailing to the named insured at the address shown on the policy of notice of termination, except where the cancellation is for nonpayment of premium in which case ten days notice of cancellation by the insurer shall be sufficient. Time of the effective date and hour of termination stated in the notice shall become the end of the policy period . . . ." New York C.L.S., Vehicle and Traffic Law, s. 313.

We perceive no fundamental difference, with respect to the matter under consideration, between G.S. 20-310 and the New York provision, except for time elements. The Supreme Court of New York has interpreted this provision in two cases.

In *Connecticut Fire Insurance Company v. Williams,* 194 N.Y.S. 2d 952 (1959), it was held that there was a unilateral failure to renew policy of insurance by the insurer and the insurer should have notified the insured of termination. Plaintiff issued to defendant Williams an automobile liability policy for the period from 1 January 1957 to 26 January 1958. Plaintiff sent a renewal policy to its agent in January 1958. Agent could not find defendant Williams and returned the renewal policy to plaintiff marked "not taken, ret. prem" (meaning insured did not want policy renewed). No notice of termination was mailed to defendant and he was never personally contacted. Defendant's automobile was involved in an accident resulting in injuries to third parties on 3 March 1958. Plaintiff sued for declaratory judgment to determine its liability, if any. The Court said:

> ". . . The court below held that there was a unilateral failure to renew by the appellant so that its failure to send a notice of termination to Williams under section 93-c of the Vehicle and Traffic Law effectuated a continuation of the insurance. . . . Section 93-c provides that no contract of insurance or renewal thereof shall be terminated by failure to renew by the insurer until 20 days after a notice of termination is mailed to the insured. It is admitted that no such notice was mailed to Williams but the appellant argues that there was not here a failure to renew by the insurer. As the appellant points out, renewal is a bilateral transaction involving both offer and acceptance. However, no offer was made to Williams since Dennis never contacted him concerning the renewal and as the court below pointed out there were reliable means available which were not used. Although a perfectly valid reason for failing to renew was available, the non-payment of premiums, this is not the issue here and it cannot be used to obscure the fact that it was the appellant insurer who was failing to renew the policy."

In *Caristi v. Home Indemnity Company,* 202 N.Y.S. 2d 340 (1960), there was an undetermined question of fact. There was evidence that insurance broker phoned plaintiff and spoke to plaintiff's wife about acceptance of a renewal policy of liability insurance, and that she stated the policy could be gotten cheaper elsewhere. "There is also an averral that this rejection was ratified by plaintiff personally." Plaintiff apparently denied this version of the matter. As to whether defendant was obligated by the statute to give notice of termination, the Court declared:

> "There is a question of fact as to whether the renewal was rejected and coverage terminated at plaintiff's behest or whether the policy was cancelled by the broker for nonpayment of premium without plaintiff's consent. If the fact is that the policy was cancelled for nonpayment of premium rather than by rejection by plaintiff, then there was a noncompliance with the statute and the ruling in *Connecticut Fire Insurance Co. v. Williams, supra,* would be applicable."

Many States have compulsory automobile liability insurance laws. But so far as our research discloses the question with which we are here concerned has arisen in no litigation except the two New York cases above.

The question in the instant case comes to this: Did plaintiff reject a renewal policy or did defendant terminate the policy coverage? It seems clear that renewal was rejected by plaintiff. He was offered a renewal upon the condition that he pay the premium by 5 February 1959. This was in accordance with the rules of the Assigned Risk Plan. He was told that unless he paid the premium by that date he would be required to apply to the Assigned Risk Plan if he desired further insurance. He did not pay the premium on the date specified and did not offer to pay it on any other date. Instead, he applied to the Assigned Risk Plan for insurance.

Under these conditions, we hold that there was no failure to renew on the part of defendant and it was under no obligation to give plaintiff further notice of termination under the provisions of G.S. 20-310. Therefore, the coverage period of the policy ended at 12:01 A. M., 22 February 1959.

The judgment below is

Affirmed.

CHARLOTTE CITY COACH LINES, INC., A CORPORATION, PLAINTIFF-APPLICANT; v. BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED LABOR ORGANIZATION, DEFENDANT-RESPONDENT.

(Filed 3 February, 1961.)

1. Pleadings § 15—

An exhibit attached to and made a part of the complaint may be considered upon demurrer.

2. Arbitration and Award § 1—

An agreement to arbitrate is a contract and is to be construed as other contracts to ascertain the intent of the parties as gathered from the instrument as a whole and not from detached fragments.

3. Statutes § 5d—

Statutes dealing with the same subject matter must be construed together and harmonized to give effect to all the provisions of each, if possible, and the whole construed to ascertain the legislative intent.

4. Arbitration and Award § 2—

Construing G.S. 95-36.6 and G.S. 95-36.9(b) *in pari materia*, it is held that G.S. 95-36.6, giving arbitrators the power to decide the arbitrability of the dispute if there is no agreement to the contrary, is modified by G.S. 95-36.9(b), giving the courts and not the arbitrators power to decide whether or not party has agreed to the arbitration of the controversy involved.

5. Master and Srvant § 15—

Where a collective bargaining agreement provides specific procedure as to grievances before a party should be entitled to demand arbitration of the dispute, such procedure must ordinarily be followed, in the absence of facts excusing or waiving such procedure, and in order for a party to assert waiver, he must allege the facts relied on as constituting waiver.

6. Same:—Arbitration and Award § 2— Party must follow procedure prescribed by the contract in order to be entitled to demand arbitration.

Where the complaint in an action to stay arbitration proceedings alleges that the collective bargaining agreement between the parties specifically provided that grievances arising out of the suspension or discharge of an employee had to be filed with the employer within 5 days of such suspension or discharge, and investigated by representatives of the employer and employee, with right to demand arbitration from the decision of the investigators, that this grievance procedure was not followed by or on behalf of the discharged employee, *is held* not subject to demurrer, since the right to demand arbitration under the contract is dependent upon following the procedure therein prescribed, and it is for the courts to decide whether the grievance came within the scope of the agreement to arbitrate. G.S. 95-36.6, G.S. 95-36.9(b).

7. Injunctions § 3— Carrier may enjoin unauthorized arbitration which might result in forcing it to breach its duty to public.

Allegations to the effect that a bus driver for an intracity carrier had been discharged in accordance with the provisions of the collective bargaining agreement between the parties for defective vision in one eye, not correctible to the minimum standard prescribed by the contract, and that he had not followed the grievance procedure prerequisite to demand for arbitration, *is held* sufficient to allege irreparable injury entitling plaintiff to restrain arbitration proceedings initiated by or on behalf of the employee, since to force plaintiff to continue such employee in his employment would compel it to violate its duty to the public to exercise the highest degree of care for the safety of its patrons commensurate with the practical operation of the business.

8. Pleadings § 12—

While a demurrer does not admit legal inferences or conclusions of law, it does admit the truth of the factual averments well stated and all relevant inferences of fact legitimately deducible therefrom.

9. Appeal and Error § 50—

Upon review of an order continuing an interlocutory injunction to the final hearing, the Supreme Court is not bound by the findings of fact by the trial court, but may review and weigh the evidence and find the facts for itself, although the findings of the trial court will be presumed correct if supported by competent evidence.

10. Injunctions § 13—

Where on the hearing of the motion to show cause why the temporary order restraining arbitration of the discharge of plaintiff's driver for defective vision, plaintiff makes it appear that it is a common carrier, that the procedure prerequisite to the right to demand arbitration had not been followed by or on behalf of the employee, and that the employee's eyes were in fact defective within the provisions of the contract authorizing discharge, plaintiff has established his *prima facie* right to the equity of injunction, warranting the continuance of the temporary order to the hearing.

11. Same—

When there is a *bona fide* controversy as to a legal or equitable right, a temporary restraining order will ordinarily be continued to the hearing to preserve the *status quo*, especially when the principal relief sought is in itself an injunction, since to dissolve the interlocutory order would virtually decide the case upon its merits.

APPEAL by defendant from *Farthing, J.*, 15 August 1960 Schedule B Nonjury Term of MECKLENBURG.

Complaint and application for a stay of arbitration, heard upon an *ex parte* order issued upon applicant's motion, for defendant to appear and show cause, if any it can, why the temporary restraining order issued should not be continued and made permanent and judgment entered for applicant, and also heard upon defendant's motions

to vacate the *ex parte* temporary restraining order and to stay action pending arbitration award.

Defendant in the Supreme Court filed a demurrer *ore tenus* to the complaint and application for a stay of arbitration.

The complaint and application, with the exhibits attached thereto and made parts thereof, appear on pages two to fifty, both inclusive, in the record. We summarize the material, essential or ultimate facts alleged in the complaint and application and set forth in the exhibits attached thereto and made parts thereof (*Moore v. W O O W, Inc.*, 253 N.C. 1, 116 S.E. 2d 186), so far as relevant to decision here:

Defendant is an unincorporated labor union, and is the collective bargaining agent of all applicant's employees classified as bus operators in the city of Charlotte. On 1 October 1958 applicant and defendant entered into a collective bargaining agreement.

On 1 March 1960, and prior thereto, one J. B. Pierce was employed by applicant as a passenger bus operator in Charlotte. Article II, §8, of the collective bargaining agreement provides: "Employees may be required from time to time to submit to any physical, medical or other examination or re-examination required by the Company, by law or by a regulatory body . . . . The examining physician will be selected by the Company."

On 1 March 1960 J. B. Pierce submitted to an annual physical examination by applicant's doctors, the Matthews-James Clinic. Their report to applicant stated J. B. Pierce had a 20/40 vision of his right eye without glasses and a 20/20 vision of the same eye with glasses, and a light perception only with his left eye, and recommended that he not be employed as a passenger bus driver. Whereupon, applicant relieved Pierce of his duties as a passenger bus driver, employed him as a safety instructor on a temporary basis, and so advised him.

Acting on the recommendation of applicant's doctors, applicant had Pierce's eyes examined by two eye specialists, Dr. Charles W. Tillett and Dr. Jack A. Thurmond. Both these doctors in their report to applicant stated Pierce had a 20/200 vision without glasses in his left eye. Dr. Tillett stated in his report the visual acuity of Pierce's left eye was correctible to 20/70, and Dr. Thurmond stated it was correctible to 20/100. Both doctors stated that, in their opinion, the visual impairment of Pierce's left eye would have no adverse effect upon his driving a passenger bus.

Since applicant began operation of the Charlottte transit system in 1955, it has required all of its passenger bus drivers to meet the minimum physical requirements prescribed by the Interstate Commerce Commission. Since 1952 the minimum qualifications prescribed by such Commission have provided, *inter alia*, as follows:

"Section 191.2 MINIMUM REQUIREMENTS. No person shall drive, nor shall any motor carrier require or permit any person to drive, any motor vehicle unless such person possesses the following minimum qualifications:

* * *

"(b) EYESIGHT. Visual acuity of at least 20/40 (Snellen) in each eye either without glasses or by correction with glasses; * * *" "(Interstate Commerce Commission, Motor Carrier Safety Regulations, Revision of 1952)." The correct citation is: Code of Federal Regulations, title 49, §191.2(b), 1960 Cumulative Pocket Supplement.

Applicant's doctors, after receiving the reports of Drs. Tillett and Thurmond, again stated in a letter to applicant that Pierce should not be allowed to drive a passenger bus, because the reports of Drs. Tillett and Thurmond showed that the visual acuity of Pierce's left eye failed to meet the minimum visual acuity standards required by the Interstate Commerce Commission, which standards are the ones adopted by applicant's doctors as determinative of the fitness of a person to drive a bus of applicant carrying passengers.

On 21 May 1960 the temporary employment by applicant of Pierce as a safety instructor was terminated, and his name was removed by applicant from the senority roster on 1 June 1960. On 8 June 1960 defendant by Pierce, chairman of its local union in Charlotte, wrote applicant a letter protesting the removal of Pierce's name from the seniority list or roster of the company. On 10 June 1960 applicant wrote Pierce, chairman of the local union of defendant, that his name was being restored to the seniority list, but that it could not permit him to drive a passenger bus. On the same day an entry was made on Pierce's personnel record with the company that he was suspended due to visual defect found by company doctors during his physical examination, and a copy of this was handed to Pierce by the company. On the same day applicant wrote W. F. Lester, deputy president of defendant, a letter setting forth the facts stated by the aforesaid doctors as to the eyes of Pierce, and their requirements as to eyesight of drivers of passenger busses according to the minimum requirements of the Interstate Commerce Commission, and stating that its decision is compulsory not to permit him to drive, and it would discuss with him other employment for Pierce, which would not involve driving a passenger bus.

On 11 July 1960 defendant, by its attorneys, notified applicant by a letter that it and Pierce are aggrieved by applicant's decision not to continue Pierce in its employment as a driver of a passenger bus, and

by virtue of §58 of their collective bargaining agreement it and Pierce demand arbitration of this grievance.

Applicant has not agreed to the arbitration of the suspension of Pierce as a driver of one of its busses carrying passengers for the following reasons: One, Article XVI, §58, of the collective bargaining agreement provides, *inter alia,* "all grievances arising out of the application of this Agreement must be presented to the Company in writing. Grievances arising out of the suspension or discharge of an employee must be filed with the Company within five (5) days after such suspension or discharge as provided in (Article XVI), §55." Two, written notice of the suspension of Pierce was given to him and defendant on 10 June 1960 by Exhibit G — Letter to Pierce, Chairman of defendant's local union in Charlotte, and by Exhibit J — Letter to W. F. Lester, deputy president of defendant. The only notice of grievance by Pierce and defendant was a letter by attorneys for defendant dated 11 July 1960 in which arbitration was demanded. Three, the failure of defendant to file written notice of its grievance in respect to Pierce's suspension, as required by Article XVI, §58, of the collective bargaining agreement, causes his suspension to be a controversy which applicant has not agreed to arbitrate.

If the letter of defendant's attorneys dated 11 July 1960 was intended as the filing of a grievance, the demand for arbitration is invalid for the reason Article XVI, §58, of the collective bargaining agreement provides that arbitration may not be demanded until the party demanding arbitration has resorted to the grievance procedure.

By virtue of N.C.G.S., §95-36.9(b), applicant is entitled to an order staying arbitration.

Applicant has no adequate remedy at law, and unless the court grants the relief prayed, it will suffer irreparable and substantial damage.

Prior to the hearing by Judge Farthing of the motions set forth above, defendant requested in writing that the judge, if he continued the temporary restraining order to the final hearing, or if he should issue a temporary restraining order to the final hearing, should find the facts.

Judge Farthing's order is, in substance: The judge, after having heard and considered the complaint and application, all affidavits filed in the hearing, and the stipulation of defendant, was of the opinion that the *ex parte* temporary restraining order heretofore issued having expired by its terms should be vacated, and was of the further opinion that he, in his discretion, should grant applicant a preliminary stay of arbitration until the final hearing, and being of the opinion that defendant's motion to stay action pending arbi-

tration should be denied, and its motion to vacate the *ex parte* temporary restraining order heretofore issued should be allowed, found the facts in substance as follows:

Judge Farthing found with particularity the essential or ultimate facts alleged in the complaint and application, and summarized above, and the following facts which are summarized: On 6 March 1960 Pierce was orally notified by applicant's dispatcher that he was suspended as driver of a bus carrying passengers on account of the vision of his left eye disclosed by his physical examination on 1 March 1960. No written grievance was filed with applicant in respect to the suspension of Pierce as driver of a bus carrying passengers within five days from 1 March 1960, or within five days from 10 June 1960, as required by Article XVI, §58, of the collective bargaining agreement. The first written grievance as to the suspension of Pierce as a driver of a bus carrying passengers was in a letter filed by attorneys for defendant on 11 July 1960, in which defendant demanded an arbitration of the suspension of Pierce, and that applicant appoint its arbitrator in five days thereafter. The written demand on 11 July 1960 constituted "written notice of the issue or question to be passed upon at the arbitration hearing" to "a party against whom arbitration proceedings have been initiated" within the meaning of N.C.G.S., §95-36.9(b). Unless applicant is granted a stay of arbitration, it will be required to proceed to arbitration, and be irreparably injured, because such arbitration would be costly to it, and because it would deprive it of rights conferred upon it by N.C.G.S., §95-36.9(b).

Whereupon, Judge Farthing decreed as follows: One, defendant's motion to stay action pending arbitration is denied. Two, defendant's motion to vacate the *ex parte* temporary restraining order is allowed. Three, based upon his findings of fact, and in his discretion, applicant is granted a stay of arbitration until the final hearing.

From the order, defendant appeals.

Lassiter, Moore and Van Allen for applicant, appellee.

Kennedy, Covington, Lobdell & Hickman by W. T. Covington, Jr., and Bailey Patrick, Jr., for defendant, appellant.

PARKER, J. DEMURRER *ORE TENUS* FILED IN SUPREME COURT.

N.C.G.S., §95-36.6 — Appointment of arbitrators reads in part: "The arbitrator or arbitration panel, as the case may be, shall have such powers and duties as are conferred by the voluntary agreement of the parties, and, if there is no agreement to the contrary, shall have

power to decide the arbitrability as well as the merits of the dispute."

N.C.G.S., §95-36.9(b) reads: "Any party against whom arbitration proceedings have been initiated may, within 10 days after receiving written notice of the issue or questions to be passed upon at the arbitration hearing, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the arbitration upon the ground that he has not agreed to the arbitration of the controversy involved. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said ten-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator and in proceedings subsequent to the award."

Defendant contends that, as the collective bargaining agreement here has "no agreement to the contrary" as used in N.C.G.S., §95-36.6, the only consistent interpretation of N.C.G.S., §95-36.9(b) in the light of N.C.G.S., §95-36.6 is that the Legislature obviously intended for N.C.G.S., §95-36.9(b) to authorize a stay of arbitration only where the parties have not agreed to leave the issue of arbitrability as well as the merits to the arbitrator, otherwise we would be faced with the inconsistency of the Legislature giving the arbitrator the initial power to decide the issue of arbitrability with the one hand, N.C.G.S., §95-36.6, and with the other hand taking the power to decide the issue from him, N.C.G.S., §95-36.9(b). Therefore, its demurrer *ore tenus* filed in the Supreme Court should be allowed because the complaint, and the collective bargaining agreement attached to the complaint and made a part thereof show applicant in the collective bargaining agreement agreed to permit the arbitrator to decide the arbitrability of the dispute.

Applicant contends that by the collective bargaining agreement it has not agreed to the arbitration of the controversy involved, because it has agreed to arbitration of grievances only if certain provisions precedent were complied with by defendant as set out in the agreement, and its complaint and application aver that such provisions precedent were not complied with by defendant, and the demurrer *ore tenus* should be overruled.

The collective bargaining agreement is attached to the complaint and application, marked Exhibit A, and made a part thereof. It can be considered on the demurrer *ore tenus. Moore v. W O O W, Inc. supra.*

The contentions of the parties necessitate a careful study of the collective bargaining agreement to ascertain its real intent and meaning in respect to the question raised by these contentions. To ascertain this the instrument must be read as a whole and not in detached fragments, for the real intent of the parties as expressed therein is the dominant object. *Electric Supply Co. v. Burgess,* 223 N.C. 97, 25 S.E. 2d 390. In that case it is stated: "In seeking the intent it is presumed that every part of the contract expresses an 'intelligible intent, *i.e.,* means something.' . . . . It is necessary to consider all of its parts, each in its proper relation to the other, in order to determine the meaning of any particular part as well as of the whole."

A submission to arbitration is a contract, and an arbitration agreement is in general subject to the same rules of interpretation and construction as other contracts. 6 C.J.S., Arbitration and Award, p. 166.

Article XVI, §58, of the collective bargaining agreement provides: "Grievances arising out of the suspension or discharge of an employee must be filed with the Company within five (5) days after such suspension or discharge as provided in §55." This section then provides: "All other grievances must be filed in thirty (30) days. . . ." It is obvious that §56 of the agreement is meant rather than §55, for the reason that §55 has nothing in respect to the filing of grievances, and §56 reads as follows: "When an employee has been suspended or discharged, an investigation will be held upon his request provided such request is made in writing within five (5) days from the date of suspension or discharge. At this investigation which shall be held in his presence, the employee may have present a Brotherhood Representative of his own choice and such witnesses as may have information relative to his case. Decision shall be rendered within five (5) days after the investigation is concluded."

Article XVI, §58, of the agreement later on after the sentences we have quoted in whole and in part uses this language:

"A sincere endeavor will be made by the parties to have all grievances arising out of the application of this Agreement disposed of by the Local Management of the Company and the Local Brotherhood Representatives. However, the Local Brotherhood Representatives shall have the right to appeal to the General Management of the Company from any decision that may be rendered by the Local Management, said appeal to be taken in ten (10) days. A decision on said appeal shall be rendered within ten (10) days after the appeal is heard, unless the time is extended by Agreement between the Brotherhood and the Company, or the appeal will be considered rejected.

"Within ten (10) days after such decision either of the parties shall have the right to demand arbitration by serving on the agent of the other a notice in writing. In the event of arbitration the Company and the Brotherhood shall each select one arbitrator, and the two so selected by the parties shall undertake to choose the third arbitrator. The party calling for arbitration shall name the arbitrator selected by it in its demand for arbitration, and the other party shall name its arbitrator within five (5) days, excluding Sundays and holidays, after such demand."

What did the parties agree to arbitrate? "Even giving the 'broadest liberalities' to private arbitration, parties to a contract cannot be forced to arbitrate an issue they did not agree to arbitrate." *Refinery Employees Union v. Continental Oil Co.*, 268 F. 2d 447, 452. It seems clear and manifest from the terms of the collective bargaining agreement that its real intent and meaning is that the parties have not agreed to the arbitration of any "grievances arising out of the application of this agreement," unless the grievance procedure provided for in the agreement has been followed.

This Court said in *Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E. 2d 898: "Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible."

"Statutes *in pari materia* are to be construed together and where the language is ambiguous, the court must construe it to ascertain the true legislative intent." *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410.

This is said in 50 Am. Jur., Statutes, §362: "It may be presumed to have been the intention of the legislature that all its enactments which are not repealed should be given effect. Accordingly, all statutes should be so construed, if possible, by a fair and reasonable interpretation, as to give full force and effect to each and all of them. Under this rule, it may not be assumed that one or the other of related statutes is meaningless. Such statutes will be so construed as to give each a field of operation."

N.C.G.S., §95-36.6 and N.C.G.S., §95-36.9(b) are *in pari materia*, and were in force at all times relevant here. Construing them together, it is our opinion, and we so hold, that the true legislative intent and meaning of these two statutes is that the provision in N.C.G.S., §95-36.6 to the effect that the arbitrators, if there is no agreement to the contrary, shall have the power to decide the arbitrability of the dispute is qualified by N.C.G.S., §95-36.9(b) to the effect that the

court, and not the arbitrators, is to decide as to whether or not a party has agreed to the arbitration of the controversy involved. Such a construction is fair and reasonable, and it harmonizes and reconciles these statutes. To adopt defendant's contention as to the construction of these two statutes would make the provisions of N.C.G.S., §95-36.9(b) practically meaningless. This means that in this case it is for the court, and not the arbitrators, to decide as to whether or not defendant has followed the grievance procedure provided for in the collective bargaining agreement so as to have a right to demand arbitration of the alleged grievance here.

It is the general rule that where a collective bargaining agreement provides an extra-judicial means of hearing and determining disputes growing out of grievances of employees within the scope of the agreement, an employee must exhaust the remedy provided before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. *Cone v. Union Oil Co. of California,* 129 Cal. App. 2d 558, 277 P. 2d 464; *Cortez v. Ford Motor Co.,* 349 Mich. 108, 84 N.W. 2d 523; *Jorgensen v. Penn. R. R. Co.,* 25 N.J. 541, 138 A. 2d 24; 56 C.J.S., Master and Servant, p. 262; 31 Am. Jur., Labor, §124. This general rule is founded upon well established principles of the law of contracts and is solidly supported by the purpose of the collective agreements to preserve industrial peace and cooperation between employers and employees.

The collective bargaining agreement here provides for specific procedure as to grievances, and that "within ten (10) days after such decision either of the parties shall have the right to demand arbitration by serving on the agent of the other a notice in writing." Defendant here must exhaust this specific procedure as to grievances, in the absence of facts which would excuse it from pursuing such procedure, before it has a right to demand arbitration. Certainly, this collective agreement would be stultified by permitting defendant to demand arbitration of the grievance here without first having tried to settle the grievance in every way the collective bargaining agreement provides.

The cases relied upon by defendant, e. g., *Mack Mfg. Corp. v. International Union, Etc.,* 368 Pa. 37, 81 A. 2d 562, to the effect that the interpretation of the provisions of the agreement relating to grievance procedure was for the arbitrator to decide, are not in point, because those cases were decided in States which do not have a statute similar to N.C.G.S., §95-36.9(b). Other Courts, e. g., *Local No. 149 Etc., v. General Electric Co.,* (First Circuit), 250 F. 2d 922, *certiorari* denied 1958, 356 U.S. 938, 2 L. Ed. 2d 813, hold that the court has the inescapable obligation to determine as a preliminary matter that the

employer has contracted to refer the controversy to arbitration. The Court in the *General Electric Co.* case was aware of the conflict of authority for it said: "We are aware of a viewpoint urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator in the first instance the question of arbitrability, that is, the question whether there is any issue to be arbitrated under the collective bargaining agreement."

Defendant also relies on *Calvine Cotton Mills v. Textile Workers Union*, 238 N.C. 719, 79 S.E. 2d 181, which is easily distinguishable, and is not in point. First, Section V of the collective bargaining agreement reads in part as follows: "(a) Any grievance, disagreement or dispute between the Company and the Union, arising from the operation or interpretation of this Agreement or concerning wages, hours of employment . . . shall, at the request of the Company or the Union, be settled by arbitration . . . " We have examined the record in this case in the office of the clerk of the Supreme Court, and the parts of the collective agreement there set forth contain no provisions for grievance procedure as here before either party has a right to demand arbitration. Second, the case was an action to vacate an arbitration award under N.C.G.S., §95-36.9(c).

Defendant further avers in his demurrer *ore tenus* that it appears from the face of the complaint and application that applicant waived any alleged non-compliance by defendant with the grievance procedure prescribed in the agreement. No such waiver appears on the face of the complaint and application, and this contention is without merit. Defendant, if so advised, can present that question for decision by pleading waiver and offering what evidence it has, if any, to that effect.

Defendant further avers in its demurrer *ore tenus* that the complaint and application do not aver facts showing it would suffer irreparable damage, and therefore, its demurrer should be allowed.

This Court said in *Harris v. Greyhound Corporation*, 243 N.C. 346, 90 S.E. 2d 710: "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.' "

The complaint and application allege that since applicant commenced the operation of the Charlotte transit system in 1955, it has required all drivers of passenger busses to meet the minimum requirements prescribed by the Interstate Commerce Commission, and it quotes from such requirements the minimum requirement for such drivers since 1952 in respect to eyesight. It then avers the facts as to the visual acuity of Pierce's left eye showing he does not meet

such minimum regulation as to eyesight of that eye. It is a general fact known to all people that Bus Companies carrying passengers for hire operating in interstate travel practically operate and conduct their business under the minimum requirement of the Interstate Commerce Commission as to the eyesight of their drivers of such busses. Surely, in the light of the facts alleged here, the effort made here to compel arbitration so as to force applicant to employ and use Pierce as a driver of its busses carrying passengers for hire in violation of its duty to such passengers, and to use Pierce as such a driver, when he cannot meet its minimum requirement as to eyesight, if successful, would cause applicant irreparable damage as being a carrier who was forced to breach the duty it owes it passengers, though it desired to perform such duty by exercising "the highest degree of care for their safety so far as is consistent with the practical operation and conduct of its business." For such a situation applicant has no adequate remedy at law.

The demurrer *ore tenus* admits the truth of factual averments well stated, and such relevant inferences as may be legitimately deduced therefrom, but not legal inferences or conclusions of law asserted by the pleader. *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132. Applying such principle to the challenged complaint and application, and the exhibits attached thereto, and made parts thereof, it is our opinion that the demurrer *ore tenus* filed in this Court should be, and it hereby is, overruled.

TEMPORARY RESTRAINING ORDER.

Defendant assigns as errors the findings of fact Nos. 4, 5, 6, 8, 9, 10, 11, 12 and 14 contained in the temporary restraining order, the failure of the trial court to make findings of fact and conclusions of law as requested by it, and the signing of the temporary restraining order.

"On an appeal from an order granting or refusing an interlocutory injunction, the Supreme Court is not bound by the findings of fact of the judge hearing the application for the writ. It may review and weigh the evidence submitted to the hearing judge and find the facts for itself. The Supreme Court nevertheless indulges the presumption that the findings of the hearing judge are correct, and requires the applicant to assign and show error in them." *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116.

The findings of fact made by the hearing judge are supported by competent evidence, and such findings support his conclusions. For instance, defendant assigns as error the eighth finding of fact, to wit:

"On March 6, 1960, Mr. Pierce was notified orally by plaintiff's dispatcher that he was suspended on account of the defect in the vision of his left eye which had been disclosed by his physical examination on March 1." J. B. Pierce in his affidavit introduced before the hearing judge stated: "He was orally advised by a dispatcher of the plaintiff on Sunday, March 6, 1960, that he would not be permitted to drive a bus on the following Monday, for which he had reported for duty to said dispatcher, on account of a defect in the vision of his left eye, which had been discovered by physical examination by Dr. Richard T. James, Jr., the plaintiff's regular employed physician." The complaint and application allege: "On March 1, 1960, J. B. Pierce submitted to an annual physical examination by plaintiff's doctors, the Matthews-James Clinic. A true copy of the report of this physical examination is attached hereto and made a part hereof as EXHIBIT B." Exhibit B states J. B. Pierce's left eye had light perception only. While the order does not state in exact words that probable cause exists that applicant will be able to establish its asserted primary right to stay arbitration, we are of the opinion that his findings of fact show the existence of such probable cause. However, to put the matter at rest beyond debate, we find as a fact from a review and weighing of the evidence that such a probable cause exists, and further we find as a fact that if the stay of arbitration is sustained to the final hearing on the merits, the damage which defendant would suffer is slight as compared with the damage which applicant might sustain in possibly being forced to use Pierce as a driver of a passenger-carrying bus, when he cannot, on the record before us, meet its minimum requirement as to eyesight, if applicant should finally prevail. *Huskins v. Hospital, supra.*

The Court said in *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80, (quoted with approval in *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383),: "It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case."

The temporary restraining order was properly entered by the hearing judge in the exercise of his sound discretion, and will not

be disturbed. Defendant's assignments of error in respect to it are overruled.

The hearing judge was correct in refusing to allow defendant's motion to stay action pending arbitration award.

Defendant's other assignments of error are overruled.

Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; AND STATE OF NORTH CAROLINA, CITY OF DURHAM, A MUNICIPAL CORPORATION, DUKE UNIVERSITY, ERWIN MILLS, INCORPORATED, COUNTY OF DURHAM, LIGGETT & MYERS TOBACCO COMPANY, MRS. MARY TRENT SEMANS, THE DURHAM CHAMBER OF COMMERCE, THE AMERICAN TOBACCO COMPANY, RESEARH TRIANGLE INSTITUTE, THE DURHAM MERCHANTS ASSOCIATION, INTERVENORS, v. SOUTHERN RAILWAY COMPANY.

(Filed 3 February, 1961.)

1. Utilities Commission § 2—

The Utilities Commission has power to require all transportation companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just, G.S. 62-39, and a public service corporation has no legal right to discontinue an established service without authorization from the Commission.

2. Utilities Commission § 5: Carriers § 4—

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is *prima facie* just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. G.S. 62-96, G.S. 62-47, G.S. 62-26.10.

3. Carriers § 4—

Whether a carrier should be allowed to discontinue or reduce a particular service must be determined upon the basis of whether the advantage of the public convenience and necessity outweighs the disadvantage of the loss sustained by the carrier in maintaining such service when considered in connection with the carrier's revenues from its entire operations, and each case must be determined in accordance with its particular facts.

4. Same— Evidence held to support order denying carrier's petition for discontinuance of passenger trains.

Defendant carrier petitioned to be allowed to discontinue its passenger trains between two designated cities 130 miles apart. The evidence tended

to show that the two trains in question afforded the only rail passenger service between the designated cities, that the discontinuance of the service would leave several counties without rail passenger service, that the territory affected was populous and expanding industrially, that one of the cities was a junction affording passengers connections with points on the main line of the carrier, that the loss from passenger travel on the trains in question was in line with the loss from passenger traffic on the facilities of the carrier as a whole, that the carrier had profitable freight traffic between the points in question, and that the loss on the trains in question did not endanger the financial stability of the carrier or materially affects its ability to maintain and acquire operating capital or its ability to realize a profit from its overall operations. *Held:* The record supports findings supporting the order of the Commission denying the petition, and shows that the Commission did not act arbitrarily or capriciously, and therefore the contention that the order deprived the carrier of property without due process of law is untenable.

5. Same—

The denial of a petition of a carrier to be allowed to discontinue passenger service between designated points does not preclude it from thereafter petitioning for like relief on the basis of its later experience in subsequent operations.

APPEAL by Southern Railway Company from *Hobgood, J.*, April 2, 1960, Regular Civil Term of WAKE.

On July 8, 1959, Southern Railway Company (Southern) filed its petition with the North Carolina Utilities Commission (Commission) for an order authorizing Southern to permanently discontinue its operation of "a pair of passenger trains," Nos. 13 and 16, between Greensboro, N. C., and Goldsboro, N. C., a distance of 129.1 miles.

Southern asserted: (1) It had incurred heavy loss, set forth in detail, in the operation of these trains during the 12-month period ending March 31, 1959; (2) public convenience and necessity no longer required the continued operation thereof; (3) required continued operation of these trains at heavy loss in the absence of public need therefor would (a) be contrary to and violate the statutes of North Carolina, (b) unduly burden interstate commerce, (c) confiscate Southern's property without just compensation and without due process of law, and (d) deny to Southern the equal protection of the law guaranteed by the North Carolina and United States Constitutions.

The State of North Carolina, through its Attorney General, intervened. G.S. 62-21. City of Durham, Duke University, Erwin Mills, Inc., County of Durham, Liggett & Myers Tobacco Company, Mrs. Mary Trent Semans, the Durham Chamber of Commerce, the American Tobacco Company, Research Triangle Institute, Sperry Rand

Corporation and the Durham Merchants Association were permitted, by appropriate order (s), to intervene as protestants.

Trains Nos. 13 and 16 are the only passenger trains now operated by Southern between Greensboro and Goldsboro.

The eastbound train, No. 16, leaves Greensboro daily at 6:10 a.m., makes 12 regular stops, with allowances for 9 flag stops, and arrives in Goldsboro at 10:45 a.m. Its principal regular stops en route are at Burlington (6:50 a.m.), Durham (7:55 a.m.), Raleigh (8:55 a.m.), and Selma (10:00 a.m.).

The westbound train, No. 13, leaves Goldsboro daily at 4:05 p.m., makes 10 regular stops, with allowances for 11 flag stops, and arrives in Greensboro at 8:50 p.m. Its principal regular stops en route are at Selma (4:50 p.m.), Raleigh (5:30 p.m.), Durham (6:55 p.m.), and Burlington (8:02 p.m.).

These trains carry express but no freight or mail. They consist of a 1500 h.p. diesel electric locomotive, a passenger-baggage car, a "straight" coach, and a ten-roomette, six-bedroom sleeping car, seven days each week. The sleeping car operates between Raleigh and Greensboro. A 60-foot express car operates five days a week between Greensboro and Goldsboro; also, a box and express car operates six days a week between Burlington and Greensboro. At Greensboro, the sleeping car on train No. 13 is attached to Southern's northbound train No. 38; and the sleeping car detached from Southern's southbound train No. 29 is attached to train No. 16. Generally, passengers make connections at Greensboro with trains on Southern's north-south main line.

The coaches on these trains have a capacity of 80 passengers and are equipped with modern facilities such as air-conditioning, wide windows, reclining seats, electric drinking fountains, etc. No food services or other types of concessions are provided on either train. The crews consist of an engineer, a fireman, a conductor, a baggage master, a flagman, a Pullman conductor, a Pullman porter, a regular porter, and an express messenger. Of these employees, six are paid by the railroad.

In October, 1959, at a hearing before the Commission, voluminous evidence, including testimony, documents and statistical charts, was presented. The Commission's order of January 20, 1960, includes: (1) An extended narrative of factual data; (2) findings of fact, including the specific finding that "public convenience and necessity exists for the operation of Passenger Trains Nos. 13 and 16"; (3) conclusions of law; and (4) a denial of Southern's petition. Commissioner Worthington dissented. Southern appealed.

In its notice of appeal, Southern, by assignments of error, asserted

that designated statements in the Commission's narrative of factual data and designated findings of fact are not supported by any competent, material and substantial evidence; that designated statements under the heading, "Conclusions," are erroneous; and that the Commission's order is "arbitrary and capricious, contrary to the law of North Carolina and the law of the United States, in violation of the Constitution of North Carolina and the Constitution of the United States, contrary to the Statutes of North Carolina, unsupported by any competent, material and substantial evidence, and otherwise unlawful and erroneous."

In the superior court, Southern's appeal was heard on the record as certified by the Commission. G.S. 62-26.10. The court, overruling Southern's exceptions and assignments of error, adopted, approved and confirmed "each Finding of Fact and Conclusion of Law" in the Commission's order. Judgment, providing that the Commission's order "be, and the said Order is hereby affirmed and sustained," was entered. Southern excepted, appealed and assigns errors.

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

Claude V. Jones for City of Durham, appellee.

E. C. Bryson for Duke University, appellee.

R. P. Reade for County of Durham, appellee.

A. H. Graham, Jr., for Erwin Mills, Inc., and Liggett & Myers Tobacco Company, appellees.

E. C. Brooks, Jr., for Mrs. Mary Trent Semans and the Durham Merchants Association, appellees.

Victor S. Bryant for the Durham Chamber of Commerce and American Tobacco Company, appellees.

Victor S. Bryant, Jr., for Research Triangle Institute, appellee.

Joyner & Howison, Arthur J. Dixon and Earl E. Eisenhart for defendant, appellant.

BOBBITT, J. Under G.S. 62-39, the Commission has power to require all transportation companies "to establish and maintain all such public service facilities and conveniences as may be reasonable and just." Also, see G.S. 62-30, G.S. 62-37, G.S. 62-46, G.S. 62-48 and G.S. 62-74.

A 1933 Statute, Public Laws of 1933, c. 307, s. 32, now codified as G.S. 62-96, provides: "Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the Commission shall have power, after petition, notice

and hearing, to authorize by order any utility to abandon or reduce its service or facilities."

Another 1933 statute, Public Laws of 1933, c. 528, s. 1, amended C.S. 3481 by providing, in pertinent part: "The Corporation Commission, or its successor, however, shall have and it is hereby vested with the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation." C.S. 3481, as amended, is now codified as G.S. 62-47.

A public service corporation has no legal right to discontinue an established service unless and until the Commission authorizes it to do so. *Sweetheart Lake, Inc., v. Light Co.*, 211 N.C. 269, 189 S.E. 785. The hearing, after notice, was on Southern's petition that the Commission authorize the discontinuance of passenger trains Nos. 13 and 16.

The power conferred by G.S. 62-96 and G.S. 62-47 *to authorize* such discontinuance indicates the General Assembly intended that the Commission exercise this power in large measure according to its judgment and discretion. Even so, an order allowing or denying a petition for such continuance is subject to judicial review and reversal if it is "arbitrary or capricious" or if the essential findings of fact on which it is based are "unsupported by competent, material and substantial evidence." G.S. 62-26.10. However, G.S. 62-26.10 provides that "(u)pon any appeal to the superior court, the rates fixed, or any rule, regulation, finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable."

In *Utilities Com. v. Kinston*, 221 N.C. 359, 20 S.E. 2d 322, it was held that protestants who were not parties to the proceeding before the Commission had no right to appeal from the Commission's order authorizing the discontinuance of designated trains. The appeal presented no question as to the validity of the Commission's order.

In *Utilities Com. v. R. R.*, 233 N.C. 365, 64 S.E. 2d 272, the railroad's petition was for authority to close its agency at Stokes, that is, to dispense with the services of a local agent at the Stokes station. Railroad freight transportation service was afforded Stokes by a branch line. Stokes had no passenger service. The railroad did not seek authority to close its freight station at Stokes or to discontinue its freight service. As stated in the opinion: "The only difference would be that incoming freight must be prepaid, and that notice of arrival would be mailed from Washington instead of Stokes, and that waybills and receipts for freight from Stokes would be handled by the

train conductor. Less than carload shipments would be unloaded and deposited in the station building, and consignee notified." In reversing the Commission's order, this Court said: "We think the finding of the Utilities Commission affirmed by the court below is not supported by material and substantial evidence, and that the order denying application for discontinuance of agency service at Stokes under the evidence did not measure up to the standard of reasonableness and justice required by the statute." Two excerpts from the opinion of *Devin, J.* (later *C.J.*), are quoted below:

> "The power conferred by statute upon the Utilities Commission to require transportation companies to maintain substantial service to the public in the performance of an absolute duty will not be denied even though the service may be unremunerative when singled out and related only to a particular instance or locality, if the loss be viewed in relation to and as a part of the over-all operations of transportation, rather than as incidental and collateral thereto.
>
> ". . .
>
> "Questions of convenience to individuals and to the public find their limitations in the criterion of reasonableness and justice. No absolute rule can be set up and applied to all cases. The facts in each case must be considered to determine whether public convenience and necessity require the service to be maintained or permit its discontinuance. The benefit to the one of the abandonment must be weighed against the inconvenience to which the other may be subjected. The question to be decided is whether the loss resulting from the agency is out of proportion to any benefit to an individual or the public."

Applying these legal principles, this Court, in *Utilities Com. v. R. R.*, 235 N.C. 273, 69 S.E. 2d 502, held the evidence sufficient to support the Commission's order denying the railroad's petition for authority to discontinue *agency service* at Lucama; and, in *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780, this Court held the evidence sufficient to support the Commission's order denying the railroad's petition for authority "to change Fremont, North Carolina, from a regular stop to a flag stop for its passenger trains numbers 48 and 49."

"The doctrine of convenience and necessity has been the subject of much judicial consideration. No set rule can be used as a yardstick and applied to all cases alike. This doctrine is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered and from those facts it must

be determined whether or not public convenience and necessity require a given service to be performed or dispensed with. . . . The convenience and necessity required are those of the public and not of an individual or individuals." *Illinois Cent. R. Co. v. Illinois Commerce Commission,* 397 Ill. 323, 74 N.E. 2d 545. Quoted with approval in *Utilities Commission v. Casey,* 245 N.C. 297, 302, 96 S.E. 2d 8, and in cases cited therein.

In *Utilities Commission v. Trucking Co.,* 223 N.C. 687, 690, 28 S.E. 2d 201, *Stacy, C.J.,* said: "It is to be remembered that what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration, *e.g.,* whether there is a substantial public need for the service; whether the existing carriers can reasonably meet this need, and whether it would endanger or impair the operations of existing carriers contrary to the public interest. Precisely for this reason its determination by the Utilities Commission is made not simply *prima facie* evidence of its validity, but '*prima facie* just and reasonable.' "

"Necessity means reasonably necessary and not absolutely imperative. . . . The convenience of the public must not be circumscribed by holding the term 'necessity' to mean an essential requisite. . . . It is necessary if it appears reasonably requisite, is suited to and tends to promote the accommodation of the public." *Mulcahy v. Public Service Commission,* 101 Utah 245, 117 P. 2d 298, 300. Quoted with approval in *Seaboard Air Line R. Co. v. Commonwealth (Va.),* 71 S.E. 2d 146.

In determining whether a railroad should be required to continue to operate trains, these criteria are controlling: "(1) The character and population of the territory served; (2) the public patronage or lack of it; (3) the facilities remaining; (4) the expense of operation as compared with the revenue from it; and (5) the operations of the carrier as a whole." *Southern Railway Company v. Commonwealth (Va.),* 86 S.E. 2d 839; Annotation, 10 A.L.R. 2d 1143 *et seq.,* and cases cited. As to the fifth criterion, see *R. R. Connection Case,* 137 N.C. 1, 15, 49 S.E. 191, affirmed 206 U.S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

In 10 A.L.R. 2d 1143, this statement appears: "The great weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a public utility company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be considered, and not merely the direct return from the branch line itself; . . ."

Southern, in its brief, states it does not contend "that its property is being confiscated in the sense that the forced continued operation

of these trains will result in its being required to operate at an overall financial loss or at such a low profit that it will not earn a fair rate of return in the constitutional sense." Rather, it contends a prosperous railroad is deprived of its property without due process of law "if it is required to render a losing service where there is no reasonable public need for that service — that is, a capricious and unreasonable taking of property cannot be justified on the ground of the prosperity of the person from whom the property is taken." This contention is relevant only if the Commission's order is arbitrary and capricious.

In *Pennsylvania-Reading Sea. Lines v. Board of Pub. U. (N.J.)*, 74 A. 2d 265, the only decision cited by Southern in support of its said constitutional contention, the New Jersey Court upheld an order authorizing the discontinuance of passenger trains. It is noted that the order made by the Board of Public Utility Commissioners was based on this finding of fact: "In our opinion the evidence wholly fails to support a finding that public convenience and necessity require continuance of passenger train operation on the Penns Grove Branch between Woodbury and Penns Grove. *The continuing deficits experienced in the operation of the branch and the entire system of the Pennsylvania-Reading Seashore Lines jeopardize essential services performed by the utility.* Continued operation of nonessential service at a substantial continuing loss, particularly where as here another means of reasonably convenient public transportation is available, is, in our opinion, not justified as in the public interest." (Our italics.)

As stated in *Fleming v. Commonwealth (Va.)*, 61 S.E. 2d 1, 4: "It is a matter of common knowledge that a revolutionary change has taken place in the field of passenger transportation. Travel by air, water, buses, and by privately owned automobiles has largely brought about the change. The railroads no longer have a monopoly on transporting passengers. The local railroad passenger travel largely has been transferred from the railroads to the highways, and this competition has, to a great extent, caused the loss to local passenger business. Public service commissions and courts cannot shut their eyes to the changed conditions when considering public convenience and necessity and adequate public service facilities and conveniences that are reasonable and just." The emphasis here is upon local passenger business. The trains involved ran between Danville and Richmond. It is common knowledge that Danville is on the main line of the Southern and that Richmond is on the main line of the Seaboard.

Southern's petition is not for the *reduction* of its passenger service, the question presented in *Fleming v. Commonwealth (Va.)*, *supra*,

and in *Southern Railway Company v. Commonwealth (Va.), supra.* In this connection, it is noted that the Virginia Court upheld the State Corporation Commission's order denying Southern's petition for authority to discontinue the operation of trains Nos. 11 and 12 between Richmond and Danville, *Southern Ry. Co. v. Commonwealth (Va.),* 68 S.E. 2d 552, and in the later case (*Southern Railway Company v. Commonwealth (Va.),* 86 S.E. 2d 839) reversed an order denying Southern's petition for authority to discontinue the operation of trains Nos. 7 and 14, then noting that the service on trains Nos. 11 and 12 would continue.

Moreover, Southern's petition is not for the reduction of an incidental or collateral service, such as the discontinuance of a station as an agency station, the question presented in two of the North Carolina cases cited above and in *Atlantic Coast Line R. Co. v. Commonwealth (Va.),* 61 S.E. 2d 5, and in *Illinois Cent. R. Co. v. Illinois Commerce Commission, supra.*

Southern's petition is for authority to abandon entirely and permanently *all* passenger service *on all portions* of the Greensboro-Goldsboro Line. If granted, Southern would no longer sustain the loss resulting from the actual operation of trains Nos. 13 and 16. In addition, Southern could dispose of passenger station facilities and release personnel employed at such facilities. On the other hand, there would be no east-west rail passenger service of any kind between Greensboro and Goldsboro. Moreover, there would be no rail passenger service of any kind for the counties of Durham, Orange and Alamance.

Until September, 1954, Southern operated three pairs of passenger trains on its Greensboro-Goldsboro line. It was then authorized to discontinue trains Nos. 21 and 22. Thereafter, in April, 1958, it was authorized to discontinue trains Nos. 111 and 112, thus reducing its passenger service to the trains here involved, Nos. 13 and 16. On February 3, 1959, it was authorized to discontinue the Asheville-Raleigh sleeper. Thus, prior to the filing on July 8, 1959, of its present petition, the sleeper service between Raleigh and Asheville had been discontinued, and the passenger service greatly reduced in respect of the public convenience afforded local passengers. Railway mail service was discontinued December 14, 1957. The authorized discontinuance of these trains and services would seem to dispel any suggestion that the Commission's attitude has been arbitrary or capricious.

The principal public convenience presently afforded by trains Nos. 13 and 16 derives from the connections these trains make at Greensboro with north-south trains on Southern's main line. They provide continuous passenger travel, including Pullman service, to and from

Washington, New York and intermediate points. There is evidence that persons in the Durham-Chapel Hill area who are advised of this service make substantial use of it. Various reasons are given for preferring this service to travel by air or by bus or by boarding the Seaboard at Raleigh, including the schedule, the overnight travel, the convenience of continuous travel, its dependability notwithstanding adverse weather conditions, etc. Even so, Southern contends that the number of persons using said trains, when available alternative methods of transportation are considered, is insufficient to permit their convenience to outweigh the loss Southern suffers by the operation thereof.

Southern offered evidence as to the results of its operations for the twelve months ending May 31, 1959. The data submitted indicates 16,583 fare-paying passengers rode trains Nos. 13 and 16 during this period. (Note: There was evidence that an additional 1,480 passengers rode on passes.) Treating the run between Greensboro and Goldsboro as 130 miles, Southern's data shows the average number of fare-paying passengers per mile for the full distance as 8.17. Although, as indicated above, the principal public convenience presently afforded by trains Nos. 13 and 16 relates to travel between Durham and Greensboro, the data submitted does not disclose the average number of passengers per train mile on this portion (55 miles) of the Greensboro-Goldsboro line. It is this portion of the line, with it long haul connections, to which protestants' evidence as to public convenience and necessity is largely directed.

There is much evidence that Southern has done little, if anything, to promote greater use of these trains. The latest advertising of Southern's passenger service on the Greensboro-Goldsboro line Southern's General Passenger Agent could recall was an advertisement of round trip coach fares, effective May 1, through November 15, 1950. At Durham, Southern has no telephone service for reservations except during the hours the passenger (ticket) agent is on duty, that is, from 10:30 a.m. to 12:30 p.m. and from 1:30 p.m. to 7:30 p.m. A porter is on duty from 7:00 a.m. to 9:00 a.m. and from 5:30 p.m. to 7:30 p.m. In contrast, there was testimony that the Seaboard, with reference to its service in and out of Raleigh, actively solicits patronage from the Durham area by advertising its trains and where reservations may be made and tickets obtained, has a well-staffed office in Durham and runs a truck between Durham and Raleigh to take care of the baggage. In short, there is evidence from which it may be reasonably inferred that greater use of trains Nos. 13 and 16 would be made, particularly on the portion of the line between

Durham and Greensboro, if Southern made greater efforts to promote and stimulate such use.

Southern's trackage covers 6,300 miles, of which 1,284 miles is in North Carolina. In 1958, according to Southern's evidence, the net railway operating deficit from its over-all passenger service operations was $17,495,033. According to Southern's Supervisory Statistician, 31.8 cents of every dollar made on its freight service operations was consumed by the passenger deficit. Notwithstanding, Southern's net profit for 1958, after payment of all taxes and all expenses, was $30,254,231. For 1958, Southern paid dividends in the amount of $21,119,892. On December 31, 1958, after payment of all dividends, Southern's total surplus from accumulated operating profits (total retained net income) was $336,206,843. This amount is included in the stockholders' equity as of December 31, 1958, to wit, $525,748,143. Suffice to say, there is no evidence the required continued operation of trains Nos. 13 and 16 will substantially impair the credit or undermine the solvency of Southern. In this respect, *Maine Central Railroad Co. v. Public Utilities Com'n (Me.)*, 163 A. 2d 633, stressed by Southern, is distinguishable.

According to Southern's evidence, for the twelve months ending May 31, 1959, direct expenses ($195,814) in excess of revenues ($54,089) amounted to $141,725. The Commission found that these trains had been operated at a loss. Diverse conclusions may be drawn as to the extent of such loss. It is noteworthy that Southern's statement of revenues for the twelve months ending May 31, 1959, reflects only the revenue for the distance traveled on trains Nos. 13 and 16. There was testimony that, for the period July 1 through September 15, 1959, 1,393 of the 2,757 passengers on Nos. 13 and 16 moved on Southern trains beyond Greensboro; and that for every dollar allocated to the Greensboro-Goldsboro line Southern received approximately four dollars in revenue for the distance traveled by these passengers on Southern's main line trains.

While the amount of several items in Southern's statement of expenses for said period were challenged, we refer only to these items: (1) An item of $16,608, "Pullman Co. Net Loss." It is conceded that $12,900 of this item was on account of the Asheville-Raleigh sleeper (discontinued February 3, 1959) and is a non-recurring expense. (2) An item of $9,500, paid for "Injuries to Persons," is a non-recurring expense.

Whatever the operating loss incurred by Southern on trains Nos. 13 and 16, such loss was deductible in computing Southern's income taxes. The Federal and State taxes on Southern's net income amounted to 57% thereof. Hence, Southern's actual loss for the operation of

trains Nos. 13 and 16, considered in the context of its overall operations, would be no more than 43% of the loss incident to the operation of these two trains.

As indicated above, Southern's evidence discloses that the net railway operating deficit from its over-all passenger service operations in 1958 was $17,495,033. Assuming passenger operations on all of Southern's 6,300 miles, the average loss per mile was $2,776.99. If we assume Southern's net railway operating deficit on the Greensboro-Goldsboro line (130 miles) was $141,725, the average loss per mile was $1,090.19.

It was stipulated that, in proceedings before the Commission in 1957 and 1958, passenger operating deficits were considered as a factor in granting freight rate increases to all railroads operating in North Carolina.

The facts concerning Durham, Orange and Alamance Counties are matters of common knowledge and need not be stated in detail. Suffice to say, this is a central, strategic and populous part of North Carolina. The size and importance of the universities, colleges and hospitals located in the area are well known. In addition to important industries heretofore established, further extensive industrial development is anticipated. Indeed, in the opinion of Southern's General Industrial Agent, "this area holds great promise in the field of industrial development. . . . the new Research Triangle will give tremendous impetus to this growth and create ever-increasing industrial interest in this section." Southern's freight traffic on the Greensboro-Goldsboro line, already lucrative, is expected to benefit greatly by such further development.

It is noted that Southern's General Passenger Agent could recall only five cities in the United States with a population in excess of 70,000 without rail passenger service. If trains Nos. 13 and 16 were discontinued, the City of Durham would be added to this short list.

We deem it unnecessary to discuss the evidence relating to whether public convenience and necessity requires the continuance of the express service now provided by trains Nos. 13 and 16. Moreover, there are other particulars, some favorable to Southern and others favorable to protestants, which we have not discussed. None is deemed of sufficient significance to affect our decision.

The question before us is not whether the Commission's order is in accord with our judgment but whether it is lawful. Our conclusion, after careful consideration of the voluminous record, is that the Commission's denial of Southern's petition was not arbitrary or capricious or unsupported by competent, material and substantial

evidence. Hence, the judgment of the court below affirming the Commission's order is affirmed.

Southern may petition again for authority to discontinue trains Nos. 13 and 16. The Commission's order simply denies authority to abandon *entirely and immediately* all passenger service on all portions of this historic line. In the event Southern should again petition for such authority on the basis of its experience in subsequent operations, it would seem appropriate that it first take all reasonable steps to publicize and improve the service rendered by these trains; and, on the other hand, it would seem appropriate for those who contend public convenience and necessity require the continued operation thereof to make and promote greater use thereof.

Affirmed.

LONNIE F. WALKER AND WIFE, DISA H. WALKER v. TOWN OF ELKIN AND DUKE POWER COMPANY

(Filed 3 February, 1961.)

1. Municipal Corporations § 25—

Notice and an opportunity to be heard are prerequisite to the validity of a modification of municipal zoning regulations, but notice published in a newspaper of general circulation in the muncipality and county advising that changes in the zoning of described property and proposed change in the zoning ordinance of the municipality would be discussed, and inviting all persons interested in the proposed changes to be present, is sufficient to sustain a finding that notice of both change in the zoning regulations and in zone lines had been given. G.S. 60-175.

2. Appeal and Error § 49—

Findings of the court in respect to publication of notice in regard to zoning regulations of a municipality are conclusive when supported by evidence.

3. Municipal Corporations § 25—

Zoning regulations must be uniform in all the areas of a defined district, but it is not required that all areas of a defined class be contiguous, it being sufficient if all areas in each class be subject to the same restrictions. G.S. 160-173.

4. Same—

Amendment to a zoning regulation reclassifying an area containing 3.56 acres from a residential zone to a neighborhood business zone will not be held invalid on the ground that it is arbitrary or capricious, or constituted "spot zoning", when the evidence discloses that this particular

area, by reason of peculiar topography or other valid considerations, is unfit for residential purposes, and such conditions existing at the time of the change are such which would have originally justified the new classification.

APPEAL by plaintiffs from *Olive, J.*, July Term, 1960, of SURRY.

Elkin in 1954 enacted pursuant to the provisions of Art. 14, c. 160 of the General Statutes a comprehensive zoning ordinance. Zones were laid out designated as RA-8 Residential, RA-6 Residential, Neighborhood Business, Business and Industrial. The use to which a property owner might put his property was least restricted in the industrial zone. The restrictions increased in an ascending scale, RA-8 Residential being the most restricted.

The ordinance limited the use of "public utility storage or service yards" to business zones.

The zoning ordinance was amended in 1958 to permit the maintenance of "public utility storage or service yards" in a neighborhood Business zone.

The ordinance was again amended in 1960, reclassifying an area containing 3.56 acres. This area was orginally classified as RA-6 Residential. The amendatory ordinance put it in a neighborhood business zone.

After the area was reclassified, Duke Power Company purchased and announced its intention of erecting a building and using its property as a storage or service yard.

Plaintiffs, property owners adjacent to the area included in the amendatory ordinance of 1960, brought this action to determine the validity of the amendatory ordinances and for an injunction prohibiting the use of the reclassified area for any use not authorized in areas zoned as RA-6 Residential.

Defendants, by answer, asserted the validity of the amendatory ordinances and the right of Duke Power Company to use the property as permitted by the ordinances of 1958 and 1960. A jury trial was waived. Judge Olive found facts. Based on his findings, he concluded the amendatory ordinances were valid. He entered judgment accordingly. Plaintiffs, having excepted to the findings and conclusions, appealed.

Deal, Hutchins and Minor for plaintiff appellants.

R. Lewis Alexander, Carl Horn, Jr., William I. Ward, Wendell R. Wilmoth, Allen, Henderson & Williams for defendant appellees.

RODMAN, J. This appeal presents two questions: (1) Was the

ordinance of 1958 permitting the maintenance of public utility storage or service yards in Neighborhood Business zones void for failure to give notice of the proposed change as required by G.S. 160-175?

The statute is explicit. Notice with an opportunity to be heard must be given before the zoning ordinance can be modified. An ordinance adopted without notice as required by the statute can have no validity. *Eldridge v. Mangum,* 216 N.C. 532, 5 S.E. 2d 721.

The court found: "The amendment to the general zoning ordinance went into effect after April 25, 1958. It was adopted after due Notice of a Public Hearing on the amendment was published in The Elkin Tribune, a public newspaper of general circulation published in Elkin, Surry County, North Carolina, on November 7, 14, and 21, 1957, and after a public hearing was held at 8:00 o'clock P.M. on November 26, 1957." The court's finding with respect to publication is supported by the evidence. The finding is conclusive. *Eakley v. Raleigh,* 252 N.C. 683, 114 S.E. 2d 777; *Insurance Co. v. Shaffer,* 250 N.C. 45, 108 S.E. 2d 49.

The notice which the court found was published read:

"In The Matter of a Request for a Change of the Zone of the below described property to 'Neighborhood Business Zone' and a Request for change in Zoning Ordinance.

"Notice hereby is given that at 8:00 o'clock P.M. on November 26, 1957, a public hearing will be held by the Mayor and Board of Town Commissioners at the City Hall in the Town of Elkin, at which time the changes of the Zone of the below described property to that of Neighborhood Business will be thoroughly discussed, and that a proposed change in the zoning ordinance of the Town of Elkin to allow 'Public Utility Storage or Service Yard' in the Neighborhood Business Zone will be thoroughly discussed. All persons for or against these proposed changes are invited to be present and make whatever statements they desire."

Then followed a description of the property proposed to be rezoned.

Plaintiffs contend this notice related to a single change, i.e., to rezone a specific area and change its classification to Neighborhood Business with the privilege of operating public utility storage or service yards limited to the area so rezoned. Defendants assert the notice related to two distinct questions: (a) to reclassify an area, and (b) to permit the maintenance of storage or service yards in any area zoned as neighborhood business.

If plaintiffs' interpretation is correct, the ordinance is, as they assert, invalid. When a city adopts a zoning ordinance restrictions on use must be uniform in all areas in a defined class or district. Different areas in a municipality may be put in the same class.

The law does not require all areas of a defined class to be contiguous, but when the classification has been made, all areas in each class must be subject to the same restrictions. G.S. 160-173.

Manifestly the town did not intend to hold a hearing on the question of the adoption of a void ordinance. The first paragraph definitely indicates two questions are to be considered. Information is given that a discussion will be had of each question, and all persons "for or against *these proposed changes*" (emphasis supplied) are invited to attend. We do not think that any interested citizen could have been misled as to the questions open for debate. The court correctly concluded that the amendment adopted in 1958 was valid, and that the right existed to maintain public utility storage or service yards in any Neighborhood Business zones or districts.

(2) Was the reclassification of the area from Residential Neighborhood Business by the 1960 ordinance void because in excess of the authority vested in the town council?

The court found: "The 3.56-acre tract is a rough hill or ridge which has been graded down to some extent on top and also graded at the northwest corner of the intersection of N.C. Highway No. 268 and Church Street. On the south the property fronts on N.C. Highway No. 268 a distance of approximately 700 feet. It rises steeply from the highway presenting a high bank on its southern, or highway, side. The property just across Hendrix Avenue on the north and west from the 3.56-acre tract is undeveloped except near Church Street. The land on the east side of Church Street and on the south side of the highway had been built up for a number of years prior to the adoption of the general zoning ordinance in 1954. Six hundred feet in a direct line from the southeastern corner of the property is the new operations building and office of the Central Telephone Company. Six hundred to seven hundred feet directly southwest of the property is the Elkin water filtration plant and nearby is an electric substation. A new street has been opened since 1954 from the Elkin business section to N.C. Highway No. 268 with which it forms a junction near the southwest corner of the 3.56-acre tract. The Elkin water filtration plant is on this street which was opened into the highway. That due to the terrain and its location the 3.56-acre tract is not suitable for residential development."

"N. C. Highway No. 268 to North Wilkesboro, which adjoins the 3.56-acre tract to the south, is one of the two public highways passing through Elkin. There are no houses on the north side of the highway from Church Street to where Oakland Drive intersects said highway approximately one-half mile to the northwest beyond the 3.56-acre tract. There are no houses on the south side of the high-

way from Spring Street to where the highway crosses Elkin Creek also one-half mile or more to the northwest beyond the 3.56-acre tract."

There is evidence to support each of the specific findings, and these findings, we think, justify the factual conclusion that "the 3.56-acre tract is not suitable for residential development." Since the court was by consent exercising the function of a jury, it had the right to draw factual conclusions justified by the evidentiary facts.

Based on the facts found the court concluded:

"The Board of Commissioners of the Town of Elkin in adopting the rezoning ordinance on January 5, 1960, did not abuse its discretion. The action of the Board of Commissioners in adopting the ordinance was reasonable and not inconsistent with its charter, with its general zoning plan, or with the laws of North Carolina, particularly Chapter 160, Article 14, of the General Statutes."

Municipalities adopting zoning ordinances are commanded to enact regulations "made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." G.S. 160-174.

The section which authorizes the original enactment of a zoning ordinance authorizes amendments. G.S. 160-175.

To prevent hasty or ill-conceived amendments, notice must be given of proposed changes. G.S. 160-175. If twenty per cent of the property owners in, abutting on, or opposite the area to be affected by the proposed change protest, the change cannot be made unless approved by the affirmative vote of three-fourths of all members of the legislative body of the municipality. G.S. 160-176. Here only two property owners other than plaintiffs protested the change. None are property owners within the area. The change was approved by four of the five members of the town council.

The term "spot zoning" has frequently been used by the courts and text writers when referring to changes limited to small areas. Different conclusions have been reached on seemingly similar factual situations. We think the basic rule to determine the validity of an amending ordinance is the same rule used to determine the validity of the original ordinance. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78. The legislative body must act in good faith. It cannot act arbitrarily or capriciously. If the conditions existing at the time of the proposed change are such as would have originally justified the proposed action, the legislative body has the power to act.

Eggebeen v. Sonnenburg, 138 A.L.R. 495; *Keller v. City of Council Bluffs, Iowa,* 51 A.L.R. 2d 251; 58 Am. Jur. 1033; 101 C.J.S. 845.

The facts found are sufficient to support the court's legal conclusions and the judgement based thereon.

No error.

IN THE MATTER OF THE WILL OF SARA B. COX, DECEASED.

(Filed 3 February, 1961.)

1. Wills § 17—

A caveat is a proceeding *in rem*, and the will and not the property devised is the *res*.

2. Same—

Judgment probating a will in solemn form is a judicial decree and is binding and conclusive like any other judgment, and may be set aside only on the grounds and in accordance with the procedure applicable to the setting aside of judgments generally.

3. Same: Judgments §18—

The correct procedure for parties named in a caveat proceeding to present their contention that they were not in fact parties thereto and had no knowledge of the prior proceedings, is by motion in the cause and not by filing a second caveat, and although the court may, in its discretion, treat the second caveat as a motion in the cause, it is error for the court to submit the issue of *res judicata* to the jury, since the motion raises issues of fact for the determination of the court and not questions of fact for the determination of a jury.

APPEAL by caveators from *Clark, J.,* March Term 1960, of COLUMBUS.

Sara B. Cox, a resident of Columbus County, North Carolina, died on 24 September 1955. A paper writing purporting to be her last will and testament was probated in common form on 26 September 1955.

On 14 November 1955 a caveat was filed to said will by her next of kin, which caveat recited that Winifred B. Fuller and Bernard J. Baggett and others were appearing as caveators in the caveat proceeding.

This proceeding was set for trial at the November Term 1956 of the Superor Court of Columbus County. During the course of the trial, the parties agreed upon a settlement of the case but the issue of *devisavit vel non* was submitted to the jury and answered in favor

of the propounders. Judgment was entered ordering the will admitted to probate in solemn form.

There is nothing in the record or briefs tending to reveal the nature of the agreement pursuant to which the estate was settled or the manner in which it was distributed or to whom it was distributed.

On 3 March 1958, Winifred B. Fuller and Bernard J. Baggett, who were listed as caveators in the original caveat proceeding, filed a caveat to the will of Sara B. Cox, alleging that they were not parties to the original proceeding and had no knowledge of the same. It was further alleged upon information and belief that at the time of the purported execution of said paper writing the said Sara B. Cox was and had been for a long period of time, by reason of old age, disease, and both mental and physical weakness and infirmity, not capable of executing a last will and testament.

The propounders filed a demurrer to this proceeding. The demurrer was overruled and this Court denied a petition for writ of *certiorari.*

The propounders thereupon filed answer setting up the former judgment as *res judicata* and plead such judgment as a bar to this proceeding. The plea in bar was separately tried and resolved by the jury in favor of the propounders and judgment was entered dismissing the second caveat.

From this judgment the caveators appeal, assigning error.

Proctor & Proctor; Powell & Powell; D. Jack Hooks; D. F. McGougan, Jr., for propounder appellees.

J. B. Eure; Wilkinson & Ward; Rodman & Rodman; Jordan, Wright, Henson & Nichols; William D. Caffrey for caveator appellants.

DENNY, J. A caveat is an in *rem* proceeding. G.S. 31-32. It is an attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the *res* involved in the litigation. *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129.

In *Mills v. Mills,* 195 N.C. 595, 143 S.E. 130, the will involved was probated in common form and thereafter caveated and the issue of *devisavit vel non* was answered in the affirmative. The Court entered judgment ordering the will admitted to probate in solemn form. In this case, citation was issued to the three executors of the will, who were legatees thereunder, but no citation or notice whatsoever was given to the heirs at law of the testatrix. This court said: "It is obvious from the judgment and agreed statement of facts that the heirs at law of testatrix under the authorities were not made parties to the caveat proceedings by citation, nor does it

appear that they were cognizant of the proceedings or charged with knowledge that the devisees in the will had taken possession of the property thereunder. Under these circumstances they are not estopped to file a second caveat." *Bailey v. McLain*, 215 N.C. 150, 1 S.E. 2d 372; *In re Will of Brock*, 229 N.C. 482, 50 S.E. 2d 555.

It was conceded in the *Mills* case in an agreed statement of facts, that the heirs at law had not been cited and had no actual knowledge of the caveat proceedings. However, in the instant case, the very question attempted to be determined in the court below was whether the caveators herein were parties to or had knowledge of the prior caveat proceedings. It was admitted the original caveat was filed and determined in favor of the propounders of the will.

It seems clear under our decisions that a second caveat was not the proper procedure to raise and determine this question of fact, but the heirs not cited and who had no knowledge of the prior caveat should have made a motion in the original cause to set aside the judgment entered therein as to them, and if successful in having the judgment set aside, then to file a second caveat to set aside the will upon the grounds alleged in their caveat.

In Freeman on Judgments, 5th Ed., Vol. I, page 418, *et seq.*, it is said: "Assuming the power exists, the grounds upon which a decree probating a will may be set aside, except in so far as they may be affected by statute, or the nature of the case, are in general the same as those available against other judgments. * * *

"The proceedings for relief must be taken in the court in which the will was probated * * *. The procedure employed in this class of cases follows the rules governing judgments generally in similar cases, except as it may be affected by some special statutory provision, both as to the nature of the application and the time within which it should be made. * * * (N)or should the application be made by filing a caveat, but is ordinarily by motion or its equivalent rather than by petition, though as to this matter necessary showing may be proper. * * *"

In the case of *Groome v. Leatherwood*, 240 N.C. 573, 83 S.E. 2d 536, this Court said: "Ordinarily, the decrees of probate courts, when acting within the scope of their powers, will be considered and dealt with as orders and decrees of courts of general jurisdiction, and where such courts had jurisdiction over the subject matter of the inquiry, such orders and decrees are not subject to collateral attack. (Citations omitted.)"

In *Coker v. Coker*, 224 N.C. 450, 31 S.E. 2d 364, the testator died, leaving a paper writing purporting to be a will, in which he devised all his property to his wife. He had no children. Plaintiffs, collateral

heirs at law, filed a caveat. It appears that the caveators offered no evidence and that it was agreed that the issue of *devisavit vel non* should be submitted to the jury without objection by the caveators.

The plaintiffs instituted a second action, alleging that they never authorized the submission of the issue of *devisavit vel non* to the jury without presenting their evidence. In the second cause of action they undertook to assert two separate alleged causes of action: (1) in ejectment, and (2) to set aside the verdict and judgment in the caveat proceeding. When the matter came on for hearing, the trial judge treated the second cause of action as a motion in the cause and, upon the facts presented, refused to set aside the judgment in the former caveat proceedings. On appeal to this Court, *Barnhill, J.*, later *C.J.*, speaking for the Court, said: "Plaintiffs, in their second cause of action, seek to attack the former judgment by independent action rather than by motion in the original cause. On the facts alleged their remedy, if any, is by motion in the cause. (Citations omitted.) The court below, rather than dismiss, treated it as such. This was permissible. *Finance Co. v. Trust Co.*, 213 N.C. 369, 196 S.E. 340, and cases cited.

"Being a motion to set aside the former judgment, the evidence raised questions of fact for the court to decide and not issues of fact for the jury. *Cleve v. Adams*, 222 N.C. 211, 22 S.E. 2d 567."

In *Cleve v. Adams, supra*, this Court said: "The motion made in the original action to set aside the judgment * * * presented questions of fact and not issues of fact. It was for the judge to hear the evidence, find the facts and render judgment thereon. *Monroe v. Niven*, 221 N.C. 362 (20 S.E. 2d 311), and cases cited."

The court below might have treated the prayer to set aside the probate in common and solemn form as a motion in the cause and proceeded to dispose of it as such, but it did not do so. *Simmons v. Box Co.*, 148 N.C. 344, 62 S.E. 435; *Craddock v. Brinkley*, 177 N.C. 125, 98 S.E. 280; *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315; *Menzel v. Menzel & Williams v. Blades*, 250 N.C. 649, 110 S.E. 2d 333. In this there was error.

Since the probate of a will in solemn form concludes all heirs and distributees who were cited, or who had knowledge of the proceeding and an opportunity to be heard therein, in our opinion, all the next of kin of Sara B. Cox who participated in the original caveat proceeding and the compromise referred to in connection therewith, should be bound thereby, and the judgment in such proceeding will remain binding as to them. If it should be established that the caveators herein, to wit, Winifred B. Fuller and Bernard J. Baggett, were not cited or given any notice whatsoever with respect to the

original caveat proceeding and had no knowledge thereof, then as to them the judgment should be set aside and they should have an opportunity to set the will aside on the grounds alleged in the second caveat.

In *In re Sanderson's Estate,* 157 Misc. 473, 283 N.Y.S. 781, it is said: "Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. (Citations omitted.)

"Upon the opening of a decree in a proceeding for re-probate, therefore, the only persons, who may avail themselves of the added opportunity to be heard, are those who were not cited in the original proceeding and who are, therefore, not bound by the adjudication made therein. (Citations omitted.) The proceeding for probate is one in rem. (Citations omitted.) As to all parties to such a proceeding in rem, the adjudication made is conclusive and binding, except upon appeal. * * *

" * * * (T)he order * * * reopening the decree in respect to the unserved parties meant exactly what it said, namely, that it was 'without prejudice to any of the proceedings heretofore had herein,' and under such order no rights were given to nor could be acquired by, a party to the previous proceeding who was bound by that adjudication on ordinary principles of res adjudicata." See also *Security Trust & Savings Bank v. Superior Court,* 21 Cal. App. 2d 551, 69 P 2d 921; *Lewark v. Dodd,* 288 Ill. 80, 123 N.E. 260; *Samson v. Samson,* 64 Cal. 327, 30 P 979; *contra, Byrd v. Riggs,* 211 Ga. 493, 86 S.E. 2d 285.

The verdict and judgment entered below are set aside and the cause remanded for further proceeding in accord with this opinion.

Error and remanded.

F. ELI WISHART AND WIFE, HALLIE F. WISHART, S. H. WELSH AND WIFE, VIVIAN P. WELSH, C. G. TOWNSEND, E. A. SUNDY AND WIFE, FRANCES C. SUNDY, AND KATE B. BIGGS v. CITY OF LUMBERTON, A MUNICIPAL CORPORATION.

(Filed 3 February, 1961.)

1. Injunctions § 8: Municipal Corporations § 17—

Injunction will lie to prevent a municipal corporation from putting public property to an unauthorized use.

2. Municipal Corporations § 17—

Where a municipal corporation purchases or acquires property by gift for a specified use, or acquires property without any limitation on its use and thereafter dedicates the property to a particular use, it may not, without legislative authority, thereafter dispose of the property or put it to an entirely different and inconsistent use.

3. Same—

The power given municipalities to establish and regulate parks does not authorize a municipality to abandon an established park. G.S. 160-200(12).

4. Same: Injunctions § 13—

Where there is *bona fide* controversy as to whether a municipality had acquired land for a public park or, after the acquisition of the land, had permanently dedicated it to such use, a temporary order restraining the municipality from using such land for a public automobile parking lot is properly continued to the hearing upon the merits.

APPEAL by defendant from *Carr, J.*, at Chambers in *Robeson* on 24 January, 1960.

Plaintiffs, as citizens and taxpayers of Lumberton, seek to enjoin the governing authorities of Lumberton from using as a public parking lot an area owned by the town. They allege the area, which contains about one acre, has heretofore, with legislative permission, been permanently set aside as a public park, and that no authority exists for an inconsistent use such as parking of motor vehicles.

Defendant demurred *ore tenus*. The demurrer was overruled. It answered alleging: The area was acquired many years ago without limitation with respect to its use. It was first used as a public cemetery. Some time after this use was terminated, the 1925 Legislature gave the municipality authority to use the land as a park, playground, or other public purpose. It denies the area has been dedicated as a permanent park. It alleges the area is not now suitable as a park or playground, but a portion is needed to enlarge the present fire station and the remainder, as a parking area to relieve traffic congestion.

Judge Carr heard the evidence offered by the parties in support of their contentions. He concluded plaintiffs' evidence was sufficient to establish *prima facie* a dedication of the area as a public park; and because its proposed use would destroy its value as a park, he continued the restraining order to the final hearing. Defendant excepted and appealed.

McLean & Stacy for plaintiff appellees.
E. M. Johnson for defendant, appellant.

RODMAN, J. The demurrer was properly overruled. If the governing authorities were preparing to put public property to an unauthorized use, citizens and taxpayers had the right to seek equitable relief. *Rheinhardt v. Yancey,* 241 N.C. 184, 84 S.E. 2d 655; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; *Brown v. Candler,* 236 N.C. 576, 73 S.E. 2d 550; *McGuinn v. High Point,* 219 N.C. 56, 13 S.E. 2d 48; *Bowles v. Graded Schools,* 211 N.C. 36, 188 S.E. 615; *Carstarphen v. Plymouth,* 180 N.C. 26, 103 S.E. 899; *Vaughan v. Commissioners,* 118 N.C. 636, 24 S.E. 425; 52 Am Jur. 10.

"Where property is dedicated or set apart without restriction merely for public uses, the municipal authorities may determine for what use it is appropriate and shall be used, and, if not irrevocably dedicated or appropriated by them to any particular public use, its use may be changed as the public convenience and necessities require." 64 C.J.S. 299. Where, however, property is purchased for the declared purpose of use as a public park or dedicated by gift for that purpose, or if acquired without any specific intent as to its use, has thereafter been definitely set aside for the sole and specific use as a public park, the governing authorities of a municipality may not, without legislative authority, dispose of the property or put it to an entirely different and inconsistent use. *Blue v. Wilmington,* 186 N.C. 321, 119 S.E. 741; *Harris v. Durham,* 185 N.C. 572, 117 S.E. 801; *Carstarphen v. Plymouth, supra; Raleigh v. Durfey,* 163 N.C. 154, 79 S.E. 434; *Southport v. Stanly,* 125 N.C. 464; *Spicer v. Goldsboro,* 226 N.C. 557, 39 S.E. 2d 526 (The difference between a park and a parkway in a public street is noted.); *Zachry v. City of San Antonio,* 305 S.W. 2d 558; *Aldrich v. City of New York,* 145 N.Y.S. 2d 732; *Williams v. Gallatin,* 128 N.E. 121, 18 A.L.R. 1238; *Wright v. Walcott,* 131 N.E. 291; Annotations 18 A.L.R. 1246; *Lowell v. City of Boston,* 79 N.E. 2d 713; *Bloemer v. Turner,* 137 S.W. 2d 387; *Smith v. Town of Hot Springs,* 240 P 2d 249; *Carson v. State,* 38 N.W. 2d 168; *City and County of San Francisco v. Linares,* 106 P 2d 369.

Apparently the Legislature has not given Lumberton any special authorization to abandon any of its public parks. We find none in its charter; none has been called to our attention. Legislative permission has been given municipalities to abandon specific uses of public properties. They may close streets, G.S. 160-200 (11), abandon cemeteries, G.S. 160-200 (36), and sell public utilities, G.S. 160-2 (6). They are authorized to establish and regulate parks, G.S. 160-200 (12), and adopt such ordinances for the use and regulation of streets, parks, and other public property belonging to the city as they may deem best for the public welfare of the citizens of the city, G.S. 160-

200(12). The right to regulate is not broad enough to authorize an abandonment.

Since the Legislature has not seen fit to delegate to the governing authorities of Lumberton the right to abandon and put to an inconsistent use property which has been permanently dedicated as a public park by its city council, it is necessary to determine whether the area has been so appropriated. The pleadings make this an issue of fact. In determining that fact we think the language of the Court of Appeals of Kentucky in *Massey v. City of Bowling Green,* 268 S.W. 348, pertinent. It said: "A city may own property for which it has no present use, and permit it to be used temporarily for any legitimate purpose, or property devoted to a specific use may become unsuited for that purpose and a change of use become necessary, and it cannot be contended that every purpose for which it is thus used fixes its status irrevocably. If so, a city dump would remain a dump forever, though by reason of abutting development it became highly desirable for other purposes. . . .

"Public parks are essential to the proper enjoyment of urban life, and their establishment and maintenance should be encouraged in every legitimate way; but to irrevocably establish such a park or dedicate municipal property thereto by user there should be such action upon the part of the city and so continued for such a length of time as to manifest a clear and unequivocal intention for the property to be devoted to that purpose only. Perhaps, where a city has paid funds out of its treasury in making improvements for park purposes on lands owned by it to such an extent that it would be inequitable to abandon it or change its use, this might be constructed as an establishment thereof."

The restraining order was properly continued in effect pending the final hearing. *Cobb v. Clegg,* 137 N.C. 153.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES A. FOX DOCKET NO. 5477 AND ALBERT R. SAMPSON DOCKET NO. 5478.

(Filed 3 February, 1961.)

1. Constitutional Law § 20: Trespass § 9—

The operator of a privately owned department store has the right to discriminate on the basis of race as to those he will serve at the lunch counter in such store, and a Negro who, with knowledge of the policy

of the store not to serve Negroes at the lunch counter, seats himself at the lunch counter and refuses to leave after request, is guilty of trespass. G.S. 14-134.

2. Constitutional Law § 20—

The constitutional guarantee against imprisonment except by the law of the land does not protect a trespasser from prosecution or prohibit a private property owner from selecting his guests or customers.

APPEALS by defendants from *Hooks, S. J.* April Assigned Term, 1960, of WAKE.

Each defendant was tried in the Raleigh City Court on a warrant which charged that on 21 March 1960 the named defendant entered the premises of McCrory-McLellan Stores on Fayetteville Street in Raleigh and "did remain in a portion of said premises set off from the balance of said store and clearly marked and partitioned from the rest of said store (after having been told to remove himself from that portion of said store by Claude M. Breeden, manager of said store)." Each was found guilty. Fines were imposed. Each appealed to the Superior Court. There the cases were consolidated. Verdicts of guilty were returned, prison sentences imposed, suspended upon condition defendants pay a fine of $25, cost, and remain on good behavior. Defendants appealed.

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

Samuel S. Mitchell, George R. Greene, F. J. Carnage, George E. Brown and Jack Greenberg for defendant appellants.

PER CURIAM. McCrory-McLellan Stores (called McLellan) operated a mercantile establishment on Fayetteville Street in Raleigh where it offered for sale to the public a general line of merchandise. In this store it set apart an area for lunch counter service. This area was enclosed by fence. McLellan pursued the policy of restricting its lunch counter service to its employees and its white patrons. This fact was known to defendants, who are Negroes. To test the right of an operator of a private mercantile establishment to select the customers he will serve in any particular portion of the store, defendants seated themselves at the lunch counter and demanded service. They did not want or expect service as they had eaten lunch a few minutes before entering the store. Despite repeated requests to leave the enclosed area, they remained and persisted in their demand for services until arrested by city police and charged with violating G.S. 14-134, the trespass statute.

Defendants contend a merchant who sells his wares to one must serve all, and a refusal to do so is a violation of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The contention lacks merit. The operator of a private mercantile establishment has a right to select his customers, serve those he selects, and refuse to serve others. The reasons which prompt him to choose do not circumscribe his right. This was decided after carefull consideration in *S. v. Avent et al,* 253 N.C. 580. Nothing need be added to what was there said.

The reasons given for affirming the judgment in *S. v. Avent, supra,* likewise demonstrate the inapplicability of Art. I, sec. 17 of the Constitution of North Carolina. Its guarantee against imprisonment except by the law of the land was not intended to protect trespassers from prosecution or to prohibit a private property owner from selecting his guests or customers.

Since defendants had no constitutional right to remain on private property over the protest of the lawful occupant, it follows that the refusal to leave when requested was a violation of the statute.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1961

STATE v. MELLOTT FAUST

(Filed 1 March, 1961.)

1. Criminal Law § 99—

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State, giving it the benefit of every reasonable inference which may fairly be drawn therefrom.

2. Same—

Contradictions and discrepancies in the State's evidence are to be resolved by the jury.

3. Homicide § 17—

Ordinarily, premeditation and deliberation are susceptible to proof only by proof of circumstances from which they may be inferred.

4. Same—

Circumstances which may be properly considered upon the question of premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing, threats and declarations of the defendant before and during the *corpus delicti*, and the dealing of lethal blows by the defendant after deceased had been felled and rendered helpless.

5. Homicide § 4—

"Cool state of blood" as used in connection with premeditation and deliberation in homicide cases does not mean the absence of passion

and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time.

6. Homicide § 20— Evidence of premeditation and deliberation held sufficient to be submitted to the jury.

The State's evidence tended to show that two police officers were attempting to arrest two Negro boys who had engaged in a fight with knives, that a large crowd gathered, including several women, who assaulted the officers, that one of the officers attempted to arrest one of the women, that defendant, who had been standing on the sidewalk talking to other persons, took this officer's gun from its holster while his arms were pinned to his side by the crowd, that defendant made a threat of death to the officer, stepped back holding the gun beside his leg, that the other officer started toward defendant but did not draw his gun, and that defendant raised the pistol and fired when the officer was some fifteen feet away and then walked to where the officer had been pulled by the crowd and fired five more shots into his prostrate body. *Held:* The evidence shows a lack of lawful provocation of defendant or affront or menace to, or assault upon him, and is sufficient to be submitted to the jury on the question of premeditation and deliberation.

7. Criminal Law § 113—

The Court is not required to give requested instructions in the language of the request, but it is sufficient if the court correctly charges the law embodied in the request insofar as it contains correct statements of legal principles applicable to the evidence, either in response to the prayer or otherwise in some portion of the charge.

8. Homicide § 24—

Where the court correctly defines premeditation and deliberation and instructs the jury that if the purpose to kill is formed simultaneously with the killing there could be no premeditation and deliberation, it is not an error for the court to refuse to give *verbatim* requested instructions that if defendant did not decide to kill the deceased before he fired the fatal shot the defendant could not be guilty of murder in the first degree.

9. Same—

The evidence tended to show that defendant killed one of the two officers who were attacked by a crowd as they were attempting to make an arrest. The court, in giving full and correct instructions on premeditation and deliberation, charged that in order to convict defendant of murder in the first degree the jury would have to find from the evidence beyond a reasonable doubt that defendant killed the deceased in furtherance of a fixed design for revenge or other unlawful purpose, and not because he was under the influence of violent passion suddenly aroused by some lawful cause or legal provocation. *Held:* It was not error for the court to refuse to give requested instructions predicated upon rage and anger incited by deceased's mistreatment of a designated person involved in the riot.

10. Same—

Where the court fully and correctly instructs the jury upon the law

of self-defense, it is not error for the court to refuse to give verbatim defendant's requested instructions on this aspect.

11. Criminal Law § 107—

The court must give the jury instructions as to the law upon all substantial features of the case arising upon the evidence, including all defenses presented by defendant's evidence, even in the absence of request for instructions.

12. Homicide § 10½—

The defense that the death of the deceased was the result of an accident or misadventure must be predicated upon the absence of wrongful purpose on the part of the defendant while engaged in a lawful enterprise and the absence of culpable negligence on his part.

13. Homicide § 27— Defendant's evidence held insufficient to raise the defense of a killing by accident or misadventure.

Defendant's testimony was to the effect that he intentionally shot and killed deceased in self-defense. A witness for defendant testified to the effect that defendant became involved in an affray while police officers were attempting to arrest persons engaged in a general disorder and riot, that defendant willingly entered the affray and obstructed the officers in the performance of their duty, and that as a result of the affray between defendant and one of the officers, this officer fell, rolled over, and shot himself. *Held:* Defendant's evidence does not present the defense of death by accident or misadventure, since it discloses that defendant was not engaged in a lawful enterprise, and further, if it be conceded that the officer involuntarily turned the gun upon himself and fired, such result was proximately caused by defendant's own wrongful act, and therefore it was not error for the court to fail to charge the jury upon the defense of accident and misadventure.

14. Criminal Law § 111— Relationships between defendant and a witness which may result in bias are not limited to relationship by blood or marriage.

Where the State's evidence tends to show that defendant was one of a crowd which assaulted police officers and interfered with the performance of their duty in attempting to arrest persons engaged in an affray, the court correctly instructs the jury to scrutinize the testimony of the defendant and those closely related to him, notwithstanding the absence of evidence that any of the witnesses were related to defendant by blood or marriage, since relationships which may be the cause of bias are not limited to blood or marriage, and the possibilty of a relationship of sympathy between the members of the crowd disapproving and resisting the arrest of persons by the officers is a sufficient basis for the instruction.

15. Criminal Law § 94—

Whether remarks of the court to counsel during the progress of the trial tend to discredit or prejudice the accused or his cause must be determined on the basis of the probable effect of the court's language on the jury, considering the remarks in the light of the circumstances under

which they were made, and it will be presumed that the trial court properly discharged its duty to control the procedure in the interests of an orderly trial, with the burden upon defendant to show prejudice.

16. Same—

The record disclosed that defendant's counsel requested that defendant be permitted to complete his answer on cross-examination, that the court readily acceded to this request, and that defendant's counsel then interrupted the cross-examination to suggest to the witness what had been said before, and thus examine the witness out of turn. *Held:* The single admonition of the court that counsel be quiet or the court would have to use some means against him, is not shown to be prejudicial, the remark of the court being considered in the light of the circumstances under which it was made.

APPEAL by defendant from *Hooks, J.*, June 20, 1960 Regular Criminal "A" Term, of MECKLENBURG.

This appeal was docketed as case No. 219 at the Fall Term 1960.

This is a criminal action. The bill of indictment charges that Mellott Faust on 21 May 1960 in Mecklenburg County did unlawfully, wilfully, feloniously and of his malice aforethought, kill and murder Johnny R. Annas.

Defendant was duly arraigned and pleaded not guilty.

Verdict: Guilty of murder in the first degree.

Judgment: Death by inhalation of lethal gas.

Defendant appealed and assigned errors.

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

Charles V. Bell and Peter H. Bell for the defendant.

MOORE, J. Defendant assigns as error the refusal of the trial court to sustain his motion "for judgment as of nonsuit upon the charge of murder in the first degree." Defendant contends that evidence of premeditation and deliberation is lacking and that the evidence adduced at the trial did not justify a submission of the case to the jury on the charge of first degree murder.

Upon a motion for nonsuit in a criminal prosecution, the evidence must be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable inference which may fairly be drawn from the evidence. Contradictions and discrepancies in the testimony of State's witnesses are to be resolved by the jury. *State v. Simpson,* 244 N.C. 325, 331, 93 S.E. 2d 425; *State v. Kelly,* 243 N.C. 177, 180, 90 S.E. 2d 241. See also the many cases cited in Strong: N. C. Index, Vol. 1, Criminal Law, § 99, footnote 800 p. 769.

Thirteen witnesses testified for the State. Seven gave eyewitness accounts of the occurrence. The testimony, in its aspect most favorable to the State, tends to show the following facts:

The deceased, Johnny R. Annas, was a police officer of the City of Charlotte. He and police officer Bruce were on duty on Saturday night, 21 May 1960, and were patrolling the streets of Charlotte in a police car. Both were in uniform. When they arrived at the intersection of Church and Summitt Streets they observed two boys fighting with knives. The combatants were Charles and John Smith, cousins. The policemen stopped at the intersection and the boys ran. The officers pursued and caught Charles, disarmed him and brought him back to the intersection. They discovered that he had been cut and were conducting him to the car for the purpose of taking him to the hospital for treatment. John returned to the scene and started taking off his shirt. Officer Bruce took him by the arm and he started struggling to free himself. A crowd began to gather and ultimately there were 150 to 200 persons at the scene. Annas attempted to help Bruce take John into custody. John began to kick and swing his arms. Bruce took hold of John's leg. The officers pulled John toward the car. Three women came up, screaming and "hollering." The crowd closed in. Annas went to the car to telephone for help. The three women began hitting Bruce and one of them struck him in the face. Bruce drew his gun but the women continued to hit him. John was on the ground and Bruce was holding him down with his left hand. Annas returned and the crowd moved back. Bruce put his gun back in the holster. Annas took hold of John and they again started to the car with him. A woman was still hitting Bruce. Bruce took hold of her and began pulling her toward the car. A number of people grabbed Bruce and were fighting him. His arms were pinned to his sides. Defendant had been standing on the sidewalk talking to three women. Bruce heard his holster unsnap and tried to reach for and recover his gun but was prevented by the persons holding him. He saw defendant with his (Bruce's) pistol. A woman said: "I always hated them . . . . we ought to kill him." Defendant was heard to say: "Kill that . . . son of a bitch." Defendant stepped back, holding the gun down beside his right leg. Bruce was still being held and beaten. Annas started back toward Bruce, but did not draw his gun. When Annas was about fifteen feet from Bruce, defendant raised the pistol and fired and Annas fell on his back. Three men pulled him to the sidewalk. The crowd freed Bruce and he ducked into the crowd and ran to the corner of a nearby house. Defendant walked to Annas, got right over him, and moved around him firing five shots into his body. Defendant reached down and took Annas' pistol and looked toward

the spot Bruce had been. He then left the scene carrying the guns. As he left he shot out a street light. He threw the guns in a vacant lot. Next morning he surrendered at police headquarters. He is twenty-one years old. Upon examination it was found that six bullets had entered Annas' body. One entered behind the right ear and lodged in the brain. Another entered the right cheek opposite the corner of the mouth. There was a wound in the right shoulder. A bullet entered the right chest and passed through the right lung, heart and left lung. One entered above the left chest. And there was a bullet wound in the lower abdomen.

The general principles of law applicable here are well stated in the opinion delivered by *Winborne, J.* (now *C.J.*)in *State v. Bowser,* 214 N.C. 249, 199 S.E. 31, as follows:

"The exceptive assignment principally pressed on this appeal is the refusal of the court to allow defendant's motion for judgment as of nonsuit on the first degree murder charge made in compliance with the statute. C.S., 4643 (G.S. 15-173). The motion challenges the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt. *S. v. Bittings,* 206 N.C. 798, 175 S.E., 299, and cases cited.

"It is pertinent, therefore, to refer to principles applicable to the case in hand.

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. C.S., 4200 (G.S. 14-17). *S. v. Payne,* 213 N.C., 719, 197 S.E., 573, and cases cited.

"The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *S. v. Payne, supra,* and cases cited.

" 'The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner.' *S. v. Miller,* 197 N.C. 445, 149 S.E. 590; *S. v. Payne, supra.*

" 'Premeditation means "thought beforehand" for some length of time, however short.' *S. v. Benson,* 183 N.C. 795, 111 S.E. 869, at p. 871; *S. v. McClure,* 166 N.C. 321, 81 S.E. 458; *S. v. Payne, supra,* 197 S.E. 579, and cases cited.

" 'Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or

to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' *S. v. Benson, supra; S. v. Payne, supra.*

"Evidence of threats are admissible and may be offered as tending to show premeditation and deliberation, and previous express malice, which are necessary to convict of murder in the first degree. *S. v. Payne, supra,* and cases cited.

" 'General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated are admissible in evidence where other facts adduced give individuation to it.' *S. v. Shouse,* 166 N. C. 306, 81 S.E. 333; *S. v. Payne, supra.*

" 'The manner of the killing by defendant, his acts and conduct attending its commission, and his declaration immediately connected therewith were evidence of express malice.' *S. v. Robertson,* 166 N.C. 356, 81 S.E. 689; *S. v. Cox,* 153 N.C. 638, 69 S.E. 419.

" 'In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and all attending circumstances.' *Stacy, C.J.,* in *S. v. Evans,* 198 N.C. 82, 150 S.E. 678."

It is said in *State v. Watson,* 222 N.C. 672, 673, 24 S.E. 2d 540, that "premeditation and deliberation are not usually susceptible of direct proof, and are, therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred. That these essential elements of murder in the first degree may be proven by circumstantial evidence has been repeatedly held by this court. (Citing cases)."

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. *State v. Matheson,* 225 N.C. 109, 111, 33 S.E. 2d 590; *State v. Hammonds,* 216 N.C. 67, 75, 3 S.E. 2d 439; *State v. Buffkin,* 209 N.C. 117, 126, 183 S.E. 543. The conduct of defendant before and after the killing. *State v. Lamm,* 232 N.C. 402, 406, 61 S.E. 2d 188; *State v. Chavis,* 231 N.C. 307, 311, 56 S.E. 2d 678; *State v. Harris,* 223 N.C. 697, 701, 28 S.E. 2d 232. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. *State v. Dockery,* 238 N.C. 222, 224. 77 S.E. 2d 664; *State v. Hudson,* 218 N.C. 219, 230, 10 S.E. 2d 730; *State v. Hawkins,* 214 N.C. 326, 331, 199 S.E. 284; *State v. Bowser, supra.* The dealing of lethal blows after deceased has been felled and rendered helpless. *State v. Artis,* 227 N.C. 371, 373, 42 S.E. 2d 409; *State v. Taylor,* 213 N.C. 521, 523, 196 S.E. 832.

Defendant contends that all of the evidence tends to show that he acted under the influence of passion suddenly aroused, while violent passion had dethroned his reason, and not in a cool state of blood. He quotes from Black's Law Dictionary the following definition of "cool blood": "Calmness or tranquility; the undisturbed possession of one's faculties and reason; the absence of violent passion, fury, or uncontrollable excitement." We do not understand the term "cool state of blood," as it is applied in determining whether or not there was premeditation and deliberation, to mean an absence of passion and emotion. We think the following explanation is more applicable and definitive: ". . . (A)lthough there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. However, passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect." 40 C.J.S., Homicide, s. 33(d), pp. 889, 890.

It is true that the evidence of the State is conflicting as to whether or not the officers struck John Smith, threw him down so that his head hit the street, and drug him along the street, and hit Barbara Harris. In any event this conflict of evidence was for the jury to resolve. *State v. Simpson, supra.* Besides, the State's evidence tends to show a lack of lawful provocation for the sudden arousal of violent passion on the part of defendant. It shows no affront or menace to, or assault upon, defendant. On the contrary, it discloses that the officers in the performance of duty were engaged in the unequal task of making arrests and quelling a riot. The efforts of the officers were not directed toward defendant. It appears from the State's evidence that defendant had been standing on the sidewalk talking to three girls, that he deliberately took part in the riot and interfered with the officers engaged in the performance of duty, that he deliberately took officer Bruce's pistol from its holster, and as he did so said "Kill that . . . son of a bitch," that he deliberately shot officer Annas who had not drawn his gun and was fifteen feet away, that after Annas had fallen defendant *walked* to him and brutally fired five bullets at close range into the helpless and inert body of Annas, and that he then took Annas' pistol, looked toward the place Bruce had been, shot out a street light and left the scene.

We think the State's evidence sufficient to justify the court in

overruling the motion and submitting to the jury the question as to whether or not defendant killed the deceased with malice and premeditation and deliberation.

Defendant in apt time submitted to the court in writing prayer for special instructions as follows:

"1. If the evidence educed in the trial of this case has failed to prove to you beyond a reasonable doubt that the defendant decided to kill officer Annas immediately before he fired the first shot into his body, then you may not render a verdict of guilty of murder in the first degree.

"2. If you believe from the evidence brought out in this trial that the deceased officer then and there caught the witness, Barbara Ann, by the hair and drugged or pulled her by it across the street to the car and was there beating her, and that the defendant saw it and that such conduct excited the defendant to great rage and anger, and that he killed the officer while in this state of rage and anger, then you would not bring in a verdict of first or second degree murder but one for manslaughter.

"3. If from the evidence educed in the trial of this case you are of the opinion that at the time the defendant shot the deceased he reasonably believe the deceased was going to kill him then and there, or inflict upon him great bodily harm, then the defendant had the right to use such force he believed necessary to protect himself — even to the extent of inflicting death. Upon such finding it would be your duty to return a verdict of not guilty."

Defendant assigns as error the refusal of the court to give these instructions verbatim.

Insofar as the requested instructions are correct statements of legal principles and applicable to the instant case, the record discloses that the court instructed the jury in substantial conformity therewith. The court is not required to give requested instructions verbatim; it is sufficient if they are given in substance. *State v. Smith,* 237 N.C. 1, 24, 74 S.E. 2d 291; *State v. Beachum,* 220 N.C. 531, 533, 17 S.E. 2d 674. This the court may do either in response to the prayer or otherwise in some portion of the charge. *State v. Pennell,* 232 N.C. 573, 61 S.E. 2d 593.

The trial judge gave the following instruction: "Premeditation means to think beforehand, and when we say that the killing must be accompanied by deliberation and premeditation, it is meant that there must be a fixed purpose to kill which preceeded the act of killing for some length of time, however short. Although the manner and length of time in which the purpose is formed, is not material. If, however, the purpose to kill is formed simultaneously with the killing, then there

is no premeditation and deliberation, and in that event the homicide would not be murder in the first degree." We think this a correct statement of the law. *State v. Bowser, supra; State v. Spivey,* 132 N.C. 989, 992, 43 S.E. 475. It is a clear statement of the legal principle involved in the first instruction requested. The jury was further instructed that the burden is upon the State to establish each and every element of murder in the first degree beyond a reasonable doubt.

There was no prejudicial error in the refusal of the court to give to the jury the second instruction requested. The trial judge charged the jury in substance that before it could return a verdict of murder in the first degree it must be satisfied from the evidence beyond a reasonable doubt that defendant shot and killed the deceased, that he killed him intentionally, pursuant to a fixed purpose and intent to kill, and that he killed him "of his wilful deliberate and premeditated malice aforethought." And the court charged that deliberation "means an act done (by defendant) in a cool state of blood . . . and in furtherance of a fixed design to gratify his feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of violent passion suddenly aroused by some lawful or just cause or legal provocation." *State v. Lamm, supra.* Thereby the court did not confine the jury's consideration of passion aroused to the conduct of the officers toward Barbara Harris. The charge permitted the consideration of all incidents contained in the evidence which were calculated to inflame defendant's mind. There was testimony that the officers were dragging and beating John Smith. Defendant testified that he was being assaulted without cause or explanation by officer Bruce and that officer Annas was advancing on him with pistol drawn and pointed. There was also testimony that the officers had fired their pistols into the air. The requested instruction might, indeed, have left the impression with the jury that the predicate for passion was limited to the officers' abuse of Barbara Harris. Furthermore, the requested instruction might leave the impression that the defendant had the burden of satisfying the jury of the absence of premeditation and deliberation and the presence of violent passion on the issue of murder in the first degree. Defendant had no such burden.

The court further instructed the jury: "Where a person is without fault and a felonious assault is made upon him, such person upon being assaulted with intent to kill is not required to retreat but may stand his ground and, if he kills his assailant, and believes or has reasonable grounds to believe that it was necessary for him to do so, and if he kills his assailant in order to save his own life or protect himself from great bodily harm, it would be excusable homicide. And this is so whether the necessity be real or apparent. This however is

to be determined by the jury, and from the facts and circumstances as they find them to be from the evidence as they reasonably appeared to the defendant at the time." *State v. Washington,* 234 N.C. 531, 535, 67 S.E. 2d 498. This is a correct statement of the principle which defendant undertakes to incorporate in the third instruction requested.

Error has not been made to appear in the refusal of the court to give the instructions prayed.

Defendant excepts to the failure of the court to explain to the jury the law in regard to homicide by accident or misadventure. It is defendant's contention that from the testimony of Charlie Mae Stewart there is a permissible inference that deceased came to his death by accident.

The court is required to charge the jury the law upon all substantial features of the case arising upon the evidence without a special request. *State v. Ardrey,* 232 N.C. 721, 723, 62 S.E. 2d 53. The defendant is entitled to have the jury consider and pass upon any and all defenses which arise upon the evidence, under proper instructions by the court. *State v. Melton,* 187 N.C. 481, 482, 122 S.E. 17.

In order to better understand the purport of the testimony given by defense witness Stewart, we first examine the testimony of defendant. Defendant's testimony raises the plea of self-defense. It is summarized as follows:

When I arrived at the intersection of Church and Summitt a police car pulled up and stopped. Officer Bruce jumped out and grabbed me in the back. Officer Annas headed into the crowd. Bruce held on to me and Barbara Harris walked behind him. Annas came back with Charles Smith. Bruce turned me loose and attempted to "smack" me and I threw up my arm and blocked the lick. Annas went to call for help. Bruce made some remarks about what he would do to me. I started to walk off; he grabbed me again in the back of my shirt and said I was not going anywhere and that he was going to "kick me up." We got in a tussle. He grabbed me by the shoulder, twisted me around, and we continued scuffling Bruce reached for his gun and I locked his arm with a half nelson and grabbed him around the waist. We were scuffling. I grabbed Bruce's pistol to keep him from grabbing it and shooting me. He attempted to get his gun when he was fighting me, so I grabbed it and put it in my belt. I took it out of his holster. Annas started yelling at me. The crowd yelled to Annas: "Don't shoot, don't shoot." Barbara ran out from Bruce. Bruce stepped away from me and disappeared in the crowd. Annas started walking from the curb with his gun in his hand. He pointed the pistol at me. I started shooting and continued until the gun was empty. He was 20

to 25 feet away. After my first shot he raised the gun back in firing position. He fell after I emptied the gun. After he fell I went over and picked up his gun. It was lying at his feet. I shot to keep him from shooting me. The officers never said I was under arrest.

Charlie Mae Stewart's testimony is somewhat confused and out of proper sequence. Taken as a whole, it recounts the occurrence in substance as follows:

Bruce and Annas grabbed John Smith and were beating him in the chest and threw him down. Annas was beating him when Barbara Harris ran up and begged them not to beat the boy like that. Annas hit Barbara and she ran into him. Annas turned John loose, grabbed Barbara by the hair and ran across the street with her, ran her into the car, and got both her legs in his fists. Defendant went over to Annas and said: "Man, don't hit that woman like that . . . you're not supposed to hit a woman." Annas ran to the car and called for help and then back to where Bruce was holding the boy. Annas grabbed hold of the boy and shot into the air, then dived down toward the boy with the pistol. He pointed the pistol toward Barbara and John. Barbara grabbed Annas, he slung back and was kicking her, trying to get to the boy. Bruce had been shooting his gun in the air, and telling the crowd to get back. Defendant went over and got the gun from Bruce, took it away from him. Bruce grabbed defendant and defendant took his gun. Bruce ran into the crowd. Defendant said to Annas: "Don't hit that woman any more." Annas got up "like he was going to throw it to" defendant, and he ran and they just met together. "When this man throwed the gun on Mellott (defendant), they met together and they came to tussling . . . . the gun went off." I don't know who pulled the trigger. I don't know whose gun went off. Annas kind of leaned and squatted; he whirled and fired twice. You could see the pistol. Annas then fell, rolled over and shot twice more. He raised up in the back and commenced to pull the trigger again. "Annas was shooting the gun on his own self." Defendant then went over and got Annas' gun.

"Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer. Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of accident." 26 Am. Jur., Homicide, s. 220, p. 305. The negligence referred to in the foregoing rule of law has been declared by this Court to mean something more than actionable negligence in the law of torts. It imports wantonness,

recklessness or other conduct, amounting to culpable negligence. *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402; *State v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *State v. Early,* 232 N.C. 717, 62 S.E. 2d 84. For definition of culpable negligence, see *State v. Early, supra.*

The testimony of Stewart does not make the defense of accident and misadventure available to defendant. Defendant is met at the threshold by the requirement that he be engaged in a lawful enterprise. It appears from Stewart's evidence that defendant intervened in behalf of persons the officers were attempting to arrest, engaged in a general disorder and riot, willingly entered in combat with Annas, and obstructed the officers in the performance of duty. It does not appear from the evidence that either Barbara Harris or John Smith were members of defendant's family or that the officers were in the act of slaying them. Against the background of his own testimony the most defendant may claim from Stewart's version is that he acted in self-defense. If it be assumed that after Annas had fallen he involuntarily turned the gun upon himself and fired, the conclusion is inescapable that this proximately resulted from the altercation with defendant. The court did not commit error in failing to submit to the jury accident and misadventure as a defense.

Defendant excepts to the following portion of the judge's charge: ". . . the court instructs you that it is your duty to carefully consider and scrutinize the testimony of the defendant, and of those who are closely related to him, and in passing upon the evidence of such witnesses, the jury ought to take into consideration the interest of the witnesses in the result of this action."

Specifically, defendant objects to the clause "those who are closely related to him." He contends that there were no witnesses in the case closely related to him, none related by blood or marriage. He argues that there is an implication of relationship by race which is calculated to prejudice the jury against defendant. The logic of the argument is difficult to follow. The record makes no reference to the racial derivation of any of the witnesses. Information on this point may be obtained only from remarks of witnesses or references by the court in recapitulating the evidence. But from such facts as may be gleaned from the record it appears that four State's witnesses were of defendant's race — three of them eyewitnesses. If race was the basis of the challenged instruction, the instruction applied alike to State's and defendant's witnesses of that race.

It does not appear that the court had any particular relationship exclusively in mind. Bias need not prevail over the obligation of a solemn oath in any relationship, however close, of a witness to an

interested party or to a cause. But experience teaches that bias because of relationship often colors the testimony of witnesses.

The relationships which might cause bias are legion. "Any sort of connection which is perceived or imagined between two or more things, or any comparison which is made by the mind, is a relation." Webster's New International Dictionary, 2d Ed. (1936), p. 2102. The law recognizes relationships far beyond blood and marriage. "Although relationship to a party should not discredit the witness, still this is a circumstance which may be weighed by the jury. So also social and business relations, intimacy or hostility, and other circumstances which are creative of bias may properly be considered." Jones on Evidence, 5th Ed. (1958), Vol. 4, s. 991, p. 1867. "The range of external circumstances from which probable bias may be inferred is infinite. . . ." Wigmore on Evidence, 3d Ed. (1940), Vol. III, s. 949, pp. 499-504. *State v. Nat*, 51 N.C. 114; *People v. Cowan*, (Cal. 1905), 82 P. 339.

There is a strong possibility of a relationship of sympathy between the people gathered at the intersection of Church and Summitt on the night of 21 May 1960, disapproving and resisting the arrest of persons involved with the officers. This might indeed be a close relationship, analagous to that of accomplices. In any event, the court properly charged, immediately following the challenged instruction: ". . . if you believe such witnesses have sworn to the truth, then you will give to his or her testimony the same weight you would give to that of any other disinterested or unbiased witness."

The challenged instruction, as limited by that next above quoted, is proper and correct. In it we perceive no error prejudicial to defendant.

During the cross-examination of the defendant by the solicitor the following transpired:

Defendant: ". . . At the time I shot him, I was excited and nervous.

"Mr. Bell (counsel for defendant): May I say this to your Honor, I would like for the witness to have an opportunity to complete his answer. (Parentheses added).

"The Court: You may complete your answer if you have anything further to say.

"Mr. Bell: Go ahead, you said you were nervous and excited.

"The Court: Be quiet, if you don't I will have to use some means against you.

"Mr. Bell: All right.

Defendant: "I said I was nervous and excited and scared and that I could not truthfully say anything, could not say anything because I don't know nothing to say."

(Cross-examination continued).

Defendant contends that the statement of the court to defense counsel was a reprimand in the presence of the jury calculated to cause the jury to infer that counsel was dealing unfairly with the court "and that the judge was against the defendant."

This Court has said: "Every person charged with crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. . . .

"The trial judge occupies an exalted station. Jurors entertain great respect for his opinion, and are easily influenced by any suggestion coming from him. As a consequence he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury . . . .

"The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. . . . The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. . . . In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. This is so because '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.' . . ." *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

In the following circumstances the remarks of the presiding judge have been held not to be prejudicial: Court directed counsel to sit down and permit witness to complete his answer without interruption, and added: "This is not a Roman circus." *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365. The court frequently reprimanded counsel for interruptions and argumentativeness. *State v. Walker,* 251 N.C. 465, 112 S.E. 2d 61. The judge commanded counsel to sit down. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508. The court gave the jury a brief recess between speeches of counsel and commented: "We have no band to play between speeches." *State v. Rowe,* 155 N.C. 436, 71 S.E. 332. Counsel repeatedly interrupted the speech of the prosecuting attorney; the court reprimanded counsel in these words: "Now, if you don't stop making those remarks I am going to fine you; those remarks are not proper remarks to be made." *Henderson v. State* (Texas 1941), 152 S.W. 2d 743. The court addressed counsel as follows: "Now, Mr. Hilliard, I will tell you once more not to ask any more questions about that matter; the objection to that has been sustained several

times. If you persist in it, I shall have to take some strenuous measures to prevent these questions, and if necessary I will make an example of you in preserving the dignity of this court." *Almond v. People*, (Colo. 1913) 135 P. 783.

The rules generally applied in determining whether the remarks of the trial judge to counsel are prejudicial are: (1) The burden is upon appellant to show prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in the light of the circumstances under which they were made, and (4) the ultimate consideration is the probable effect of the language upon the jury. *State v. Gibson, supra; State v. Carter, supra;* 62 A.L.R. 2d 166-264.

The following circumstances are pertinent in the instant case. The defendant was being cross-examined by the solicitor and the cross-examination had not been completed. The court readily acceded to the request of defense counsel that defendant be permitted to complete his answer. Counsel in his zeal interrupted to suggest to witness what had been said before, and thus examined the witness out of turn. It does not appear that defendant was limited in any way in giving testimony or that counsel would have been prevented from examining defendant on redirect, if he had desired to do so.

It was the attempt to examine defendant out of turn that occasioned the judge's remark. The effect of the admonition was that counsel should desist or that measures would be taken against him. The entire remark consisted of a single sentence, the words were moderate and appeared to be dispassionate. There were no other incidents of this nature during the trial. Applying the rules enunciated above, we are of the opinion that prejudicial error does not appear. The court was doing nothing more than exercising that control of procedure which is essential to an orderly trial. We do not believe the incident could have been misunderstood by a jury of reasonable citizens.

Assignments of error 3 and 9 have been carefully examined and considered. We find them to be without merit. No good purpose would be served by extended discussion.

In the trial of the case below, we find

No error.

WALDRON BUICK CO. v. GENERAL MOTORS CORPORATION AND LEE A. FOLGER, INC.

(Filed 1 March, 1961.)

1. Pleadings § 28—

Plaintiff may recover only upon the case made out by his pleadings.

2. Monopolies § 2—

Evidence tending to show only that an automobile manufacturer executed contracts with two dealers, giving each the exclusive agency for the make of car in their respective municipalities, some fourteen miles apart, that plaintiff dealer solicited sales in the municipality in which defendant dealer was located, that defendant dealer protested to the manufacturer, and that the manufacturer advised plaintiff dealer to desist from soliciting customers in defendant's territory, *is held* insufficient to show that the manufacturer and defendant dealer entered into an unlawful agreement or combination in restraint of trade, since defendant dealer was seeking merely to protect its valid contractual rights with the manufacturer. G.S. 75-1, 75-5(b) (6).

3. Contracts § 7—

Contracts in partial restraint of trade will be upheld when they are founded upon valuable consideration, are reasonably necessary to protect the interests of the parties, and are sufficiently limited in time and territory so that they do not adversely affect the interest of the public.

4. Same—

A contract between an automobile manufacturer and a dealer which gives the dealer for a period of less than two years the exclusive agency for the sale of the particular make of automobile within the dealer's municipality and its environs, in consideration of the dealer's contractual obligation to maintain its salesroom, staff of salesmen, and working capital up to prescribed standards and to contribute to the advertising fund for that make of car, will not be held an unlawful restraint of trade, the contract being limited in time and territory to that reasonably necessary for the protection of the dealer without adversely affecting the public interest, and being supported by valuable consideration.

APPEAL by plaintiff from *Campbell, J.*, February 29, 1960, Term, Schedule B, of MECKLENBURG, docketed and argued as No. 248 at Fall Term, 1960.

Civil action instituted January 18, 1957, by Waldron Buick Company (Waldron), a North Carolina corporation with principal office and place of business in Concord, Cabarrus County, North Carolina, against General Motors Corporation, a Delaware corporation, and Lee A. Folger, Inc. (Folger), a North Carolina corporation, with principal office and place of business in Charlotte, Mecklenburg County, North Carolina.

The action is to recover for alleged "severe financial losses, depletion of its assets, great injury to its credit and reputation, and

the total ruin of its business," alleged to have been proximately caused by alleged unlawful acts of defendants pursuant to defendants' alleged unlawful combination or conspiracy to restrain trade in Buick motor vehicles in and around Charlotte. Waldron alleges it sustained actual damages in the amount of $54,000.00. The action is to recover treble damages against defendants, jointly and severally.

The complaint alleges that General Motors, the manufacturer, agreed to sell Buick motor vehicles to Waldron under the terms of a "Direct Dealer Selling Agreement" entered into on or about April 25, 1955; that, while this dealership agreement obligated Waldron to develop the sale of such vehicles particularly in the area of Concord, it was specifically understood and agreed that the market area available to Waldron would include the City of Charlotte; and that Waldron, soon after establishing its business near Concord, on that section of U. S. Highway #29 running between Concord and Charlotte, began developing and promoting sales in accordance with its dealership agreement and in May and June, 1955, realized substantial profits from said business.

The complaint alleges further that Folger, which "held dealership rights under a contract with General Motors," had been "for several years" and was engaged in selling Buick vehicles in Charlotte and in a wide area surrounding Charlotte.

Paragraphs 8, 9 and 10 of the complaint, as amended, are as follows:

> "8. In July, 1955, General Motors and Folger, as the plaintiff is informed and believes, willfully and unlawfully joined together in a combination or conspiracy to restrain trade in the area in and around Charlotte, North Carolina, to prevent competition in the selling of goods in that area, and to destroy the plaintiff's business, all in violation of the laws of North Carolina.
>
> "9. That during the months from July, 1955, to July, 1956, inclusive, the defendants, pursuant to said illegal combination or conspiracy, willfully and unlawfully acted together to bring pressure upon the plaintiff to discontinue its sales activities, advertising, and sales promotion and solicitation anywhere within the City of Charlotte and suburban areas immediately adjacent thereto, and to cease all sales negotiations with persons residing in or near Charlotte, even where such negotiations were initiated by prospective purchasers, the sole purpose of this pressure being to restrain trade in that territory and to create an unlawful monopoly by destroying plaintiff's business and eliminating plaintiff as a competitor of Folger in and around the City of Charlotte, all in violation of the laws of the State of North Carolina.

"10. On July 24, 1955, General Motors, acting pursuant to this unlawful combination or conspiracy with the defendant Folger, ordered the plaintiff to cease immediately all sales activities in and around the City of Charlotte, and thereafter, during the period July, 1955, to July, 1956, by various direct and indirect pressures, forced the plaintiff to confine its sales promotion and activities in such way as to refrain from any form of competition with Folger in that area, all in violation of the laws of North Carolina. In furtherance of this illegal combination and conspiracy, General Motors required plaintiff during the months of August and September, 1955, to purchase an increasing number of Buick vehicles although, as General Motors well knew, such vehicles could not be profitably sold by plaintiff under the area restrictions which General Motors was unlawfully undertaking to impose."

Defendants filed separate answers.

Folger admitted "that during the times mentioned in the complaint and many years prior thereto, it had dealership contracts with General Motors, and pursuant thereto was engaged in the business of buying Buick automobiles from General Motors and selling them to the public in Charlotte and adjacent territory." Except as stated, Folger denied all material allegations of the complaint.

General Motors alleged it and Waldron had executed three dealership agreements, to wit, on April 25, 1955, November 1, 1955, and March 1, 1956; and that these documents, as provided therein, stated the entire agreement as to the rights and obligations of the respective parties. It alleged that, since 1937, it had executed successive dealership agreements with Folger. Except as stated, General Motors denied all material allegations of the complaint.

Each defendant pleaded in substance these further defenses: (1) The controversy is entirely private in nature and involves no injury to the public, hence G.S. 75-1 *et seq.*, do not apply; (2) plaintiff's action is barred by G.S. 1-54, the one-year statute of limitations; (3) plaintiff, by its acts and conduct, is estopped to maintain this action.

Plaintiff introduced its evidence and rested its case. The court, allowing the motion of each defendant therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Blakeney, Alexander & Machen for plaintiff, appellant.

Kennedy, Covington, Lobdell & Hickman and Henry M. Hogan for defendant General Motors Corporation, appellee.

Cochran, McCleneghan & Miller for defendant Lee A. Folger, Inc., appellee.

BOBBITT, J. Plaintiff seeks to recover treble damages for business losses allegedly caused by acts committed pursuant to an alleged unlawful combination or conspiracy entered into by defendants in July, 1955, to restrain trade in Buick automobiles in an area in and around Charlotte, North Carolina, to prevent competition in the selling of goods in that area, and to destroy plaintiff's business. G.S. 75-1, G.S. 75-16.

A plaintiff must make out his case *secundum allegata*. There can be no recovery except on the case made by his pleadings. *Andrews v. Bruton*, 242 N.C. 93, 95, 86 S.E. 2d 786, and cases cited; *Manley v. News Co.*, 241 N.C. 455, 460, 85 S.E. 2d 672, and cases cited.

The basic question is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to support a finding that the defendants entered into the alleged unlawful combination or conspiracy. Hence, the evidential facts stated below include only portions of the testimony and exhibits deemed pertinent to a determination of this basic question.

Waldron was incorporated in April, 1955. It commenced business in May, 1955, pursuant to its written agreement of April 25, 1955, with General Motors, as the Buick dealer in Concord. Folger was, and had been for many years, the established Buick dealer in Charlotte.

The dealership agreement between General Motors and Folger, in effect on and prior to April 25, 1955, and thereafter, provided: "FIRST: Subject to the terms and conditions hereof, Seller (General Motors) will sell and Dealer (Folger) will buy Buick motor vehicles and chassis and Dealer shall have the obligation to develop properly the sale thereof particularly in the" "Metropolitan Area of Charlotte, N. C.," defined as the City of Charlotte and a described portion of Mecklenburg County lying southeast of and immediately adjacent to the City of Charlotte.

The Folger dealership agreement provided that no changes as to the maximum number of dealers in said Charlotte area would be made by General Motors "unless and until a survey, analysis or review" thereof "has been made and at least sixty (60) days' notice of such proposed change shall have been given" to Folger so that it, if it desired to do so, would have opportunity to discuss the proposed change with General Motors prior to the effective date thereof. In an addendum, made a part of said dealership agreement and executed simultaneously therewith, General Motors established "at One (1)," to wit, Folger, the maximum number of Buick dealers to be located in said Charlotte area.

The dealership agreement of April 25, 1955, between General Motors and Waldron, provided: "FIRST: Subject to the terms and conditions hereof, Seller (General Motors) will sell and Dealer (Waldron) will buy Buick motor vehicles and chassis and Dealer shall have the obligation to develop properly the sale thereof particularly in the following area: CONCORD, NORTH CAROLINA."

Waldron established its place of business in leased premises located on U. S. Highway #29, "half a mile from the city limits of Concord and 14 miles from Charlotte . . . on the right-hand side as you go out 29 towards Greensboro." W. R. Waldron, Sr., and W. R. Waldron, Jr., executive officers of Waldron, resided in Charlotte. Waldron, Jr., had been sales manager in Charlotte for Young Motor Company, Ford Dealer in Charlotte. Waldron employed Gordon and Allison, who resided in Charlotte, as salesmen. They had previously been employed in Charlotte as salesmen (under Waldron, Jr.) for Young Motor Company. Gordon and Allison had "a clientele already built up in Charlotte, their primary duty was to sell cars and to develop the sales in the area of Charlotte and Mecklenburg County . . ."

In May, 1955, Waldron sold a total of twenty-one new Buicks, five in Charlotte, eleven in the Concord area, two in Kannapolis, two in Salisbury, and one (undesignated) elsewhere. In June, 1955, Waldron sold a total of twenty-four new Buicks, fourteen to residents of Charlotte, six in the Concord area, one in Kannapolis and three (undesignated) elsewhere. In July, 1955, Waldron sold a total of twenty-one new Buicks, eight in Charlotte, five in the Concord area, two in Kannapolis, two in Salisbury, and four (undesignated) elsewhere. Prior to July 15, 1955, Gordon and Allison (Waldron's salesmen) spent about ninety per cent of their time soliciting sales in Charlotte.

Testimony, admitted as to General Motors but not as to Folger, tends to show that officials of General Motors, prior and subsequent to the execution of Waldron's dealership agreement of April 25, 1955, but before the conference of July 20, 1955, discussed below, gave assurances that Waldron had the right to contact prospective purchasers and solicit sales in Charlotte and would be permitted and expected to do so.

Folger protested Waldron's sales activities in said Charlotte area.

On May 23, 1955, in a conversation between Spencer Folger, an official and stockholder of Folger, and Waldron, Jr., General Manager of Waldron, Spencer Folger said: "Bill, you have to get these salesmen out of Charlotte. They are over here working on our customers, calling on people that are interested in buying cars at Folger and that some of our salesmen are dealing with. You got to stay out of Charlotte. You got to quit this advertising. Now, Bill, you and I have

been friends for a long time. I have known you and your family but this is business. I put one dealer out of business and I got a lot of money and will put you out of business if you don't cut this out. I have a lot more money than you got."

In June, 1955, in a telephone conversation with Waldron, Jr., Spencer Folger said he was "very tired" of his salesmen reporting to him that Waldron's salesmen were still living in Charlotte and that they were following up deals in Charlotte. Also: "Now, Bill, you have got to move those men out of town; you have got to stay over there. If you don't I am going to put you out of business just like I have put another dealer out of business."

Prior to the conference of July 20, 1955, discussed below, Folger complained to General Motors of Waldron's interference with Folger's sales activities in Charlotte, contending its dealership agreement entitled it to protection therefrom.

The conference of July 20, 1955, was held in the Charlotte office of the Buick Motor Division of General Motors. Frank Leigh, an official of General Motors, Waldron, Jr., and Spencer Folger were present. Waldron asserted it had the right to continue active sales solicitation in said Charlotte area. Folger contended it had been designated the only dealer in said Charlotte area and that General Motors was obligated to protect it from interference by Waldron. In the course of the conversation, Spencer Folger said: "Frank, if you are going to let this man sell in Charlotte when we have a million-dollar investment here, I am going to Belmont and close my doors and I will operate the same way he is."

As the conference of July 20, 1955, concluded, Leigh said: "Bill, I have got to protect this dealer's investment here. This man has a large investment. . . . I want you to get into your own little back yard and get into the spirit of things. . . . I want you to get over there and sell your cars in Concord; leave Charlotte alone."

The following day, July 21, 1955, Waldron, Jr., in a letter to Leigh, said:

> "It was certainly nice of you to give Spencer and myself the time you did yesterday. It was a very understanding interview.
>
> "We know and appreciate that Spencer and Lee Folger have a large investment and are out to protect that investment. We also know that they are of the opinion that we are soliciting business in the Charlotte area. Frank, we can truthfully say that we are not soliciting business, but have followed up people who have expressed a desire to have us offer them a trade or straight sale proposition.

"In regards to your decision concerning following up any persons who might come over here and being unable to close a transaction in our place, we follow them up in Charlotte, we are not completely in accord.

"As we discussed yesterday, Mr. Jack Williams informed us that we could follow up any party desirous of having us offer them a proposition. This decision came after our discussing the Grant Motor Company of Kannapolis following up deals in the limits of Concord.

"We feel that if we are not allowed to follow up persons who are desirous of dealing with us, that we are being curtailed in an unfair way.

"You may rest assured that we are not intending to do anything contrary to your decision, under any circumstances, but we would appreciate your reviewing the situation and upon such reviewing, perhaps alter your decision to the point that we be allowed to follow up such persons who approach us and are desirous of having us offer to them a proposition.

"We will appreciate your consideration in this matter, and would like to know your feelings at your convenience."

Shortly thereafter, apparently in early August, 1955, Waldron, Jr., complained to Jack Williams, Buick's District representative for the Concord area, of the restrictions imposed by Leigh on Waldron's sales activities. Williams replied: "Now, this is Buick Motor Division's orders to me to give you. Bill, you stay out of Charlotte."

Waldron's dealership agreement of April 25, 1955, expired October 31, 1955. It executed a second dealership agreement dated November 1, 1955, containing identical provisions except as to duration. Its expiration date was stated as October 31, 1956. This was superseded by a third dealership agreement, effective from March 1, 1956, through October 31, 1960. This third agreement was terminated by Waldron in August, 1956.

After the conference of July 20, 1955, Folger's protests were directed principally to particular phraseology in Waldron's advertisements in Charlotte newspapers and over a Charlotte radio station and to one incident relating to alleged interference by Waldron's salesman with a Folger prospect who lived in Charlotte.

Allison moved to Concord in June or July, 1955. Gordon moved to Concord in August, 1955. After July 15, 1955, they spent about thirty per cent of their time in Charlotte. Waldron continued to advertise in Charlotte newspapers and over a Charlotte radio station. It employed "bird dogs in Charlotte," a "bird dog" being "one with whom

an arrangement is made to search out and refer prospective customers to the dealer." It continued to make sales in Charlotte until it terminated its dealership in August, 1956. In September, October, November and December, 1955, and in January, March, and July, 1956, Waldron sold more new Buicks in Charlotte than in Concord, and in May, 1956, sold an equal number (5) in each area. Of the total of 297 cars handled by Waldron, 98 were sold in Charlotte, 78 were sold in Concord, and 121 were sold in Kannapolis, Salisbury, Winston-Salem and Greensboro. The rest were sold at undesignated places or otherwise disposed of.

Although Waldron continued to solicit sales and to sell in said Charlotte area after the conference of July 20, 1955, it conducted these activities stealthily rather than openly. Waldron, Jr., testified: ". . . I instructed my men not to openly solicit in Charlotte. I told them—'If you have got to go over there, don't be seen.' . . . To the best of my recollection, they did follow my instructions."

The evidence, in our opinion, is insufficient to show that either General Motors or Folger intended or acted to destroy Waldron's business. What General Motors did, and all that it did, was to recognize the rights asserted by Folger by attempting, with a limited measure of success, to prohibit the solicitation of sales by Waldron in said Charlotte area. As to Waldron's activities in its own area of sales responsibility, the evidence discloses that General Motors cooperated fully with Waldron in its efforts to conduct a profitable business.

A letter of November 21, 1956, from Waldron, Sr., to General Motors, contains this final paragraph: "I want to take this opportunity to thank you for the splendid co-operation you gave us while we were in Concord. If I can reciprocate in any way, please do not hesitate to call upon me." Folger sold parts to Waldron, at first on credit and later (when Waldron failed to meet its obligations promptly) on a C.O.D. basis; and in January, 1956, from its own stock, sold a Buick to Waldron.

We pass, without discussion, defendants' contention that the evidence shows Waldron's business losses and insolvency were caused by limited resources, high operative costs, poor trading practices, etc. We assume, for present purposes, that the evidence is sufficient to show that Waldron sustained *some loss* on account of the restrictions imposed by General Motors upon its solicitation of sales in said Charlotte area.

We need not speculate as to what injury Folger might or would have inflicted upon Waldron by lawful competitive practices if General Motors had refused to recognize Folger's rights as exclusive Buick

dealer in said Charlotte area. In this connection, it is noted that General Motors did not, by the terms of said dealership agreements or otherwise, impose or attempt to impose any restrictions on Folger or on Waldron in respect of the resale price of Buick cars purchased by them from General Motors. Suffice to say, General Motors did recognize Folger as the exclusive Buick dealer in said Charlotte area at the conference of July 20, 1955. Apart from its insistence that it be so recognized, there is no evidence of any act of Folger by which Waldron was injured.

Prior to its dealership agreement with Waldron, General Motors had "established" Folger as its only Buick dealer in said Charlotte area. By doing so, we are of opinion, and so hold, that General Motors agreed that Folger was to have exclusive rights in respect of selling and soliciting sales within said Charlotte area. In this connection, it is noted that General Motors did not impose or attempt to impose any restrictions on Waldron's sales activities *except within said Charlotte area,* whether the prospect involved resided in Charlotte or elsewhere.

Waldron's action is based on the statutory provision declaring illegal "(e)very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina," G.S. 75-1, and particularly on G. S. 75-5(b) (6) which declares it unlawful for any person, "(w)hile engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State with the intention of preventing competition in sellng or to fix the price or prevent competition in buying such goods within these limits."

Under G.S. 75-1 *et seq.,* as interpreted in *Mar-Hof Co. v. Rosenbacker,* 176 N.C. 330, 97 S.E. 169, and later cases, "agreements in partial restraint of trade will be upheld 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.' " As stated by *Allen, J.,* in *Sea Food Co. v. Way,* 169 N.C. 679, 682, 86 S.E. 603: ". . . the true test now generally applied is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public."

The validity of a covenant in a contract of employment providing that, upon termination of the employer-employee relationship, the employee will not engage in a business in competition with the employer, is determinable by these tests: (1) Is it founded on a valuable consideration? *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d

431, and cases cited. (2) Is it reasonably necessary to protect the legitimate interests of the employer? *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543, and cases cited. (3) Is the limitation or restriction reasonable in respect of both time and territory? *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352; *Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154, and cases cited.

In connection with the sale of a business, including good will, the validity of a covenant providing that the seller will not engage in business in competition with the buyer is determinable by these tests: (1) Is it reasonably necessary to protect the legitimate interests of the purchaser? *Shute v. Shute,* 176 N.C. 462, 97 S.E. 392. (2) Is the limitation or restriction reasonable in respect of both time and territory? *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910, and cases cited.

In each of these two classes of cases, a limitation or restriction upon a person's right to engage in a lawful occupation or business is deemed detrimental to the public interest unless the restraint imposed is reasonable under the stated tests.

The cited decisions, while relating to diverse factual situations, establish the tests by which the reasonableness of a contract in partial restraint of trade is to be determined.

Waldron contends: If General Motors had expressly restricted Waldron to selling and to soliciting sales in the Concord area, such provision would be unlawful as violative of these statutory provisions; hence, any act of General Motors restricting Waldron from selling and from soliciting sales in the Charlotte area was unlawful.

Decision does not depend upon whether *a contractual provision* purporting to restrict Waldron from selling or soliciting sales in the Charlotte area *would be valid.* Waldron asserts it did not so contract but that the action of General Motors in attempting to impose such restriction violated its contract rights. However, Waldron does not allege a cause of action against General Motors for alleged breach of its obligations to Waldron under its dealership contracts.

Whatever the rights of Waldron and General Motors, *inter se,* and assuming the validity of its agreement with Folger, General Motors was obligated to recognize Folger as the sole and exclusive Buick dealer in the Charlotte area. If so, General Motors' obligations to Folger were in conflict with its alleged obligations to Waldron.

Obviously, Folger would not be guilty of participation in an unlawful combination or conspiracy by insisting upon its legal rights. Whether Folger entered into an unlawful combination or conspiracy with General Motors in violation of G.S. 75-1 *et seq.,* turns upon the answer to this question: Was it unlawful for General Motors and

Folger to enter into an agreement under which Folger was given the exclusive right to sell Buicks and to solicit sales within the area defined in Folger's dealership agreement?

It is noted that General Motors, not Folger, was subjected to the restraint imposed by its establishment and recognition of Folger as the sole and exclusive Buick dealer in the Charlotte area. Whether Folger was entitled to the protection afforded thereby depends upon whether this agreement in partial restraint of trade was reasonable under the applicable tests.

Mar-Hof Co. v. Rosenbacker, supra, deals with a similar factual situation. The plaintiff, a manufacturer, sued the defendant, a merchant, to recover an unpaid balance owing for goods sold and delivered. As a counterclaim, the defendant alleged that the plaintiff had agreed that defendant would have the exclusive sale of Mar-Hof middy suits in Winston-Salem for the 1916 and 1917 seasons but in breach of such agreement the plaintiff had placed a quantity of these suits with other retail dealers in Winston-Salem, and by reason thereof the defendant had sustained damages on account of diminishing sales and lost profits. The plaintiff, by demurrer, challenged the defendant's said counterclaim on the ground that the alleged agreement was void as violative of statutory provisions now codified as G.S. 75-1 *et seq.*

As set forth in the opinion of *Hoke, J.* (later *C.J.*), the allegations of the counterclaim were considered as alleging "that defendant, an established merchant in Winston-Salem, bought of plaintiff, a manufacturer of middy suits, desirous of introducing his goods into a new market, a large quantity of such middy suits, and in compliance with her agreement and as a part of the consideration, defendant had spent large sums of money and much time and effort in advertising the goods and popularizing them on the local market, and had lost heavily by plaintiff's breach of the agreement in placing designated quantities of the goods with other local dealers."

This Court *reversed* a decision sustaining plaintiff's said demurrer. It was held that a contract such as that alleged, when made in good faith, did not come within the prohibition of the statutory provisions now codified as G.S. 75-1 *et seq.*

Waldron, in its brief, referring to the *Mar-Hof* case, says:

> "Under this case, a manufacturer, while still in possession of the natural monopoly of his own product, may elect to do business with only one distributor in a given community, and thereby give that distributor, in practical effect, an exclusive territory for the retailing of this product. He may even go further, and make a

legally enforceable agreement with the distributor that he will not also deal with any other distributor in that community.

"But that is as far as the holding in the *MAR-HOF* case goes. It does not purport to lay down any rule on whether or not the manufacturer may lawfully grant an exclusive franchise to a dealer in a particular area of this State and then agree *not to permit* any other dealer to sell in that area goods which that other dealer has purchased from the manufacturer."

Whatever the respective rights and obligations of Waldron and General Motors, *inter se,* if Folger did nothing more than insist upon legal rights conferred by the dealership agreement it entered into with General Motors prior to Waldron's dealership agreement of April 25, 1955, it did not thereby participate in an unlawful combination or conspiracy in restraint of trade.

As to the reasonableness of the restraint imposed on General Motors:

1. The agreement as to restraint was founded on a valuable consideration. Under its dealership agreement, Folger was required, *inter alia,* to comply with General Motors' requirements in respect of (a) the maintenance of its place of business, including "salesroom, service station, parts and accessories facilities," (b) working capital, (c) contributions to the Buick Advertising Fund. In addition, Folger was required to "maintain a staff of salesmen and a selling and customer relations organization adequate to take care of the sales potential" in said Charlotte area.

2. The protection afforded did not extend beyond the legitimate business interests of Folger. It related solely to sales activities within an area in which Folger had been the established Buick dealer for many years and in which it had a large investment.

3. In respect of time, the Folger dealership agreement in force on April 25, 1955, expired October 31, 1955. An agreement executed November 1, 1955, providing for expiration on October 31, 1956, was superseded by an agreement of March 1, 1956, providing for termination on October 31, 1960. In the two later agreements, General Motors, in like manner, established Folger as the exclusive Buick dealer in said Charlotte area.

4. The protection afforded did not appreciably interfere with the public interest. The restraint related solely to a single make of automobile, to wit, Buicks, in a highly competitive market. Moreover, Buick dealers in close proximity to Charlotte, including the Concord dealer, could sell to any resident of Charlotte. The only protection afforded Folger was an exclusive right to sell and to solicit sales *within the boundaries of said Charlotte area.*

Based on our decisions, particularly the *Mar-Hof* case, our conclusion is that General Motors' said agreement with Folger was not invalid as an unreasonable restraint on trade.

Most, if not all, pertinent decisions in other jurisdictions are discussed or cited in an article, "Restraints on Trade and the Orderly Marketing of Goods," by Stanley D. Robinson, 45 Cornell Law Quarterly (1959-1960), 254 *et seq.* Suffice to say, the conclusion reached herein is in accord with the weight of authority in other jurisdictions.

Two recent decisions are noteworthy, namely, *Schwing Motor Company v. Hudson Sales Corporation,* 138 F. Supp. 899, affirmed 239 F. 2d 176, and *Packard Motor Car Co. v. Webster Motor Car Co.,* 243 F. 2d 418, reversing 135 F. Supp. 4. While these were actions for treble damages under the Federal Anti-Trust Statutes, the basic question was the same as that here presented. It was held that an exclusive dealership in one make of automobile in a particular city, while it necessarily involved a limited monopoly to sell this product of the manufacturer in the area covered thereby, was not invalid as an unreasonable restraint on trade. As here, the agreements under consideration were not between competitors but imposed restraint upon a manufacturer and in favor of its dealer.

For the reasons stated, the evidence in our opinion was insufficient to support a finding, in accordance with Waldron's allegations, that General Motors and Folger in July, 1955, entered into an unlawful combination or conspiracy in restraint of trade.

Hence, the judgment of involuntary nonsuit is affirmed.

Affirmed.

LENOIR FINANCE COMPANY v. JAMES S. CURRIE, COMMISSIONER OF REVENUE, STATE OF NORTH CAROLINA.

(Filed 1 March, 1961.)

1. Taxation § 1a—

The power to tax is limited only by constitutional restrictions.

2. Taxation § 1c

The constitutional requirement of uniformity in taxation extends not only to property taxes but also to license, franchise, and other forms of taxation. Constitution of N. C., Art. V § 3.

3. Taxation § 1a: Constitutional Law § 24—

A tax statute which meets the requirement of uniformity imposed by

the State Constitution meets the requirements of the Fourteenth Amendment to the Federal Constitution.

4. Taxation § 1c: Constitutional Law § 10—

The formulation of classifications for taxation and the determination of the amount of taxes each class should bear are matters of public policy within the exclusive province of the Legislature, and the courts have the duty to determine only whether the classifications set up by statute are based upon differences in fact.

5. Taxation § 1c—

While classifications based solely on nomenclature can not be allowed to stand, the courts are not required to treat things which are different in fact as the same in law.

6. Controversy Without Action § 2—

An agreed statement of facts with stipulation that no facts other than those stated are material or necessary to the decision of the case, does not preclude the courts from taking notice of pertinent public laws and facts within common knowledge.

7. Taxation § 1c—

The imposition of taxes on installment paper dealers, G.S. 105-83 (a) (b) is not rendered discriminatory by the exemption from the tax of corporations organized under the State or national banking laws, G.S. 105-83 (d), even though banks, in addition to their regular banking business, carry on the identical business of discounting commercial paper, since the two businesses are distinct in fact and the one is subject to regulations and controls which are not applicable to the other.

APPEAL by plaintiff from *Hobgood, J.*, June 1960 Civil Term, of WAKE. Docketed and heard here as No. 454, Fall Term, 1960.

Plaintiff seeks to recover $1911.36, taxes paid under protest. It alleges the statute under which the tax was levied is unconstitutional and void.

By agreement of the parties plaintiff's right to recover was made to depend on facts summarized and quoted as follows:

(1) Plaintiff is a domestic corporation with offices in Lenoir, Statesville, Hendersonville, Elkin, and Forest City, N. C. "The plaintiff is engaged in the business of an installment paper dealer as defined in subsection (a) of Section 105-83 of the General Statutes of North Carolina and is generally engaged in the auto finance business."

(2) The provisions of G.S. 105-83 are quoted as a part of the stipulated facts.

(3) "Many of the State and National Banks in North Carolina are installment paper dealers as defined by said statute and are engaged in the auto finance business, in addition to their other activities, in substantial competition with the plaintiff and other non-bank install-

ment paper dealers, and are doing a substantial volume of the installment paper dealer business in North Carolina."

(4) Plaintiff, an installment paper dealer and auto finance company, pays to North Carolina franchise, license, intangible, sales, and income taxes, and pays to the counties and cities in which it operates *ad valorem* taxes on its real and personal property. The taxes paid include the taxes levied pursuant to the provisions of G.S. 105-83.

(5) Plaintiff made the reports required by subsection (b) of G.S. 105-83 for the quarter ending 30 September 1959 and paid under protest $1911.36 as taxes imposed by said subsection, based on the report so made. The amount so paid was in addition to the tax levied pursuant to subsection (a) of G.S. 105-83.

(6) Within thirty days after payment plaintiff made written demand for refund. The demand was rejected. Plaintiff then instituted this action.

(7) Banks doing business in North Carolina, including national banking associations, are required by G.S. 105-228.12 to pay an excise tax equal to 4½% of their net income. The tax levied pursuant to that section is, by G.S. 105-228.13, in lieu of State intangible property, franchise, and income taxes, and taxes levied on tangible personal property by local taxing jurisdictions. State banks also pay the fees authorized by G.S. 53-122.

(8) National banks are taxed by North Carolina to the extent and manner permitted by Title 12, USCA, sec. 548.

"(9) The tax imposed by North Carolina General Statutes 105-83 on installment paper dealers is not imposed upon State or National banks, though many of them are also installment paper dealers in addition to their other activities, and by virtue of the provisions of Title 12 USCA, Section 548, such a tax may not be imposed upon National banks.

"(10) A substantial number of State and National Banks doing business in North Carolina engage in the business of installment paper dealers as defined in G.S. 105-83, in addition to their other activities, as do the plaintiff and other non-bank installment paper dealers. All such installment paper dealers, banks and non-banks engage in substantially identical operations with respect to their installment paper business, which do not differ in any material respect, either as to the methods and mechanics of acquiring installment paper, or as to the business arrangements with the automobile dealers, or as to the rates charged, or as to the type of paper bought, or otherwise. In general and in detail, the conduct of installment paper dealer business in North Carolina is and was at all times mentioned in the Complaint the same in all substantial and material respects, as engaged in

and carried on by State and National banks and the plaintiff and other non-bank installment paper dealers.

"(11) In a substantial number of banks this installment paper dealer business is handled by a separate department of the bank commonly known as an Installment Loan Department or as a Time Payment Department, often in an office or building entirely separate from the main bank building, and the records, bookkeeping and management personnel in such department devote their full time exclusively to the contracting for, acquisition of, collecting of, servicing of this installment paper and to other work incident to this phase of the bank's operations and the same is substantially identical to the operations of non-bank installment paper dealers. Many of the banks maintaining Installment Loan Departments or Time Payment departments keep these departments open beyond regular banking hours to conform to hours maintained by the plaintiff and other non-bank installment paper dealers.

"(12) It is further agreed that no facts other than those stated hereinabove are material or necessary to the decision of this case.

"(13) The question involved in this case is whether or not G.S., Section 105-83 of the General Statutes of North Carolina, is unlawfully discriminatory and unconstitutional. If so, the plaintiff is entitled to recover of the defendant the sum of $1,911.36 with interest; and, if not, the plaintiff is not entitled to recover."

The court, being of the opinion that the statute is not unlawfully discriminatory or unconstitutional as applied to plaintiff, adjudged it take nothing. Plaintiff appealed.

Taylor, Allen and Warren and Fairley, Hamrick & Jack T. Hamilton for plaintiff, appellant.

Attorney General Bruton and Assistant Attorneys General Abbott and Young for defendant, appellee.

RODMAN, J. W. A. Johnson, successor in office to defendant Currie, was, on motion of the State, substituted as defendant.

The legislative power to tax is limited only by constitutional provisions. Sec. 3, Art. V of our Constitution imposes the duty to tax in a just and equitable manner. It further provides: "Taxes on property shall be uniform as to each class of property taxed." Specific authority is given to tax trades, professions, franchises, and incomes. Literally the requirement of uniformity is confined to taxes on property, but repeated judicial interpretations extend this requirement to license, franchise, and other forms of taxation. *Assurance Co. v. Gold,* 249

N.C. 461, 106 S.E. 2d 875; *Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; *S. v. Stevenson,* 109 N.C. 730; *Gatlin v. Tarboro,* 78 N.C. 119.

A tax statute which suffices to meet the rule of uniformity required by our Constitution likewise conforms to the requirements of the Fourteenth Amendment of the U. S. Constitution.

Since courts are not charged with the duty of providing funds for the support of government, they have no right to weigh and determine legislative wisdom in selecting one form of tax over another or one class rather than another or the proportion of the whole tax burden which any class should fairly assume. It is the duty of a court, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. Merely assigning different names to members of the same groups is not sufficient to meet constitutional requirements, but, as said by *Mr. Justice Frankfurter:* "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 84 L. ed. 1124. *Devin, J.* (later *C.J.*), put it this way: "It has been declared by this Court that the power to classify subjects of taxation carries with it the discretion to select them, and that a wide latitude is accorded taxing authorities, particularly in respect of occupation taxes under the power conferred by Art. V, sec. 3 of the Constitution." *Bottling Co. v. Shaw,* 232 N.C. 307, 59 S.E. 2d 819.

Courts have approved legislative distinctions between wholesale and retail merchants, *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316, appeal dismissed 308 U.S. 516; a single grocery store and a chain or grouping of such stores, *Tea Co. v. Maxwell,* 199 N.C. 433, 154 S.E. 838, affirmed 284 U.S. 575; volume of business, *Nesbitt v. Gill,* 227 N.C. 174, 41 SE 2d 646, affirmed 332 U.S. 749; *Mercantile Co. v. Mt. Olive,* 161 N.C. 121, 76 S.E. 690; *Cobb v. Commissioners,* 122 N.C. 307; businesses conducted in areas of differing populations, *S. v. Green,* 126 N.C. 1032, *S. v. Carter,* 129 N.C. 560; handlers of meat products, *Lacy v. Packing Co.,* 134 N.C. 567, affirmed 200 U.S. 226; vending machines selling different kinds of merchandise, *Snyder v. Maxwell,* 217 N.C. 617, 9 S.E. 2d 19; transportation companies, based on mileage, *Clark v. Maxwell,* 197 N.C. 604, 150 S.E. 190, affirmed 282 U.S. 811; a retail sale by the producer of an article and the sale of the same article by a merchant, *Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754; stock companies and mutual insurance companies, *German Alliance Ins. Co. v. Lewis,* 233 U.S. 389, 58 L ed 1011; an agent whose business is selling accident insurance and an agent of a transportation company who sells accident insurance as an incident and a part of his business of selling transportation, *Hunter v. Wright,* 152 S.E. 61 (Ga.); drug

stores and news stands, even though both sell newspapers, magazines, tobacco, and soft drinks, *S. v. Towery*, 239 N.C. 274, 79 S.E. 2d 513, appeal dismissed 347 U.S. 925.

Legislatures have for many years grouped and classified those engaged in lending money based on the manner in which the business was conducted. Pawn brokers are nearly always put in a class distinct from other money lenders, and this classification has been upheld. *S. v. Davis*, 157 N.C. 648, 73 S.E. 130; *S. v. Hill*, 69 A.L.R. 574, with annotations; *Metropolitan Trust Co. v. Jones*, 149 A.L.R. 1416, with annotations. True, most of these cases deal with the exercise of the police power rather than the power to tax, but the principle involved is the same. Classification, to be valid, must rest on a genuine distinction.

We assume the parties did not, by the 12th stipulation that no facts except as stipulated were material or necessary to a decision of the case, intend to deny us the right to take notice of pertinent public laws and facts of common and general knowledge.

It is a matter of general knowledge that loans can be obtained by borrowers from many distinct kinds of business. The Federal Government has created special agencies to help certain types of borrowers. Illustrative: Home Owners Loan Corporation and Federal Land Banks, which as federal agencies, are free from State taxes. The principal private businesses making loans are insurance companies, taxed pursuant to Art. 8 b of our Revenue Act (c. 105 of the General Statutes); banks, taxed pursuant to Art. 8 c of the Revenue Act; building and loan associations, taxed pursuant to Art. 8 d; pawn brokers, taxed under G.S. 105-50; installment paper dealers, licensed and taxed under G.S. 105-83; loan agencies or brokers, licensed and taxed under G.S. 105-88. Each of these varying kinds of businesses is defined by statute. Probably all make some loans identical in all respects with loans made by some other lending agency, but that fact does not make the businesses identical.

Installment paper dealers are defined by statute, G.S. 105-83, as "engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations." Those engaged in this business are by subsec. a of the statute required to pay an annual license tax of $100, and by subsec. b, to pay quarterly a tax equal to .275 of 1% of the face value of the obligations handled during such quarter.

The asserted invalidity of the statute is based on subsec. d, which reads: "This section shall not apply to corporations organized under

the State or national banking laws." Although appellant has paid the taxes levied under subsecs. a and b, it does not claim that the tax levied under subsec. a is invalid. It limits its claim of invalidity to subsec. b. But if the statute is invalid because installment paper dealers and banks are in fact in the same class, the entire statute would fail, not merely subsec. b leaving in effect subsec. a which requires payment of $100 per year.

The business taxed under G.S. 105-83 is of comparatively recent origin. It came into existence primarily as a means to facilitate the sale of motor vehicles. We take judicial knowledge of the fact that there are many corporations engaged in this business. Some are financial giants and national in scope. Their shares are listed on various stock exchanges. Their resources run into hundreds of millions. They establish lines of credit and borrow from banks and insurance companies. They are created under statutes which authorize the creation of business corporations in general. They do not have to secure a certificate of convenience and necessity to begin business. They do not receive deposits.

On the other hand, the statutory definition of a bank is "any corporation, other than building and loan associations, industrial banks, and credit unions, receiving, soliciting, or accepting money or its equivalent on deposit as a business." G.S. 53-1. Before a bank can be created, application must be made to the Commissioner of Banks who must determine the need for such an institution, fitness of the proposed incorporators to conduct the proposed business, and their ability to command the confidence of the community, G.S. 53-4. The powers which a bank may exercise are enumerated in G.S. 53-43. Their right to make investments and the kinds of investments which they may make are restricted, G.S. 53-46, 48. Banks must keep on hand or in approved depositories a fixed per cent of the monies on deposit, G.S. 53-50. They cannot establish branch offices without the approval of the Commissioner of Banks, G.S. 53-62. They are subject to regulations promulgated by the Commissioner of Banks, G.S. 53-104.

The foregoing are some of the things that distinguish a bank from an installment paper dealer. The distinction between banks and installment paper dealers is at least as great as the distinction between installment paper dealers and loan agencies or brokers, G.S. 105-88. The Legislature, in providing funds for governmental needs, had a right to recognize these distinctions. If perchance some banks are operating contrary to law and regulations promulgated by the Commissioner, that fact would not nullify a statute properly enacted by the Legislature.

Not long after the business defined by statute as installment paper

dealers became economically important, several States, recognizing the distinction between such a business and the business of banking, taxed them differently. Where such statutes were challenged as arbitrary classifications, the courts upheld legislative action. *Dewey v. Richardson,* 92 N.E. 708; *Cowart v. Greenville,* 45 S.E. 122; *City Council v. Clark & Co.,* 52 S.E. 881; *Norris v. Lincoln,* 142 N.W. 114; *Link v. Commonwealth,* 265 S.W. 804; *Ormes v. Tenn. Finance Co.,* 269 S.W. 3; *Bradley & Co. v. Richmond,* 66 S.E. 872.

The facts stipulated, supplemented as they must be by matters of which we take judicial notice, support the conclusion reached by the trial court that plaintiff was not entitled to recover because of the asserted invalidity of the statute.

Affirmed.

GEORGE F. WILLETTS v. H. L. WILLETTS.

(Filed 1 March, 1961.)

1. Cancellation and Rescission of Instruments § 7—

The right of heirs to maintain an action to cancel a deed executed by their testator is derived from and limited by the right of action vested in the testator at the time of his death.

2. Cancellation and Rescission of Instruments § 10—

An action to rescind a deed for fradulent misrepresentations made by the grantee to the grantor at the time of the execution of the instrument is properly nonsuited when plaintiff fails to introduce any evidence of misrepresentations made at the time of the execution of the deed.

3. Cancellation and Rescission of Instruments § 2: Fraud § 2—

The mere relationship of parent and child is not such a confidential and fiduciary relationship as to invoke a presumption of fraud in the execution of a deed by the parent to the child.

4. Same— Evidence held insufficient to show agency under circumstances rendering the agent a fiduciary in regard to matter in question.

Evidence tending to show that a son, after his marriage, lived near the homeplace of his father, helped his father in farming and marketing operations, upon request gave his father advice in connection with the father's business affairs and problems, listed his father's land for taxes as agent of his father, together with evidence that the father was mentally competent to handle his affairs, and without any evidence that the son exercised or attempted to exercise a dominating influence on his father, *is held* insufficient to show that the son occupied such a position of trust or agency as to raise the presumption of fraud in the execution of a deed from the father to the son.

5. Same—

Evidence tending to show that upon the payment of a mortgage debt, presumably by the mortgagor, the mortgage was assigned to the mortgagor's son, without any evidence that the son at any time had or asserted any claim against the mortgagor, is insufficient to establish the relationship of mortgagor and mortgagee so as to raise the presumption of fraud in the later conveyance of the land by warranty deed to the son.

6. Trusts § 5b—

A grantor may not establish a parol trust upon his deed conveying the absolute title.

7. Same—

A parol trust may not be set up in favor of the grantor in a deed absolute in form upon allegations that at the time of the execution of the instrument the grantor was indebted to a third person and conveyed the land to the grantee under an agreement that the grantee would borrow money with which to discharge the debt and reconvey to the grantor subject to the mortgage after the prior debt had been satisfied.

8. Limitation of Actions § 4—

Ordinarily, the time at which the right to institute action arises determines when the applicable statute of limitations begins to run.

9. Limitation of Actions § 17—

Defendant's plea of the applicable statute of limitations puts upon plaintiff the burden of showing that the action was instituted within the prescribed period.

10. Fraud § 5—

A party who signs an instrument without reading it may not thereafter assert his ignorance of its contents as fraud on the part of the other contracting party unless he is prevented from reading the instrument by some trick, artifice or misrepresentation.

11. Limitation of Actions § 7—

An action for fraud in procuring the execution of a deed by misrepresentation that the grantee therein agreed to reconvey to grantor is barred as a matter of law by the three-year statute of limitations, G.S. 1-25(9), when plaintiff's own evidence discloses that the grantee claimed the absolute fee simple title to the knowledge of the grantor more than three years prior to the institution of the action.

APPEAL by plaintiffs from *Craven, Special Judge,* May-June Special Term, 1960, of BRUNSWICK, docketed and argued as No. 604 at Fall Term, 1960.

George F. Willetts instituted this action September 6, 1957. The complaint filed by George F. Willetts was answered by defendant.

Upon the death of George F. Willetts, *pendente lite,* Anna May Alburger, individually and as executrix of the estate of George F. Willetts, Roosevelt Willetts, Roger Willetts, Dorothy Willetts Cyph-

ers, Lillian Willetts Thomas, Wardie Willetts Potter and Thelma Willetts Varnum, seven of the children of George F. Willetts, were made parties plaintiff and adopted the original complaint. Defendant, a son of George F. Willetts, adopted his original answer.

The action is to set aside a deed dated February 26, 1936, executed and delivered by George F. Willetts and wife, Mary L. Willetts, to H. L. Willetts, which, according to its terms, conveys in fee simple, with full warranties, a tract of land in Brunswick County described (1) as "adjoining the lands of *G. F. Willetts,* Pink McDowell, Joseph McDowell, J. D. Greer land, G. K. Lewis, R. M. Robbins and others," and (2) by metes and bounds, and (3) as "being the same land inherited by G. F. Willetts from his father, Alfred Willetts and possessed for over fifty-six (56) years, . . ." (Our italics.) On March 9, 1936, the grantors acknowledged their execution of this deed before A. M. Beck, a Justice of the Peace, who certified, *inter alia,* that the private examination of Mary L. Willetts was duly taken. The deed was filed for registration on March 19, 1936, and recorded March 21, 1936, in Book 57, page 462, Brunswick County Registry. It is referred to hereafter as the "subject deed."

The complaint, in substance, alleges:

Prior to March 9, 1936, George F. Willetts was indebted to the Estate of J. W. Brooks in the amount of $800.00. His application for a loan to obtain money to pay the Brooks debt was declined on account of his age. Defendant had knowledge of these facts. The subject deed was executed and delivered under this agreement: Defendant was to obtain a loan from C. Ed. Taylor, Guardian, of sufficient amount to pay the Brooks debt and loan expenses. As security, defendant was to execute a first lien mortgage on the tract of land described in the subject deed. After doing so, defendant was to reconvey this land to George F. Willetts. Defendant obtained the loan from C. Ed. Taylor, Guardian, paid the Brooks debt and loan expenses, but did not reconvey the land to George F. Willetts.

George F. Willetts "requested" defendant to reconvey the land "on numerous occasions," and defendant, "up to within the last preceding year," agreed to do so "as soon as he could get some things straightened out, to wit, a $2500.00 encumbrance" defendant had placed on the land without the knowledge or approval of George F. Willetts.

On or about March 9, 1936, defendant, in the presence of A. M. Beck, presented the subject deed to George F. Willetts. Defendant then stated "it was a trust deed to the defendant conveying the lands agreed upon to get the loan through Mr. C. Ed. Taylor, Guardian, and falsely and fraudulently stated that the deed prepared provided that after the loan had been obtained, the J. W. Brooks Estate loan

paid, the said defendant, the vendee in said deed, should transfer said lands back to the plaintiff." These representations were false and fraudulent and were made with intent to deceive and did deceive George F. Willetts. Defendant paid no money or other consideration for the subject deed. George F. Willetts and wife, Mary L. Willetts, executed and delivered the subject deed in reliance upon said false and fraudulent representations of defendant. Provisions embodying the terms of the alleged agreement to reconvey were omitted from the deed by mistake of the draftsman.

George F. Willetts had implicit confidence in defendant. Defendant was his confidential agent and advisor. The land was worth not less than $4,000.00. The false and fraudulent representations of defendant were made in pursuance of "a scheme or procedure by which the defendant could become the owner of this tract of land and deprive his ten brothers and sisters of their inheritance." George F. Willetts is now in possession of the land and has been in possession thereof since 1936, "using it for the purpose for which it was capable of being used," and occupying and possessing it "adversely to all people." George F. Willetts listed and paid the taxes on the land through 1953. Defendant listed the land in his own name for 1954, 1955 and 1956 but had not paid the taxes for these years.

Defendant sold timber of the value of $3,250.00 but failed and refused to comply with George F. Willetts' repeated demands that defendant account to him for the proceeds.

The prayer of the complaint is that George F. Willetts be adjudged the owner of the land; that defendant be directed to reconvey the land to George F. Willetts or that the subject deed be adjudged void; that defendant be directed to account to George F. Willetts for all money, plus interest, received by him from the sale of timber; that defendant pay the costs; that George F. Willetts be awarded such other and further relief to which he may be entitled.

Answering, defendant admitted that George F. Willetts owned the land on and prior to March 9, 1936, and that he had knowledge of the Brooks debt which, defendant alleged, was in an amount in excess of $800.00. Defendant alleged that "after your defendant purchased the lands described in the complaint he gave a mortgage on said lands to C. Ed. Taylor and thereafter paid off the lien that was against said lands to the J. W. Brooks Estate and also paid several other debts that were owed to various creditors by the plaintiff." Defendant admitted that he had sold timber from the land on various occasions but denied that George F. Willetts had ever requested or demanded any of the proceeds therefrom until he "instituted *an action* demanding that your defendant reconvey the lands in the complaint

to the plaintiff." (Our italics.) Except as stated, defendant denied the allegations of the complaint.

For further defenses, defendant pleaded (1) the Statute of Frauds in bar of George F. Willetts' right to recover on the alleged oral agreement to reconvey, and (2) the three-year Statute of Limitations in bar of George F. Willetts' right to recover for the alleged fraud.

It was stipulated "that an action involving the same subject matter was instituted by *George F. Willetts v. H. L. Willetts, et al.*, on the 7th day of February, 1957, in which a voluntary nonsuit was taken by the plaintiff on the 2nd day of May, 1957; costs of Court therein having been paid before the institution of the present action."

Plaintiffs having introduced their evidence and rested their case, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Kellum & Humphrey and Kirby Sullivan for plaintiffs, appellants.
Herring, Walton & Parker for defendant, appellee.

BOBBITT, J. The question is whether the evidence, considered in the light most favorable to plaintiffs, is sufficient to support the cause of action alleged by George F. Willetts. Plaintiffs have no legal rights except those derived from George F. Willetts, their father. *Holt v. Holt*, 232 N.C. 497, 61 S.E. 2d 448, and cases cited.

There is testimony that the words "G. F. Willetts, Pink McDowell, Joseph McDowell, J. D. Greer land, G. K. Lewis, R. M. Robins," preceding the particular description in the subject deed, are in the handwriting of C. Ed. Taylor, an attorney who died October 16, 1943. Apart from this, no evidence was offered as to the identity of the draftsman or as to the circumstances attending the drafting of the subject deed.

No evidence was offered as to what occurred on March 9, 1936, when George F. Willetts and wife, Mary L. Willetts, executed and acknowledged the subject deed before A. M. Beck, Justice of the Peace. In this connection, it is noted: Mary L. Willetts died June 15, 1951. George F. Willetts died February 20, 1958. No evidence was offered as to whether A. M. Beck was living at the time of the trial. In any event, A. M. Beck did not testify.

Plaintiffs' evidence was insufficient to support the allegations that defendant made false and fraudulent representations to George F. Willetts to the effect the subject deed contained provisions embodying the alleged oral agreement to reconvey or to support the allegations that such provisions were omitted from the subject deed by mistake of the draftsman.

Plaintiffs assert defendant had the means and power to take advantage of his father by reason of the alleged confidential and fiduciary relationship.

"The law is well settled that in certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted.' *Lee v. Pearce,* 68 N.C. 76. Among these, are, (1) trustee and *cestui que trust* dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant." *McNeill v. McNeill,* 223 N.C. 178, 181, 25 S.E. 2d 615, and cases cited.

It is well settled that the mere relation of parent and child does not raise the presumption of fraud. *Walters v. Bridgers,* 251 N.C. 289, 111 S.E. 2d 176, and cases cited.

As to the actual relationship between defendant and his father prior to the execution of the subject deed, the evidence tends to show these facts:

The home in which plaintiffs and defendant were reared was on the land described in the subject deed. Apparently, defendant was the oldest child. He went to grade school in Brunswick County but did not attend high school or college. After 1921 or 1922, defendant, then married, did not live with his parents or on the tract of land described in the subject deed. Until 1931, he lived approximately one-half mile from his parents' home. After 1931, he lived approximately a mile and a half from his parents' home.

Two of the plaintiffs (Mrs. Alburger and Mrs. Thomas) had left their parents' home to pursue occupations elsewhere. One (Roger W. Willetts) was in college. (Note: Mrs. Cyphers left in July, 1936. Mrs. Potter left when "23 years old," but the record does not disclose her age.) The record leaves the impression that, subsequent to March, 1936, such time as these plaintiffs spent in their parents' home was principally while on visits until Mrs. Cyphers and Mrs. Thomas returned in 1953 or thereafter.

There is evidence that defendant assisted his father in farming and in marketing his crops and livestock, and that his father often requested defendant's advice in connection with his business affairs and

problems. Too, there is evidence that the property of George F. Willetts was listed for taxes for 1933, 1934, 1935 and 1936 in the name of George F. Willetts by H. L. Willetts. In the listing for 1933, the return was signed by H. L. Willetts "as agent."

In March, 1936, George F. Willetts was 61 years of age. Defendant was 36. There is neither allegation nor evidence that George F. Willetts was mentally or physically incapable of transacting business in March, 1936. Mrs. Thomas, one of the plaintiffs, testified: "My father was not a little bit weak-minded. I said that my father was perfectly capable of taking care of his own business up until the day he died. . . . in 1936 he was perfectly capable of taking care of his own business and I know that during his life and during those years in the 1930's there was not any time when he was sick or unable or when his mind was gone. His mind was all right."

In our opinion, the evidence is insufficient to establish that defendant's relationship to his father in March, 1936, was that of a fiduciary within the meaning of the fifth category of fiduciary relations set forth in *McNeill v. McNeill*, *supra*. The evidence leaves the impression that all defendant did was to assist his father when called upon to do so. Indeed, Roger W. Willetts, one of the plaintiffs, testified: "I would think that if my father asked Sinker (defendant) for any advice it would be his duty to give it to him. There is nothing wrong with that so far as I know." This witness, a college graduate and Education Officer for the U. S. Army Transportation Corps, stationed at Williamsburg, Virginia, testified as to his own relationship with his father: "My father and I were real close. If my father asked any advice about what to do on any matter, of course, I would give it to him to the best of my ability. I would think that was my duty as a son."

There is no evidence tending to show any incident or transaction either before or after the execution and delivery of the subject deed in which defendant exercised or attempted to exercise a dominating influence over his father. Moreover, the allegations as to fraud relate solely to alleged misrepresentations as to the contents of the subject deed.

The foregoing impels the conclusion that the evidence is insufficient to establish that, at the time of the execution and delivery of the subject deed, defendant's relationship to his father was such a confidential and fiduciary relationship as to give rise to the presumption of fraud.

We have not overlooked plaintiffs' contention that, at and prior to the execution and delivery of the subject deed, defendant occupied the status of mortgagee and his father the status of mortgagor in

respect of the land described therein. As to this, the complaint contains no allegations as to such mortgagor-mortgagee relationship. The evidence relevant to this contention is as follows: In 1917, prior to his execution of the mortgage securing the Brooks debt, George F. Willetts had executed a mortgage to J. C. Potter. The Potter mortgage covered a tract of 150 acres which included the land conveyed by the subject deed. Upon payment of the Potter debt (presumably by George F. Willetts) in 1930, the Potter mortgage was assigned to H. L. Willetts. It was not cancelled of record until March, 1936, when the new loan obtained by defendant from C. Ed. Taylor, Guardian, was closed. The cancellation in March, 1936, was authorized by "H. L. Willetts, assignee." Mrs. Alburger, one of the plaintiffs, testified that defendant told her the Potter paper was assigned to him "so that he could use that as collateral at any time that he might need it for business reasons." There is no evidence that defendant at any time had or asserted a claim against his father on account of the Potter mortgage or that defendant ever used the Potter mortgage as collateral to borrow money either for himself or for his father. (Note: The Brooks mortgage, which was executed in 1919, contained a provision to the effect that it was made subject to the said Potter mortgage.) Apart from the absence of allegation, the evidence is insufficient, in our opinion, to establish that George F. Willetts was obligated to defendant in March, 1936, in the relationship of mortgagor to mortgagee.

Absent sufficient evidence to establish that defendant procured the subject deed by fraud or mistake of the draftsman, plaintiffs' case rests upon the breach by defendant of the alleged oral agreement to reconvey.

A well established rule is stated by *Hoke, J.* (later *C.J.*), in this oft-quoted excerpt from his opinion in the case of *Gaylord v. Gaylord,* 150 N.C. 222, 227, 63 S.E. 1028: "Upon the creation of these estates (parol trusts), however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, *to arise by reason of the contract or agreement of the parties thereto,* will not be set up or engrafted *in favor of the grantor* upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass." (Our italics.)

In *Loftin v. Kornegay,* 225 N.C. 490, 35 S.E. 2d 607, *Denny, J.,* says: "A parol agreement in favor of a grantor, entered into at the time of or prior to the execution of a deed, and at variance with the written conveyance, is unenforceable in the absence of fraud, mistake or undue influence. (Citations.) To permit the enforcement of such

an agreement would be tantamount to engrafting a parol trust in favor of a grantor upon his deed, which purports to convey the absolute fee simple title to the grantee. A parol trust in favor of a grantor cannot be engrafted upon such a deed. (Citations.)" Later cases in accord: *Conner v. Ridley,* 248 N.C. 714, 104 S.E. 2d 845; *Vincent v. Corbett,* 244 N.C. 469, 94 S.E. 2d 329; *Lamm v. Crumpler,* 240 N.C. 35, 81 S.E. 2d 138; *Jones v. Brinson,* 231 N.C. 63, 55 S.E. 2d 808; *Bass v. Bass,* 229 N.C. 171, 48 S.E. 2d 48; *Poston v. Bowen,* 228 N.C. 202, 44 S.E. 2d 881.

In *Gaylord,* the evidence tended to show that Ebenezer Gaylord in 1884 executed the deed to Sam Gaylord, his brother; that he did so because, then having some trouble with his first wife and his father-in-law, he wanted to place his property so his wife could establish no claim upon it in case of litigation; that the deed was made with the understanding that Sam was to reconvey the land to Ebenezer whenever he called for a deed; that no consideration was paid by Sam for the deed; and that Ebenezer continued in possession and control of the property until his death in 1898. The plaintiffs were the children of Ebenezer by his second wife. It is noted that the judgment of involuntary nonsuit was reversed. The cause was remanded for trial to determine whether the deed, which was not recorded during Ebenezer's lifetime, was in fact delivered to Sam or merely deposited with him in escrow.

Decisions cited by plaintiffs, *e.g., Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289, relating to the establishment of resulting trusts, do not apply. They rest upon "the general rule that in the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase." *Creech v. Creech,* 222 N.C. 656, 661, 24 S.E. 2d 642. Here, as in *Gaylord* and similar cases, plaintiffs seek to engraft a parol trust in favor of George F. Willetts *upon his own deed* which, by its terms, conveyed the absolute fee simple title to defendant.

Subsequent to March 19, 1936, George F. Willetts and wife, Mary L. Willetts, continued to live on the land described in the subject deed. Each lived there until death. Their children who lived away from home visited them as theretofore. During certain years the land was farmed by defendant. In other years it "lay out." In other years it was leased under arrangements made by George F. Willetts and by defendant. Subsequent to March, 1936, the land was listed

for taxes in certain years in the name of George F. Willetts by H. L. Willetts and in certain years in the name of H. L. Willetts.

In 1953, Dorothy Willetts Cyphers, one of the plaintiffs, was separated from her husband. Defendant went to Newport News, Virginia, and brought her and her children back to her father's home in Brunswick County. She and her two children continue to reside there. Mrs. Lillian Willetts Thomas, one of the plaintiffs, also resides there.

Testimony as to statements made by defendant in 1954 and 1955, if competent for such purpose, was sufficient to support a finding that defendant had promised to reconvey the land to George F. Willetts after he had made arrangements to pay off the Brooks debt. Mrs. Cyphers testified to statements made by defendant in 1954. Roger W. Willetts, Mrs. Alburger, Mrs. Thomas and Mrs. Potter testified to statements made by defendant in 1955. There was testimony that in October, 1955, defendant agreed to go to a lawyer and have the names of all the children put on the deed but later refused to do so. There was evidence to the effect that, prior to 1954, none of the plaintiffs knew defendant had a deed for the land.

The mortgage securing the payment of $925.00 to C. Ed. Taylor, Guardian of James Stanley, was executed by H. L. Willetts and wife, Beulah Willetts. It is dated March 9, 1936, and recorded in Book 52, page 539, Brunswick County Registry. It was filed for registration on March 19, 1936, at 2:00 p.m. simultaneously with the subject deed.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises, . . ." 54 C.J.S., Limitation of Actions § 109; 34 Am. Jur., Limitation of Actions § 113; *Shearin v. Lloyd,* 246 N.C. 363, 367, 98 S.E. 2d 508, and cases cited.

Obviously, George F. Willetts' alleged cause of action, if considered solely as an action to enforce the alleged oral contract, is barred by the three year statute of limitations. G.S. 1-52(1). The view most favorable to plaintiffs is that G.S. 1-52(9) applies, under which an action "(f)or relief on the ground of fraud or mistake" must be instituted within three years from the date the cause of action accrues, but in such case "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Assuming, but not deciding, that the evidence was sufficient to support a finding that defendant procured the subject deed by fraud, defendant's plea of the three-year statute of limitations put upon plaintiffs the burden to show that this action was instituted within the prescribed period.

Whether this action is barred by G.S. 1-52(9) does not depend upon

when plaintiffs first learned the subject deed had been made to defendant. Nor does it depend upon whether defendant misled plaintiffs or any of them or failed to comply with an oral agreement in October, 1955, to have their names put on the deed. To repel the bar of the statute of limitations, the burden was on plaintiffs to show that George F. Willetts did not acquire knowledge of the alleged fraud and was not put on notice thereof until a time within the period of three years next preceding the institution of this action or the prior action instituted by him on February 7, 1957, and referred to in the stipulation quoted in the statement of facts. *Swartzberg v. Insurance Co.*, 252 N.C. 150, 157, 113 S.E. 2d 270, and cases cited.

"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." *Harrison v. R.R.*, 229 N.C. 92, 95, 47 S.E. 2d 698; *Harris v. Bingham*, 246 N.C. 77, 97 S.E. 2d 453; *Isley v. Brown*, 253 N.C. 791, 117 S.E. 2d 821, and cases therein cited.

Evidence, uncontradicted and unequivocal, is to the effect that George F. Willetts could read and write and in 1936 and thereafter until his death (at the age of 83) was capable of transacting his own business. There was evidence that he had served as a constable and also as a justice of the peace.

In 1943 a timber deed was executed and delivered by George F. Willetts and wife, Mary L. Willetts, and by H. L. Willetts and wife, Beulah Willetts. The only land covered thereby owned by H. L. Willetts was that conveyed by the subject deed; but the timber deed also covered land owned by George F. Willetts and not conveyed by the subject deed.

In 1946, another timber deed was executed and delivered by George F. Willetts and wife, Mary L. Willetts, and by H. L. Willetts and wife, Beulah Willetts. It appears that this timber deed covers only the land conveyed by the subject deed. After the particular description, these words appear: "And being the same land conveyed to H. L. Willetts by George F. Willetts and wife by deed dated February 26, 1936."

In his answer, defendant admitted that he had sold timber from the land conveyed by the subject deed and asserted he received and was entitled to receive the proceeds from such sales. He denied that his father had ever requested or demanded any portion of the proceeds. The complaint alleges that George F. Willetts "repeatedly" made demands therefor and defendant refused to comply with such demands. Obviously, the proceeds from such sales of timber were received by

defendant in 1943 and 1946. If such demands were made by George F. Willetts and refused by defendant, this tends to show that George F. Willetts was fully aware of the fact that defendant had or claimed ownership in fee under the subject deed.

The complaint alleges that George F. Willetts "requested" defendant, "on numerous occasions," to reconvey the land to him. While such requests, if made, imply that George F. Willetts contended defendant was obligated under the alleged oral agreement to reconvey the land to George F. Willetts, they tend to show that George F. Willetts was fully aware of the fact that defendant had or claimed ownership in fee under the subject deed.

The conclusion reached is that the evidence offered by plaintiffs is insufficient to show that this action was brought within the prescribed time; but, on the contrary, plaintiffs' evidence tends to show that George F. Willetts' cause of action for alleged fraud, if any he had, was barred by G.S. 1-52(9) many years prior to the institution of this or any action to set aside the subject deed.

For the reasons stated, the judgment of involuntary nonsuit was properly entered and is affirmed.

It is noted: We have elected to consider this appeal upon the assumption that plaintiffs are entitled to prosecute this action as heirs of George F. Willetts. It was so considered in the briefs. However, the only information disclosed by the record as to the substitution of the present plaintiffs for George F. Willetts is a stipulation setting forth, *inter alia,* that Anna May Alburger, individually and *as executrix,* was made a party plaintiff. Mrs. Alburger's testimony includes the following: "The paper writing you are showing me is my father's will. It was dated September 1, 1957. I know who wrote that will; it was my husband." The record does not contain any will of George F. Willetts. While these facts are noted, no opinion is expressed herein as to what bearing, if any, the judgment of involuntary nonsuit herein may have upon the rights, if any, of the devisees under a will, if any, of the late George F. Willetts.

Affirmed.

COLLINS *v.* SIMMS.

MARSHALL C. COLLINS, EDWIN MOORE, HAYWOOD WISE, GEORGE MIDGETT, ALFONZO SCARBOROUGH AND DAVE ALEXANDER, DEACONS OF THE HAVEN CREEK BAPTIST CHURCH, MANTEO, N. C., ACTING AS TRUSTEES HOLDING TITLE TO THE PROPERTY OF THE CHURCH, AND MARSHALL C. COLLINS, EDWIN MOORE, HAYWOOD WISE, GEORGE MIDGETT, ALFONZO SCARBOROUGH AND DAVE ALEXANDER, INDIVIDUALLY FOR THEMSELVES AS MEMBERS OF SAID CHURCH AND FOR SUCH OTHER MEMBERS OF SUCH CHURCH AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, PLAINTIFFS v. REVEREND J. C. SIMMS, DEFENDANT.

(Filed 1 March, 1961.)

1. Appeal and Error § 21—

A sole exception to the judgment presents only the face of the record for review.

2. Judgments § 13—

The failure of defendant to plead within the statutory time after service of summons and verified complaint upon him in an action within the jurisdiction of the court, admits the allegations of fact and entitles plaintiffs to that relief to which the facts alleged in the verified complaint entitle them, and default judgment for such relief is properly entered.

3. Judgments § 15—

A judgment by default must strictly conform to, and be supported by, the allegations of fact in the verified complaint, G.S 1-226.

4. Religious Societies § 2—

The Superior Court has jurisdiction of an action instituted by the governing authorities of a congregational church for an injunction upon allegations that at a regular annual meeting of the congregation, held after due notice in accordance with the customs and practices of the church, a majority of the members of the congregation had voted not to re-employ defendant as pastor for the ensuing year, and that defendant had thereafter appeared and disrupted orderly services by attempting to continue to act as the church's pastor, and had stated his intentions to continue to do so.

5. Judgments § 21—

A default judgment which grants plaintiffs relief in excess of that to which they are entitled upon the facts alleged in the verified complaint is irregular, but is not void, and the proper procedure for relief against such judgment is by motion in the cause.

6. Religious Societies § 2: Judgments § 15—

Where the verified complaint in an action by the governing authorities of a congregational church alleges facts entitling plaintiffs to enjoin defendant from continuing to assert his right to act as pastor of the church after the expiration of his term, a judgment not only restraining defendant from continuing to attempt to act as pastor but further enjoining defendant from appearing at the church or going upon the church grounds, is in excess of the relief to which plaintiffs are entitled upon the facts alleged.

7. Judgments § 15—

A judgment by default precludes defendant from denying the truth of the facts properly set forth in the verified complaint but does not preclude him from objecting to the judgment on the grounds that it does not strictly conform to, and is not supported by, the allegations.

APPEAL by defendant from a judgment entered at the October Term, 1960 of DARE by *Bone, J.*, denying a motion by defendant to vacate a judgment by default final entered at the May Term 1960 by Hooks, J., and denying a motion by Lloyd Meekins and other persons to vacate the same judgment by Hooks, J., and to dissolve the permanent injunction therein decreed.

The complaint was properly verified by one of the plaintiffs, and filed in the office of the clerk of the Superior Court of Dare County on 11 February 1960. On the same date the clerk issued a summons.

A summary of the complaint's material allegations of fact follows, except when a direct quotation is made.

The six plaintiffs are members and deacons in good standing of Haven Creek Baptist Church, Manteo, North Carolina, and compose a majority of its nine-men board of deacons. The board of deacons holds title to the church property, though the deacons have never been designated by name as trustees.

The Rev. J. C. Simms, the defendant, is a resident of Norfolk, Virginia, and served as pastor of the church for the year 1959.

This church, like other Baptist churches, is a congregationally organized church. It has no formal constitution or by-laws. On 15 November 1959 announcement was made that the regular annual business meeting for the election of officers and a pastor for the church would be held on Friday night, 27 November 1959. On the next Sunday, 22 November 1959, similar announcements were made at Sunday school and at the Baptist Training Union. At the meeting held on 27 November 1959 all the members of the church present voted unanimously to dispense with the services of defendant as pastor of the church at the close of the year 1959. Whereupon, the secretary of the board of deacons of the church wrote defendant a letter telling him of the action taken at the meeting.

The announcements and the holding of the regular annual business meeting were all made and done in accordance with the custom and usage of this church, just as elections had been held in previous years. This church as a congregationally organized church has sole authority in such matters as to the method of conducting its business affairs, and the vote of the membership on 27 November 1959 was a valid and final decision on the question of retaining or not the services of de-

fendant as its pastor. "It is admitted that there is some support for the defendant but a majority of the members at the regular annual business meeting, as above set forth, have voted not to employ him as pastor."

Despite the action of this church in not re-employing defendant as its pastor for the year 1960, and the letter to that effect sent to him by the secretary to the board of deacons, defendant on every preaching Sunday in the year 1960 to the date of filing of the complaint (11 February 1960) has returned to the church, and has attempted to serve as pastor. On the first Sunday in January 1960 he returned, the doors of the church were locked to avoid possible trouble, and he held services on the grounds of the church. On the third Sunday he again returned. A warrant for his arrest was taken out, charging him with disturbing religious worship. On this warrant he was tried, found guilty and fined in the Recorder's Court of Dare County. He appealed to the Superior Court, and told various members of the church and of its board of deacons that he intended to continue to attend this church and act as pastor.

The acts of defendant in coming to this church and attempting to act as its pastor are having a most disrupting influence on the church and its worship service, and are causing it irreparable damage. His statements that he intended to continue to attend this church and act as its pastor are in the nature of continuing trespass.

Wherefore, plaintiffs pray for a permanent injunction enjoining defendant from trespassing on the church property.

On 15 February 1960 the Honorable Chester R. Morris, resident judge of the first judicial district, (Dare County is in this district), issued a temporary restraining order enjoining defendant from appearing at this church and interfering in any manner with the worship service or other meetings of the church, and ordering defendant to appear before him at a specified time and place, and show cause, if any he can, why the temporary restraining order should not be continued until the final determination of the action.

The summons was duly served on the defendant on 20 February 1960, and a copy of the summons, a copy of the complaint, and a copy of the temporary restraining order were left with him.

On 5 March 1960, the return date of the temporary restraining order, Judge Morris, by consent of defendant, who *in propria persona* signed the order signifying his consent, continued the temporary restraining order issued by him on 15 February 1960 to be in full force and effect until the final hearing of the action.

At the May Term 1960 of the Superior Court of Dare County the State took a *nolle prosequi* with leave in the case of State v. the de-

fendant for disturbing religious worship which he had appealed to that court from the Recorder's Court of Dare County. At one place in the record the charge in the warrant is said to be disturbing religious worship, in another disorderly conduct.

At the May Term 1960 of the Superior Court of Dare County Hooks, J., upon motion of plaintiffs, entered a judgment by default final in the action. This judgment recites in substance, the proper service of summons on defendant on 20 February 1960, and the delivery to him on the same date of a copy of the verified complaint, a copy of the summons duly issued, and a copy of the temporary restraining order, the consent of defendant to the continuance in force of the temporary restraining order issued by Judge Morris to the final determination of the action, the fact that defendant had filed no answer, demurrer or other pleading in the action, that no extension of time had been granted to defendant to plead, and that the time within which defendant could file pleadings had expired, and that the verified complaint alleged a good cause of action against the defendant for trespassing on the church property. Whereupon, Hooks, J., ordered and decreed "that the defendant be and he is hereby perpetually enjoined and restrained from appearing at the Haven Creek Baptist Church or trespassing on the grounds or in the church building," and that defendant be taxed with the costs.

On 25 July 1960 defendant, long after the time for answering had expired, filed an answer in the clerk's office. On 30 September 1960 he filed a motion to vacate the judgment by default final entered by Judge Hooks and to dismiss the complaint.

On 26 October 1960 one Lloyd Meekins, a member and a deacon of the church, filed a motion in behalf of himself and other members of the church to vacate the judgment by default final by Judge Hooks, and to dissolve the injunction, in so far as the judgment perpetually enjoins defendant from "appearing at the Haven Creek Baptist Church . . . or in the church building."

The motions of defendant and Lloyd Meekins and others were heard at the October Term 1960 of Dare County Superior Court by Bone, J., who entered a judgment denying all the motions.

Defendant excepted to Judge Bone's judgment, and appealed to the Supreme Court.

Frank B. Aycock, Jr., for Plaintiffs, Appellees.
James R. Walker, Jr., for Defendant, Appellant.

PARKER, J. Defendant has one exception, and that is to the judgment of Judge Bone. This presents only the face of the record for

inspection or review. *King v. Rudd,* 226 N.C. 156, 37 S.E. 2d 116; *Sprinkle v. City of Reidsville,* 235 N.C. 140, 69 S.E. 2d 179.

The face of the record shows that summons was duly served on defendant on 20 February 1960, and at the same time a copy of the summons, a copy of the verified complaint, and a copy of the temporary restraining order were delivered to him, pursuant to the provisions of G.S. 1-89, 1-94, and 1-121. The summons notified defendant in precise language, pursuant to the provisions of G.S. 1-89, that if he failed to answer the complaint within thirty days after the date of service, the plaintiffs will apply to the court for the relief demanded in the complaint. On 5 March 1960, the return date of the temporary restraining order, defendant personally appeared before Judge Morris, and consented to the continuance of the temporary restraining order in full force and effect until the final hearing of the action. The record before us shows that at the time of the regular May Term 1960 of Dare County Superior Court defendant had filed neither an answer nor a demurrer, nor any other pleading in the action, and that defendant had neither requested, nor been granted an extension of time in which to plead, and that the time within which he could file pleadings had long expired.

Defendant's failure to plead within the statutory time in response to the summons and verified complaint personally served upon him within the jurisdiction of the court, thereby admitting the allegations of fact in the verified complaint, entitled plaintiffs to a judgment by default final at the regular May Term 1960 of Dare County Superior Court on the cause of action, if any, stated in the verified complaint. *Junge v. MacKnight,* 137 N.C. 285, 49 S.E. 474, (reversing the same case reported in 135 N.C. 105, 47 S.E. 452); *Lee v. McCracken,* 170 N.C. 575, 87 S.E. 497; *Gillam v. Cherry,* 192 N.C. 195, 134 S.E. 423; *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661; *Land Bank v. Davis,* 215 N.C. 100, 1 S.E. 2d 350; *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835. See *Eason v. Dortch,* 136 N.C. 291, 48 S.E. 741, concurring opinion by *Montgomery, J.,* who wrote the opinion of the Court in *Junge v. MacKnight,* 135 N.C. 105, 47 S.E. 452, in which he said the decision he wrote in the *Junge* case "was erroneous."

A judgment by default must strictly conform to, and be supported by the allegations of fact in the verified complaint. G.S. 1-226; *Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841; *Simms v. Sampson,* 221 N.C. 379, 20 S.E. 2d 554; *Land Bank v. Davis, supra;* 49 C.J.S., Judgments, Sec. 214, b.

The verified complaint alleges that Haven Creek Baptist Church, Manteo, North Carolina, is congregational in its church polity, is a

self-governing unit, has no formal constitution or by-laws, and like other Baptist churches a majority of its members, nothing else appearing, controls its church property and the election or re-election of its pastor. *Windley v. McCliney,* 161 N. C. 318, 77 S.E. 226; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114.

The complaint alleges these facts: The defendant, the Rev. J. C. Simms, served as pastor of the Haven Creek Baptist Church for the year 1959. On 15 November 1959 an announcement was made that the regular annual business meeting for the election of officers and a pastor for the church would be held on Friday night, 27 November 1959. On the next Sunday, 22 November 1959, similar announcements were made at Sunday school and at the Baptist Training Union. The announcements and the holding of the regular annual meeting on 27 November 1959 were all made and done in accordance with the custom and usage of this church, just as elections had been held in previous years. At this meeting there was some support for the defendant, "but a majority of the members at the regular annual business meeting . . . have voted not to employ him (the defendant) as pastor." The secretary of the board of deacons notified defendant by letter of the action taken. Despite the action of a majority of the members of the church in not re-electing defendant as its pastor for the year 1960, defendant has returned to the church on every preaching Sunday in the year 1960 to the date of the filing of the complaint herein, has attempted to act as pastor, and has told various members of the church and its board of deacons that he intended to continue to attend this church and act as pastor, which is having a disruptive influence on the church and its worship service to its irreparable damage.

The subject matter of the action is in Dare County, and defendant was personally served with process within the jurisdiction of the court. The court has jurisdiction over the subject matter and the parties. There is no merit to defendant's contention that the court has no jurisdiction.

The manner of the calling of the regular annual business meeting of Haven Creek Baptist Church for 27 November 1959 and the holding of the meeting to ascertain the will of the members of the church were all made and done in accord with the customs and practices of the church, just as elections had been held in previous years, and was proper. *McDaniel v. Quakenbush,* 249 N.C. 31, 105 S.E. 2d 94.

The verified complaint states a good cause of action for injunctive relief to prevent defendant after the year 1959 from appearing at the church and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor. It does not state a good cause of action against defendant for per-

petual injunctive relief to prevent him from merely appearing at the church, and Judge Hooks' judgment by default final in which he decreed "that the defendant be and he is hereby perpetually enjoined and restrained from appearing at the Haven Creek Baptist Church or trespassing on the grounds or in the church building" is not supported by the allegations of fact in the verified complaint, and is far in excess of the relief the law gives plaintiffs upon the facts alleged in their verified complaint. The complaint alleges a minority of the church members supports defendant. It is possible that a majority of the church members at a properly called meeting may decide in the future to elect defendant as its pastor. If that should occur, Judge Hooks' judgment as it stands would prevent defendant from even appearing at the church.

Defendant's failure to answer within the statutory time prevents him from denying any facts set forth in the verified complaint, and admits that plaintiffs are entitled to such relief as the law gives them upon the facts alleged, but he may be heard to object to the judgment by default final as not strictly conforming to, and being supported by the allegations of fact in the verified complaint.

Judge Hooks' judgment by default final, which grants relief in excess of that encompassed in the verified complaint, is irregular. *Pruitt v. Taylor, supra; Simms v. Sampson, supra; Land Bank v. Davis, supra; White v. Snow,* 71 N.C. 232. A motion in the cause is the proper course to obtain relief from such an irregular judgment. *Pruitt v. Taylor, supra; Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Land Bank v. Davis, supra; Fowler v. Fowler,* 190 N.C. 536, 130 S.E. 315.

"An irregular judgment is not void. It stands as the judgment of the court unless and until it is set aside by a proper proceeding." *Collins v. Highway Commission, supra.*

Defendant filed his motion to vacate Judge Hooks' judgment by default final on 30 September 1960. It was heard at the October Term 1960 of Dare County Superior Court by Judge Bone. Defendant has been diligent to protect his rights. His motion shows that Judge Hooks' judgment by default final injuriously affects his rights, that he has stated meritorious grounds for relief, and that no rights of innocent third parties have intervened.

A judgment by default final restraining defendant, whom a majority of the members of this church has voted not to employ as its pastor after the year 1959, from appearing at this church after the year 1959 and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor, violates no rights guaranteed to him by Article I, Sections 1, 17, 25 and 26

of the North Carolina Constitution, or by the 1st and 14th Amendments to the United States Constitution.

It may be stated in passing that there is no allegation in the complaint that defendant is a member of this church.

That part of Judge Bone's judgment denying the motion by Lloyd Meekins and other persons, who were not parties to the action, to vacate Judge Hooks' judgment and to dissolve the permanent injunction therein entered, is correct, was not appealed from by movants, and is affirmed. *Shaver v. Shaver,* 244 N.C. 309, 93 S.E. 2d 614. That part of Judge Bone's judgment denying defendant's motion to vacate Judge Hooks' judgment by default final cannot be sustained, and is remanded to the lower court for a judgment vacating that part of Judge Bone's judgment, and for the entry of a judgment by default final restraining defendant in accordance with the injunctive relief to which this opinion holds plaintiffs are entitled.

Affirmed in part.

Error and remanded in part.

IN RE: PERQUIMANS COUNTY DRAINAGE DISTRICT NO. FOUR.

(Filed 1 March, 1961.)

1. Drainage § 4— Record held not to establish surplus funds of drainage district subject to orders of court.

Where, upon motion to divert surplus funds of a drainage district to provide access to the canals for maintenance purposes, the record shows only that the bid for the right-of-way and the construction of the drainage canals in accordance with the original plan was less than the estimated cost, the record fails to show that the funds of the district are in excess of those necessary to pay the annual installments of principal and interest of the drainage bonds, if any, and the annual cost of maintenance of the drainage works, and therefore fails to show any surplus funds within the purview of G.S. 156-116 (3), and the clerk's order for the application of an assumed surplus can not be allowed to stand.

2. Same—

The disposition of funds of a drainage district is a matter of statutory regulation in North Carolina.

3. Same: Notice § 1—

An *ex parte* order of the clerk in regard to a drainage district which order is entered without notice to the interested parties is irregular.

IN RE DRAINAGE DISTRICT.

APPEAL by North Carolina Pulp Company from an order of *Bone, J.*, in chambers at NASHVILLE, North Carolina, on 3 November 1960.

On 26 April 1960 Frank M. Wooten, Jr., attorney for Perquimans County Drainage District No. Four, filed an unverified motion with W. H. Pitt, clerk of the superior court of Perquimans County, for the purpose of diverting surplus funds and a part of a fund for contingencies of the drainage district in order to provide access to its canals.

This is a summary of the motion:

The court has heretofore approved the final report of the board of viewers and the reorganization of the district. This report proposed that several canals be constructed in the district. The plans as heretofore approved by the court contain no provision to provide access to the canals for maintenance purposes.

Engineers of the Soil Conservation Service of the U. S. Department of Agriculture have recommended to the commissioners of the district that during the construction of the canals provision for access thereto be made to facilitate their maintenance, and have stated that the U. S. Government will pay 66.4% of the cost of the construction to provide access to the canals.

The total cost of the construction of the canals and other work needed is estimated to be $7,572.75. These figures include the cost of culverts to bridge lateral ditches and canals that drain into the main canal from adjacent lands, and of seed and fertilizer for vegetation along the banks. The U. S. Government does not pay any part of the cost of culverts. Of the estimated cost of $7,572.75, the federal government will pay $2,495.50, and the balance of $5,077.25 will be paid by the drainage district.

The low bid received by the commissioners of the district for the clearing of a right of way and the construction of the canals is $19,860.29. This bid is about $4,000.00 less than the estimated cost as shown in the final report of the board of viewers and the certificate of assessment. This report and certificate have a figure of $1,676.58 for contingencies.

It is the opinion of the commissioners of the district that it would be for the best interests of the district that this surplus fund of $4,000.00 and a part of the $1,676.58 for contingencies be used for the purpose of providing access to the canals, for the reason that this would reduce the cost of maintenance of the canals, and assure the continuing efficiency of the drainage of the canals to the same degree as when constructed.

Wherefore, movant prays that such a diversion and expenditure of funds be approved and authorized by the court.

On the same day this motion was filed the clerk of the superior court of Perquimans County entered an order finding the facts to be as alleged in the motion, and adjudging and decreeing that such an expenditure of funds be authorized and approved as prayed for in the motion.

On 3 May 1960 the North Carolina Pulp Company, which owns Tracts Nos. 34 and 34A in the drainage district, excepted to the clerk's order, and appealed to the Superior Court, assigning as errors practically all the findings of fact and the adjudication.

This appeal came on to be heard by consent of the parties by Judge Bone in Nashville, North Carolina, on 3 November 1960. At this hearing it was admitted that the North Carolina Pulp Company owns about 3,500 acres in the drainage district, subject to assessment. Judge Bone's order states that he heard and considered arguments by the attorneys for movant and the North Carolina Pulp Company, and then he adjudged and decreed in substance: One. The order of the clerk entered 26 April 1960 is affirmed and approved, with the explicit provision that the commissioners of the drainage district are not to expend funds for the purposes set forth in the motion and the order of the clerk, until they have definitely ascertained that there will be a surplus, and only the surplus as existing shall be used for said purposes without further orders of the court or compliance with the provisions of the drainage laws of the State relating to assessments for the maintenance of the canal. Two. The exceptions and appeal filed by North Carolina Pulp Company are dismissed. It seems that no evidence was introduced at the hearing before Judge Bone.

From the order, North Carolina Pulp Company appeals.

Frank M. Wooten, Jr., By David E. Reid, Jr., for Appellee.
Norman & Rodman for Appellant.

PARKER, J. The North Carolina Pulp Company states in the record its "only exception is to the conclusions of law of the trial judge." It does not on this appeal challenge the findings of fact made by the clerk, its exceptions to which findings were dismissed by Judge Bone.

Other than the appeal entries, the record contains only the unverified motion, the order of the clerk with the assignment of errors thereto by the North Carolina Pulp Company, and the order of Judge Bone, and a stipulation of the parties that the record shall contain paragraphs 10 and 13 of the final report of the board of viewers as filed in this proceeding.

A fair summary of the contents of the stipulation and the purpose

of the motion here is stated in movant's brief as follows: "Although the plan recommended by the U. S. Soil Conservation Service in their report included construction of maintenance roads or ways, and the final report of the board of viewers adopted the report of the U. S. Soil Conservation Service, inadvertently there was no provision included in the final report of the board of viewers for these access roads or ways along the canals. Since it had become apparent that there would be surplus funds available from the construction funds, it was deemed advisable by the commissioners to use these surplus funds to correct the ommission of the provision for access roads or ways along the canals."

The movant in his brief contends that the commissioners of the drainage district have authority under the provisions of G.S. 156-116, paragraph 3, to expend these alleged surplus funds to provide access roads or ways along the canals.

G.S. 156-116, Modification of Assessments, reads in part: "3. SURPLUS FUNDS. If the funds in the hands of the county treasurer at any time, arising under this section or in any other manner, shall be greater than is necessary to pay the annual installments of principal and interest, or the annual cost of maintenance of the drainage works, or both, such surplus shall be held by the county treasurer for future disbursement for other purposes as herein provided or subject to the order of the board of drainage commissioners."

We have nothing before us of the proceedings by the commissioners of the drainage district, except a fragmentary part of the final report of the board of viewers. There is nothing before us to show that the county treasurer has any funds in his hands, as to whether or not this drainage district is obligated to pay annual installments of principal and interest, or what is the annual cost of maintenance of the drainage works.

Movant alleges in his motion that there will be a surplus because the low bid received by the commissioners of the drainage district for the clearing of a right of way and the construction of the canals is about $4,000.00 less than the estimated cost of such work in the final report of the board and the certificate of assessment, and that this report and certificate have a figure of $1,676.58 for contingencies. If the estimated surplus of $4,000.00 should in fact materialize, and if the reserve of $1,676.58 for contingencies should not be used for contingencies, or any part of it, and should be paid into the hands of the county treasurer, there is nothing in the record before us to show that such funds "shall be greater than is necessary to pay the annual installments of principal and interest, (if any due), or the annual cost of maintenance of the drainage works, or both." Movant has completely failed to show the drainage district has, or will have, any

surplus funds in the hands of the county treasurer within the intent and meaning of G.S. 156-116, paragraph 3. The clerk's order upon the findings of fact made, and Judge Bone's order confirming the clerk's order as modified by him, find no support in G.S. 156-116, paragraph 3.

G.S. 156-92 authorizes drainage commissioners to keep the levee, ditch, drain, or water course of the drainage district in good repair, and that they may levy an assessment on the lands benefited by the maintenance or repair, but contains no provision for the diversion of funds to provide access to such levee, etc., from levies already made for other purposes. G.S. 156-118 and G.S. 156-123, added by Public Laws 1923, Ch. 231, have the effect of amending G.S. 156-92, and provide that the drainage commissioners may issue bonds instead of levying an assessment.

G.S. 156-93.1 provides that the board of drainage commissioners may annually levy maintenance assessments not exceeding one dollar per acre per year, but provides for no application of funds on hand for this purpose from other sources.

G.S. 156-98, pertaining to a surplus accumulating from excess assessments levied and collected to pay bonds issued by the drainage district, has no application to the facts before us on the present record.

G.S. 156-124.1 provides: "All assessments for repair, maintenance or enlargement or other improvements of any canal or canals in any drainage district shall be levied against the lands benefited by such repair, enlargement or improvement." The statute then goes on to require the giving of notice of the proposed assessments.

This court said in *In re Drainage District,* 228 N. C. 248, 45 S.E. 2d 130: "The statutes authorizing the creation, maintenance and improvement of drainage districts provide flexible procedure which may be modified and molded by decrees from time to time to promote the beneficial objects sought by the creation of the district (*Staton v. Staton.* 148 N. C., 490, 62 S.E., 596; *Adams v. Joyner,* 147 N. C., 77, 60 S.E., 725), 'subject, however, to the restriction that there should be no material change or any change that would throw additional costs upon the other landowners except to the extent of benefit to them.' *In re Lyon Swamp Drainage District, supra.* And the correct procedure to secure additional authority for improvements and proper maintenance is by motion or petition in the original cause. *Newton v. Chason,* 225 N.C., 204, 34 S.E. (2d), 70."

In *Staton v. Staton,* 148 N.C. 490, 62 S.E. 596, the Court speaking of a proceeding under our Drainage Act says: "From the nature of the proceeding, the judgment in 1886 is not a final judgment, conclusive of the rights of the parties for all time, as in a litigated matter. But it is a proceeding *in rem,* which can be brought forward from time to

time, upon notice to all the parties to be affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments, when for any cause the amount previously assessed should be increased or diminished, for repairs; for enlarging and deepening the canal or for other purposes, or to extend the canal and bring in other parties. It is a flexible proceeding, and to be modified and moulded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in the control of the court. It is not necessary, however, to keep such cases on the docket, but they can be brought forward from time to time, upon notice to the parties, upon supplementary petition filed therein, and further decrees made to conform to the exigencies and changes which may arise."

The following is stated in 28 C.J.S., Drains, § 87: "The disposition of the funds of a drainage district is a matter of statutory regulation. Ordinarily, under the various statutes such funds cannot be diverted from the purpose for which the assessment was levied, although under some statutes commissioners of a drainage district may, under the direction or approval of the court, use the money secured by assessment for any legitimate purpose of the district, and are not held strictly to the several items of the estimate." Later on this section states: "*Unexpended funds* of a drainage district are trust funds and, in the absence of some statutory provision therefor, equity has jurisdiction to distribute them among the contributors, but the landowners are not entitled to the return of such funds if there is future use for them."

G.S. 156-116, paragraph 3, provides that surplus funds, as there defined, arising from the levy and collection of assessments "shall be held by the county treasurer for future disbursement for other purposes as herein provided or subject to the order of the board of drainage commissioners." We know of no other statute of ours relating to the disbursment for other purposes of surplus funds of a drainage district derived from an assessment levied and collected, with the possible exception of G.S. 156-98 relating to an excess assessment to pay bonds issued by the drainage district, which has no application to the facts here, and with the exception of G.S. 156-135.1 relating to the investment of surplus funds of a drainage district which has no application to the facts here, nor have counsel in their briefs called any other statute to our attention.

The disposition of funds of a drainage district is a matter of statutory regulation in North Carolina. Judge Bone was in error in affirming

and approving the clerk's order as modified by him for the diversion of funds from the purpose for which the assessment was levied, for the very simple reason that the unchallenged facts found by the clerk in his *ex parte* order based on an unverified motion totally fail to show that the drainage district has, or will have, in the hands of the county treasurer any surplus funds, as defined in G.S. 156-116, paragraph 3.

This Court said in *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; "The clerk of the Superior Court holds no terms of court. In consequence, all motions made before the clerk other than those grantable as a matter of course or those otherwise specially provided for by law must be on notice. *Bank v. Hotel Co., supra,* (147 N.C. 594, 61 S.E. 570); *Blue v. Blue, supra,* (79 N.C. 69). The rules mentioned in this and the preceding paragraph are thus epitomized in *S. v. Johnson,* 109 N.C. 852, 13 S.E. 843: 'A party in court is fixed with notice of all orders and decrees taken at term, for it is his duty to be there in person or by attorney; but he is not held to have notice of orders out of term; nor of orders before the clerk.' " See also McIntosh, N. C. Practice & Procedure, 2nd Ed., Vol. 2, p. 555.

The *ex parte* order issued by the clerk here, in violation of the rules respecting procedural notice, is also irregular, in addition to the fatal defect above set out. *Collins v. Highway Commission, supra.*

If the drainage district has or shall have a surplus fund, as defined in G.S. 156-116, paragraph 3, whether it can be diverted for the purpose here sought in the motion, and if so, whether it can be done by order of the board of drainage commissioners, or must be done by an order of court, and whether or not a notice must be given to the interested parties in the drainage district if the board of drainage commissioners decide to enter an order, must await another day and another forum. This Court has no original jurisdiction in respect to drainage matters as provided for in G.S. Chapter 156, entitled Drainage, and in such matters passes on appeals from the Superior Court. *Woodard v. Clark,* 234 N.C. 215, 66 S.E. 2d 888.

The order of the trial judge is

Reversed.

STATE v. AMOS HADDOCK.

(Filed 1 March, 1961.)

1. Criminal Law § 103—

The trial judge's election not to submit to the jury one of the counts contained in the indictment will be treated as the equivalent of a verdict of not guilty on that count.

2. Criminal Law § 101—

In a case in which the State relies upon circumstantial evidence, it is not the function of the court upon motion to nonsuit to determine whether the evidence excludes every reasonable hypothesis of innocence but only whether there is competent evidence tending to prove the fact in issue, or which reasonably conduces to such conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjection of guilt.

3. Criminal Law § 99—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

4. Automobiles § 66—

The elements of the offense defined by G.S. 20-138 are the driving of a vehicle upon a highway within the State while under the influence of intoxicating liquor or narcotic drugs.

5. Automobiles § 72— Circumstantial evidence that defendant, being intoxicated, drove a vehicle upon a State highway, is held sufficient to be submitted to jury.

The State's evidence tended to show that defendant was apprehended in an intoxicated condition sitting under the steering wheel, with his head drooped forward, and with both hands holding the steering wheel of a vehicle parked on the shoulder of a highway, and that the headlights of the vehicle were burning and the motor running. The evidence further tended to show that no car was parked at the scene when the officers passed the place some fifteen minutes prior to the time the defendant was apprehended. There was no evidence that any other person was present at the scene. *Held:* The evidence is sufficient to raise the inference that defendant drove the vehicle upon the highway while intoxicated, and motion to nonsuit was correctly denied.

6. Criminal Law § 156—

Assignment of error to the charge which fails to point out specifically the part of the charge challenged is ineffectual.

MOORE, J., dissenting.

HIGGINS, J., joins in dissent.

APPEAL by defendant from *Burgwyn, E. J.*, September Term 1960 of CRAVEN.

Criminal prosecution on an indictment with two counts. The first count charges defendant with unlawfully driving an automobile upon the public highways of the State, while under the influence of intoxicating liquor and narcotic drugs, in violation of G.S. 20-138. The second count charges defendant with the improper use of headlights in the operation of an automobile.

Plea: Not Guilty.

The trial judge in his charge submitted the case to the jury only on the first count in the indictment.

Verdict: Guilty.

From a judgment imposing a fine of $100.00 and the costs, defendant appeals.

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

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

PARKER, J. The trial judge's election not to submit to the jury in his charge the second count in the indictment will be treated as the equivalent of a verdict of not guilty on that count. *S. v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312; *S. v. Love,* 236 N.C. 344, 72 S.E. 2d 737.

The State's evidence consists of the testimony of H. W. Pridgen, a state highway patrolman. Defendant offered no evidence. Defendant assigns as error the denial of his motion for judgment of nonsuit made at the close of the State's case.

The State's evidence tends to show the following facts:

About 12:30 a.m. on 13 August 1958 H. W. Pridgen, a state highway patrolman, about 15 minutes prior to defendant's arrest, was driving a patrol car down the old Cherry Point Road, which is old Highway 70. State highway patrolman Henry was riding in the car with Pridgen. Pridgen was travelling in an easterly direction, and passed Williams' Service Center, which was closed. From there he patroled down the highway about four and one-half miles to Old Red's Service Station, where he turned around and proceeded back to New Bern. Upon his approach to Williams' Service Center, he saw a 1950 Ford automobile standing in front of the Service Center on the right-hand shoulder, about three feet off the paved part of the highway, headed east with bright headlights shining directly down the highway. At the time he had passed this Service Center 15 minutes earlier no car was there. Pridgen stopped his car, got out and went to the parked car to ask who was there to turn off the lights. When he reached the 1950 Ford automobile, he saw defendant sitting under the steering wheel, with both hands holding the steering wheel, and

his head drooped over in front. The motor of the Ford automobile was running. Pridgen opened the door, and tried to rouse him. Defendant would just groan. Defendant was drunk. Pridgen smelt the odor of alcohol about him. Defendant couldn't walk, and did not say a word. Patrolman Pridgen and Patrolman Henry lifted him out of the Ford automobile, put him in the patrol car, and carried him to jail.

This is a case of circumstantial evidence. The rule in respect to the sufficiency of the evidence to carry a case of circumstantial evidence to the jury is stated by *Higgins, J.*, in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.'"

WINBORNE, C.J., said for the Court in *S. v. Rogers* and *S. v. Foster,* 252 N.C. 499, 114 S.E. 2d 355: "In this connection, it is settled law in this State that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and it is entitled to every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, and if there be any competent evidence to support the charge in the warrant, the case is one for the jury."

In *State v. Hazen,* 176 Kan. 594, 272 P. 2d 1117, the defendant was convicted of driving a motor vehicle while under the influence of intoxicating liquor. The State's evidence showed the following facts: "At about 9 o'clock on the night of May 29, 1953, while patrolling Kansas Highway No. 4, about a mile east of Ransom, law enforcement officers came upon a car parked upon the highway, headed east, in the center of the east-bound traffic lane. It was dark and the car's lights were out. The engine was not running. Defendant was sitting in a slumped position in the driver's seat, and was in a dazed condition. A carton of beer, with one can removed, was in the car. There was an open can of beer, partially full, in the front seat. Some of it had been spilled. Very shortly thereafter other officers appeared at the scene. All of them testified that defendant was intoxicated. Efforts were made to move the car to the side of the road so as to lessen the traffic hazard, and there was evidence to the effect that at the time these efforts were being made defendant himself started the engine

and backed the car a few feet. He was arrested, taken to jail, and one of the officers drove the car into town. The only evidence introduced by defendant consisted of the testimony of a witness who was at the scene with respect to who did or did not move defendant's car off of the highway. There is no contention that defendant was not intoxicated when found by the officers." The Court said: "Entirely aside from the confusing evidence as to whether defendant 'drove' his car after the officers arrived at the scene, the circumstantial evidence above related was sufficient to withstand the demurrer and to support the verdict of guilty."

The facts in the following cases are closely similar to the facts in the *Hazen* case, and were held sufficient to survive a demurrer to the State's evidence, and to carry the case to the jury: *State v. De Hart,* 3 N.J. Misc. 71, 129 A. 427; *State v. Baumgartner,* 21 N.J. Super. 348, 91 A. 2d 222; *State v. Damoorgian,* 53 N.J. Super. 108, 146 A. 2d 550.

G.S. 20-138 defines three distinct elements of the offense: (1) driving a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating liquor or narcotic drugs.

The evidence for the State is plenary to the effect that defendant when taken into custody by state highway patrolmen Pridgen and Henry was very drunk, and that the automobile in which he was sitting, when seen by the two patrolmen, had been driven upon a public highway to where it was parked within fifteen minutes before the patrolmen arrived at the scene.

Defendant argues that the State has no evidence tending to show that he actually drove the automobile on a highway, while under the influence of intoxicating liquor. It is true that no one actually saw defendant driving the automobile, but the State's evidence shows the following facts: About 12:30 a.m. on 13 August 1958 state highway patrolman Pridgen patroling old Highway 70 drove by Williams' Service Center, which was closed. At that time no automobile was there. He patroled down the highway about four and one-half miles, turned around and proceeded back to New Bern. Within 15 minutes after he had passed Williams' Service Center he approached it again, and saw a 1950 Ford automobile parked in front of Williams' Service Center on the right-hand shoulder, about three feet off the paved part of the highway, headed east with bright lights shining down the highway. The motor of the Ford automobile was running. The defendant was sitting under the steering wheel of the Ford automobile, with both hands holding the steering wheel, and his head drooped over in front. He had the odor of alcohol about him, and was drunk. There is no evidence any one else was there. The State's evidence tends to show facts which authorize the fairly logical and legitimate

inference that defendant actually drove the 1950 Ford automobile upon a highway within the State, while under the influence of intoxicating liquor, and that the State sustained its burden of proof to carry its case to the jury.

State v. Hall, 271 Wis. 450, 73 N.W. 2d 585, is factually distinguishable. In that case no one knew how long the automobile had been parked, and defendant was seated on the passenger side. *State v. McDonough,* 129 Conn. 483, 29 A. 2d 582, is also factually distinguishable. In that case there was no evidence as to how long the automobile had been parked, and defendant was seated in the middle of the front seat, leaning toward the right, and with one hand on the floor and the other on the dashboard, as though he was reaching or feeling for something.

Defendant has no exceptions as to the evidence. He has several assignments of error as to the charge. They are not in conformity with the rules of practice in this Court, in that they do not point out specifically the part of the charge challenged. To find this out we had to go beyond the assignments themselves as to the charge, and go on a "voyage of discovery." *Steelman v. Benfield; Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. However, we have read and considered the charge, and error sufficiently prejudicial to justify a new trial does not appear.

All defendant's assignments of error are overruled.

No error.

MOORE, J., dissenting:

It is my opinion that the evidence, when taken in the light most favorable to the State, fails to make out a *prima facie* case of operating a vehicle on a public highway while under the influence of intoxicants. It is conceded that there is ample evidence of public drunkenness. But on the issue of operating the vehicle the showing merely creates suspicion and leaves the matter in the realm of conjecture.

The majority opinion asserts: "This is a case of circumstantial evidence," and acknowledges that "It is true that no one actually saw defendant driving the automobile . . . ."

I do not agree that the circumstances listed are sufficient to withstand a motion for nonsuit.

With reference to defendant's condition patrolman Pridgen testified: "I tried to rouse him up and I opened the door and shook him. I couldn't get any sense in him at all. He would just groan . . . . He could not walk . . . he was just as limber as he could be. He didn't say a word." The patrolmen took him bodily from the Ford, placed him in the patrol car and took him to jail. If this evidence tends to

prove anything, other than public drunkenness, it is that defendant was utterly incapable of operating the Ford automobile. How long had he been in this condition? One minute, one hour, longer? Any possible answer is a pure assumption, a mere guess. There is no evidence of intoxicating beverages in or near the vehicle. No empty or partially empty bottles were found. As to when or where he did the drinking and lapsed into a drunken stupor there is no evidence.

Stress is laid upon the testimony that the car was not at this location fifteen minutes before defendant was apprehended. In the majority opinion it is said that the evidence does not show anyone else was there. By the same token, the evidence does not show that there were not others there. The real weakness of this case consists of the things the evidence does not show. There is no evidence that the officers made any effort to determine whether there were other persons in or near the premises. Besides, there is no evidence as to whether or not there were dwellings or other buildings nearby.

There is no evidence that defendant owned the automobile. Surely this was a matter within the knowledge of the patrolmen, or which could have been easily determined by them. There is no evidence that defendant had been seen alone in this car at any other location on this night.

It is true that the motor was running and the lights were burning. Even so, there is no evidence that defendant was doing anything to set the vehicle in motion. If it be assumed that he had driven the car in an intoxicated condition, and had sufficient presence of mind to drive it off the hard surface and park it to avoid detection, must it not also be assumed that he had presence of mind sufficient to cause him to stop the motor and turn off the lights? If the running motor and burning headlights tend to prove anything against defendant, it is that he had made preparation to drive. But mere preparation is not sufficient for conviction even of an attempt to commit a crime. *State v. Surles,* 230 N.C. 272, 275, 52 S.E. 2d 880.

In order to sustain the conviction, it is necessary to make assumptions and deal in possibilities. Facts are lacking. The operation of a motor vehicle by a person under the influence of intoxicants imports motion of the vehicle, and does not embrace holding an automobile motionless by putting the foot on a brake pedal. *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435. Sitting in a parked car while it rolls backwards under the force of gravity is not operating. *State v. Robbins,* 243 N.C. 161, 90 S.E. 2d 322. Conceding there is evidence that the Ford automobile had been moved to the location in front of the Service Center within a 15-minute period prior to defendant's arrest, there is still the unanswered question: Who drove it there? The

defendant was never seen in the Ford at another place, and was never seen in the Ford at this place while it was in motion.

We have found no case in this or other jurisdictions with the same factual situation as that here presented. There are cases somewhat similar. The results reached are about evenly divided; but the result in each case is made to depend upon the peculiar circumstances of the particular case. The majority opinion relies on two cases. *State v. Hagen,* 176 Kan. 594, 272 P. 2d 1117 (1952); *State v. Baumgartner,* 21 N.J. Super. 348, 91 A. 2d 222 (1952). There are important factual differences between these cases and the one at bar. In other cases the decisions favored the defendants. *State v. Hall,* 271 Wis. 450, 73 N.W. 2d 585 (1955); *State v. McDonaugh,* 129 Conn. 483, 29 A. 2d 582 (1942).

It appears contrary to our concept of presumption of innocence and the justice individuals have the right to expect in our courts to permit a jury to consider whether or not this defendant is guilty *from the evidence* beyond a reasonable doubt when essential elements must be assumed from pure conjecture and possibilities.

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

GREAT AMERICAN INSURANCE COMPANY AND HARDWARE MUTUAL INSURANCE COMPANY OF THE CAROLINAS, INC. v. CHARLES F. GOLD, COMMISSIONER OF INSURANCE; BERRY C. GIBSON, HENRY L. BRIDGERS, CHARLES F. GOLD, I. MILLER WARREN AND CLYDE C. CARTER, CONSTITUTING THE BOARD OF TRUSTEES OF THE NORTH CAROLINA FIREMEN'S PENSION FUND; THE NORTH CAROLINA FIREMEN'S ASSOCIATION; C. R. PURYEAR AND RAY E. SCOTT.

(Filed 1 March, 1961.)

1. Insurance § 1—

The Commissioner of Insurance is a constitutional officer of the State with authority to levy and collect certain taxes for general State purposes. G.S. 105-1, G.S. 105-228.5, G.S. 105-228.9.

2. Firemen's Pension Fund Act—

The Board of Trustees of the North Carolina Firemen's Pension Fund, under S.L. 1959, c. 1212, purports to be an agency of the State charged with the duty, among others, of administering moneys appropriated from the general fund of the State.

3. State § 3a—

An action to declare unconstitutional a provision of G.S. 105-228.5, levying a tax on certain contracts of insurance, and G.S. 118-18 *et seq.*, estab-

lishing the North Carolina Fireman's Pension Fund, and to prevent the collection of the tax and forestall expenditure by the Trustees of Funds made available by the tax, *is held* a suit against the State, since the act is to prevent a State official and agency from performing official duties.

4. Same—

The State is immune to suit except in instances in which it has expressly consented to be sued, and in those instances the statutory procedure authorizing suit must be followed and the remedies therein authorized are exclusive.

5. Same: Taxation § 38c—

Parties subject to the tax on certain insurance policies levied by G.S. 105-228.5 may not maintain an action to have the statute declared unconstitutional, the statutory remedy of recovery of the tax after payment under protest being exclusive.

6. Administrative Law § 3: Constitutional Law § 10—

An administrative board has only such authority as is properly conferred upon it by statute, and the question of the constitutonality of a statute is for the judicial branch of the government.

7. Declaratory Judgment § 1—

The Declaratory Judgment Act does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose.

8. Injunctions § 5: Constitutional Law § 4—

Parties subject to the tax on certain insurance policies levied by G.S. 105-228.5 may not maintain that the enforcement of the act would result in irreparable injury to them, since, if the statute is unconstitutional such parties may recover the tax paid with interest by following the statutory procedure, G.S. 105-267, and if the statute is valid, no rate increase which could affect the volume of such parties' business would go into effect pending the final determination of the validity of the statute.

APPEAL by plaintiffs from *McKinnon, J.*, August 1960 Civil Term, of WAKE.

This appeal was docketed at the 1960 Fall Term as Case No. 458.

This is an action instituted 16 December 1959 by plaintiffs Insurance Companies pursuant to the Declaratory Judgment Act to test the validity and constitutionality of Chapters 1211, 1212 and 1273 of the Session Laws of 1959 and, in the alternative, to have Chapter 1211 construed in the event it is declared constitutional.

Plaintiffs are licensed in North Carolina to write all types of fire and lightning insurance and are engaged in this business. The defendants are Charles F. Gold, Commissioner of Insurance, the Board of Trustees of the Firemen's Pension Fund, the North Carolina Fire-

men's Association, C. R. Puryear (a regular fireman) and Ray E. Scott (a volunteer fireman).

Defendants in apt time demurred to plaintiffs' complaint. The court sustained the demurrer and dismissed the action.

Plaintiffs appealed and assigned errors.

Joyner & Howison and Allen & Hipp for plaintiffs.

Attorney General Bruton, Assistant Attorney General Pullen and Taylor and Ellis for defendants.

MOORE, J. Plaintiffs challenge the constitutionality of three Acts of the General Assembly passed at the 1959 Session. These Acts and their general provisions are as follows:

(1) S.L. 1959, c. 1211, codified as the sixth paragraph from the end of G.S. 105-228.5. This section is a part of subchapter I of Chapter 105 of the General Statutes of North Carolina.

The Act levies a tax at the rate of 1% on the gross amount of premiums collected by each insurance company on contracts of insurance applicable to fire and lightning coverage, excluding marine and automobile policies. The Act does not apply to insurance written in unprotected areas, and does not apply to any policies written by farmers' mutual assessment fire insurance companies. The tax is payable to the Commissioner of Insurance.

(2) S.L. 1959, c. 1212, entitled "North Carolina Firemen's Pension Fund." It is codified as Article 3, Chapter 118, of the General Statutes of North Carolina (G.S. 118-18 to G.S. 118-32).

This Act establishes the North Carolina Firemen's Pension Fund to provide pension allowances and other benefits for eligible firemen, both regular and volunteer. For the purpose of administering the Fund a Board of Trustees is created, consisting of the Commissioner of Insurance, the State Auditor, and three members to be appointed by the Governor. The State Treasurer is made custodian of the Fund. Appropriations are to be made by the Legislature from the State's general fund for administrative expenses. Each eligible fireman is to pay $5.00 per month into the Pension Fund. Upon retirement, eligible firemen are to draw monthly pensions in accordance with the provisions of the Act. "In no event shall the appropriation made by the General Assembly in future years exceed the amount of revenue collected from the one per cent (1%) tax on fire and lightning insurance premiums in the preceding bienniums." The office of Secretary of the North Carolina Firemen's Pension Fund is created, with an annual salary of $8,000.00

(3) S.L. 1959, c. 1273. This is an appropriation measure and is not codified.

The Act appropriates funds, in maximum amounts, from the State's general fund to the North Carolina Firemen's Pension Fund for the biennium ending June 30, 1961, for administrative expenses and State contributions to the Pension Fund. The appropriations are to be paid in amounts, in any one fiscal year, not to exceed an amount equal to 1% of the amounts collected by insurance companies on contracts of insurance applicable to fire and lightning coverage, except marine and automobile insurance, within protected areas in North Carolina in the preceding calendar year.

The complaint alleges in substance:

The three Acts are so inter-related and inter-dependant as to constitute only one piece of legislation. The legislation was divided into separate enactments in an attempt to avoid the constitutional objections inherent in the 1957 Act which purported to create a firemen's pension fund. S.L. 1957, c. 1420; *Assurance Co. v. Gold, Comr. of Insurance,* 249 N.C. 461, 106 S.E. 2d 875; *Assurance Co. v. Gold, Comr. of Insurance,* 248 N.C. 288, 103 S.E. 2d 344. The three 1959 Acts, taken together, violate the Fourteenth Amendment to the Constitution of the United States and Article I, sections 7 and 17, Article II, section 14, and Article V, sections 3 and 7, of the Constitution of North Carolina. The Acts attempt to confer a special privilege on a special class, to create an arbitrary and unreasonable classification for tax purposes, to provide non-uniform taxation, to provide for a private rather than public purpose, and to impose a tax not uniform throughout the State. The legislation was not adopted in accordance with constitutional provisions, and is vague and uncertain. Enforcement of the Acts would irreparably injure plaintiffs and they have no adequate remedy at law.

Defendants demur to the complaint on the following grounds: (1) The court has no jurisdiction of the parties or the subject matter of the action, for that (a) this is an action against the State, which has not consented to be sued in this manner, (b) plaintiffs are not interested persons, within the meaning of G.S. 1-254, in a construction of Chapters 1212 and 1273, (c) a suit under the Declaratory Judgment Act will not lie to test the validity of a tax, and (d) an advisory opinion on the correctness of an executive interpretation is sought; (2) there is a misjoinder of parties and causes; and (3) the complaint does not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer and dismissed the action. The judgment assigns the following reasons for the dismissal of the action (numbering ours): (1) "This is an action against the State of

North Carolina to restrain or avoid the collection of a tax, and this court is without jurisdiction over the subject matter of the action, the State of North Carolina not having permitted itself to be sued in this manner and there being other remedies provided by law for the adjudication of plaintiffs' cause of action," and (2) "the complaint fails to state a cause of action against the defendants" of which the court has jurisdiction.

The Commissioner of Insurance is a constitutional officer of the State and a member of the Council of State. Art. III, sections 13 and 14, Constitution of North Carolina. Among the duties imposed upon him as such official is the levying and collecting of certain taxes to "provide revenue for the necessary uses and purposes of the government and State of North Carolina." G.S. 105-1; G.S. 105-228.5; G.S. 105-228.9. With respect to the assessment and collection of such taxes "the Commissioner of Insurance is . . . given the same power and authority as is given to the Commissioner of Revenue . . . ." G.S. 105-228.9. The taxes to be collected by the Commissioner of Insurance for general State purposes are set out in G.S. 105-228.5. S.L. 1959, c. 1211, the validity of which is challenged in this action, was made a part of G.S. 105-228.5, and purports to be a tax for general fund purposes of the State.

The Board of Trustees of the North Carolina Firemen's Pension Fund, under S.L. 1959, c. 1212, purports to be an agency of the State charged with the duty, among others, of administering moneys appropriated from the general fund of the State.

The acts of the Commissioner of Insurance and the Trustees of the North Carolina Firemen's Pension Fund, of which plaintiffs complain, if performed, would be performed in their official capacities. The purpose of this suit is to have the challenged legislation declared invalid, prevent a collection of the tax by the Commissioner, and forestall expenditure by the Trustees of funds made available by reason of the tax. In other words, it is sought to prevent a State official and agency from performing official duties. In essence, it is a suit against the State. *Buchan v. Shaw, Comr. of Revenue,* 238 N.C. 522, 78 S.E. 2d 317; *Insurance Co. v. Unemployment Commission,* 217 N.C. 495, 8 S.E. 2d 619; *O'Neal v. Wake County,* 196 N.C. 184, 145 S.E. 28; *Rotan v. State,* 195 N.C. 291, 141 S.E. 733.

"It is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission. Except in a limited class of cases the State is immune against any suit unless and until it has expressly consented to such action. . . . An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected

is in fact an action against the State." *Insurance Co. v. Unemployment Compensation Commission, supra.* The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action. *Kirkpatrick v. Currie, Comr. of Revenue,* 250 N.C. 213, 108 S.E. 2d 209; *Duke v. Shaw, Comr. of Revenue,* 247 N.C. 236, 100 S.E. 2d 506; *Insurance Co. v. Unemployment Compensation Commission, supra; Rotan v. State, supra.*

The challenged Acts, insofar as they affect the plaintiffs, primarily involve the taxing provisions of S.L. 1959, c. 1211, which have been incorporated in G.S. 105-228.5, designed to provide revenue for the State's general fund. G.S. 105-228.5 and G.S. 105-267 are parts of the same chapter and subchapter of the General Statutes, and G.S. 105-267 provides, in part: "No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter." It then provides that a person having a valid defense to the enforcement of the collection of a tax may pay under protest, demand refund, and upon refusal institute an action to recover the tax paid. If the taxpayer prevails, the tax "shall be refunded by the State." This procedure is available to plaintiffs and is exclusive.

We are not unmindful of the provision for administrative review (G.S. 105-241.2; G.S. 105-241.3). Quaere: Does a quasi-judicial board of the executive branch of government have jurisdiction to pass upon the constitutionality of a statute? Administrative boards have only such authority as is properly conferred upon them by the Legislature. The question of constitutionality of a statute is for the judicial branch. 16 C.J.S., Constitutional Law, s. 92, p. 293.

It is true that a person "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder" by suit pursuant to the Declaratory Judgment Act. G.S. 1-254. Plaintiffs undertake to invoke this provision of the Declaratory Judgment Act in the case at bar. But the controversy, if there is a controversy in the instant action, must be of the type a declaratory judgment can settle. Our Court has not permitted the Declaratory Judgment Act to supplant or substitute for the specific statutory proceeding for

testing a tax statute. *Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918; *Buchan v. Shaw, Comr. of Revenue, supra; Insurance Co. v. Unemployment Compensation Commission, supra.*

Plaintiffs allege that they will suffer irreparable injury if the Acts in question are enforced, and that they have no adequate remedy at law. In the light of what has been said in preceding paragraphs, we are at a loss to understand how these allegations apply in an action of the type here presented. Even so, the factual allegations do not support these general conclusions. Plaintiffs allege that the Commissioner of Insurance and the North Carolina Fire Insurance Rating Bureau will take no action to permit the 1% tax to be reflected in insurance rates until the validity and constitutionality of the statute has been determined. If so, the plaintiffs may pay the tax and upon recovery by proper procedure *must be* repaid by the State with interest. G.S. 105-267. Plaintiffs will then be required to account to no one for the funds thus recovered. Since there will be no rate increase pending final determination of the question, the tax could not affect the volume of plaintiffs' business. Certainly G.S. 105-267 furnishes a full and adequate legal remedy.

It is true that this Court ruled upon the constitutionality of the 1957 North Carolina Firemen's Pension Fund Act (S.L. 1957, c. 1420) in a suit instituted under the Declaratory Judgment Act (G.S. 1-253 *et seq.*). *Assurance Co. v. Gold, Comr. of Insurance, supra.* The situation there presented is easily distinguished. Under the 1957 Act the majority of the Board of Trustees was not elected by a State agency, the duties of the Commissioner of Insurance were only ministrant in character and the funds to be received and transmitted by him did not belong to the State and the State had no interest in, or control of, such funds. So the rights and interest of the State were not directly affected. The action was not against the State. The Act had no provision for the refund of payments in the event the assessments were paid under protest and the Act was later declared unconstitutional. The action was not one to test a tax statute, since the assessments involved did not affect the rights, interests or purposes of the State.

The questions involved on this appeal are purely procedural. We are not to be understood to have intimated or expressed herein any opinion as to whether or not the three Acts are a single piece of legislation, or whether or not they, or either of them, are valid and constitutional. These matters are for another day should plaintiffs elect to proceed as provided by statute.

The judgment below is

Affirmed.

RALPH P. BRADLEY *v.* T. W. PRITCHARD, BRUCE A. BLEVINS, W. P. THOMPSON, ADON N. SMITH, II, AND T. W. PRITCHARD, JR., TRUSTEES OF "PRITCHARD PAINT AND GLASS COMPANY EMPLOYEES' PENSION TRUST."

(Filed 1 March, 1961.)

Insurance § 33— Disability preventing performance of work for which employed or similar work does not preclude ability to work intermittently at odd jobs.

Evidence tending to show that plaintiff was discharged because of his failure to turn out work with sufficient speed to make him a profitable employee, that after his discharge he attempted other employment but was discharged therefrom after a very short time because he was not able to do the simple duties of the employment, together with expert testimony that at the time of his original discharge plaintiff was totally and permanently disabled by reason of anemia, low blood pressure, and neurasthenia, *is held* sufficient to be submitted to the jury in plaintiff's action to recover benefits provided in the employer's pension plan for employees whose termination of employment is due to total and permanent disability to perform the "job for which he is employed or similar work."

APPEAL by defendants from *Clarkson, J.*, October Term, 1960, of BUNCOMBE.

This is an action brought by the plaintiff to recover from the defendants certain funds which he claims belong to him as a participant under an employees' pension trust, on the ground that at the time of his discharge from employment he was then totally and permanently disabled to perform the duties of the job for which he was employed or for similar work.

The plaintiff was employed by the Pritchard Paint and Glass Company of Asheville, beginning in 1943, where he worked continuously until on or about 16 July 1956. The defendants are trustees of a trust known as "Pritchard Paint and Glass Company Employees' Pension Trust." On 17 December 1948 the plaintiff became a participant under the trust and on that date a policy of life insurance was issued to the plaintiff upon his life by the Northwestern Mutual Life Insurance Company. The cash surrender value of this policy on 14 January 1957 was $3,924.23, which sum was received on the above date by the defendants as trustees.

The pension trust agreement covered employees of the Pritchard Paint and Glass Company (Charlotte) and Pritchard Paint and Glass Company of Asheville (Asheville), and in pertinent part reads as follows: "ARTICLE VIII. * * * 1. In the event that the employment of any Participant shall terminate before his normal retirement date by reason of his becoming totally and permanently disabled, the

COMPANIES shall immediately give written notice to the TRUSTEES of the fact that the employment of such Participant has been terminated and the date of such termination. In order to establish such disability, a Doctor of Medicine, approved by the COMPANIES, must certify to the COMPANIES in writing that the Participant is disabled to perform the job for which he was employed, or similar work. In the event that the COMPANIES determine that the Participant's employment was terminated by reason of his becoming totally and permanently disabled, as aforesaid, such Participant shall be entitled to the full equity in the contracts then held for his benefit hereunder and such equity or benefits shall be paid to said Participant in the manner directed by the Participant, with the approval of the TRUSTEES.

"2. * * * (e) (I)f such employee has been a Participant hereunder for more than five (5) years but less than ten (10) years and the termination of his employment is occasioned by discharge on the part of the COMPANIES without cause, he shall have a vested interest in 25% of the cash value of all contracts held for his benefit up to the date of such termination of services. * * *"

When the Certificate of Participation in the pension plan was issued on 17 December 1948 and forwarded to the plaintiff herein, it was accompanied by a letter signed by T. W. Pritchard, which read in part as follows: "Your Company is anxious to promote the welfare of its employees. Realizing that you can only prosper as your Company prospers, and realizing that the time will come when you can not serve your Company as you are doing now, this Pension Plan has been established to help you to prepare for that time. This plan will provide an income for you at the time in your life when you may most need it, or it will provide something for your family in event of your death prior to that time. In ANY EVENT it should prove to be a blessing to you."

The plaintiff was discharged by the Pritchard Paint and Glass Company of Asheville on 16 July 1956. The normal retirement age of plaintiff under the pension plan was 65 years. Plaintiff was 57 years of age in 1956. Employees were not required to contribute to the pension fund.

The evidence tends to show that on 17 July 1956 the plaintiff went to see Dr. Lawrence Sprinkle, by whom he was examined; that Dr. Sprinkle filled out a report of his examination of the plaintiff on a form furnished by the Pritchard Paint and Glass Company. This report was dated 18 July 1956 and forwarded to the Pritchard Paint and Glass Company of Asheville by Dr. Sprinkle. The report states that plaintiff's illness was due to "anemia, low blood pressure, neuras-

thenia." Dr. Sprinkle certified in this report that the plaintiff was totally disabled and prevented from performing all the duties of his occupation from that date.

Thereafter, on 21 August 1959 and on 19 November 1959, Dr. Sprinkle made affidavits with respect to the mental and physical condition of the plaintiff. These affidavits were furnished the plaintiff's employer. They were to the effect that the plaintiff was totally and permanently disabled from and after the date of his first examination on 17 July 1956.

Dr. Sprinkle was a witness for the plaintiff in the trial below, and the defendants admitted and the court found that he is a duly licensed and practicing physician engaged in the general practice of medicine and surgery and is a medical expert. Dr. Sprinkle testified, among other things, "I saw Mr. Bradley professionally on or about the 17th day of July, 1956, in my office, where he was examined by me, and I diagnosed his ailments. Mr. Bradley had a mild anemia, low blood pressure, benign prostatic hypertrophy, and arteriosclerosis and neurasthenia. The arteriosclerosis was moderately severe and he had moderate arthritis involving the joints of the fingers, toes and vertebrae. On that day, I filled out a form which I signed on July 18. The report is in my handwriting. This is a group insurance blank and the diagnosis that I put down on that date was anemia, low blood pressure and neurasthenia. Neurasthenia might be called in lay terms nervous prostration. It is a psychoneurosis or nervous disorder, characterized by exhaustion and abnormal fatigability. It is the name for a group of symptoms, some functional disorder of the nervous system, with severe depression of the vital forces. It is usually due to prolonged, excessive expenditure of energy and is marked by a tendency to fatigue, lack of energy, pain in the back, loss of memory, insomnia, constipation, loss of appetite, mental and visual disturbances, and the constant sense of the pulse beat, and irregularity of the pulse beat, heart action and blood pressure.

"I reported on that day in July, when I examined him, that he was suffering from neurasthenia. Benign prostatic infection is an enlargement of the prostate gland without cancer. Arteriosclerosis in lay terms is hardening of the arteries, and on that day I found he was suffering from it. He has some arthritis, which is a disease of old age, and is usually marked by enlargement of various joints of the skeletal system, and often by calcification of the joints. It is my opinion that the ailments which I found will be permanent and continuing."

Between 17 July 1956 and the time the case was tried, this physician re-examined the plaintiff eleven times. He further testified, "In my opinion there have been no times from July 1956 until this date

that he was not totally and permanently disabled." This testimony was in conflict with one of the affidavits made by Dr. Sprinkle to this extent: There appears in the first affidavit referred to above, the statement, "affiant is of the opinion that the patient (plaintiff) might have for a few days, been able to do light work during the period of time July 18, 1956 to this date (August 21, 1959)." Even so, the affidavits and oral testimony of Dr. Sprinkle were to the effect that the plaintiff since his first examination on 17 July 1956 has been totally and permanently disabled to perform the work for which he was employed as a glazier, or similar work.

Fred Rice testified that he was a construction foreman for the Merchant Construction Company, that for a short time in 1958 the plaintiff attempted to work for the Merchant Construction Company; that plaintiff was employed to do light work, cleaning up, carrying boards, and as a handy man around general construction. This witness further testified: "He tried to do the work. * * * I discharged him because he was not able to do the work. He was off one week and come back and said he felt a little better and he would like to try again. I said, 'O.K., if you can make it, you can try.' He worked one day. * * * I discharged him after that day. I said, 'Plumer, you can't do the work, I am going to have to let you go.' "

Defendants rely on the fact that the plaintiff, prior to his discharge, worked about as regularly as the average employee; there were complaints about the time consumed by the plaintiff in doing his work. Mr. T. W. Pritchard, Jr., manager of the Asheville corporation, testified: "I fired him because of his general over-all attitude, for his lack of interest, and his lack of cooperation and the lack of doing the job as prescribed by management."

Evidence by a number of other witnesses who testified for the defendant tends to show that the plaintiff complained often about not feeling well; that while he had slowed up in his work, there is no evidence the plaintiff ever did any unsatisfactory work or that he was uncooperative. In fact, the defendants' witnesses who had worked with the plaintiff testified that he never violated a rule of the company or failed to carry out an order of his superiors. The evidence of the manager of the employer tends to show that this employee for sometime had not been turning out work as a glazier with sufficient speed to make him a profitable employee for the corporation.

At the close of the evidence defendants moved for judgment as of nonsuit. The motion was overruled.

It was stipulated that the following issues should be submitted to the jury:

"1. Was the plaintiff's employment with Pritchard Paint & Glass

Company terminated by reason of his becoming totally and permanently disabled to perform the job for which he was employed, or similar work, as alleged in the complaint?

"2. If not, was the termination of plaintiff's employment occasioned by his discharge from the company with cause, as alleged in the answer?"

It was further stipulated, "That if the jury should answer the first issue in favor of plaintiff, the court by consent may render judgment in the amount prayed for, plus interest; and if the first issue is answered in favor of defendant and the second issue in favor of plaintiff the court may by consent render judgment in favor of plaintiff in the amount of one-fourth of the amount prayed for, plus interest."

The jury answered the first issue in the affirmative and the court entered judgment on the verdict in favor of the plaintiff in accordance with the stipulation. The defendants appeal, assigning error.

E. L. Loftin, Ward & Bennett for plaintiff.
Lee & Lee; Cochran, McCleneghan & Miller for defendants.

DENNY, J. The defendants have abandoned all their exceptions and assignments of error except to the refusal of the court below to sustain their motion for judgment as of nonsuit. Therefore, the sole question for consideration and determination is whether or not the plaintiff's evidence, when considered in the light most favorable to him, was sufficient to carry the case to the jury.

The pension agreement, pursuant to which the plaintiff claims the surrender value of the insurance policy issued on his life when he qualified for the benefits under the pension plan on 17 December 1948, sets out what is required to establish total disability under the agreement. It provides: "In order to establish such disability, a Doctor of Medicine, approved by the COMPANIES, must certify to the COMPANIES in writing that the Participant is disabled to perform the job for which he was employed, or similar work."

The appellants cite and rely upon *Thigpen v. Insurance Co.*, 204 N.C. 551, 168 S.E. 845; *Boozer v. Assurance Society*, 206 N.C. 848, 175 S.E. 175; *Hill v. Insurance Co.*, 207 N.C. 166, 176 S.E. 269; *Lee v. Assurance Society*, 211 N.C. 182, 189 S.E. 626; *Medlin v. Insurance Co.*, 220 N.C. 334, 17 S.E. 2d 463; *Jenkins v. Insurance Co.*, 222 N.C. 83, 21 S.E. 2d 832; *Ford v. Insurance Co.*, 222 N.C. 154, 22 S.E. 2d 235; *Johnson v. Assurance Society*, 239 N.C. 296, 79 S.E. 2d 776; and *Andrews v. Assurance Society*, 250 N.C. 476, 108 S.E. 2d 921.

In each of the above cases the plaintiff or beneficiary, before he or

she was entitled to recover under the provisions of the contract or policy of insurance involved, had to be both totally and permanently disabled to such an extent as to be unable to pursue any occupation whatsoever for remuneration or profit. Recovery was denied in each of the above cases because the evidence was insufficient to establish such disability.

In *Medlin v. Insurance Co., supra,* it is said: "This Court has frequently construed total and permanent disability clauses in life insurance policies to mean that the insured cannot recover disability benefits if he is able to engage with reasonable continuity in his usual occupation or in any occupation that he is physically and mentally qualified to perform substantially the reasonable and essential duties incident thereto. This rule of law has been given application to the extent of denying benefits to an insured who, though suffering from a severe disability, continues to work at a gainful occupation."

In the case of *Bulluck v. Insurance Co.,* 200 N.C. 642, 158 S.E. 185, this Court, speaking through *Brogden, J.* said: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.' "

The plaintiff, under the terms of the agreement involved herein, is not required to show total and permanent disability that would prevent him from performing the duties of any other occupation, but only that there was total and permanent disability to the extent that he could not perform with reasonable continuity the "job for which he was employed (as a glazier), or similar work."

In light of the provisions of the pension agreement and the testimony adduced in the trial below, in our opinion, the plaintiff made out a case for the jury. *Bulluck v. Insurance Co., supra; Guy v. Insurance Co.,* 206 N.C. 118, 172 S.E. 885; *Gennett v. Insurance Co.,* 207 N.C. 640, 178 S.E. 87; *Leonard v. Insurance Co.,* 212 N.C. 151, 193 S.E. 166.

The ruling of the court below is

Affirmed.

B. C. CUTHRELL AND J. W. JENNETTE, TRUSTEE v. CAMDEN COUNTY.

(Filed 1 March, 1961.)

1. Mortgages and Deeds of Trust § 11: Public Welfare: Registration § 1—

Both a deed of trust and an old age assistance lien are required by law to be recorded. G.S. 161-22, G.S. 108-30.1.

2. Registration § 2—

An instrument is not properly registered until it has been properly indexed. G.S. 161-22.

3. Same—

Where the wife, by survivorship, acquires sole ownership of lands theretofore held by the entireties, the indexing of a mortgage thereon, executed by herself and children, in the name of one of the children "et al." constitutes an ineffectual registration.

4. Same: Public Welfare—

Old age assistance liens should be indexed in the names of lienees, alphabetically, and the indexing should refer to the books and pages at which the liens are recorded. G.S. 108-30.1, G.S. 161-22, G.S. 2-42.

5. Same—

The purpose of registering instruments and their indexing is to give notice, and parties will be held to notice of all matters which would have been discovered by a reasonably prudent examiner from an inspection of the records themselves.

6. Same—

In this case, the old age assistance lien was properly indexed in the name of the lienee, and the index referred to the proper lien book, but erroneously referred to page 120 of the book whereas the lien actually appeared on page 117. *Held:* The index was sufficient to give notice.

7. Registration § 3—

A prior registered deed of trust was ineffectually indexed and the defect in the indexing was not cured until after the effective registration of the County's lien for old age assistance. *Held:* The lien for old age assistance has priority.

APPEAL by plaintiffs from *Bone, J.*, Fall 1960 Term, of CAMDEN.

This is a civil action instituted 3 September 1960 under the Declaratory Judgment Act (G.S. 1-253 *et seq.*) to determine priority as between a deed of trust held by plaintiffs and an old age assistance lien of defendant on the real property of Mollie Cuthrell.

The parties waived jury trial and agreed that the cause might be heard out of term and out of the county. The facts were stipulated and agreed as follows:

". . . Mollie Cuthrell became the owner in fee simple of an improved lot of land in Camden County, . . . upon the death of her husband,

the property having been conveyed to her and her husband as tenants by the entirety. Subsequently, on or about April 5th, 1950, a Deed of Trust was prepared conveying said lot in trust to J. W. Jennette, Trustee, to secure a note therein described, made payable to B. C. Cuthrell. The note was executed by the said Mollie Cuthrell, although her . . . children executed the Deed of Trust under the apparent erroneous impression that they had inherited the one-half interest of their father. This Deed of Trust was filed for record April 15, 1950, but the same was indexed on the Grantor side of the general index to deeds in the Office of the Register of Deeds of Camden County as "R. G. Cuthrell et al." The name of Mollie Cuthrell was not included at that time on the grantor index.

"Subsequently, Mollie Cuthrell applied for and was granted old age assistance by the defendant on or about the 11th day of April, 1950, after the recordation of the Deed of Trust mentioned above. A lien for such old age assistance was filed for record in the office of the Clerk of the Superior Court of Camden County, North Carolina, and in the index to judgments and liens in said Clerk's office, on the defendant's side, Mollie Cuthrell's name appears showing a lien filed against her in Lien Book 1, at page 120. However, no lien against Mollie Cuthrell is recorded on page 120 of Lien Book 1, but there is an old age assistance lien recorded in Lien Book 1, at page 117, the number of said certificate being 120. This lien was filed on January 12, 1952, against Mollie Sawyer Cuthrell.

"Subsequently, it was discovered that the Deed of Trust given by Mollie Cuthrell and others to J. W. Jennette, Trustee, hereinabove referred to, was not indexed in the name of Mollie Cuthrell, and the same was thereupon indexed on the Grantor side of the general index to deeds in the office of the Register of Deeds in Camden County on January 5, 1960, against said Mollie Cuthrell. The lien claimed by Camden County has never been indexed anywhere showing the same to be recorded on page 117 of Lien Book 1."

On 17 October 1960 judgment was entered declaring that the old age assistance lien has priority over the deed of trust.

Plaintiffs appeal.

J. W. Jennette and LeRoy, Goodwin & Wells for plaintiffs.

E. Ray Etheridge for defendant.

MOORE, J. Both the deed of trust and the old age assistance lien are by law required to be recorded. G.S. 161-22; G.S. 108-30.1. It is conceded by all parties that "priority" in this case means priority of recordation. ". . . (N)o instrument shall be deemed to be properly

registered until the same has been properly indexed . . ." G.S. 161-22. Indexing of deeds is an essential part of registration, and the indexing of judgments is an essential part of docketing. *Cotton Co. v. Hobgood,* 243 N.C. 227, 90 S.E. 2d 541; *Story v. Slade,* 199 N.C. 596, 155 S.E. 256; *Fowle v. Ham,* 176 N.C. 12, 96 S.E. 639; *Ely v. Norman,* 175 N.C. 294, 95 S.E. 543.

The deed of trust held by plaintiffs was not properly indexed, and therefore not properly recorded, until 5 January 1960. Mollie Cuthrell was the owner of the land and executed the deed of trust, but it was not indexed in her name. Her children, though they had no title to the land, also signed the deed of trust. One of the grantors therein was R. G. Cuthrell. It is assumed that he was one of the children. The grantors were listed in the "grantor" side of the general index to deeds as "R. G. Cuthrell et al." In a case in which there were several grantors in a deed of trust, it was held that the indexing and cross-indexing of the instrument in the full name of one of the grantors, the other grantors being referred to solely by the expression "et al," was sufficient notice only as to the grantor fully named in the index. *Woodley v. Gregory,* 205 N.C. 280, 171 S.E. 65. We think this holding correct where the sole owner of the property, as in the instant case, is not named in the index, but is one of those referred to by the abbreviation "et al." The deed of trust was properly recorded on 5 January 1960 when the proper indexing was supplied.

The old age assistance lien was filed and transcribed in the lien book on 12 January 1952. The original indexing has not been changed. The decisive question on this appeal is whether or not the indexing of the lien was legally sufficient to give notice to subsequent purchasers and lienholders and establish priority over subsequently recorded conveyances and liens.

The legislative authority for the establishment of old age assistance liens is contained in G.S. 108-30.1. With reference to recording and indexing, this section provides that "The statement (lien) shall be filed in the regular lien docket and shall be cross-indexed showing the name of the county filing said statement as claimant and the name of the recipient as owner." This provision was rewritten by S.L. 1953, c. 260, as follows: "The statement shall be filed in the regular lien docket, showing the name of the county filing said statement as claimant, or lienor, and the name of the recipient as owner, or lienee, and same shall be indexed in the name of the lienee in the defendants' or reverse alphabetical, side of the cross-index to civil judgments; in said index the county shall appear as plaintiff, or lienor; no cross-index in the name of the county, or lienor, shall be required." These recording and indexing requirements are less specific than those relating to

deeds and judgments. They should be construed in *pari materia* with the recording and indexing provisions of G.S. 161-22 and G.S. 2-42. It is necessarily inferred that old age assistance liens should be indexed in the names of the lienees alphabetically and the indexing should refer to books and pages.

The Cuthrell lien was transcribed in Lien Book 1, at page 117, and bears certificate number 120. ". . . (I)n the index to judgments and liens . . . on the defendant's side, Mollie Cuthrell's name appears showing a lien filed against her in Lien Book 1, at page 120." The only error in indexing is the page reference. The index correctly refers to Lien Book 1, but erroneously refers to page 120. The lien record is on page 117.

In order for a recordation to be effective as notice there must be a substantial compliance with the indexing statutes. The general rule to be applied in determining the sufficiency of an irregular indexing has been stated by this Court in these terms: ". . . (T)he primary purpose of the law requiring the registration and indexing of conveyances is to give notice, and it has been repeatedly stated by those writing on this subject that an index will hold a subsequent purchaser or encumbrancer to notice if enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found. . . . The cardinal purpose of the registration and indexing laws is to provide records that shall of themselves be sufficient, under careful and proper inquiry, to disclose the true state of the title to real estate." *Dorman v. Goodman,* 213 N.C. 406, 412, 196 S.E. 352.

In the following circumstances the indexing was held insufficient for notice and not in substantial compliance with statutory requirements: J. Frank Crowell was grantor in a deed; it was indexed "J. L. Crowell" — there was a J. L. Crowell and his name appeared in the grantor index more than a hundred times. *Dorman v. Goodman, supra.* Wife owned land; she and her husband executed a mortgage; it was indexed and cross-indexed only in the name of the husband. *Heaton v. Heaton,* 196 N.C. 475, 146 S.E. 146. An instrument creating a lien on real estate was indexed and cross-indexed only in the chattel mortgage index. *Bank v. Harrington,* 193 N.C. 625, 137 S.E. 712 (Court equally divided — no precedent). Judgment in favor of J. A. Currie cross-indexed in the name of J. A. Quick. *Trust Co. v. Currie,* 190 N.C. 260, 129 S.E. 605. Public officer gave mortgage in lieu of official bond; it was indexed only in the Bond Book. *Hooper v. Tallassee Power Co.,* 180 N.C. 651, 105 S.E. 327.

In the following instances indexing was declared sufficient: Corporate trustee executed a deed; it was indexed in the name of the

corporation, but the index did not indicate the capacity of the corporation as trustee. *Tocci v. Nowfall,* 220 N.C. 550, 18 S.E. 2d 225. Wife owned land; she and husband executed a deed of trust; it was indexed in the name of the husband "et ux." *Prudential Insurance Co. v. Forbes,* 203 N.C. 252, 165 S.E. 699. Jesse Hinton and wife owned land by the entirety and executed a deed of trust which was indexed "Jesse Hinton and wife." *West v. Jackson,* 198 N.C. 693, 153 S.E. 257. Index book had alphabetical subdivision of each letter; a deed of trust executed by one Harrison was indexed in the subdivision "Haa to Hap" instead of the subdivision "Har to Haz." *Clement v. Harrison,* 193 N.C. 825, 138 S.E. 308.

Cotton Co. v. Hobgood, supra, is an indexing case involving an incorrect reference to book and page. A chattel mortgage and crop lien was filed in the office of the Register of Deeds of Moore County on 23 May 1952 and transcribed in Chattel Mortgage Book 115, at page 70. The names of the parties were properly indexed and cross-indexed, but in both instances the reference was to Chattel Mortgage Book 102, page 493. Book 102 contained no such numbered page. The cross-index was corrected in May 1952 and the grantor index on 26 November 1954, after institution of the action. Crops covered by the chattel mortgage were sold at defendants' warehouse in the Fall of 1952. The trial court held that the chattel mortgage was not recorded as required by law. This Court reviewed many former decisions and concluded: "In light of our decisions, we hold that the indexing was sufficient to put a careful and prudent examiner upon inquiry. Moreover, from and after 1 June, 1952, the instrument was cross-indexed properly and accurately as required by statute. We cannot conceive of a careful examiner failing to examine the cross-index when he found the instrument was not recorded in the book and on the page referred to in the direct index." We think this compelling authority for defendant's position in the instant case. The irregularity was much greater in the *Cotton Company* case.

Barney v. Little, 15 Iowa 527, is practically identical with the case *sub judice.* There, a mortgage was entered of record in Book 3, at page 546. The index entry referred to Book 3, page 596. There, as here, the only material irregularity was the page reference. In holding the recordation sufficient, the court said: "It is a purchaser's duty to examine the record. The law places the means at his disposal. It requires all matters affecting titles to appear of record If he omits to examine, he is to impute the loss, if any, to his own indolence or folly. . . . Assuming the instrument to be one which may properly be registered, the law charges him with a knowledge of all facts which an ordinarily careful examiner of the records would have made him

cognizant of. Having thus settled the rule which is to be applied, the Court cannot avoid the conclusion, that if the appellants, in the case under consideration, had made an ordinarily diligent, skillful and careful examination of the records, the mortgage in question would have been discovered to them."

". . . (I)t is a universally accepted principle that 'constructive notice from the possesion of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all the inquiry would have disclosed.'" *West v. Jackson, supra.*

Applying the rule laid down in the *Dorman* case, it is our opinion, and we so hold, that defendant's lien was indexed in substantial compliance with statutory requirements and has priority over plaintiffs' deed of trust. Enough is disclosed by the index to put a careful and prudent examiner on inquiry. It plainly shows that there is a lien against Mollie Sawyer Cuthrell in favor of Camden County recorded in Lien Book 1. By a careful examination of the indicated Book the record of the lien would be found.

The judgment below is

Affirmed.

CARROLL H. SMITH v. MATT R. MOORE AND MILTON R. MOORE.

(Filed 1 March, 1961.)

1. Highways § 11—

If a road was existent as a public way, the fact that it was not taken over and maintained by the State Highway Commission, would not constitute it a private way. G.S. 136-67.

2. Same—

Evidence that prior to 1929 a road existed across certain lands from a river to another highway, that such way was used by the public at large, at its convenience, in going to fishing camps located on the river, but that the road was not taken over for maintenance by the State Highway Commission, is sufficient to be submitted to the jury as to whether such road remained a neighborhood public road.

3. Easements § 3—

A deed to lands and the privileges appurtenant conveys not only the lands described but also easements existent at the time of the convey-

ance which are so apparent and beneficial to the use of the land conveyed as to lead to the conclusion that the parties contemplated that such easements should continue as reasonably necessary to the fair and convenient enjoyment of the land.

4. Same—

An easement appurtenant is not dependent upon the complete absence of other ingress and egress and it is not required that it be absolutely necessary to the enjoyment of the land, but the existence of another way may be material if such other way affords such convenient access to the property as to permit a reasonable inference that the grantor did not intend that the asserted easement appurtenant should remain open for the fair and convenient enjoyment of the property.

5. Same—

If lands conveyed by the grantor are entirely shut off from access to a public way by other lands retained by the grantor, the law will assume that the grantor intended for his grantee to enjoy the land conveyed and will imply an easement by necessity, which may be established pursuant to G.S. 136-69.

6. Appeal and Error § 42—

Conflicting instructions upon a material aspect of a case must be held prejudicial.

APPEAL by plaintiff from *Sink, E. J.* October 3, 1960 Term, of Craven.

Plaintiff instituted this action in June 1960 to enjoin defendants from an asserted continuing trespass committed by using a road on plaintiff's land in traveling from their property to the public highway known as the Adams Creek Road.

To support his claim plaintiff alleged he and defendants owned adjoining properties. These lands were originally one tract owned by C. C. Smith, who conveyed the southern portion to plaintiff and the northern portion to his daughters, who conveyed to defendants. Plaintiff's southern boundary is the public highway known as Adams Creek Road. Defendants' northern boundary is Neuse River. The deeds made by C. C. Smith were both dated 19 January 1951 and recorded 9:00 a.m., 20 January 1951. A road crosses plaintiff's land, extending from the Adams Creek Road northwardly to the lands of defendants, and then northwardly to the dwelling formerly occupied by C. C. Smith. Said road is a mere private way, is not, and has never been a public way, and is not maintained by any public authority. Plaintiff forbade defendants to use the road in crossing his property to get to the public highway. Nonetheless, defendants continued to use it. In addition to injunctive relief he seeks damages resulting from unauthorized use.

Defendants admitted the ownership of the respective tracts of land and the existence of a road extending northwardly from the Adams

Creek Road across lands of plaintiff to the residence now occupied by defendants, formerly occupied by the common ancestor, C. C. Smith. They admit the road is not presently maintained by any state authority. They deny the allegation that it has never been a public way and aver that it is and has been used by the public as of right. They allege C. C. Smith conveyed to their ancestor in title "with all privileges and appurtenances and with full warranties and that the said land was sold to the defendants by warranty deed with all privileges and appurtenances thereunto belonging. . ." They make no other specific averment entitling them to affirmative relief. They pray that plaintiff take nothing and "that the court enter a judgment in proper form declaring that the defendants have an easement by prescription and appurtenant over and across the said road. . ." The cause was without exception submitted to the jury on issues which the jury answered as follows:

"1. Does the plaintiff own the lands described in the Complaint free and clear of any easement, as alleged by the plaintiff?

"Answer: No.

"2. Are the defendants entitled to the easement in the specific roadway leading or running northwardly across the lands of the plaintiff from Adams Creek Road to the Neuse River, as alleged by the defendants?

"Answer: Yes."

Judgment was entered declaring plaintiff not entitled to recover and "that the plaintiff shall not interfere with the defendants in their use of the easement appurtenant." It was further adjudged "that defendants' pleadings be, and they are hereby amended, in furtherance of justice, conforming the pleadings to the facts proved and the verdict to the extent allowed by G.S. 1-163."

No amended pleadings appear to have been filed by defendants. From the judgment entered, plaintiff appealed.

H. P. Whitehurst, David S. Henderson, and Ward & Tucker for plaintiff, appellant.

Robert G. Bowers and John W. Beaman for defendant, appellees.

RODMAN, J. Much of the difficulty of determining the applicable legal principles stems from the failure to plainly and concisely state the facts as required by G.S. 1-122 and 135. This failure seemingly beclouded the determinative issues. Giving the pleadings that liberal interpretation required by statute, G.S. 1-151, these issues arose: (1) Was the road from defendants' residence to the Adams Creek Road, when C. C. Smith conveyed to his children, a neighborhood

road as defined by G.S. 136-67? (2) If not, was it appurtenant to the property now owned by defendants?

Plaintiff alleged the road was not maintained by public authority, was not and never had been a public road. Defendants admitted the road was not now maintained as a public way. They denied the allegation with respect to its use as a public highway. They alleged present and long previous use by the public.

The rights of the parties must be determined by conditions existing in January 1951 when C. C. Smith conveyed to his children.

The evidence is sufficient to show: C. C. Smith, in 1929, moved from the southern portion of his land now owned by plaintiff to the residence now occupied by defendants; for many years prior thereto a road existed from Adams Creek Road across the Smith land to Neuse River; this road served fishing camps located on the river and was used by the public at large at its convenience. The evidence is sufficient to warrant a finding that this road was, prior to 1929, a public way.

Prior to 1929 we had a dual system for the creation and maintenance of public highways. Some were the sole responsibility of the State, others the responsibility of counties or townships. Beginning in 1929 (c. 40, P.L. 1929) the State acted to relieve local units from the burden of maintaining local roads. The burden was placed on the Highway Commission, but it was not required to maintain all local roads. The failure of the Highway Commission to maintain a particular road did not solely, because of that fact change the road to a private way. When C. C. Smith conveyed to his children in 1951, the law determining the character of a public road abandoned by the Highway Commission was as now codified in G.S. 136-67.

The evidence was sufficient to support but not to compel a finding that the road in question in January 1951 served a public purpose and as a means of ingress and egress to people other than C. C. Smith, and because of such public service defendants had the right to use it as a neighborhood road. *Woody v. Barnett,* 235 N.C. 73, 68 S.E. 2d 810. Because of this evidence the court correctly declined to allow plaintiff's motion for a directed verdict.

If the road was not, because of public use or need, a neighborhood road in 1951, defendants were not necessarily excluded from the use thereof. It was open to them to show, if they could, that their right to use was so incidental to the enjoyment of the property conveyed that the law implied the right as appurtenant to the southern parcel, plaintiff's property, to reach Neuse River, and appurtenant to defendants' property to reach Adams Creek Road. Each deed by express language conveyed the privileges appurtenant to the land there described.

An appurtenance is defined by Webster as: "1. That which belongs to something else. . . 2. In common parlance and legal acceptation, something belonging to another thing as principal and passing as an incident to it, as a right of way or easement to land. . ."

The right to use a road or other easement may arise from the use of the word "appurtenant" or "appurtenance" because of conditions existing at the time of the grant so apparent and beneficial to the thing granted as to lead to the conclusion that the parties contemplated these physical conditions would continue as reasonably necessary to the enjoyment of the property conveyed. *Potter v. Potter,* 251 N.C. 760, 112 S.E. 2d 569; *Barwick v. Rouse,* 245, N.C. 391, 95 S.E. 2d 869; *Bradley v. Bradley,* 245 N.C. 483, 96 S.E. 2d 417; *Spruill v. Nixon,* 238 N.C. 523, 78 S.E. 2d 323; *Cassidy v. Cassidy,* 141 N.E. 149.

The right of access to property is not, however, limited to easements appurtenant. If one conveys a part of his property entirely surrounded by other lands of the grantor and without any way to the property conveyed, the law, acting upon the assumption that grantor intended for his grantee to enjoy the thing granted, will imply an easement to provide access for a public way. *Carver v. Leatherwood,* 230 N.C. 96, 52 S.E. 2d 1; *Carmon v. Dick,* 170 N.C. 305, 87 S.E. 224; *Lumber Co. v. Cedar Works,* 158 N.C. 161, 73 S.E. 902. *Hetfield v. Baum,* 35 N.C. 394, presents an interesting illustration of such a way impliedly reserved. 28 C.J.S. 699-701. Statutory provision is now made for the establishment and location of easements of this character. G.S. 136-69. Defendants do not claim an easement implied by necessity.

To establish the right to use a road as appurtenant to the property granted, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the "fair," *Potter v. Potter, supra,* "full," *Bradley v. Bradley, supra,* "convenient and comfortable," *Meroney v. Cherokee Lodge,* 182 N.C. 739, 110 S.E. 89, *Carmon v. Dick, supra,* enjoyment of his property.

To avoid the effect of the allegation that the road was appurtenant to defendants' property, plaintiff offered evidence that another road existed which, as he contended, afforded defendants such rightful and convenient access to their property as to repel any suggestion that grantor intended that the road in controversy should remain open for the benefit of his grantee.

Related to plaintiff's contention of rightful and convenient access by another way, the court charged: "This litigation arose out of these

contentions, the plaintiff insisting that the defendants Moore had no right and contends and insists that he had another way to get out; they didn't have to use this road. At this point the Court instructs you, ladies and gentlemen of the jury, that whether there was another road or whether there was not is not an issue for you to pass upon here." In substance the jury was informed that the existence of another convenient and comfortable way, existing in January 1951 when Smith conveyed to his children, was not material in determining the rights of the parties.

Plaintiff assigns the quoted portion of the charge as error. True the court subsequently quoted from *Barwick v. Rouse, supra,* and gave the jury the correct rule to determine the rights of the parties. The jury was left with two conflicting rules. This was prejudicial error. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163; *Graham v. R.R.,* 240 N.C. 338, 82 S.E. 2d 346; *Godwin v. Cotton Co.,* 238 N.C. 627, 78 S.E. 2d 772.

The parties do not here question the correctness of the charge that plaintiff had the burden of proof. The reformation of the pleadings as permitted by the court may bring this question into proper focus. *McCracken v. Clark,* 235 N.C. 186, 69 S.E. 2d 184; *McPherson v. Williams,* 205 N.C. 177, 170 S.E. 662; *Mt. Holyoke Realty Corporation v. Holyoke Realty Corp.,* 187 N.E. 227; *Oldfield v. Smith,* 24 N.E. 2d 544; 28 C.J.S. 734.

New trial.

EMMA PITTMAN WATERS v. CLARENCE PITTMAN AND WIFE, NORA EVANS PITTMAN; RUBY PITTMAN CURRAN AND HUSBAND, WILLIAM C. CURRAN; WILLIAM D. LONON AND WIFE, DOROTHY M. LONON; LILLIAN PITTMAN HYATT AND HUSBAND, WILLIAM HYATT.

(Filed 1 March, 1961.)

1. Husband and Wife § 17—

A decree of divorce vests in the wife a one-half interest in lands theretofore held by her and her husband by entireties.

2. Ejectment § 9: Quieting Title § 2: Evidence § 15—

The introduction by plaintiff of a deed executed by the common source of title to a stranger, for the purpose of attack, does not, as against plaintiff, establish the truth of the recital in the deed of a valuable consideration, since such recital as to plaintiff is *res inter alios acta.*

3. Registration § 5b—

The burden is upon the parties claiming under a prior registered instrument to show that they are purchasers for value so as to bring themselves within the protection of the registration laws.

4. Ejectment §§ 7, 10: Quieting Title § 2—

Plaintiff introduced in evidence a prior executed, but subsequently recorded, deed to herself and, for the purpose of attack, a subsequently executed but prior registered deed from the same grantor to defendants', predecessor in title. *Held:* Plaintiff's evidence establishing a prior deed from the common source makes out a *prima facie* case and the burden is upon defendants to establish that the subsequently executed deed was supported by valuable consideration so as to bring the instrument within the protection of the registration laws, and therefore it was error to nonsuit plaintiff's action to remove defendants' claim as a cloud in title.

APPEAL by plaintiff from *Froneberger, J.*, October Regular Term, 1960, of MCDOWELL.

Plaintiff alleges she is the owner in fee simple of a one-half undivided interest in a one-quarter acre of land and that certain deeds constitute a cloud on her title. She prays that she be adjudged the owner of the alleged interest and for the removal of the alleged cloud.

Defendants Clarence Pittman and wife, Nora Evans Pittman, Ruby Pittman Curran and husband, William C. Curran, and Lillian Pittman Hyatt and husband, William Hyatt, deny plaintiff's allegations of ownership and allege that the defendants Pittman are the sole owners in fee simple of the said lot and that they are in the rightful possession thereof.

The plaintiff's evidence consisted of a stipulation and documentary evidence as follows:

1. A deed dated 26 October 1951, executed by Lillian Pittman Hyatt and husband, William Hyatt, of McDowell County, to Clarence Pittman and wife, Emma Pittman, of McDowell County. This deed was registered in Deed Book 153 at page 605 in the office of the Register of Deeds of McDowell County on 11 August 1959.

2. A deed dated 30 October 1952, executed by Lillian Pittman Hyatt and William Hyatt, her husband, to William Lonon of McDowell County. This deed was offered in evidence for the purpose of attack. It was recorded in the office of the Register of Deeds of McDowell County on 14 November 1952 in Deed Book 120 at page 621.

3. A deed dated 17 March 1954, executed by William D. Lonon and Dorothy M. Lonon, his wife, of McDowell County, to Ruby Pittman Curran of McDowell County, and recorded in the office of the Register of Deeds of McDowell County in Deed Book 127 at page

274 on 19 March 1954. This deed was offered in evidence for the purpose of attack.

4. A deed dated 2 April 1956, executed by Ruby Pittman Curran and her husband, William C. Curran, of McDowell County, to Clarence Pittman and wife, Nora Evans Pittman. This deed was recorded in Deed Book 151 at page 529 in the office of the Register of Deeds of McDowell County on 3 April 1959. It was introduced for the purpose of attack.

5. It was stipulated and agreed that the description contained in the above four instruments offered in evidence as plaintiff's Exhibits 1, 2, 3, and 4, describe and include the same one-quarter acre of land now in controversy.

6. Plaintiff offered in evidence that part of paragraph 3 of the answer, which reads as follows: " * * * it is admitted that on or about 26 October 1951 the plaintiff and the defendant, Clarence Pittman, were husband and wife."

7. The plaintiff offered in evidence Minute Docket No. 23 at page 273, in the office of the Clerk of the Superior Court of McDowell County, which sets forth a judgment to the effect that the defendant Clarence Pittman was granted an absolute divorce from the plaintiff herein on 14 February 1955.

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

William C. Chambers for plaintiff appellant.
J. M. Yelton, Jr.; Anglin & Bailey for defendants appellee.

DENNY, J. The plaintiff alleges in her complaint that the three conveyances introduced for the purpose of attack are neither valid in law, nor in fact; that each of said instruments was made without valuable consideration and was a voluntary conveyance made for the purpose of depriving the plaintiff of her title, interest and estate in said land, and that said instruments constitute a cloud upon plaintiff's one-half interest in said land.

The warranty deed dated 26 October 1951, executed by Lillian Pittman Hyatt and husband, William Hyatt, of McDowell County, North Carolina, to Clarence Pittman and wife, Emma Pittman, of McDowell County, as tenants by the entirety, purported to convey to grantees a fee simple title to the land described therein. Moreover, when Clarence Pittman divorced his wife, Emma Pittman, if the estate had not theretofore been destroyed, she became seized of a one-half undivided interest in said one-fourth acre of land as a tenant in common. *Hatcher*

v. Allen, 220 N.C. 407, 17 S.E. 2d 454. The introduction in evidence of the four deeds referred to hereinabove, established the fact that the plaintiff and the defendants are claiming title from a common source.

One of the methods laid down in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142, by which a plaintiff may establish title, is to "connect the defendant with a common source of title and show in himself a better title from that source."

The plaintiff's title to a one-half undivided interest in the premises involved herein is good, notwithstanding the fact that the original deed to Clarence Pittman and wife, Emma Pittman, was not recorded until 11 August 1959, unless the defendants are purchasers for value, and the burden of proof is on the defendants to show by a preponderance of the evidence that they are purchasers for value. *Hughes v. Fields,* 168 N.C. 520, 84 S.E. 804; *King v. McRackan,* 168 N.C. 621, 84 S.E. 1027 (affirmed on rehearing, 171 N.C. 752, 88 S.E. 226); *Bank v. Mitchell,* 203 N.C. 339, 166 S.E. 69; *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129, 159 A.L.R. 380; *Skipper v. Yow,* 240 N.C. 102, 81 S.E. 2d 200. See also Anno: Burden of Proof — Good Faith — Consideration, 107 A.L.R. 502, *et. seq.,* where the authorities bearing on the burden of proof in a situation like that now before us are collected.

In *Skipper v. Yow, supra,* it is said: "The general rule as it prevails in this jurisdiction is stated in *Claywell v. McGimpsey,* 15 N.C. 89, as follows: 'When it (a deed) is offered as evidence of the truth of matters recited, acknowledged, or declared in the deed it is then admissible only *against* parties and privies. When offered against others, it is opposed by one of the best established rules of law, founded on principles of natural justice, that no one shall be prejudiced by *res inter alios acta* — by the acts, declarations or conduct of strangers.

" 'But there is no warrant of authority or reason for the position that a recital or description in a deed proves its own truth *in favor* of the party himself.' (Citations omitted.)"

It is also said in Jones on Evidence, 3rd Ed., section 469, page 722, *et seq.:* "Although the grantor cannot show want of consideration to defeat the conveyance, it need hardly be said that, as against strangers who attack the conveyance for fraud, no conclusive force can be claimed for the recital which states the consideration. Generally, as against third persons, the recital of consideration is no evidence whatever, and as against creditors or innocent purchasers without notice, the mere statement that a nominal consideration has been paid raises no presumption of a substantial consideration. In such cases the burden is on the grantee to prove a sufficient consideration."

In 20 Am. Jur., Evidence, section 940, page 792, *et seq.,* it is like-

wise said: "Recitals in a deed other than an ancient deed are not, as a general rule, competent evidence against a stranger to the instrument to prove the facts therein recited, nor are they binding upon him. To state the rule another way, a recital in a deed is inadmissible as evidence of the fact recited, as against one who was neither a party nor a privy to the deed. A recital in a recent, as distinguished from an ancient, deed that the consideration has been paid or the amount of the consideration paid is not proof of such fact as against a stranger. * * * Recitals in a deed may, as between the parties to it, be admissible evidence as tending to prove the facts recited, but as to strangers, such recitals are merely *ex parte* statements of the parties to the deed. They are at most admissions of the grantor and grantee and, therefore, hearsay when offered against a stranger. * * *"

When the case of *King v. McRackan, supra,* was before this Court, on a petition to rehear on the ground that the Court in its prior opinion had erroneously placed the burden of proof on defendants to show that they were purchasers for value, this Court said: "We have carefully considered the arguments of the learned counsel for the petitioner urging us to reverse the ruling on the former appeal, holding that the burden was on the defendant to prove that he was a purchaser for value, but we are not convinced that we were then in error.

"In addition to the reasons then stated, it may be suggested, without elaboration, that the opinion placed the burden of proof on the purchaser, who usually knows all the facts, and who has it in his possession to inform the court of the amount paid and to whom, and of all the circumstances surrounding the purchase, while the opposite rule, and the one contended for by the petitioner, would impose the burden on one unacquainted with the facts, and he would be required to establish a negative, to wit, that the other party was *not* a purchaser for value. 'It is often said that facts which are especially within the knowledge of the party must be proved by him. This rule is especially applied when the fact particularly well known to the other side presents the further difficulty in the way of adequate proof that it is negative. Under these circumstances it occurs with special frequency that the other party is called upon to prove it.' Chamberlayne on Evidence, vol. 2, sec. 978."

It is true that in an action in ejectment, or to remove cloud from title, the burden is on the plaintiff to establish his or her superior title. *Walker v. Story,* 253 N.C. 59, 116 S.E. 2d 147; *Seawell v. Fishing Club,* 249 N.C. 402, 106 S.E. 2d 486. Even so, plaintiff in the instant case has made out a superior title under her prior dated

but later recorded deed to the one-half undivided interest in the land in controversy, unless the defendants are purchasers for value.

We think it is well to note that the original deed to Clarence Pittman and wife, Emma Pittman, was executed by Lillian *Pittman* Hyatt and her husband, William Hyatt. The second deed, by the same grantors, was executed to William Lonon of McDowell County. The third deed was executed by William D. Lonon and wife, Dorothy M. Lonon, to Ruth *Pittman* Curran, and the fourth deed by Ruth *Pittman* Curran and her husband, William C. Curren, of McDowell County, to Clarence Pittman and his present wife, Nora Evans Pittman. While the record does not disclose the relationship, if any, between Lillian Pittman Hyatt, Ruth Pittman Curran, and Clarence Pittman, the record does disclose that William D. Lonon and wife, Dorothy M. Lonon, were personally served with summons in this case and that they have failed to file an answer or otherwise plead.

In the case of *Hayes v. Ricard,* 245 N.C. 687, 97 S.E. 2d 105, relied on by the defendants, and in the same case on a prior appeal, reported in 244 N.C. 313, 93 S.E. 2d 540, it was clearly established that the deed to the defendant Ricard was not only supported by a valuable consideration but was recorded prior to the registration of the deed under which the plaintiffs therein claimed. Moreover, the evidence clearly established the fact that the grantee in the unrecorded fee simple warranty deed, prior to his death, intentionally withheld registration of his deed and expressly requested the grantors in his deed to make a second deed directly to the defendant Ricard. Hence, the facts in the Ricard case are distinguishable from those in the present case.

In our opinion, the plaintiff is entitled to have a jury determine whether or not the defendants are purchasers for value. If the defendants are purchasers for value, the burden is upon them to establish this fact by the preponderance or greater weight of the evidence.

The judgment entered below is

Reversed.

J. C. STILES v. JAMES S. CURRIE, COMMISSIONER OF REVENUE.

(Filed 1 March, 1961.)

Taxation § 29: Constitutional Law § 20—

G.S. 105-147 (18) limiting the right of a nonresident taxpayer, in computing his net income taxable by this State, to claim only those deductions which are related to his business in this State, is valid and does not constitute an unlawful discrimination in that residents of this State are permitted personal deductions not allowed to the nonresident, since only the income of the nonresident earned within this State is subject to income taxes here. Article IV, § 2 and the Fourteenth Amendment to the Federal Constitution.

APPEAL by plaintiff from *McLean, J.*, September 1960 Term, of HAYWOOD.

Plaintiff brought this action to recover a payment made under protest of sums assessed by the Commissioner of Revenue as income taxes due North Carolina for the years 1954, 1955, and 1956, with interest accrued thereon. He alleges the assessments were void because in violation of rights guaranteed to him by sec. 2, Art. IV, and sec. 1 of the Fourteenth Amendment to the Constitution of the United States. The facts necessary to a determination of the controversy were stipulated. We summarize the facts stipulated: Plaintiff was, during the years 1954, 1955, and 1956 engaged "in owning, managing and operating several hotels and motels in the States of Georgia, South Carolina and North Carolina." He was, during said period, a resident of Georgia. He filed income tax returns for each of said years. These returns disclosed his total gross income and gross income in North Carolina. He deducted from his North Carolina income not only his expense incurred in the operation of his North Carolina business but that proportion of "his total itemized personal deductions, including non-business interest paid and contributions" which his North Carolina gross income bore to his total gross income. The Commissioner of Revenue disallowed deductions not related to his business in North Carolina and assessed a tax based on the sums deducted and disallowed.

Based on the facts stipulated the court adjudged plaintiff was not entitled to recover. Plaintiff appealed.

William I. Millar for plaintiff appellant.

Attorney General Bruton and Assistant Attorneys General Pullen and Abbott for defendant appellee.

RODMAN, J. The motion made here by the Attorney General to

substitute W. A. Johnson, successor in office to defendant Currie, is allowed.

Our statute imposes a tax on the net income of residents of the State and upon that portion of a nonresident's income derived from the operation of a business conducted here. Net income is gross income less the deductions enumerated by statute. G.S. 105-140. Permissible deductions are enumerated in G.S. 105-147. They fall into two classes: (a) those relating or incidental to the cost of producing income; (b) those unrelated to the cost of producing income — personal to the taxpayer. Some of the items enumerated fall in one class, some in another, and some may fall within either class, as illustrated by subsec. 9, which permits deduction of losses if (a) of capital or property used in trade or business, (b) of property not connected with trade or business arising from fire, storm, or other casualty, or theft, to the extent not compensated by insurance, (c) losses incurred from the sale of corporate shares or bonds of corporations or from transactions in commodity futures contracts.

Interest, taxes, and charitable contributions may fall within either class, dependent upon the purpose for which the expenditure is made, but expenditures for medical care or funeral expenses of a dependent or to defray the cost of institutional care of a dependent relative who is physically or mentally defective clearly fall in the class of personal as distinguished from business expenditures.

G.S. 105-147 (18) limits the right of the nonresident taxpayer to claim enumerated permissible deductions only if related to business in this State. It provides: "In the case of a nonresident individual the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the State; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules and regulations prescribed by the Commissioner of Revenue."

Plaintiff contends the statute creates an arbitrary discrimination in violation of the United States Constitution for that residents are permitted to deduct certain expenditures unrelated to the production of income, which right is denied to him. He asserts that he is entitled to deduct that proportion of his personal expenditures which his North Carolina income bears to his total income. He overlooks the fact that our statute taxes the income of its residents wherever earned, but asserts a right to tax only that part of a non-resident's income which is earned in North Carolina.

The claim of arbitrary discrimination between residents and nonresidents by reason of similar statutory provisions was raised more

than forty years ago and answered adversely to plaintiff's claim by the Supreme Court of the United States. *Shaffer v. Carter*, 252 U.S. 37, 64 L. ed. 445; *Travis v. Yale Manufacturing Co.*, 252 U.S. 60, 64 L. ed. 460. *Mr. Justice Pitney* delivered the opinion for the Court in each of those cases. The validity of Oklahoma's income tax law was involved in *Shaffer v. Carter*. It permitted residents to deduct nonbusiness losses and denied that right to nonresidents. Mr. Justice Pitney said: "Appellant contends that there is a denial to noncitizens of the privileges and immunities to which they are entitled, and also a denial of the equal protection of the laws, in that the act permits residents to deduct from their gross income not only losses incurred within the state of Oklahoma, but also those sustained outside of that state, while nonresidents may deduct only those incurred within the state. The difference, however, is only such as arises naturally from the extent of the jurisdiction of the state in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred."

The validity of the New York tax law was presented in *Travis v. Yale & Towne Manufacturing Co.* That statute permitted taxpayers in computing their income to deduct taxes, losses, depreciation charges, etc., but provided "in the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state. . ." *Mr. Justice Pitney* referred to *Shaffer v. Carter* to support the right of a State to tax the income of a nonresident earned in that State. He then said: "That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by that decision." What is now G.S. 105-147 (18) was apparently based on the New York statute quoted by *Mr. Justice Pitney*.

The validity of the New York statute was subsequently challenged in *Goodwin v. State Tax Commission*, decided by the Supreme Court of that State in November 1955, 146 N.Y.S. 2d 172. There a resident

of New Jersey earned income as a lawyer regularly practicing in New York. He asserted the right to deduct from his New York income taxes on his home in New Jersey, interest on his home, medical expenses, and life insurance premiums. His right to make these deductions was denied because the New York statute limited such deductions to its residents. The Court sustained the New York statute and denied plaintiff's right to deduction.

Plaintiff appealed to the Court of Appeals. That Court recited the facts and affirmed in March 1956 without delivering an opinion, 133 N.E. 2d 711. Plaintiff then appealed to the Supreme Court of the United States. That Court, in October 1956, dismissed the appeal "for want of a substantial Federal question." 352 U.S. 805, 1 L. ed. 2d 38.

Plaintiff bases his claim on the Constitution of the United States. The Supreme Court of the United States, the final authority in interpreting that instrument, has twice expressly declared and finally by clear implication said that the claim is wanting in merit.

The stipulations do not disclose whether plaintiff has deducted from his Georgia income tax the items here claimed as he apparently had the right to do. Georgia Code 92-3109.

Affirmed.

CLAUDE JACOBS, PETITIONER v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 1 March, 1961.)

1. Pleadings § 12—

A pleading will be liberally construed upon demurrer with a view to substantial justice between the parties, and the demurrer admits the truth of factual averments well stated and such inferences of fact as may be deduced therefrom. G.S. 1-127, G.S. 1-151.

2. Eminent Domain § 8—

A petition alleging the ownership of a leasehold interest in real estate, the taking of the property by respondent under statutory authority, the authority of respondent to maintain the proceedings, and damage, with request that the damages be appraised in accordance with law, states a good cause of action, G.S. 40-12, and the fact that the petition refers to the public register for a more complete description of the property does not make petitioner's title to depend upon the nature of the instrument referred to.

3. Same—

While a petition under G.S. 40-12 must state the names of all parties who own or claim any interest in the land, the failure of petitioner-leasee to name such others is a defect which does not go to the substance of the action, and constitutes a defective statement of a good cause of action.

4. Pleadings § 19—

A demurrer to a pleading setting forth a defective statement of a good cause of action may not be allowed prior to the expiration of the time for obtaining leave to amend.

APPEAL by petitioner from *Hooks, S. J.*, at August-September Special Term, 1960, of JACKSON.

Special proceeding to assess and recover damages for the taking of petitioner's alleged leasehold interest in a certain service station-garage by the State Highway Commission in accordance with Chapter 40 of the General Statutes of North Carolina.

This appears: The respondent, North Carolina State Highway Commission, undertook the reconstruction and re-location of Highway 19A as it runs through the town of Dillsboro, Jackson County, North Carolina. The petitioner at the time the construction started was operating a service station-garage in the town of Dillsboro, adjacent to the old Highway 19A. The service station-garage property was taken by the Highway Commission in its reconstruction and re-location of Highway 19A. Thereupon petitioner instituted this action.

When the cause came on for hearing and being heard the respondent demurred *ore tenus* on the ground that the petition failed to state facts sufficient to constitute a cause of action. The demurrer was sustained and the court, in its discretion, denied petitioner's motion to amend. To the signing and entry of the foregoing judgment petitioner objects and excepts, and appeals to the Supreme Court and assigns error.

M. Buchanan, T. D. Bryson, Jr., for petitioner appellant.

Attorney General Wade Bruton, Assistant Attorney General Harrison Lewis, Trial Attorney Andrew McDaniel, Hall & Thornburg for the State Highway Commission.

WINBORNE, C.J.: The sole question presented for decision is whether or not the lower court erred in sustaining the respondent's demurrer *ore tenus*. The question thus presented involves a question of pleading which has been the subject of many decisions of this Court.

The office of a demurrer is to test the sufficiency of a pleading, ad-

mitting, for the purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. Furthermore, pleadings challenged by a demurrer are to be construed liberally with a view to substantial justice between the parties. G.S. 1-127. G.S. 1-151. *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568.

When the State Highway Commission, in the exercise of the power of eminent domain conferred upon it by statute, G.S. 136-19, takes land or any interest therein for highway purposes, the owner's remedy is by special proceeding as provided by G.S. 40-12, *et seq.* As is said in *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479, "If the State Highway and Public Works Commission and a landowner are unable to agree upon the compensation justly accruing to the latter from a taking of property by the former, the matter is to be determined once for all in a condemnation proceeding instituted by either party under the provisions of Chapter 40 of the General Statutes." See also *Gallimore v. Highway Comm.,* 241 N.C. 350, 85 S.E. 2d 392; *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Ferrell v. Highway Comm.,* 252 N.C. 830, 115 S.E. 2d 34.

Indeed, in *Gallimore v. Highway Commission, supra, Bobbitt, J.,* said: "The procedure in such special proceeding is that prescribed in G.S. Ch. 40 entitled "Eminent Domain." G.S. 40-12 specifies the necessary allegations of such petition. In brief, these consist of allegations that petitioners own the property appropriated and pray that commissioners be appointed to ascertain and determine the amount of compensation 'which ought justly be made.' "

Petitioner's allegations may be summarized as follows: First, it is alleged that he is the owner of a "certain leasehold interest in and to that certain piece, parcel or tract of land" which, he alleges is "described in a contract dated 26 April, 1957," and which he also alleges is recorded in the office of the Register of Deeds of Jackson County, North Carolina, in Book 223 at page 245, and to which public records he makes reference in his petition for a more complete description thereof.

Secondly, he alleges that the respondent, North Carolina State Highway Commission has the power and liability described by statute to sue and be sued in such a proceeding.

Thirdly, the petitioner alleges that the respondent, North Carolina Highway Commission, was authorized to acquire the right of way necessary and proper for the construction of Highway 19A, and that "under the authority aforesaid" the respondent, North Carolina State Highway Commission appropriated and took all of the lands of the petitioner "as described in paragraph one above, and all of the buildings and improvements located on said real estate."

Fourthly, the petitioner alleges that in the appropriation and taking of "the leasehold of your petitioner and the improvements thereon" the petitioner was damaged.

Finally, the petitioner prayed that the court appraise the damages to the petitioner in the manner prescribed by law.

Petitioner does not, as respondent seems to contend, allege that he is the owner of a leasehold interest in the real property by virtue of the "Dealer Sales Contract" which is incorporated in, and attached to the petition. Petitioner states that the contract is referred to for a more complete description. Thus the petitioner alleges ownership of a leasehold interest in real estate, authority for the taking, authority for his action, the actual taking, and that he was damaged by the taking and requests that his damages be appraised in accordance with the law. Therefore the conclusion is that the petition states a good cause of action, as the respondent was thereby informed of the grievance asserted and the remedy sought. G.S. 40-12. *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43.

As is aptly stated by *Parker, J.,* in *Williams v. Highway Comm.,* 252 N.C. 141, 113 S.E. 2d 263, "Respondent is an agency of the State government. It entirely took petitioner's whole leasehold estate under the right of eminent domain, which is the power of the sovereign to take or damage private property for a public use on payment of just compensation."

However, it must be noted that G.S. 40-12 also requires petitioner to state the "names of all parties who own or have, or claim to own or have estates or interest in the land." *Tyson v. Highway Comm.,* 249 N.C. 732, 107 S.E. 2d 630. Petitioner failed to make such allegation in the present case. But this defect does not go to the substance of the cause. This constitutes a defective statement of a good cause of action. A defective statement of a good cause of action is one in which an enforceable cause of action is stated, but is stated, inartificially or without sufficient clearness, or definiteness or particularity. *Allen v. R.R.,* 120 N.C. 548, 27 S.E. 76; *Davis v. Rhodes, supra; Scott v. Veneer Co.,* 240 N.C. 73, 81 S.E. 2d 146.

And in this connection, the law of this State is that where a pleading contains a defective statement of a good cause of action, as the omission of a necessary allegation, which can be cured by amendment, a demurrer will lie. *Bowling v. Burton,* 101 N.C. 176, 7 S.E. 701; *Mizzell v. Ruffin,* 118 N.C. 69, 23 S.E. 927; *Ladd v. Ladd,* 121 N.C. 118, 28 S.E. 190; *Blackmore v. Winders,* 144 N.C. 212, 56 S.E. 874; *Bank v. Duffy,* 156 N.C. 83, 72 S.E. 96.

But a complaint or petition cannot be overthrown by a demurrer unless it be wholly insufficient, at least until the time for obtaining

leave to amend has expired. *Blackmore v. Winders, supra; Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278.

Therefore, taking the facts alleged in the petition to be true, as is done in a civil action in this State, in considering the sufficiency of a pleading to withstand the challenge of demurrer, and applying the applicable principles of law, the conclusion is that the petition states a cause of action, though defectively, and the court erred in sustaining the respondent's demurrer *ore tenus* on the ground the petition failed to state a cause of action.

The case will be remanded to the court below to the end that further proceedings be had as to right and justice appertain and the law directs.

Error and remanded.

STATE OF NORTH CAROLINA, UPON THE RELATION OF JOHN CARRINGER, PLAINTIFF v. C. L. ALVERSON, W. D. TOWNSON, FRANK MAUNEY AND MERLE DAVIS, DEFENDANTS.

(Filed 1 March, 1961.)

1. Public Officers § 7—

If a statute creating a public office is unconstitutional, persons purporting to fill the offices therein created are not public officers, either *de jure* or *de facto*, and therefore their right to hold the office cannot be adjudicated prior to the determination of the constitutionality of the statute.

2. Constitutional Law § 13: Statutes § 2—

The statute authorizing the creation of municipal housing authorities is a statute relating to health and sanitation, G.S. 157-2, within the purview of Article II, § 29 of the State Constitution.

3. Appeal and Error § 1: Constitutional Law § 4—

The courts will not pass upon the constitutionality of a statute unless the question is squarely presented by a party whose rights are directly involved.

4. Same—

Where, in plaintiff's action attacking the constitutionality of the statute authorizing the creation of municipal housing authorities, plaintiff alleges that he is a taxpayer but does not allege that public money has been or is to be expended, that taxes have been or are to be levied, or that debts have been or are to be incurred under the Act by the housing authority in question, or that defendants have invaded or threaten to invade his rights, plaintiff fails to show his qualification to maintain the action, and nonsuit is proper.

5. Declaratory Judgment Act § 1—

A stipulation by the parties that the action is a proper case for a declaratory judgment involves a question of law, and is not binding on the courts.

APPEAL by plaintiff from *McLean, J.*, November, 1960 Term, CHEROKEE Superior Court.

Plaintiff alleged in substance (1) that he is a resident and taxpayer of the Town of Murphy, a municipal corporation in Cherokee County, North Carolina—population more than 500, fewer than 5,000. Additional allegations form the basis of the demand for relief:

"4. That recently, and during the year 1960, said Town of Murphy, by and through its Mayor and Council, and upon a petition as required by law, duly and regularly and pursuant to the 'Housing Authorities Law' of the State of North Carolina, Chapter 456, Public Laws of North Carolina 1935, and amendments thereto, and Chapter 1281 of the 1959 Session Laws of the General Assembly of North Carolina as hereinabove set out, established and created a 'Housing Authority of the City of Murphy' and appointed Merle Davis, W. D. Townson, Frank Mauney and J. G. Greene; that said members duly qualified and took their oaths of office, filed with the Secretary of State of North Carolina an application for a Certificate of Incorporation which was subsequently issued by the Secretary of State under the name of the 'Housing Authority of the City of Murphy'; that subsequently the member by the name of J. G. Greene was killed in an automobile accident and this vacancy has not been filled.

"5. That the defendants, C. L. Alverson, W. D. Townson, Merle Davis and Frank Mauney now claimed to be public officers and to hold a public office as members of said 'Housing Authority of the City of Murphy' and as such have and are conducting business and duties of said office under the provisions of Chapter 456 of the Public Laws of 1935, and amendments thereto, the same being Chapter 157 of the General Statutes of North Carolina.

"6. That as the plaintiff is advised, informed and believes said Chapter 1281 of the Session Laws of the 1959 General Assembly of North Carolina which is hereinabove set out and which rewrites G.S. 157-3(2) and particularly the portion thereof which provides: 'That in Alleghany, *Cherokee,* Clay, Graham, Hertford, Macon, Swain, Transylvania, Jackson, Haywood, Madison, Buncombe, Henderson, and Polk Counties a city shall

mean any city or town having a population of more than five hundred (500) inhabitants according to the last Federal Census or revision of amendment thereto,' is violative of Article II, Section 29 of the North Carolina Constitution and is unconstitutional and invalid because it pertains to public health and is local in nature.

"7. That the defendants, C.L. Alverson, W. D. Townson, Merle Davis and Frank Mauney are unlawfully holding and exercising a public office as members of 'Housing Authority of the City of Murphy' because Chapter 1281 of 1959 Session Laws of the General Assembly of North Carolina is unconstitutional and invalid, as hereinabove alleged, and the Town of Murphy had no authority to create a Housing Authority for the City of Murphy under the Laws of the State of North Carolina."

The plaintiff prayed for the following relief:

"1. That Chapter 1281 of the Session Laws of the 1959 General Assembly of North Carolina amending G.S. 157-3(2) is unconstitutional and invalid.

"2. That the defendants be adjudged as unlawfully holding and exercising a public office as members of the 'Housing Authority of the City of Murphy.'"

The defendants filed a joint answer in which they alleged that they are holding office as members of the "Housing Authority of the City of Murphy," by virtue of Chapter 456, Public Laws, Session 1935, and amendments thereto, including Chapter 1281, Session Laws of 1959, all enacted by the North Carolina General Assembly pursuant to and in accordance with its lawful authority under the Constitution of North Carolina. All other allegations of the complaint are admitted.

The parties stipulated:

"1. That the allegations of paragraphs 1, 2, 3, 4, 5 and 8 of the complaint and petition for Declaratory Judgment filed in this proceeding are true and constitute the facts before the Court for its consideration.

"2. That this is a proper matter for a Declaratory Judgment under the provisions of Article 26 of Chapter I of the General Statutes of North Carolina and that there are no irregularities, procedural or otherwise, and the Court has full authority and power to enter a Declaratory Judgment in this proceeding."

The court rendered judgment (1) Chapter 1281, Session Laws of 1959, is constitutional and valid, and (2) the defendants are lawfully holding office. The plaintiff excepted and appealed.

T. C. Gray, for plaintiff, appellant.
McKeever & Edwards, for defendants, appellees.

HIGGINS, J. The plaintiff brought this action to have the court declare (1) Chapter 1281, Session Laws of 1959, unconstitutional, and (2) the defendants "unlawfully holding and exercising a public office."

The parties admit the Housing Authority Act, prior to the 1959 amendment, did not authorize the "City of Murphy" — population under 5,000, to establish a Housing Authority. It must be conceded, therefore, if the 1959 amendatory act was passed in violation of Article II, Section 29, Constitution of North Carolina, as alleged, the attempt of the Mayor and Council of Murphy and the Secretary of State to establish the Housing Authority was a nullity. If a nullity, the defendants are not officers; hence the court cannot remove them from office. "Where the Legislature undertakes to create a public office by an unconstitutional statute, is the incumbent of such an office an officer *de facto?* This query must be answered in the negative for the very simple reason that there can be no officer, either *de jure* or *de facto,* unless there is a legally existing office to be filled." (citing authorities) *Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313. So much of the controversy as relates to the right of the defendants to hold office as members of the Housing Authority of the City of Murphy must await determination of the question whether there is such an office.

Is the 1959 amendment within the legislative power? There can be little doubt but that the "Housing Authority Law" relates to health and sanitation. G.S. 157-2 declares the purpose to be the removal of conditions which "cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare of the citizens . . ." Article II, Section 29, North Carolina Constitution, provides: "The General Assembly shall not pass any local, private, or special act . . . relating to health, sanitation and abatement of nuisances, . . . The General Assembly shall have power to pass general laws regulating matters set out in this section."

The general law provides that for the purposes of the Housing Act "city" shall mean any incorporated municipality whose population is 5,000 or more. The amendment applicable to 14 of the State's one hundred counties provides "city" for such purpose shall mean any incorporated municipality whose population is 500 or more. The plaintiff contends that Chapter 1281 is an attempt by a local or special act to amend the general law and is forbidden by the Constitution. The defendants contend the amendment is general and not local or

special, in scope. For discussion, see the following authorities: *Memorial Hospital v. Wilmington,* 237 N.C. 179, 74 E. 2d 749; *State ex rel Taylor v. Carolina Racing Association,* 241 N.C. 80, 84 S.E. 2d 390; *Carolina-Virginia Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310; *Orange Speedway, Inc. v. Clayton,* 247 N.C. 528, 101 S.E. 2d 406; *Idol v. Street, supra; State v. Dixon,* 215 N.C. 161, 1 S.E. 2d 521; *Sams v. Board of Commissioners,* 217 N.C. 284, 7 S.E. 2d 540, 36 N.C. L. Rev., 537.

Courts are reluctant to hold invalid any Act of the General Assembly. Before deciding any Act unconstitutional the question must be squarely presented by a party whose rights are directly involved. "Courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found necessary to do so in order to protect rights guaranteed by the Constitution." *Fox v. Commissioners,* 244 N.C. 497, 94 S.E. 2d 482. Only an injured party may assail the validity of a statute. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563.

Is the plaintiff entitled to maintain this action? He alleges he is a taxpayer. He does not allege that public money has been or is to be expended; that taxes have been or are to be levied; that debts have been or are to be incurred. Neither directly nor by inference does the plaintiff allege the defendants individually or as the Housing Authority have invaded or threatened to invade his rights. Hence he fails to show his qualification to maintain this action. True, the parties have stipulated that this is a proper case for Declaratory Judgment. The stipulation, however, involves a question of law — not binding on the courts. Nonsuit in this case should have been entered in the superior court for failure of the plaintiff to show his right to maintain it.

Reversed.

JOHN T. MAXWELL, v. HIRAM GRANTHAM, EXECUTOR FOR THE LAST WILL AND TESTAMENT OF JANIE MAXWELL McINTOSH; MIRIAM DIANNE MAXWELL, JACQUELINE MAXWELL AND JOHN T. MAXWELL, JR., MINOR CHILDREN OF JOHN T. MAXWELL.

(Filed 1 March, 1961.)

1. Wills § 31—

A will is to be construed as a whole, and meaning given to each clause, phrase, and word, if possible.

2. Wills § 33g—

A devise of property to testatrix's sister for life, and at her death to testatrix's named nephew, and at the death of the named nephew "the property is to be inherited by his children" gives the nephew, after the death of testatrix's sister, a life estate only, with vested remainder in the children of the nephew, it being apparent that testatrix used the word "inherited" in its general and non-technical sense, and to construe the will as vesting the fee simple in the nephew would require that the later dispositive provisions of the will be ignored.

APPEAL by guardian *ad litem* from *Hall, J.,* August-September Civil Term, 1960, of ROBESON, docketed and argued as No. 739 at Fall Term, 1960.

Civil action under Declaratory Judgment Act, G.S. 1-253, *et seq.,* for construction of the will of Janie Maxwell McIntosh.

Testatrix, a widow, died July 14, 1952, at the age of 87. She had no children. She resided in Robeson County, near Red Springs, on a parcel of land containing some 31 acres. Her unmarried sister, Margaret Maxwell, resided in the home with her. Her estate consists of said real estate and of personal property, including certain stocks and bonds. The will was probated. The executor qualified.

The portion of the will quoted below constitutes all of its dispositive provisions.

> "After the payment of my just debts including my funeral expenses, I hereby bequeath my estate as follows:
>
> "To my sister, Margaret Maxwell, I leave my entire estate for her life time. At the death of my sister, Margaret Maxwell, this estate is to become the property of my nephew, John Maxwell.
>
> "At the death of my nephew, John Maxwell the property is to be inherited by his children."

Margaret Maxwell, sister of testatrix, died September 6, 1959.

Plaintiff is the nephew of testatrix referred to as "John Maxwell" in her will. Defendant Gratham is the executor. Defendants Miriam Dianne Maxwell, Jacqueline Maxwell and John T. Maxwell, Jr., are minor children of John T. Maxwell, the plaintiff. They, also all other children of John T. Maxwell who may be living at the time of his death, are represented herein by Charles G. McLean, Esq., their guardian *ad litem.*

Upon these facts, the court adjudged that, upon the death of Margaret Maxwell, John T. Maxwell, the plaintiff, became and "is now vested with a valid fee simple title to all the real estate, and title absolute to all the personal property, belonging to the said

Janie Maxwell McIntosh at the time of her death, and, subject to the payment of all debts and costs of administration, he is entitled to the immediate possession of the same."

The guardian *ad litem* excepted and appealed.

Wm. E. Timberlake for plaintiff, appellee.

Charles G. McLean, guardian ad litem, in propria persona, appellant.

BOBBITT, J. In *Andrews v. Andrews,* 253 N.C. 139, 116 S.E. 2d 436, this Court construed this provision of the will of Mrs. Lizzie May Banks: "All the remainder of my real and personal properties goes to my daughter Annie May — at her death all property be divided equally among the grandchildren." It was held that this provision vested in the daughter (Annie May) only a life estate in the real and personal property of the testatrix.

In *Andrews,* this Court, in opinion by *Moore, J.* said: "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."

Here, the gift to John T. Maxwell is in lanquage sufficient, standing alone, to pass a fee simple and absolute estate, but he is given no power of disposition, expressed or necessarily implied. There is a limitation over to the children of John T. Maxwell; and it appears plainly that the testatrix intended that, at the death of John T. Maxwell, her property should go to John T. Maxwell's children.

To ascertain the intent of the testatrix, the will must be construed as a whole; and, if possible, meaning must be given to each clause, phrase and word. *Trust Co. v. Wolfe,* 245 N.C. 535, 537, 96 S.E. 2d 690, and cases cited. To construe the provisions here considered as vesting the estate in John T. Maxwell in fee simple and absolutely, it would be necessary to ignore the final dispositive provision, to wit: "At the death of my nephew, John Maxwell the property is to be inherited by his children."

Appellee contends the word "inherited" in said final dispositive provision "is a clear recognition that the fee is vested in John Maxwell, otherwise his children could not *inherit* from him." But it is not provided that "the property" is to be inherited by the children *from their father.* In her will, the testatrix is disposing of *her* estate; and the clear implication is that the children of John T. Maxwell

are to become the owners and entitled to the possession of *her* property upon the death of their father.

The said final provision, to effectuate the manifest intent of the testatrix, must be construed a *dispositive* provision of her will. It may not be reasonably considered a mere superfluous comment that if perchance John T. Maxwell, at his death, intestate, should own any part of the estate that passed to him under his aunt's will, his children, under the law, would be entitled thereto as his heirs and distributees.

True, the word "inherit," in its technical sense, connotes only the passing of real property by descent. Obviously, the testatrix used the words, "to be inherited," in a general and nontechnical sense, that is, to manifest her intention that, at the death of John T. Maxwell, her property was to "go to" or "be received by" the children of John T. Maxwell. 43 C.J.S., p. 393; 21A Words and Phrases, Permanent Edition, pp. 21-23.

We perceive no substantial distinction between the provisions now considered and the provision construed in *Andrews v. Andrews, supra.* Appellee cites *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 368, and decisions of like import. Since these were fully considered and distinguished in *Andrews,* further discussion thereof is unnecessary. (Note: *Andrews* was decided after the entry of Judge Hall's judgment.)

Our conclusion is that John T. Maxwell, the plaintiff, takes only a life estate in the real and personal property that passed to him under Mrs. McIntosh's will.

For the error indicated, the judgment is vacated; and the cause is remanded for judgment consistent with the law as stated herein.

Error and remanded.

STATE v. MAX TESSNEAR.

(Filed 1 March, 1961.)

1. Indictment and Warrant § 9—

Where time is not of the essence of the crime charged, the failure of the indictment to aver the date the offense was committed is not a fatal defect.

2. Receiving Stolen Goods § 3—

The crime of receiving stolen goods is not one in which time is of the essence, and the failure of the indictment to aver the date the offense was committed is not fatal. G.S. 15-153, G.S. 15-155.

3. Criminal Law § 99—

On motion to nonsuit, the evidence is to be taken in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence is not to be considered except insofar as it is not in conflict with that of the State, but tends to explain or make clear the State's evidence.

4. Criminal Law § 101—

As a general rule, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to that conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture, the case should be submitted to the jury.

5. Receiving Stolen Goods § 6—

Evidence tending to show that a defendant bought goods from persons responsible for the larceny of the goods, that at that time defendant made a remark inferring defendant's knowledge that the goods had been stolen, and that the value of the goods stolen was in excess of one hundred dollars is sufficient to be submitted to the jury in a prosecution under G.S. 14-71.

6. Receiving Stolen Goods § 1a—

That the value of stolen goods received with knowledge by defendant exceeded one hundred dollars is an essential element of the offense proscribed by G.S. 14-71.

7. Receiving Stolen Goods § 7—

In a prosecution for feloniously receiving stolen goods with knowledge that they had been stolen, the court must charge the jury that it must find beyond a reasonable doubt that the goods were of value in excess of one hundred dollars to support a verdict of guilty, particularly when the record fails to disclose that any of the goods were found in defendant's possession or that all of the goods stolen were received by defendant.

APPEAL by defendant from *Froneberger, J.*, at November Term, 1960, of RUTHERFORD.

Criminal prosecution upon a bill of indictment charging that Max Tessnear did "on the first day of ..... and in the year of our Lord 19....," commit the criminal offense of feloniously receiving "watches, rifle and shotgun shells, cigarettes, money" of J. B. Harrill of the value of more than $100.00, well knowing that the same had been before then feloniously stolen, taken and carried away, contrary to the form of the statute in such cases made and provided, etc. G.S. 14-71.

When the case was called for trial, and before a plea was entered, defendant Max Tessnear, through his attorney, moved to quash the bill of indictment upon the ground that the bill of indictment contained no definite reference to the time the alleged offense was committed.

The motion was denied and defendant excepts.

Thereupon defendant entered a plea of not guilty to the bill of indictment.

The case was submitted to the jury upon the evidence introduced upon the trial — under the charge of the court.

The jury returned verdict of guilty of receiving stolen property knowing it to be stolen. Thereupon the court adjudged that defendant be confined in the State Prison at Raleigh to do hard labor for a period of not less than five years.

Defendant excepts thereto and appeals therefrom to Supreme Court, and assigns error.

Attorney General Bruton, Assistant Attorney General, H. Horton Rountree, for the State.

Hamrick & Hamrick, for defendant appellant.

WINBORNE, C.J.: At the outset defendant contends and urges that the trial court erred in denying his motion to quash the bill of indictment, and in arrest of judgment, for that the bill contains no definite reference to the time the alleged crime was committed. In this connection, while it is true that the bill of indictment here contains no such date, this Court has uniformly held that when time is not of the essence of the offense leaving out the date does not make it defective. See *S. v. Peters,* 107 N.C. 876, 12 S.E. 74; *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745.

The crime of receiving stolen goods is not one of the offenses in which time is of the essence, G.S. 15-153 and G.S. 15-155. Indeed, as said by *Avery, J.,* in *S. v. Shade,* 115 N.C. 757, 20 S.E. 537, "Where the defendant thinks an indictment * * * fails to impart information sufficiently specific, as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal." Error here is not made to appear.

The defendant contends next that the trial court erred in refusing to grant his motion for nonsuit at the close of all the evidence. On such a motion the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable inference to be drawn therefrom. On such a motion the defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when not in conflict with the State's evidence. It may be used to explain or make clear that which has been offered by the State. The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion

as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to a jury. See *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Holland,* 234 N.C. 354, 67 S.E. 2d, 272; *S. v. Smith,* 237 N. C. 1, 74 S.E. 2d 291.

There is evidence in the record tending to show that after the goods were taken from the Harrill store, the defendant bought them from persons responsible for the larceny, but not concerned in this appeal, and remarked, "You must have pulled a hot job somewhere," and that the value of the items taken from the Harrill store was $163.50. Therefore, applying the rule stated above, the defendant's motion for nonsuit was properly overruled. *S. v. Yow,* 227 N.C. 585, 42 S.E. 2d 661; *S. v. Brady,* 237 N.C. 675, 75 S.E. 2d 791.

However defendant next contends, and rightly so, that the trial court erred in its charge in that it did not explain to the jury that before they could convict the defendant of the crime charged, they must find beyond a reasonable doubt that the goods received by the defendant were of the value of more than one hundred dollars. In the bill of indictment the defendant was charged with a felony, that is, receiving goods of the value of more than one hundred dollars. G.S. 14-71 and G.S. 14-72. In order for the defendant to be found guilty under G.S. 14-71, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than one hundred dollars. This is an essential element of the crime because G.S. 14-72 specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars is hereby declared a misdemeanor.

It must be noted that the record fails to disclose that any of the goods were ever found in the defendant's possession, or that the defendant received all of the goods or just a part of them. The conclusion then is that the trial court erred when it failed to charge the jury on an essential element of the crime with which the defendant was indicted and stands convicted. The jury could have gotten the erroneous impression that the receiving of any of the stolen goods, knowing them to be stolen, was sufficient to convict the defendant. *S. v. Andrews, supra.*

Other assignments of error relate to matters which may not recur upon another trial. Hence they need not be discussed here.

For error pointed out, let there be a

New trial.

P. P. GREGORY v. GIDEON TILLITT GODFREY, BESS TILLITT GODFREY SAWYER, AND WILLIAM CHARLES SAWYER, ORIGINAL DEFENDANTS, AND W. S. GODFREY, GUARDIAN AD LITEM OF UNBORN CHILDREN OF GIDEON TILLITT GODFREY, ADDITIONAL DEFENDANT.

(Filed 1 March, 1961.)

1. Declaratory Judgment Act § 1—

A proceeding may be maintained under the Declaratory Judgment Act to determine the persons who will be entitled to the remainder after a life estate in lands under the terms of a will, there being a *bona fide* controversy as to the construction of the will in this respect. G.S. 1-253, G.S. 1-254.

2. Wills § 33g—

The will devised lands to testator's children for life with provision that the life estate of any child dying without leaving lineal descendants should go to the surviving children for life, with further provision that if any child died leaving a child or children him surviving such grandchildren should take the fee after the life estate. *Held:* The remainder in the portion of any of testatrix's children leaving lineal descendants vests in such descendants, while the portion of any child leaving no lineal descendants goes, after the termination of the life estate, to testatrix's descendants *per stirpes*.

APPEAL by respondents from *Bone, J.*, December Term 1960 of the Superior Court of PASQUOTANK, at which time it was agreed by all the parties that the judgment rendered should have the same force and effect as if it had been rendered at the September Term 1960 of CAMDEN.

This is a proceeding brought under the Declaratory Judgment Act, G.S. 1-253, *et seq.*

Mrs. Bettie F. Tillitt, a widow, died in 1925, leaving surviving her five children, Arkie M. Tillitt Grandy, a daughter, who died in 1933, leaving no child or other lineal descendants; D. Howard Tillitt, a son, who died in 1940, leaving one child, Bettie Anna Tillitt Cobb; Bruce Martin Tillitt, a son, who died in 1943, leaving one child, Bettie Tillitt Bunting; Bess Tillitt Gregory, a daughter, who died in 1956, leaving no child or other lineal descendants; and Gideon Tillitt Godfrey, a daughter, one of the respondents, who has one child, respondent Bess Tillitt Godfrey Sawyer who also has one living child who, at the time the answer was filed herein, was about one month old.

The petitioner is the widower of Bess Tillitt Gregory. In 1954, by deeds regular in all respects, the petitioner purchased the vested and contingent interest of the said Bettie Anna Tillitt Cobb and husband and of Bettie Tillitt Bunting and husband in the land devised and referred to in Item 4 of the will of Bettie F. Tillitt.

The will of the said testatrix contained the following:

"ITEM 4. My children are each and all equally dear to me, and it is my desire that each shall have an equal benefit from my estate. I, therefore, will and devise to them my "Brickhouse Farm," the school lot and any other land I may own at the time of my death, for and during the term of their several lives, and should any of them die, without leaving lineal descendant, then in that event the portion going to such one, shall go to his or her surviving brother and sisters, during their natural lives, but to those who may leave child or children, I will and devise the remainder after said life estate in said real property to the children of my said deceased child or children in fee simple."

Four of the children of Bettie F. Tillitt are now dead, only two of whom left a child surviving. The respondent Gideon Tillitt Godfrey is the sole surviving child of the testatrix and, therefore, the sole surviving life tenant under the terms of the will of the testatrix.

It is conceded by the petitioner that upon the death of Bess Tillitt Gregory without leaving a child or other lineal descendants, her one-fourth undivided interest which would have passed to her child or children at the time of her death had she been survived by a child or children, passed to Gideon Tillitt Godfrey for life, but it is alleged by the petitioner that upon the death of the said Gideon Tillitt Godfrey, the fee simple title to said property will vest in the descendants of Bettie F. Tillitt *per stirpes* or their assigns in equal shares. The respondents on the other hand allege and contend that the petitioner is the owner in fee simple of an undivided one-half interest in said lands and the respondent Gideon Tillitt Godfrey owns the other one-half interest for life with remainder to her surviving child or children.

The court below held that it had jurisdiction of this proceeding, under the Declaratory Judgment Act, and overruled the respondents' motion to dismiss on the ground that the proceeding presented only a moot question, and further held that upon the death of Bess Tillitt Gregory without lineal descendants, the one-fourth undivided interest held by her vested in Gideon Tillitt Godfrey for life, and that upon the death of the said Gideon Tillitt Godfrey, the fee simple title to said property will vest *per stirpes* in the descendants of Bettie F. Tillitt.

The respondents appeal, assigning error.

LeRoy, Goodwin & Wells for petitioner appellee.
E. Ray Etheridge and John H. Hall for respondents appellant.

DENNY, J. This cause was heard by the court below without a

jury, by agreement of the parties, upon the pleadings, the evidence offered, and the stipulations.

G.S. 1-253 of the Uniform Declaratory Judgment Act reads as follows: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree."

G.S. 1-254 of said Act is as follows: "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof."

In view of the conflicting construction placed on Item 4 of the will of Bettie F. Tillitt as set out in the pleadings, and in the light of the above provisions contained in our Declaratory Judgment Act, we are constrained to uphold the ruling of the court below in overruling the respondents' motion to dismiss on the ground that the question presented by the petitioner was moot. *Trust Co. v.* Green, 238 N.C. 339, 78 S.E. 2d 174; *Woodard v. Clark*, 234 N.C. 215, 66 S.E. 2d 888.

The question presented on this appeal is purely a legal one. If Gideon Tillitt Godfrey at the time of her death is survived by a child or other lineal descendants, such child or other lineal descendants will take in fee the one-fourth undivided interest in which she held a life estate prior to the death of her sister, Bess Tillitt Gregory. *Bunting v. Cobb,* 234 N.C. 132, 66 S.E. 2d 661. The other one-fourth interest in which she holds a life estate as the last survivor of the five children of Bettie F. Tillitt, under the terms of the will, the fee simple title to this one-fourth interest will vest *per stirpes* in the descendants of Bettie F. Tillitt or their assigns.

On the other hand, if Gideon Tillitt Godfrey should die without leaving a child or other lineal descendants, then in that event the entire remainder of the one-half undivided interest in which she holds a life estate, under the terms of Item 4 of the will of Bettie F. Tillitt, will vest in fee simple *per stirpes* in the descendants of Bettie F. Tillitt or their assigns.

Except as modified, the judgment below will be upheld.

Modified and affirmed.

THE DIOCESE OF WESTERN NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH; ASHEVILLE CHAPTER OF THE UNITED DAUGHTERS OF THE CONFEDERACY; TRINITY PROTESTANT EPISCOPAL CHURCH OF ASHEVILLE, N. C.; ANNIE JUSTICE GREENE; THE RIGHT REVEREND M. GEORGE HENRY, BISHOP OF THE DIOCESE OF WESTERN NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH AND THE REVEREND JOHN W. TUTON, RECTOR OF TRINITY PROTESTANT EPISCOPAL CHURCH OF ASHEVILLE, N. C. v. FRED L. SALE AND T. CLAYTON PEGRAM, CO-EXECUTORS UNDER THE WILL OF JULIA BETHEL ROBERTS CLAYTON, DECEASED; T. CLAYTON PEGRAM, INDIVIDUALLY; AND BETTY PEGRAM SESSOMS.

(Filed 1 March, 1961.)

1. Bill of Discovery § 5—

G.S. 8-89 which gives Superior Court judges discretionary power to order parties to produce for inspection and copying, books, records and documents relating to the merits of an action pending in the Superior Court, is remedial and should be liberally construed.

2. Same—

In an action to compel an executor to account for certain stock of the estate which plaintiffs alleged he had purchased before the death of testatrix with her money under a power of attorney, the executor contended that he purchased the stock with funds of the executrix and with his own funds and that the stock was issued to them as joint tenants with right of survivorship under a valid contract between themselves. *Held:* The court has the discretionary power to order the executor to exhibit to plaintiffs or their counsel all paper writings relied upon by him as a basis of the asserted contract.

APPEAL by defendants from *Clarkson, J.*, September, 1960 Term, BUNCOMBE Superior Court.

This is a civil action instituted by legatees under the Will of Julia Bethel Roberts Clayton against the defendants, Fred L. Sale and T. Clayton Pegram, executors, T. Clayton Pegram, Individually and Betty Pegram Sessoms, legatee. In addition to the averments with respect to the probate of the will, qualification of executors, etc., plaintiffs, in short summary, allege: (1) More than four years prior to her death the testatrix executed a power of attorney to the defendant T. Clayton Pegram under which he purchased for the testatrix, with her funds, 200 shares of stock in the R. J. Reynolds Tobacco Company. Subsequently one hundred per cent stock dividend was issued and at the death of the testatrix the 400 shares of stock constituted a part of the assets of her estate. (2) That the executors have failed to list the stock as an asset of the estate or to account for it. (3) The plaintiffs and the defendant Betty Pegram Sessoms are special legatees and the United Daughters of the Confederacy and

the Diocese of Western North Carolina of the Protestant Episcopal Church are residuary legatees under the will. (4) Unless the Reynolds stock is accounted for, certainly the residuary legatees, and perhaps some of the special legatees will be defeated for lack of sufficient assets.

The complaint contains other allegations not now pertinent to the question before us. For relief the plaintiffs ask that the executors be required to account for the Reynolds stock, including the dividends.

The defendant Pegram answered and, among other things, admitted the execution and registration of a paper writing referred to as the power of attorney executed by the testatrix to the defendant; that defendant and testatrix jointly purchased the Reynolds stock and had it issued to "Mrs. Julia Bethel Clayton and T. Clayton Pegram as joint tenants, with right of survivorship and not as tenants in common." That the stock was purchased "with funds belonging to Julia Bethel Clayton and this answering defendant and was held as joint tenants . . . under a valid contract entered into between the deceased and this answering defendant, for valuable considerations."

The defendant Pegram further answered, "that the said 200 shares of dividend stock was impressed with the contract and agreement that upon the death of Mrs. J. Bethel Clayton, T. Clayton Pegram, as the surviving joint tenant, would be vested with all interest and title therein."

The defendant admitted his refusal to account for the stock, claiming it as his own. Upon motion supported by affidavit, the court ordered the defendant T. Clayton Pegram to exhibit to the plaintiffs or counsel all paper writings relied upon by him, either as an individual or an executor, in support of his claim to ownership of the Reynolds stock, and to permit copies. From this order, the defendant appealed.

Lee and Allen, for plaintiffs, appellees.

George W. Craig and E. L. Loftin, for defendant T. Clayton Pegram, Co-Executor and Individually, appellant.

HIGGINS, J. The pleadings are sufficient to permit these inferences: (1) More than four years before her death the testatrix executed a power of attorney authorizing T. Clayton Pegram to act for her in certain business transactions. (2) Pegram purchased Reynolds stock which the plaintiffs allege was paid for entirely from funds of testatrix, and which the defendant alleges was paid for in part by the testatrix and in part by himself; that the stock was issued to both as joint tenants with right of survivorship. (3) The plaintiffs claim the stock should be accounted for as an asset of the estate. The defendant claims

he is the sole owner "under a valid contract entered into between the deceased and this answering defendant, for valuable considerations."

Upon the plaintiffs' request, Judge Clarkson ordered the defendant Pegram to permit inspection and copying of the books, papers and documents relied on by the defendant as showing title to the stock. The order was made pursuant to G.S. 8-89 which gives superior court judges, in their discretion, the power to order parties to produce for inspection and copying, books, records and documents relating to the merits of an action pending in the superior court. The section is remedial and should be liberally construed. *Abbitt v. Gregory*, 196 N.C. 9, 144 S.E. 297.

Here, the attorney in fact purchased stocks, according to his own admission, in part from his principal's funds. Later, as executor of the principal's estate, he refused to account for the stock, claiming he owns it "under a valid contract entered into between the deceased and this answering defendant, for valuable considerations." Having occupied the relationship of attorney in fact at the time he purchased the stock, and now occupying the position of executor, he complains that the superior court committed prejudicial error in ordering him to show the contract under which he claims the stock. Trust relationships are involved. The trustee who seeks to benefit should be willing to disclose his authority to do so. The purpose of the statute is to enable superior court judges to do exactly what Judge Clarkson did in this case. His order is

Affirmed.

STATE v. G. H. WYATT, JR.

(Filed 1 March, 1961.)

1. Indictment and Warrant § 17: Embezzlement § 7: Criminal Law § 102—

Where an indictment for embezzlement alleges ownership in the "Pestroy Exterminating Co." and the bill of particulars lays the ownership in "Pestroy Exterminators, Inc." and the witnesses use both terms and "Pestroy Exterminating Corporation" interchangeably, but it is apparent that all the witnesses were referring to the same corporation, there is no fatal variance between allegation and proof, defendant having been informed of the corporation which was the victim of the embezzlement.

2. Criminal Law § 97—

While wide lattitude is allowed in the argument to the jury, the de-

fendant should not be subjected to unwarranted abuse by the solicitor, and the action of the trial court in overruling objection to the solicitor's characterization of defendant as one of "the slickest confidence men we have had in this court for a long time" must be held for prejudicial error.

3. Criminal Law § 83—

Questions asked defendant's witnesses on cross-examination *held* prejudicial under the rule laid down in *State v. Phillips*, 240 N.C. 516.

APPEAL by defendant from *Huskins, J.*, at October 1960 Criminal Term, of BUNCOMBE.

Criminal prosecution upon a bill of indictment charging defendant G. H. Wyatt, Jr., with embezzling and fraudulently converting to his own use money in the sum of $37.50 belonging to "Pestroy Exterminating Company — John M. Young, President."

Plea: Not guilty.

Verdict: Guilty as found in the bill of indictment.

Judgment: That defendant be confined in the common jail of Buncombe County for a term of not less than two nor more than five years, and assigned to work under the supervision of the State Prison Department, as provided by law.

Defendant objects and excepts thereto, and appeals to Supreme Court and assigns error.

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

Sanford W. Brown for defendant, appellant.

WINBORNE, C.J. Defendant assigns as error the overruling of his motion for nonsuit. He contends that the motion should have been granted because of a variance between the allegation in the indictment and the proof. The indictment alleges embezzlement of the property from the "Pestroy Exterminating Co." However, the defendant moved for a bill of particulars and in the bill of particulars the phrase "Pestroy Exterminators, Inc." was used. The record also shows that the witnesses used these terms, along with "Pestroy Exterminating Corporation," interchangeably throughout the trial. It is apparent that all the witnesses were talking about the same thing.

The State is restricted in its proofs to the items set out in the bill of particulars. *S. v. Lea*, 203 N.C. 13, 164 S.E. 737. Therefore, the question is whether or not the use of "Pestroy Exterminators, Inc." is such a variance from "Pestroy Exterminating Co." as to be fatal and require a nonsuit.

Upon a thorough examination of the record, the conclusion is that there was not fatal variance between allegations and proof, and that the defendant was informed of the corporation which was the accuser

and victim. *S. v. Grant,* 104 N.C. 908, 10 S.E. 554; *S. v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901.

And as is aptly stated by *Rodman, J.,* in *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381, "The fact that the property was stolen from J. A. Turner & Co., Inc., rather than from J. 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." Furthermore, there was sufficient evidence of all elements of the crime charged to go to the jury. *S. v. Blackley,* 138 N.C. 620, 50 S.E. 310.

Therefore, in the overruling of defendant's motion for nonsuit, no error is made to appear.

However the defendant assigns as error, and properly so, this statement made to the jury by the Assistant Solicitor for the State in his closing argument:

"Ladies and gentlemen of the jury, you have before you in this trial two of the slickest confidence men we have had in this court for a long time, and there is no telling how much money they have taken from John Young and his company; they have just bled him white."

Counsel for defendant objected. Objection was overruled by the court, and defendant excepted.

In this connection, wide latitude is given to the counsel in making argument to the jury. However defendant should not be subjected to unwarranted abuse by the solicitor in the argument to the jury. Here the characterization of defendant, and co-defendant, in the manner recited above is held highly improper and objectionable. *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717.

The impropriety of the argument was brought to the attention of the trial court in time to be corrected then or in the charge. *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 37. Nevertheless the tenor of the language used is of too grave nature to be easily erased from the minds of the jurors — even though the court had attempted to do so.

Furthermore, defendant points to a series of questions asked of witnesses for defendant, and objected to by him, which appear to be violative of the rulings of this Court in *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762. There in the cross-examination of defendant, the Solicitor asked him numerous questions which assumed to be facts, the unproved insinuations of defendant's guilt of a number of collateral offenses. The court held the cross-examination was improper. Further elaboration of the subject need not be extended since they may not recur upon another trial.

For errors pointed out let there be a

New trial.

STATE v. ROBERT LEE MAIDES.

(Filed 1 March, 1961.)

1. Criminal Law § 147—

Where the record is sufficient to infer an appeal from the Superior Court to the Supreme Court, the appeal will not be dismissed for absence of statement of case on appeal, but in such instance only the face of the record is presented for review.

2. Indictment and Warrant § 12—

A general appearance waives objections predicated upon a mere irregularity in the warrant. The use of abbreviations in the record of proceedings of a court of record is disapproved.

APPEAL by defendant from *Morris, J.*, at November 18, 1960 Term, of CRAVEN.

Criminal prosecution upon warrants before Recorder's Court in Craven County upon affidavits of a State Highway Patrolman, charging defendant with operating a motor vehicle upon public highways on the 11th day of October, 1958, (1) while under the influence of intoxicating liquors (narcotic drugs) in violation of General Statutes 20-138, and (2) in a careless and reckless manner in violation of General Statutes 20-140.

In the Recorder's Court on 14 October 1958, defendant plead not guilty to OAWUIW and careless and reckless driving. Verdict: Guilty. Judgment: Let defendant be confined in common jail of Craven County for a period of 4 months. Suspended upon payment of a fine of $100.00 and costs, and upon the further condition that the defendant surrender his operator's license to the court to be forwarded to the Department of Motor Vehicles for revocation according to law.

It appears in the record that on 9 May 1960, upon petition of defendant for writ of *recordari* (erroneously designated writ of *certiorari*), Judge Bundy of Third Judicial District ordered the Clerk of the Recorder's Court of Craven to transmit forthwith to the docket of the Superior Court of Craven County, all of the original papers, warrant and other records of the proceeding of a trial and conviction of defendant, dated October 14, 1958, to the end that a hearing might be had on a motion to vacate former judgment by reason of void warrant or a trial as the court may determine.

Furthermore, the record contains this notation on minute book 0-2 "Writ of *certiorari* — Writ denied." The minutes also contain notation that on 5 January, 1961, Chester Morris, Trial Judge, ordered that defendant be allowed to give appeal bond in the Supreme Court.

Attorney General Bruton, Staff Attorney Richard T. Sanders for the State.

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

PER CURIAM. The Attorney General moves to dismiss the appeal for that there is no statement, or settlement of case on appeal, and the Court is relegated to an examination of an obvious fragmentary and selective portion of the record. However, since there is data in the record from which an appeal may be inferred, the motion will not be allowed. Nevertheless error upon the face of the record is not made to appear. Indeed where defendant enters a general appearance in court, he waives any objection predicated upon any irregularity in the warrant. *S. v. Harris,* 213 N.C. 648, 197 S.E. 142. See also *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019, and also *S. v. Johnson,* 247 N.C. 240, 100 S.E. 2d 494.

In the case in hand the record shows that defendant entered plea of not guilty, and was tried and convicted in the Recorder's Court.

Moreover, the records of the proceedings in this case are subject to the charge that, as stated in *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241, "they are incomplete and unduly abbreviated and ciphered, a practice that should not be pursued, and is not approved in the recording of the proceedings of a court of record." See also *S. v. Edmundson,* 244 N.C. 693, 94 S.E. 2d 844.

Affirmed.

MRS. CALLIE C. YORK v. JOSEPH O. COLE AND WIFE, SARAH FRANCES COLE.

(Filed 1 March, 1961.)

Cancellation and Rescission of Instrument § 11—

In a suit to set aside a conveyance of real estate on the ground of fraud and coercion, defendants may properly set-up a counterclaim for personal services rendered grantor, since the grantor seeking the equitable remedy of cancellation should return anything she may have received from grantees.

APPEAL by plaintiff from *Preyer, J.,* May 23, 1960 Term, of GUILFORD (High Point Division).

This is a civil action instituted 12 December 1958.

Plaintiff is an elderly woman in chronic ill health. For a period of

time she resided in the home of defendants, relatives. She sues: (1) to set aside a conveyance of real estate which she alleges was made by her to defendants by reason of fraud and coercion on their part, (2) to recover for the wrongful conversion by defendants of rents, postal savings, social security payments, an automobile and a quantity of furniture, and (3) for punitive damages.

Defendants, answering deny the material allegations of the complaint, and counterclaim for services rendered by them to plaintiff and for expenses incurred in maintaining and caring for her in their home.

Plaintiff's demurrer *ore tenus* to the counterclaim was overruled. Nine issues were submitted to the jury. The first seven deal with plaintiff's cause of action. All of these, except the issue involving punitive damages, were answered in favor of plaintiff. The eighth and ninth issues relate to defendants' counterclaim. These were answered in favor of defendants.

In conformity with the verdict, the court entered judgment: (1) setting aside and declaring null and void the conveyance from plaintiff to defendants, (2) awarding articles of furniture to plaintiff, (3) allowing plaintiff to recover $3,086.04, with interest, for conversion of property and money by defendants; (4) permitting defendants recovery of $3,100.00 on their counterclaim.

Plaintiff appealed and assigned errors.

John W. Hinsdale and Thomas Turner for plaintiff.
James B. Lovelace for defendants.

PER CURIAM. Plaintiff assigns as error the overruling of the demurrer *ore tenus* to defendants' counterclaim, the refusal of the court to set aside the verdict as to the eighth and ninth issues, the court's charge on the eighth and ninth issues, and the signing of the judgment. We find no prejudicial error in the rulings of the court, the trial, and entry of judgment. Relative to plaintiff's cause of action, this trial furnishes a proper example of the application of the maxim: "He who seeks equity must do equity." A complainant who seeks to have an instrument, obligation, or transaction canceled or set aside must return or offer to return whatever he may have received from the defendant. 19 Am. Jur., Equity, s. 464, p. 321.

No error.

STATE v. HORACE BRIGHT.

(Filed 1 March, 1961.)

Criminal Law § 160—

Appellant has the burden of showing prejudicial error presented by a proper assignment of error.

APPEAL by defendant from *Burgwyn, E. J.*, September 1960 Term, of BEAUFORT.

Defendant was charged in bills of indictment with assaults with a deadly weapon. The cases were consolidated for trial. Verdicts of guilty of simple assault were returned. Prison sentence of thirty days was imposed. Defendant excepted and appealed.

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

LeRoy Scott and Carter & Ross for defendant appellant.

PER CURIAM. The sufficiency of the evidence to support the charges was not challenged by motion to nonsuit or for directed verdict. To secure a new trial it is necessary for appellant, by proper assignment of error, *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405, to show prejudicial error. *Barefoot v. Rulnick*, 252 N.C. 483, 113 S.E. 2d 921. Here appellant failed in both requirements.

Appeal dismissed.

STATE v. LINCOLN FRAZIER.

(Filed 8 March, 1961.)

1. Courts § 15—

The juvenile court of a county has jurisdiction of a proceeding to determine whether a minor resident of the county is a delinquent child within the purview of G.S. 110-21.

2. Infants § 10: Constitutional Law § 29—

The commitment of a minor to a training school upon findings that such minor is a delinquent within the intent and meaning of G.S. 110-21 is not punishment and the proceeding is not penal in nature, and therefore such delinquent is not entitled to trial by jury upon his appeal from the order of the juvenile court committing him to a training school.

3. Courts § 7—

Where, upon appeal from the order of a juvenile court committing a mi-

nor to a training school as a delinquent, the record discloses the order of the juvenile court with its specific findings of fact and that the court had jurisdiction, the fact that the petition has been misplaced and was not produced on the appeal it not a fatal defect.

4. Same—

Where the Superior Court finds that the findings of the juvenile court that the minor is a delinquent was supported by evidence and not only reviews the findings of fact, conclusions and order of the juvenile court, but also hears evidence and tries the cause *de novo*, and finds that the juvenile is a delinquent, the order committing the minor to a training school will not be disturbed on appeal.

APPEAL by defendant from *Morris, J.*, November Term 1960 of CRAVEN.

Proceeding instituted in the Juvenile Court of Craven County by petition of the Public Welfare Department of Craven County, pursuant to G.S. 110-25, averring that the defendant, Lincoln Frazier, a fifteen-year-old boy residing in Craven County, is a delinquent child within the provisions of G.S. 110-21.

On 29 September 1960, W. B. Flanner, Judge of the Juvenile Court of Craven County, issued a summons directing Minezetta Frazier, mother of Lincoln Frazier, to appear before the Juvenile Court of Craven County at New Bern, North Carolina, on 30 September 1960 at 10:00 a.m., and to bring with her Lincoln Frazier, a child represented to the court as being a delinquent child, and there to abide such orders as may be made touching the welfare of the child. The summons was duly served on her the day of its issuance, and a copy was left with her.

On 8 November 1960 the Judge of the Juvenile Court of Craven County rendered an order in substance as follows, except when the order is quoted: At the hearing Lincoln Frazier, a delinquent child, admitted in open court that he was employed and worked at an illicit still in Craven County, and did not attend school regularly, and it further appeared from evidence introduced at the hearing that Lincoln Frazier had been further delinquent, in that he had broken out window lights in the school building, had broken into and entered several places, and stayed away from home at night. The mother of Lincoln Frazier stated to the court she could not control him. "Upon the foregoing findings of fact it was adjudged that said Lincoln Frazier was delinquent, and therefore should be committed to the training school for boys."

Several days later defendant's present counsel of record appealed from the order to the Superior Court.

The appeal came on to be heard before Judge Morris at the No-

vember Term 1960 of Craven County Superior Court. At the hearing before Judge Morris the present counsel for defendant appeared for him, and participated in the hearing. At the beginning of the hearing Judge Morris ruled that no issues of fact arise on the appeal to be submitted to the jury. To this ruling defendant excepted. In behalf of petitioner the following witnesses testified: W. B. Flanner, Clerk of the Superior Court of Craven County and Judge of the Juvenile Court of Craven County, Richard William Henry Badger, principal of the school in Vanceboro, Charles Joyner, principal of the Craven Corner School, and W. E. Taylor, a deputy sheriff, all of whom were cross-examined at length by defendant's counsel. The following witnesses testified in behalf of the defendant: his mother, Artie Nolan, Annie Dove, and Ethel George.

W. B. Flanner testified in substance: That as Judge of the Juvenile Court of Craven County he heard this proceeding on a petition from the Welfare Department, that he does not know where the petition is at present. He kept it on his desk for some time waiting for Mr. Abernethy to come over to see it, and it must have been misplaced. The remainder of his testimony is a recital of the facts found in his order, and the decree based upon such facts.

Richard William Henry Badger testified that Lincoln Frazier was enrolled as a student in his school, but seldom attended.

The testimony of Charles Joyner was of little value.

W. E. Taylor testified that Lincoln Frazier told him he had helped Rudolph Godette make whiskey at a still, had stolen two watches, and did not attend school. He further testified that Lincoln Frazier's mother in Lincoln's presence told him Lincoln didn't stay home at nights, that he came home only to eat, and that she couldn't do anything with him.

The evidence of defendant's witnesses was to the effect that since Lincoln Frazier was brought before the Juvenile Court he has been doing fine, and behaving himself.

Judge Morris' order is in substance: The findings of fact of the Judge of the Juvenile Court to the effect that Lincoln Frazier is a delinquent, and should be committed to a training school for boys is amply supported by the evidence he heard, and the order of the Juvenile Court is affirmed. Whereupon, he remanded the proceeding to the Juvenile Court to the end that its order heretofcre entered be placed in effect.

From this order defendant appeals.

T. W. Bruton, Attorney General, for the State.
Charles L. Abernethy, Jr., for defendant, appellant.

PARKER, J. The evidence and the findings of fact show that Lincoln Frazier is a fifteen-year-old boy residing in Craven County, and is delinquent within the intent and meaning of G.S. 110-21. The Juvenile Court of Craven County had jurisdiction over him by virtue of the provisions of the same statute.

Defendant assigns as error the ruling of Judge Morris that no issues of fact arise on the appeal to be submitted to a jury. This assignment of error is without merit.

The various training schools in North Carolina established by Chapter 134 of the General Statutes were created by the General Assembly for the training and moral and industrial development of the criminally delinquent children of the State. The purpose of establishing the training schools is not criminal or penal, but to meet, in some measure, the duty imposed upon society, for its own protection, and for the good of the child.

This Court said in *In re Watson,* 157 N.C. 340, 72 S.E. 1049: "The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime."

This Court also said in *S. v. Burnett,* 179 N.C. 735, 102 S.E. 711: "To the objections frequently raised that these statutes ignore or unlawfully withhold the right to trial by jury, these and other authorities well make answer that such legislation deals and purports to deal with delinquent children not as criminals, but as wards and undertakes rather to give them the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, a support and not a hindrance to the commonwealth."

Our cases are in accord with the view generally taken by Courts in other jurisdictions. 31 Am. Jur., Juvenile Courts, etc., §67; 50 C.J.S., Juries, §80; Annotation, 67 A.L.R. 1082.

The only exception appearing in the record is the one discussed above. Defendant did not except to the judgment of Judge Morris but appealed to the Supreme Court. The appeal to this Court is an exception to the judgment, *Bennett v. Attorney General,* 245 N.C. 312,

96 S.E. 2d 46, and presents only the face of the record for review and inspection, *King v. Rudd,* 226 N.C. 156, 37 S.E. 2d 116; *Sprinkle v. City of Reidsville,* 235 N.C. 140, 69 S.E. 2d 179.

G.S. 110-24 provides: "The court shall maintain a full and complete record of all cases brought before it, to be known as the juvenile record." Defendant contends that there is a fatal defect in the record because the petition by the Welfare Department was not produced at the hearing before Judge Morris. The record clearly shows that such a petition was filed with the Juvenile Court. The judge of that court testified before Judge Morris: "I kept it (the petition) on my desk for some time waiting for Mr. Abernethey to come over to see it, and it must have been misplaced." There is nothing in the record to show that a diligent search was made for the petition, and it could not be found. There is in the record the order of the Juvenile Court with its specific findings of fact. The court had jurisdiction in the premises. We do not consider the misplacing of the petition a fatal defect, and this contention is overruled. See *In re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564.

G.S. 110-40 provides for an appeal from any judgment or order of the Juvenile Court to the Superior Court having jurisdiction in the county. This section reads in part: "The judge of the superior court shall on receiving a statement on record of appeal from the juvenile court hear and determine the questions of law or legal inference and the judge shall deliver to the clerk of the superior court of the county in which the action or proceeding is pending his order or judgment. The clerk of the superior court shall immediately notify the judge of the juvenile court of the order or judgment."

Judge Morris stated in his order, while he was of opinion that he was not required to hear the matter *de novo,* he did hear evidence both from the State and from the defendant, and considered the record, including the findings of fact in the order of the Juvenile Court. The record shows that Mr. Abernethy cross-examined at length the witnesses for the State, and offered four witnesses for defendant. Judge Morris in fact had a full scale hearing, and his conclusion "that the findings of fact of the Judge of the Juvenile Court to the effect that the defendant Lincoln Frazier is a delinquent and should be committed to a training school for boys is amply supported by evidence in this case" is, under the circumstances here, tantamount to such a finding by Judge Morris. The record shows that Judge Morris in effect not only reviewed the findings of fact, conclusions and order of the Juvenile Court, but also heard the appeal *de novo.*

The evidence at the hearing before Judge Morris amply supports

the findings of fact, the conclusions, and the order of the Juvenile Court, and also amply supports Judge Morris' findings of fact, conclusions, and order. No error of law appears on the face of the record. All of defendant's contentions have been considered, and are overruled. The order of Judge Morris is

Affirmed.

STATE v. EDWARD TURNER POWELL.

(Filed 8 March, 1961.)

1. Automobiles § 75: Criminal Law § 134—

In order to sustain the imposition of a higher penalty provided by statute for repeated convictions of a similar offence, the indictment must allege the prior conviction or convictions, and the matter must be established by the verdict of the jury in the absence of judicial admission by defendant.

2. Criminal Law § 108—

An instruction to the jury may not assume as true the existence or nonexistence of any material fact in issue.

3. Criminal Law § 151—

The record imports verity and the Supreme Court is bound thereby.

4. Criminal Law § 87½—

While no proof is necessary of a fact stipulated or admitted, and no particular form is required of a stipulation, a stipulation must be definite and certain.

5. Same—

Agreement of defense counsel that the record introduced by the solicitor was the official record of an inferior court is not an admission by defendant that defendant had theretofore been convicted of a similar offense, nor will the silence of defendant in the face of the subsequent remark of the solicitor that such record showed that defendant had theretofore been convicted of a similar offense, bind defendant, since the remark of the solicitor does not contain a statement that the defendant admitted the truth of the fact therein stated.

6. Automobiles § 75: Criminal Law § 134—

The admission of the authenticity of the record of an inferior court introduced by the solicitor is not an admission by the defendant that he had been theretofore convicted of a similar offense, even though the record shows a conviction of a similar offense, G.S. 15-147, there being no admission by defendant that he was the person referred to in the record, and an instruction assuming that defendant had made such admission must be held for error.

7. Criminal Law § 161—

An instruction by the court which erroneously assumes that defendant admitted he had theretofore been convicted of a similar offense cannot be held harmless even though the evidence is amply sufficient to support conviction of the offense charged, since the jury might have considered defendant's purported stipulation or admission of a former conviction as bearing upon his credibility.

8. Criminal Law § 112—

It is not error for the court to recite the testimony of the defendant in stating the contentions of the parties, since the contentions arise upon the evidence and the reasonable inferences therefrom.

APPEAL by defendant from *Bundy, J.*, November 1960 Criminal Term, of CARTERET.

This is a criminal action.

Indictment: ". . . Edward Turner Powell . . . on the 11th day of June, 1960 . . . did . . . operate an automobile upon the public highways of Carteret County while . . . under the influence of intoxicating liquors . . ., this being his second offense, he . . . having been convicted of operating a motor vehicle upon the public highways of Carteret County while . . . under the influence of intoxicating liquors in the Recorder's Court of Carteret County on October 9, 1958 . . . ."

Plea: Not guilty.

Verdict: ". . . guilty as charged with operating an automobile upon public highways of Carteret County while . . . under the influence of intoxicating liquors . . . this being his second offense."

Judgment: $200.00 fine and costs.

Defendant appeals and assigns error.

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

Thomas S. Bennett for the defendant.

MOORE, J. After the jury was impanelled and before any witness had been called by the State, the following transpired.

"MR. ROUSE (Solicitor): First of all I would like to introduce into the record in the case, which we stipulate they are the official records of the County Recorder's Court of Carteret County, Mr. Bennett?

"MR. BENNETT (Defense Counsel): Yes Sir.

"MR. ROUSE: The record shows the defendant was charged with driving drunk, was found guilty as charged, September the 10, 1958; I believe that would be all that is pertinent.

"COURT: Of what?

"MR. ROUSE: Driving drunk.

"COURT: Superior Court of this County?

"MR. ROUSE: In the County Recorder's Court of Carteret County."

Thereafter, none of the evidence adduced at the trial makes reference to a former conviction of defendant for drunken driving. Defendant testified in his own behalf and was not examined either on direct or cross-examination with respect to a prior conviction for this offense.

The court charged the jury: "In support of his contention that the defendant is guilty as charged, first the defendant stipulates, that is, he agrees in open court through his counsel for him, formally that the defendant was convicted in the recorder's court of this county for driving under the influence of intoxicating liquors on September the 10th, 1958."

The court's final instruction to the jury was as follows: "If you find beyond a reasonable doubt that he was driving and that at the time he was driving he was on the highway and at the time he was under the influence of intoxicating liquors as that term has been explained to you, then it would be your duty to return a verdict of guilty; otherwise, not guilty."

Defendant contends that these instructions assume, as true, that there had been a prior conviction of defendant for drunken driving on 10 September 1958, that the allegation of former conviction was controverted by defendant's plea of not guilty, and that the issue of prior conviction had not been withdrawn from the jury by judicial admission or stipulation.

Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment or warrant for a subsequent offense must allege the prior conviction or convictions, and in the absence of judicial admission by defendant the question as to whether or not there was a former conviction is for the jury, not for the court. *State v. Cole,* 241 N.C. 576, 583, 86 S.E. 2d 203. An instruction to the jury may not assume as true the existence or nonexistence of any material fact in issue. *State v. Cuthrell,* 235 N.C. 173, 69 S.E. 2d 233.

It is apparent that the trial judge and solicitor understood defendant to stipulate that he had been previously convicted of drunken driving on 10 September 1958. The solicitor offered in evidence a record of the Recorder's Court of Carteret County. Counsel for defendant stipulated that it was an official record of that court. The solicitor then said: "The record shows the defendant was charged with driving drunk, was found guilty as charged, September 10, 1958." To this statement defendant made no response. Thereafter, no evidence was offered by the State or defendant as to whether or not defendant

was the person referred to in the record, or whether or not defendant had been previously convicted on a charge of driving under the influence.

Parenthetically, "the subject matter of a judicial admission ceases to be an issue in the case, and evidence thereafter offered by either party in affirmance or denial of the admitted fact is objectionable on the ground of irrelevancy." Stansbury: North Carolina Evidence, s. 166, p. 353.

The court and solicitor undoubtedly assumed that there had been a full and complete admission of defendant's prior conviction. If the State and defendant had an understanding and agreement on this point prior to the introduction of the Recorder's Court minutes, the record on appeal does not disclose it. If there was a misunderstanding, the record before us does not disclose any effort on defendant's part to correct the court's impression. Defendant's assignments of error based upon the foregoing incidents of the trial appear to be afterthoughts.

"No proof of stipulated or admitted facts, or of matters necessarily implied thereby, is necessary, the stipulations being substituted for proof and dispensing with evidence . . . ." 83 C. J. S., Stipulations, s. 24b(3), p. 63. "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent . . . ." *ibid,* s. 3. p 3. These principles apply in both civil and criminal cases. Thus, where the State's attorney, in a trial of one for rape, announced in open court that defense counsel was willing to stipulate that defendant and prosecutrix were not man and wife, and defense counsel made no objection and by his conduct indicated acquiescence, it was held that the failure to object must be regarded as assent. *State v. Seeb* (N.D. 1949), 37 N. W. 2d 341. See also *U.S. v. Monroe* (CCA 2C 1947), 164 F. 2d 471.

In the instant case, notwithstanding the apparent assent and acquiescence of defendant, the record does not show that the terms of the stipulation were "definite and certain." We are bound by the record. It imports verity. *State v. Snead,* 228 N.C. 37, 39, 44 S.E. 2d 359. Defendant stipulated that the court minutes offered in evidence were an official record of the Recorder's Court of Carteret County. When the solicitor stated the contents of the record and purported to apply them to defendant, defendant remained silent. The solicitor did not state that defendant admitted the truth of the matters contained in the Recorder's Court record or that defendant stipulated that he was the person referred to in the record. The purported stipulation was

not definite and certain on this phase. This is the feature that distinguishes this from the *Seeb* case. An unilateral statement by the solicitor may not be considered as evidence. Silence will not be construed as assent thereto unless the solicitor specifies that assent has been given. The court inadvertently fell into error by not insisting upon a full, complete, definite and solemn admission and stipulation.

Where a person is charged in a bill of indictment or warrant with an offense which, on the second conviction thereof, is punishable with a greater penalty than on the first conviction, and the indictment or warrant alleges a prior conviction, "a transcript of the record of the first conviction, duly verified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction." G.S. 15-147. *State v. Stone,* 245 N.C. 42, 44, 95 S.E. 2d 77. The verdict of the jury "should spell out, first, whether the jury find the defendant guilty of the violation of G.S. 14-138 charged in the warrant or indictment, and if so, whether they further find that he was convicted of" the alleged prior violation thereof. *State v. Stone, supra.* While it is not required, it would not be amiss to submit to the jury written issues.

When a case involving a former conviction is presented to the jury under proper instructions, the failure of the jury to find that there was a former conviction does not necessarily defeat the entire prosecution and require a general verdict of not guilty. The jury may return a verdict of guilty of a violation of G.S. 14-138 and a verdict that there has been no prior conviction under that section. *State v. Stone, supra.* In such event the punishment shall be as in case of a first conviction, and if it appears that the court might have considered a former conviction in sentencing defendant, the cause will be remanded for resentence. *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99; *State v. White,* 246 N.C. 587, 99 S.E. 2d 772; *State v. Miller,* 237 N.C. 427, 75 S.E. 2d 242.

In the instant case, the jury returned a verdict of guilty as charged in the bill of indictment. This of necessity was predicated upon the purported stipulation by defendant. There was sufficient evidence to support a conviction for violation of G.S. 14-138. But the evidence of former conviction was insufficient. The jury may have considered the purported stipulation of former conviction as bearing upon the credibility of defendant. This factor could have been the controlling consideration in returning a verdict of guilty of violating G.S. 14-138. There must be a new trial.

The other assignments of error do not merit extended discussion. The matters therein complained of probably will not recur upon a retrial. However, it is appropriate to point out that it is not error for

the court, in giving the contentions of the parties, to recite the testimony of defendant and other witnesses as a basis for the contentions. Indeed, contentions arise upon the evidence and the reasonable inferences to be drawn therefrom. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191; *State v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218; *State v. Grainger,* 223 N.C. 716, 28 S.E. 2d 228.

New trial.

MELVIN RUTHERFORD v. CHARLES A. HARBISON, ADMINISTRATOR OF THE ESTATE OF GAITHER HARBISON, DECEASED.

(Filed 8 March, 1961.)

1. Trial § 53½—

Where the parties agree that the court may rule upon the legal effect of stipulated documentary evidence, the court has no authority to make additional findings of fact unless authorized by the stipulations, but the court's statements as to the legal effect of the instruments are conclusions of law and not findings of fact.

2. Executors and Administrators § 28½—

The rejection of a claim against an estate must be absolute and unequivocal in order to start the running of the six months statute of limitation, G.S. 28-112.

3. Same—

The attorney for the estate notified claimant in writing that the claim for compensation for services rendered the deceased by claimant was rejected, but added that the claim was excessive, and offered to discuss the matter at a later date. Thereafter the attorney offered to settle the claim for a smaller amount. *Held:* The rejection was only as to the amount and was insufficient to start the running of the statute of limitations. That the rejection was not considered unqualified is borne out by the later offer of compromise.

APPEAL by plaintiff from *Froneberger, J.,* September 1960 Term, of MCDOWELL.

This is a civil action to recover for services rendered and goods furnished to defendant's intestate.

Gaither Harbison died intestate on 28 August 1958 and Charles A. Harbison qualified as administrator of his estate on 2 September 1958. On 15 September 1958 plaintiff filed with the administrator a claim, in writing and verified under oath, in the amount of $1,500.00 for

services rendered and goods furnished intestate. The claim was not paid and this action was instituted 30 November 1959.

The complaint alleges: For about 4 years prior to intestate's death plaintiff, at intestate's request, furnished him materials and care. Intestate promised and plaintiff expected compensation therefor. Intestate paid nothing on account and at his death was justly indebted to plaintiff. Defendant administrator has filed a purported final account without settling plaintiff's claim. The personal estate has been exhausted and the real estate should be sold to make assets to pay the debt due plaintiff.

Defendant denies the material allegations of the complaint but admits that the claim was filed. Defendant alleges that the claim was rejected and disallowed in writing and that the action is barred by G. S. 28-112.

At the trial a jury was sworn and empanelled. The parties preliminary to the offering of oral evidence upon the merits of plaintiff's claim, stipulated that certain correspondence was exchanged by the respective counsel for plaintiff and defendant, and agreed that the court might rule upon the legal effect of this correspondence and determine therefrom whether the action is barred by G.S. 28-112.

The correspondence in material part is as follows:

(1) Letter of 15 September 1958 from plaintiff's attorney to estate's attorney, enclosing plaintiff's claim:

> "I am enclosing Notices of Claim from Melvin Rutherford and Alberta Rutherford, whom I represent in the matter of the estate of Gaither Harbison.
>
> At any time you might wish to discuss these claims with me, I will be available, but I ask that you give me three or four days notice so that I can arrange to be in town."

(2) Letter of 24 September 1958 from the estate's attorney to plaintiff's attorney:

> "As attorney for the estate of Gaither Harbison, I am writing you in regard to the claims of Melvin Rutherford and Alberta Rutherford, which you mailed to me on September 15, 1958. I have carefully gone over these claims with Charlie A. Harbison, Administrator, and payment of said claims are disallowed. We feel that the claims are very excessive and unreasonable; however, if you care to discuss any phase of these claims with me I shall be glad to talk to you."

(3) Letter of 27 October 1958 from plaintiff's attorney to the estate's attorney:

"With reference to the claims of Melvin and Alberta Rutherford against the Estate of Gaither Harbison, I plan to be in Morganton the afternoon of October 30, Thursday, and if convenient with you we can discuss these matters at that time. Will 3:00 P. M. be convenient? If not, please suggest a time."

(4) Letter of 6 November 1958 from the estate's attorney to plaintiff's attorney:

"I have carefully gone over the claims of Melvin and Alberta Rutherford against the estate of Gaither Harbison with the administrator, Charles A. Harbison. He has considered these claims and has authorized me to state that he will pay $300.00 in settlement. He feels that this is a fair sum for services rendered the deceased. You may discuss this with your clients and let me know at your earliest convenience."

The court concluded that the "claim was disallowed and rejected on September 24, 1958, and is barred by" G.S. 28-112, and entered judgment dismissing the action.

Plaintiff appeals.

Everette C. Carnes and Curtis D. Hawkins for plaintiff.

O. L. Horton and John H. McMurray for defendant.

MOORE, J. G.S.28-112 provides that "If a claim is presented to and rejected by the . . . administrator . . . , the claimant must, within six months, after due notice in writing of such rejection . . . commence an action for recovery thereof, or be forever barred from maintaining an action thereon."

The purpose of this statute is to expedite the administration and settlement of estates. The language is positive and explicit, and the section must be enforced in accordance with the plain meaning of its terms. *Batts v. Batts,* 198 N.C. 395, 151 S.E. 868; *Morrisey v. Hill,* 142 N.C. 355, 55 S.E. 193.

The court purported to find facts. The only evidence before the court was the four letters. The facts were stipulated, therefore the only matter for the court was a question of law. Where a cause has been submitted to the court upon stipulated facts, the court has no authority to make additional findings of fact unless so authorized by the stipulations. *Swartzberg v. Insurance Company,* 252 N.C. 150, 113 S.E. 2d 270. In the case at bar the challenged findings of fact are merely conclusions of law.

The crucial question on this appeal is whether or not the letter

of 24 September 1958 rejected plaintiff's claim so as to invoke the bar of the statute.

To bring into play the six months limitation of G.S. 28-112 for institution of action on the claim, it is necessary that there be a rejection of the claim and that the rejection be absolute and unequivocal. An administrator may not claim the benefit of the bar of the statute when the rejection leaves the matter open for further negotiation or adjustment.

The letter of 24 September 1958, in the second sentence, rejects and disallows the claim. If nothing more had been said, the disallowance would have been sufficient. But the letter goes further and explains that the claim is considered "excessive" and "unreasonable." Then it is said, ". . . if you care to discuss any phase of these claims with me I shall be glad to talk to you." Plaintiff probably inferred, and rightfully so, that the claim was being rejected only as to amount. The letter leaves the impression that negotiations are in order and implies that a discussion might result in allowance and settlement of the claim in some amount.

That the matter was not considered closed is borne out by subsquent correspondence. In response to defendant's offer to discuss the claim, plaintiff on 27 October 1958 wrote a letter requesting a conference for 3:00 P.M. on 30 October. Thereafter counsel for defendant advised that the administrator had considered the claim and offered $300.00 in settlement and requested an answer.

The correspondence taken as a whole indicates that neither party considered that the claim had been unqualifiedly rejected or that negotiations had ended. The purported rejection was not such as to start the running of the statute.

The New York statute is practically identical with G.S. 28-112. The Court of Appeals in *Hoyt v. Bonnet,* 50 N.Y. 538 (1872), deals with a similar situation. Plaintiffs filed a claim and defendants rejected it in the following terms: ". . . executors . . . as at present advised, decline to pay your claims . . . . they will be greatly obliged if you will furnish them a bill of particulars containing the items of your accounts . . . ." The Court declared that the rejection "should not be ambiguous or equivocal, capable of two interpretations, but decided, unequivocal and absolute; such an act or declaration as will admit of no reasonable doubt that the claim is definitively disputed or rejected, so that the claimant will be without excuse for not resorting to his action within the time required to save his claim. To construe and apply the statute in a manner more liberal to the representatives of estates would make it a trap and a snare to claimants. They might be misled, and induced to remain passive until they had

lost the right of action by a notice or a declaration so carefully drawn or made as to lull them to rest; . . . ." See also *Donnally v. Welfare Board* (Md. 1952), 92 A. 2d 354, 34 A.L.R. 2d 996, in which it is said by way of dicta that a rejection must be absolute.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

Reversed.

C. T. GILLIKIN, ADMINISTRATOR OF LOUIE ELMER GILLIKIN, DECEASED AND NEXT OF KIN TO LOUIE ELMER GILLIKIN, DECEASED v. LESLIE D. SPRINGLE.

(Filed 8 March, 1961.)

1. Pleadings §§ 19, 30—

An action should not be dismissed upon demurrer or judgment on the pleadings allowed in favor of defendant if the allegations of the complaint are sufficient to constitute a defective statement of a good cause of action, since in such instance plaintiff should be allowed to amend, but the action may be dismissed when the complaint fails to state any cause of action entitling plaintiff to relief.

2. Pleadings § 30—

The Superior Court is not required to specify the reasons for allowing motion for judgment on the pleadings, but on appeal the Supreme Court must examine the record to ascertain if there is error in the judgment appealed from.

3. Perjury § 6—

Perjury and subornation of perjury are criminal offenses and a civil action will not lie for such offenses or conspiracy to commit them. G.S. 14-209, G.S. 14-210.

4. Fraud § 1—

There can be no recovery for fraud in procuring a judgment unless and until the judgment is set aside.

5. Judgments § 24—

The obtaining of a judgment by perjured testimony is intrinsic fraud and the judgment cannot be set aside on this ground unless the party charged with perjury has been convicted or has passed beyond the jurisdiction of the court, and therefore is not amenable to criminal process.

APPEAL by plaintiff from *Burgwyn, E. J.*, October 1960 Term, of CARTERET.

This and the companion suits by plaintiff, No. 94 versus Ohio Farmers Indemnity Company, No. 96 versus United States Fidelity & Guaranty Company, and No. 98 versus Gene Bell, were all begun by the issuance of summons 20 August 1959. Because of their common origin and the substantial identity of factual allegations in each case, they were argued here as a single appeal. In order to avoid repetition, we here summarize the allegations common to all the cases:

A head-on collision occurred on 2 July 1956 between an automobile headed eastwardly on Highway 70 and a truck headed westwardly. The automobile was owned by Donnie F. Gillikin. Louie Elmer Gillikin (hereafter called intestate) was operating the automobile with the permission of the owner. The truck was owned by Leslie D. Springle (hereafter called Springle). It was operated by Springle's agent. Intestate and Charles E. Lewis, an occupant of the automobile, were killed in the collision. C. T. Gillikin, next of kin of intestate, has qualified as administrator of his estate. Donald Knudson, another occupant of the automobile, suffered serious injuries in the collision. The collision was caused by the negligence of Springle's agent. Springle was coroner of Carteret County. Immediately following the collision, Springle made an investigation to determine the cause of the collision. He refused to permit a highway patrolman or the sheriff's department of Carteret County to take charge of and assume responsibility for the investigation. He refused to hold an inquest.

On 9 October 1956 Springle instituted suit in the Superior Court of Carteret County against Donnie Gillikin and C. T. Gillikin, administrator. (The complaint does not state what cause of action was alleged. It may be inferred Springle sought to recove damages resulting from the negligent operation of the automobile.) Defendant answered and set up a counterclaim. (The answer and counterclaim are not included as part of the record. It is inferred from other portions of the complaint in this action that the counterclaim asserted a cause of action for wrongful death caused by the collision.)

Facts known to plaintiff prior to the trial, supplemented by facts since ascertained (but not described) caused plaintiff to believe and he "alleges that there was every possibility and probability of winning the said action and securing substantial damages for the loss of life" of intestate, but because of "wicked and wrongful scheming" and the wrongful use of "the functions and prerogatives of his office as coroner," coercion of witnesses, and concealment of truth, a conspiracy with others to show the collision was caused by the negligence of intestate, Springle "brought about a situation wherein the presiding judge entered a nonsuit on the then defendant's counterclaim and cross action."

The conspirators, according to the allegations, were defendant, agents of an insurance company, a highway patrolman who investigated the accident, and a photographer who took pictures for use in the trial. They coerced one Knudson, an occupant of the automobile, to give perjured testimony in the trial of the case and assisted in securing other false testimony. Springle made an investigation to determine the cause of the collision. He sought to show intestate was under the influence of intoxicants. Unable to find any evidence tending to establish that fact, he "covertly and with malicious intent did secure a beer can and a 7-Up bottle and placed them in a prominent position in the car and directed a commercial photographer, who had been called to the scene of the accident, to make faked-up and trumped-up pictures to not only defame and degrade the good name and reputation of Louie Elmer Gillikin but directed the taking of pictures for the wicked and wrongful purpose of framing and shaping testimony, evidence and facts to fit in with his own selfish interests and in order that he might prevail in any litigation to be brought."

"That on the basis of the forgoing allegations it is again averred specifically that the said Leslie D. Springle did create false and fraudulent evidence and did perpetrate a fraud upon the court and did suppress and coerce testimony and thwart justice to his own gain to the great and lasting damage of this plaintiff and as a result of these actions herein referred to, this plaintiff has been damaged in being deprived of a just verdict and thus has been irreparably damaged."

Plaintiff prayed that he recover $25,000 compensatory damages, $5,000 punitive damages, and such further relief as "may seem just and proper."

Defendant answered, admitting ownership of the motor vehicles and the appointment of plaintiff as administrator of intestate's estate. He denied the allegations charging wrongful and improper conduct. He specifically alleged the prior action between the parties wherein plaintiff was nonsuited in his claim for damages for wrongful death, asserting that judgment as a complete bar to plaintiff's claim. In addition he pleaded the one-and three-year statutes of limitations. Defendant moved for judgment of dismissal based on the pleadings. The motion was allowed. Plaintiff appealed.

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

C. R. Wheatly, Jr. and Thomas E. Bennett for defendant, appellee.

RODMAN, J. When it affirmatively appears from the complaint that plaintiff has no right of action, this Court is not required to await

a formal demurrer. It may, *ex mero motu,* dismiss the action. *Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717. If there is a mere defect in the attempted statement of the cause of action, plaintiff should be permitted to amend.

The rule which is applied here may be used by the Superior Court, particularly when, as here, there is a motion for judgment on the pleading. *Speas v. Ford,* 253 N.C. 770.

Giving the pleadings the liberal construction commanded by the statute, G.S. 1-151, it appears plaintiff asserts tortious conduct by defendant to plaintiff's detriment by (1) initiating a conspiracy to suborn perjured testimony in an action to which plaintiff was a party, (2) fraud perpetrated by defendant on plaintiff by the perjured testimony, thereby preventing plaintiff from recovering for the wrongful death of his intestate, (3) defamation of plaintiff's intestate by asserting intestate was drunk and nude when he drove the automobile and by exhibiting derogatory pictures of intestate, (4) prostitution of the office of coroner to defendant's personal advantage.

Plaintiff's brief does little to enlighten us which allegation entitles him to compensatory or punitive damages as claimed. He contents himself with the statement: "This (the asserted conspiracy) reveals a rotten situation for which there should be some remedy and redress in the courts . . . There was never a full and complete adjudication in the original suit for the same was tainted with fraud due to the scheming and connivance of the Coroner in his individual and official capacity.

"We cannot know just what theory Judge Burgwyn acted on as his judgment does not specify the grounds for his ruling. . . . We feel there was error in not specifying the grounds for the ruling and we pray for a ruling of error in this case."

Manifestly a judge is not compelled to inform a litigant of the reason which leads him to make a ruling, but the appeal does compel us to examine the record to see if there is in fact error in the judgment. The brief seems to say plaintiff is entitled to recover because of (a) the asserted conspiracy to procure perjured testimony, or (b) the fraud resulting from the perjured testimony preventing his recovering damages for wrongful death.

Perjured testimony and the subornation of perjured testimony are criminal offenses, G.S. 14-209, 210, but neither are torts supporting a civil action for damages. The right to recover based on perjury has recently been considered by us and denied. *Brewer v. Coach Co.,* 253 N.C. 257. Nothing need be added to what was there said.

Plaintiff does not ask that the judgment of nonsuit in his action for damages for wrongful death be vacated because of asserted fraud.

His prayer is for damages for the fraud. It would seem manifest that he could not recover for fraud unless and until the judgment denying him the right to recover was vacated. The fraud which he asserts is intrinsic fraud. Many decisions of this Court have declared a judgment cannot be vacated because of perjured testimony unless the party charged with perjury has been indicted and convicted or he has passed beyond the jurisdiction of courts and is not amenable to criminal process. *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1; *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452; *Kinsland v. Adams,* 172 N.C. 765, 90 S.E. 899; *Moore v. Gulley,* 144 N.C. 81; *Dyche v. Patton,* 56 N.C. 332; *Peagram v. King,* 9 N.C. 605; 30A Am. Jur. 734. These decisions supplemented by the cases there cited are decisive.

The right to recover for alleged defamation of intestate or because of wrongful acts as coroner are discussed in *Gillikin v. Bell, post,* 244, and *Gillikin v. Guaranty Co., post,* 247, where further facts pertinent to those questions are stated.

Plaintiff's allegations show he has no cause of action.

Affirmed.

C. T. GILLIKIN, ADMINISTRATOR OF LOUIE ELMER GILLIKIN, DECEASED, AND NEXT OF KIN TO LOUIE ELMER GILLIKIN, DECEASED v. GENE BELL.

(Filed 8 March, 1961.)

1. Dead Bodies § 3—

An action for a wrongful act done to a body is governed by the three-year statute of limitations, G.S. 1-52 (5).

2. Limitation of Actions § 18—

When it appears from plaintiff's pleading that the cause alleged is barred by the applicable statute of limitations, the court may properly dismiss the action.

3. Common Law—

The common law, except as modified by statute, is in force in this State. G.S. 4-1.

4. Same: Libel and Slander § 1—

The publication of defamatory pictures of the body of a dead person with the malevolent purpose of injuring his family is a misdemeanor at common law, but the common law recognized no right of civil action for damages for defamation of a dead person, and, since no such right of action is given by statute, it does not exist in this State.

GILLIKIN *v.* BELL.

APPEAL by plaintiff from *Burgwyn, E. J.*, October 1960 Term, of CARTERET.

This suit is a companion to the case of *Gillikin v. Springle, ante*, 240, which is referred to for a general statement of the facts relating to a conspiracy to defeat plaintiff's right of action for the wrongful death of his son. Defendant's participation in the alleged conspiracy is amplified in the complaint filed in this action. We summarize the allegations particularly directed at defendant: He is a commercial photographer. He aided Springle in taking "scurrilous and defamatory pictures which tended to reflect upon and desecrate the body of the said Louie Elmer Gillikin." ". . .(W)ith the aid and assistance of Patrolman J. W. Sykes, he pulled the body of the deceased out of the car and directed a picture taken of the body covered with blood and made pictures exposing his private parts and further directed a picture taken of the body as it lay on the stretcher and at no time exhibited any respect for the deceased nor did he cover the body." Springle, aided and abetted by defendant, "caused many copies to be made of these photographs and distributed and exhibited them throughout Carteret County with the wicked and evil intent of casting aspersions and indignities upon the deceased. . ." Bell "knew that it was wrong for him to aid and assist in distributing such photographs for the sole purpose of aiding the said Leslie D. Springle in his efforts to win in a law suit. . . . through the wrongful acts of the said Gene Bell the said Bell aided and abetted the said Leslie D. Springle in thwarting justice and in defeating the rightful claim of the administrator in the original suit." He prays for $15,000 compensatory and $5,000 punitive damages."

Defendant denied all allegations charging him with wrongdoing. As additional defenses he pleaded the one-and three-year statutes of limitations. Defendant's motion for judgment on the pleadings was allowed. Plaintiff excepted and appealed.

Charles L. Abernethy, Jr., for plaintiff, appellant.
C. R. Wheatly, Jr. and Thomas S. Bennett for defendant, appellee.

RODMAN, J. If, as alleged, defendant with the intent to prevent plaintiff from recovering damages for the wrongful death of his intestate, took pictures falsely depicting conditions at the wreck and knowingly used or permitted the use of such pictures in the trial of plaintiff's action, he would be guilty of perjury or subornation of perjury. This conduct would support criminal prosecution but would not create civil liability. *Gillikin v. Springle, ante* 240.

We do not understand from our reading of the complaint that

plaintiff intends to allege a wrongful act done to the body, but if he does intend to assert some such right of action, it is barred by the statute of limitations, G.S. 1-52(5). The collision occurred 2 July 1956. This action was begun 20 August 1959. Since the bar appears from the pleadings, the court could properly dismiss the action. *Nowell v. Hamilton,* 249 N.C. 523, 107 S.E. 2d 112.

But plaintiff does not limit his right to recover to these allegations. He also seeks to recover because of "scurrilous and defamatory pictures which tended to reflect upon" deceased, which pictures were "distributed and exhibited. . . throughout Carteret County with the wicked and evil intent of casting aspersions and indignities upon the deceased."

Chancellor Kent defined libel as a malicious publication tending to blacken the memory of one dead or the reputation of one alive. This definition of a libel has been referred to with approval by this Court in several cases. *Simmons v. Morse,* 51 N.C. 6; *Davis v. Retail Stores, Inc.,* 211 N.C. 551, 191 S.E. 33; *Flake v. News Co.,* 212 N.C. 780, 195 S.E. 55. It is the definition most frequently used in defining libel. 33 Am. Jur. 38; 53 C.J.S. 32.

Since a libel is apt to create a breach of the peace, it is a common law crime. 33 Am. Jur. 291, 53 C.J.S. 409; *Kennerly v. Hennessy,* 19 A.L.R. 1468, with annotations. It has been recognized as such by us. *S. v. Powers,* 34 N.C. 5; *S. v. Townsend,* 86 N.C. 676; *S. v. Lyon,* 89 N.C. 568; *S. v. McIntire,* 115 N.C. 769. The common law, except as modified by statute, is in force in this State. G.S. 4-1; *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251. The Legislature has enlarged the class of things which are criminal because defamatory. G.S. 14-47, 48.

"It is a misdemeanor at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory matter of any person deceased, provided it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief reason of punishing offenses of this nature is their tendency to a breach of the peace. And although the party be dead at the time of publishing the libel, yet it stirs up others of the same family, blood or society to revenge and to break the peace." Newell, Slander and Libel, 4th ed., p. 931.

Not all criminal acts gave a right of action for damages at common law. The wrongful killing of a human being, even though criminal, gave no right of action until the enactment of Lord Campbell's Act. G.S. 28-173. We have never been called upon to determine whether a right of action existed for damages for the defamation of a dead person, but since, as noted, the common law applies in North Carolina except as amended by statute, we turn to common law to ascertain

if it afforded such a right of action. The cases are practically unanimous in holding that no such right existed. *Renfro Drug Co. v. Lawson,* 160 S.W. 2d 246, 146 A.L.R. 732, with annotations, 739; *Rose v. Daily Mirror,* 31 N.E. 2d 182, 132 A.L.R. 888; *Kelly v. Johnson Publishing Company* (Calif.), 325 P 2d 659; *Hughes v. New England Newspaper Publishing Co.,* 43 N.E. 2d 657; 33 Am. Jur. 42; 53 C.J.S. 53.

The Legislature has the power to modify the common law and permit an action for damages for defamation of a dead person, designating the person who may sue and how the sums recovered shall be distributed. Until the Legislature authorizes such actions, we feel impelled to adhere to the common law denying a right of action. Manifestly the Legislature has not been inadvertent to the law of libel. Illustrative of the attention which it has given to the subject, see c. 99 of the General Statutes, G.S. 28-175, G.S. 14-47, 48, and 401.3.

Plaintiff makes no attempt to allege an invasion of his right of privacy. *Bremmer v. Journal-Tribune Publishing Company,* 76 N.W. 2d 762; *Kelly v. Post Publishing Co.,* 98 N.E. 2d 286.

Since plaintiff has not alleged a cause of action not barred by the statute of limitations, the court properly dismissed the action.

Affirmed.

C. T. GILLIKIN, ADMINISTRATOR OF LOUIE ELMER GILLIKIN, DECEASED, AND NEXT OF KIN TO LOUIE ELMER GILLIKIN, DECEASED v. UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 8 March, 1961.)

1. Coroners: Public Officers § 1—

Coroners are public officers. Constitution of North Carolina, Article IV § 24.

2. Coroners—

A coroner is under duty to make an investigation as to the cause of the death of a person only when it appears that the deceased probably came to his death by criminal act, and he is required to summon a jury only if such investigation satisfies him of this fact, G.S. 152-7, and a death resulting from negligence is not the result of a criminal act unless the negligence is culpable.

3. Coroners: Public Officers § 9: Principal and Surety § 2—

A civil action will not lie against a coroner or the surety on his bond for the refusal of the coroner to call an inquest, or the manner in which he makes his personal investigation of a death, even though he acts corruptly and maliciously, since in the performance of such duties he acts

as a judicial officer and public policy prohibits a civil action for damages based on the manner in which he performs such duties.

PARKER, J., concurs in result.

APPEAL by plaintiff from *Burgwyn, E. J.*, October 1960 Term, of CARTERET.

This is one of four related actions which trace their origin to a collision of motor vehicles in Carteret County resulting in the death of plaintiff's intestate. There is substantial identity in the allegations in each complaint of the asserted tortious conduct which forms the basis for the action. These basic allegations are summarized in *Gillikin v. Springle, ante,* 240. By reference they are made a part of the statement of facts on which this decision rests. In addition to the facts there summarized and to afford a basis of relief against this defendant, plaintiff alleges: Springle, owner of the truck which collided with the automobile operated by plaintiff's intestate, was coroner of Carteret County, and as such executed a bond for the faithful performance of the duties of his office as required by statute, G.S. 152-3. Defendant executed that bond as surety. "That at the time of the wreck the said Leslie D. Springle, in violation of his ethical duty and his legal duty as set forth under General Statutes 152-7 refused to call an inquest at the specific request of the members of the family group of the deceased and this refusal was done, as plaintiff is advised, because the said Springle did not want to perpetuate and put in record testimony of evidence as it arose at the scene of the accident, then favorable to the administrator, before he had an opportunity to tamper with, coerce and fix the evidence in his own selfish interests."

"That immediately upon taking over the investigation from Patrolman Sykes he first refused to disqualify himself because he had a personal interest in the controversy although Deputy Sheriff Askew suggested that he disqualify himself and permit the Sheriff's Department to handle the investigation. Instead of agreeing to this suggestion he immediately coerced and brow beat the drivers of the trucks (working for him and hauling his potatoes) and fixed their testimonies in his own behalf and although Donald Knudson, the surviving rider in the death car, was severely injured in the hospital and unable to talk, the said Leslie D. Springle aided and abetted by Patrolman Sykes, went to the hospital room and did coerce and threaten the said witness to cause him to testify in Springle's favor."

Defendant answered. It admitted execution of bond as surety for Springle, coroner of Carteret County. It admitted the collision between

the motor vehicles resulting in the death of Gillikin and plaintiff's appointment as administrator. It denied any of the allegations of wrongdoing. It admitted Springle had instituted a suit against Gillikin, administrator, for damages caused by the collision, which action had terminated in Springle's favor. It pleaded said judgment in bar of recovery.

Defendant moved for judgment on the pleadings. The motion was allowed and plaintiff appealed.

Charles L. Abernethy, Jr. for plaintiff, appellant.
C. R. Wheatly, Jr. and Thomas S. Bennett for defendant, appellee.

RODMAN, J. For the reasons given in *Gillikin v. Springle, ante,* 240, plaintiff cannot recover because of the alleged conspiracy to defeat, by perjured testimony, his action for damages for the wrongful death of his intestate.

Certainly if he cannot recover against Springle personally for the alleged perjured testimony, no right of action can be maintained against Springle as coroner because of such perjured testimony.

In final analysis plaintiff's asserted right to recover in this action is predicated upon the assertion that Springle as coroner refused to hold an inquest.

Coroners are public officers. Art. IV of our Constitution relating to the judicial department of government provides, in sec. 24, for their election. Their duties are prescribed by c. 152 of the General Statutes. Sec. 7 of that chapter details their duties with respect to the holding and manner of conducting an inquest. That section is simply a statement of the historical function of a coroner. He is by that section commanded to make an investigation whenever it appears deceased probably came to his death by criminal act. He is not required to summon a jury unless satisfied from his personal investigation that death was the result of criminal conduct.

Plaintiff makes no assertion that his intestate died as a result of criminal conduct. He merely alleges that the death was the result of a negligent act of Springle's employee in taking more than his proper share of the highway. Negligence is not criminal unless culpable. *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132.

The duty of determining whether an inquest is necessary and the manner of conducting an inquest are judicial functions. *S. v. Knight,* 84 N.C. 789. A judicial officer cannot be held accountable in an action for damages for the manner in which he performs his duties even though it be alleged that he acted corruptly and maliciously. *Cunningham v. Dillard,* 20 N.C. 485; *Furr v. Moss,* 52 N.C. 525; *Phelps*

v. Dawson, 97 F 2d 339, 116 A.L.R. 1343; Annotations, 173 A.L.R. 838; 30A Am. Jur. 50.

Since public policy prohibits an action for damages for a coroner's refusal to call an inquest, it follows that no right of action exists against the surety on his official bond.

The judgment dismissing the action is

Affirmed.

PARKER, J. concurs in result.

C. T. GILLIKIN, ADMINISTRATOR OF LOUIE ELMER GILLIKIN, DECEASED, AND NEXT OF KIN TO LOUIE ELMER GILLIKIN, DECEASED v. OHIO FARMERS INDEMNITY COMPANY.

(Filed 8 March, 1961.)

1. Insurance § 61½—

The fact that an insurer has issued liability policies on both vehicles involved in a collision does not create such a fiduciary relationship with insureds as to prohibit insurer from making such investigation as it deems necessary to determine whose negligence proximately caused the collision and resulting injuries.

2. Insurance § 63—

Where plaintiff does not allege damages resulting from his insurer's failure to discharge its contractual obligations to provide counsel to represent him in an action instituted against him by the owner of the other vehicle involved in the collision, but only that insurer conspired to defeat, by perjured testimony, insured's right of action against the owner of the other vehicle and failed to provide counsel for such suit, dismissal is proper, since the complaint fails to state a cause of action on the policy contract and no right of action exists for conspiracy to suborn perjury.

APPEAL by plaintiff from *Burgwyn, E. J.,* October 1960 Term, of CARTERET.

This case is another companion to the suit of *Gillikin v. Springle, ante,* 240, which see for summary of the general statement of facts. In addition to the facts there alleged, plaintiff made allegations pertinent to defendant which may be summarized as follows: Defendant issued a policy of liability insurance to the owner of the automobile in effect at the time of the collision which required it (1) to defend suits against owner or operator for damages claimed because of negligent operation, and (2) to pay all costs and sums adjudged to be

owing by intestate as an insured under the policy. Defendant likewise carried liability insurance on Springle's truck. It did not defend plaintiff administrator in the action which Springle brought against him, but conspired with Springle "to produce false testimony in Springle's suit against present plaintiff."

Plaintiff's prayer for relief is for $25,000 compensatory damages and $5,000 punitive damages.

Defendant admitted insuring each vehicle. It admitted it did not provide Gillikin with counsel in the suit of Springle against Gillikin, administrator. It pleaded the three-year statute of limitations and the judgment rendered in the action of Springle against Gillikin, administrator, as a plea in bar.

Judgment was entered dismissing the action, and plaintiff appealed.

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

RODMAN, J. For the reason given in *Gillikin v. Springle, ante,* 240, plaintiff has not stated a cause of action entitling him to damages because of the asserted conspiracy to defeat plaintiff's right of action for damages for wrongful death by perjured testimony.

The mere fact that defendant insured the automobile operated by plaintiff's intestate and the truck owned by Springle did not create a fiduciary relationship between the parties prohibiting defendant from making such investigation as it deemed necessary to determine whose negligence proximately caused the collision and resulting injuries. It was bound by contract to pay, within the limits of its policy, such damages as might be recovered against its insured because of such negligence. Plaintiff does not specifically allege that judgment has been rendered against him because of the negligence of his intestate. The absence of such allegation might be treated as a defective statement of a good cause of action, but when all of the allegations are considered, we think it apparent that plaintiff does not intend to allege that he has suffered damages by reason of defendant's failure to discharge its contractual obligations and pay counsel fees incurred in defending the action against plaintiff, or such judgment as may have been obtained against him.

Nor does plaintiff assert any right of action based upon the failure of defendant to discharge its contract and provide counsel to represent him in the litigation with Springle. His complaint is that it conspired to defeat his right of action and failed to provide him with counsel to sue Springle to recover damages for wrongful death.

Because of the failure to state a cause of action, the court properly allowed the motion to dismiss.

Affirmed.

MYRTICE R. HEUAY v. HALIFAX CONSTRUCTION COMPANY, INC.

(Filed 8 March 1961.)

1. Negligence § 21—

Negligence is not presumed from the mere fact of injury, but plaintiff is required to offer legal evidence tending to establish a failure on the part of the defendant to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances, that such negligent breach of duty produced injury in continuous sequence and without which it would not have occurred, and that a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed.

2. Negligence § 23—

Whether there is sufficient evidence to support the issue of negligence is a question of law for the court.

3. Automobiles § 34a—

Evidence tending to show that defendant moved some dirt from an area adjacent to a highway in connection with a construction project, that defendant's car skidded on some mud and clay on the highway during a rain storm some two days after defendant had performed some work at the place, that no mud or dirt was on the highway earlier on the day of the accident, and that the kind and quantity of the mud and dirt on the highway and the way it was distributed indicated it could have been brought upon the highway by automobiles, *is held* insufficient to show that defendant construction company was responsible for the dangerous condition.

4. Negligence § 24a—

Evidence which raises a mere conjecture or surmise as to the existence of negligence is insufficient to be submitted to the jury.

APPEAL by plaintiff from *Stevens, J.*, at October 1960 Civil Term, of HALIFAX.

Civil action to recover for personal injuries and property damage as a result of an automobile accident allegedly caused by the negligence of the defendant in leaving mud and clay on the highway surface.

The record of case on appeal shows: On the afternoon of Sunday,

11 May 1958, the plaintiff was operating her automobile in an easterly direction on U.S. Highway 158 through the town of Littleton, North Carolina. As she reached the city limits her car allegedly skidded on some mud and clay on the highway. The right rear of her car skidded to the right, with the front traveling across the center line where it collided with an automobile which was approaching from the opposite direction.

Shortly before the accident a heavy rainstorm had occured, and it was still raining at the time of the collision.

At the close of the plaintiff's evidence, defendant moved for judgment of nonsuit. The motion was allowed, and judgment was signed and entered dismissing the action. To the foregoing judgment plaintiff objects and excepts and appeals to the Supreme Court, assigning error.

Allsbrook, Benton & Knott for plaintiff, appellant.
Uzzle & Dumont for defendant, appellee.

WINBORNE, C.J. The determinative question to be decided in case on appeal is whether or not the trial court erred in allowing defendant's motion for nonsuit.

Taking the evidence offered upon the trial in the light most favorable to the plaintiff and giving to her the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done when considering a motion for judgment of nonsuit, it is manifest that the plaintiff has failed to make out a case for the jury. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661.

In order to establish actionable negligence plaintiff must show that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to the plaintiff under the circumstances in which they were placed, and 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. See also *Whitt v. Rand,* 187 N.C. 805, 123 S.E. 84; *Mills v. Moore, supra; Rogers v. Green,* 252 N.C. 214, 113 S.E. 2d 364.

Negligence is not presumed from the mere fact of injury. The plaintiff is required to offer legal evidence tending to establish beyond a mere speculation or conjecture every essential element of negligence, and upon failure to do so nonsuit is proper. And in this connection,

whether or not there is enough evidence to support a material issue is a question of law. *Mills v. Moore, supra.*

There is no evidence in the present case from which a jury could find that the defendant was responsible for the mud and clay being on the highway. True, there is evidence that the mud and clay caused the plaintiff to skid, but there is no evidence in the record as to how or when the mud and clay got there. The testimony of State Highway Patrolman, Wallace E. Brown, was the only evidence tending to show how the mud and dirt got on the surface of the highway. He testified: "The shoulder was a clay type shoulder which was very soft and wet. There was mud on the road; some on both sides of the road; it is not impossible that it was the kind of mud and dirt, the amount, the quantity, and the way it was distributed that can be brought upon the highway by automobiles * * * ."

At most, the plaintiff's evidence tends only to show that the defendant had moved some dirt from the area adjacent to the highway hard-surface in connection with a sewer construction project. Indeed, the plaintiff testified that she failed to observe any dirt upon the highway when she passed the scene of the accident earlier on the same day. And in this connection the plaintiff's own evidence is to the effect that defendant's employees had done no work in the area of the accident since Friday, 9 May 1958.

Furthermore, Officer Brown testified that he had patrolled the scene of the accident prior to its occurrence and no dirt or clay was observed on the highway. Thus the conclusion is that the plaintiff has not offered sufficient evidence, as stated by *Parker, J.*, in *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258, "to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." To like effect is *Goldman v. Kossove,* 253 N.C. 370, 117 S.E. 2d 35, where it is said: "A resort to conjecture or surmise is guesswork, not decision, and 'a cause of action must be something more than guess'."

We have considered defendant's remaining assignments of error and no prejudicial error is made to appear. For reasons stated the judgment below should be and is

Affirmed.

FRANCES BADHAM HOWARD, FANNIE BADHAM, BESSIE B. SMALL, SIDNEY BADHAM, MILES BADHAM, PENELOPE OVERTON, ALEXANDER BADHAM, CHARITY BADHAM, CHARLES BADHAM, PAULINE B. TURNER, FRANK BADHAM, SADIE B. HAWKINS, JAMES BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DECEASED, V. LONNIE BOYCE.

(Filed 22 March, 1961.)

1. Attorney and Client § 3—

An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole *corpus* of the controversy.

2. Same: Judgments § 25—

It will be presumed that the attorney signing a compromise or consent judgment had authority from his client to do so, and the burden is upon the party asserting absence of consent and want of authority in the attorney to so prove to the satisfaction of the court.

3. Judgments §§ 18, 25—

Unless procured by fraud or mistake, a judgment which is regular and valid on the face of the record may be set aside only by motion in the cause in the court wherein it was rendered, and such motion is addressed to the court, and if a jury verdict is returned it is advisory only.

4. Appeal and Error § 59—

A decision of the Supreme Court must be interpreted within the frame work of the facts of that particular case.

5. Judgment §§ 18, 21, 25—

Movants seeking to set aside a judgment regular upon the face of the record on the ground of want of jurisdiction, or on the ground that it was a consent judgment and was entered without movant's consent, are not required to show a meritorious defense or cause of action.

6. Judgments §§ 18, 25—

Mere lapse of time alone will not amount to laches barring a motion in the cause to set aside a compromise or consent judgment on the ground that movants did not in fact consent thereto, although positive acts amounting to ratification, or unreasonable delay after notice, resulting in prejudice to innocent parties may, under certain circumstances, work an estoppel.

7. Same—

Upon the hearing of plaintiffs' motion to set aside a judgment in retraxit on the ground that the attorney of record compromised and settled their rights without their knowledge, authority, or consent, the court should make specific findings of fact in regard to the authority of the attorney and laches, and where the court fails to find such predicate facts the cause must be remanded.

8. Appeal and Error §§ 49, 55—

Where the lower court fails to find the facts necessary to support its judgment, the cause must be remanded.

APPEAL by movants, Penelope Overton and Alexander Badham, from *Bone, J.*, September 1960 Term, of CHOWAN.

This action was commenced 26 October 1944. The thirteen persons listed in the caption, including Penelope Overton and Alexander Badham, were named as plaintiffs, and Lonnie Boyce as defendant.

The complaint alleges:

Plaintiffs are heirs at law of Hannibal Badham, deceased. They are "scattered throughout the United States," and are tenants in common and seized in fee of a tract of land in Chowan County, North Carolina, being "that certain tract of pocosin land . . . adjoining the lands of the late Henderson Luten and others, containing by estimation 319 acres, being the same land conveyed to Hannibal Badham by H. H. Page and wife by deed duly recorded in Chowan County, in Book B, page 198." Defendant claims an estate in this land adverse to plaintiffs. This claim is not valid in law or fact. Plaintiffs have been in possession since the property was deeded to Hannibal Badham in 1889 and defendant's claim is a cloud on plaintiffs' title.

The answer admits that the land described in the complaint was deeded by H. H. Page and wife to Hannibal Badham in 1889. All other material allegations of the complaint are denied.

J. W. Jennette of Elizabeth City was attorney of record for plaintiffs and J. N. Pruden, since deceased, was attorney of record for defendant.

A judgment, approved by counsel for plaintiffs and defendant, was entered in the cause on 13 July 1945 by the Clerk of Superior Court of Chowan County, as follows:

> ". . . (I)t appearing that all matters in controversy have been fully settled between the parties and that there does not exist any further dispute between said parties relative to the ownership of the property described in complaint and that plaintiffs disclaim any further interest in said controversy and that said plaintiffs desire that this action be nonsuited and stricken from the docket.
>
> "Now, therefore, it is ordered that this action be, and the same is hereby nonsuited."

On 2 April 1959, Penelope Overton and Alexander Badham commenced another action against defendant, Lonnie Boyce, in the Superior Court of Chowan County. The allegations of their complaint

are to all intents and purposes identical with those of the complaint in the original action of 1944. They are represented in the 1959 action by counsel other than J. W. Jennette. They allege that they are residents of Chowan County.

Defendant answered the complaint and pleaded the judgment of 13 July 1945 as *res judicata* of the matters and things alleged in the 1959 action.

The 1959 action came on for trial at the September 1959 Term of Chowan before McLean, J. After hearing, the court entered judgment declaring that the judgment of 13 July 1945 is *res judicata* of the cause of action stated in the 1959 complaint, and dismissing the 1959 action. Upon appeal, the 1959 judgment was affirmed by this Court. *Overton v. Boyce*, 252 N.C. 63, 112 S.E. 2d 727.

Thereafter on 10 August 1960, Penelope Overton and Alexander Badham filed motion in the original cause to set aside the judgment of 13 July 1945, on the following grounds: (1) The judgment is erroneous, irregular and totally false in that movants have never disclaimed any interest in the controversy, have never authorized, requested, approved or ratified a settlement, compromise or adjustment of the matters in controversy, and have never desired, authorized, requested, approved or ratified a dismissal of the action; and (2) movants have never had their day in court relative to the merits of the controversy, this motion is the only remedy open to them for protection of their property rights, and a denial of this motion will contravene sections 17, 19 and 35 of Article I of the Constitution of North Carolina and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Movants filed affidavits in support of the motion. The affidavits are in substance as follows:

Movants did not sign or verify the 1944 complaint and did not authorize counsel to file suit in their behalf. They did not authorize the discontinuance and dismissal of the action, and did not know that it had been dismissed "until some time after its discontinuance and after the entry of the so-called judgment of the 13th day of July, 1945." They did not authorize the entry of the judgment. They did not retain the attorney, and did not enter into any agreement, understanding, conference or negotiations with him or anyone else for the settlement or compromise of any matter related to the land in question, and have authorized no person to do so in their behalf. They have never disclaimed ownership or interest in the land, and they assert their rights thereto as they existed prior to the purported judgment of 1945.

At the hearing upon the motion, J. W. Jennette, plaintiffs' attorney of record in the 1944 action, was called by defendant and testified substantially as follows:

E. C. Bryson, of the Duke University Law School faculty and the Duke University Legal Aid Clinic, wrote Jennette and asked if he would accept employment by Frances Badham Howard, of New York City. Jennette agreed to accept employment. After 15 years Jennette has no recollection of his transactions in connection with the suit independent of the facts disclosed by his files. He communicated with Frances Badham Howard by mail. He does not recall ever having seen her in person, but she apparently verified the complaint in Elizabeth City. He communicated with none of the other plaintiffs and the only instructions he received were from Mrs. Howard. J. N. Pruden, who represented defendant, is dead. At the time of the settlement and entry of judgment, Jennette received from defendant a check for $308 and endorsed it. He has no recollection of the disbursement of the proceeds of the check and has none of his bank statements prior to 1954. The bank did not retain a record of his account. There are no letters in the file to or from Mrs. Howard relative to the settlement. There is an unsigned copy of a contract of employment in the file. It purports to provide a contingent fee of 33 1/3 percent of recovery. He drew no deed for plaintiffs to sign. His signature is on the judgment indicating approval. Mrs. Howard signed nothing but the complaint so far as the file discloses. She furnished Jennette by letter a list of the heirs at law of Hannibal Badham. Since the settlement he has corresponded with no one about the matter.

The affidavits of movants, Jennette's testimony and the court records in the two actions are all the evidence adduced at the hearing on the motion.

The court found facts, stated conclusions of law, and entered judgment as follows:

"1. That this was an action to remove cloud from plaintiffs' alleged title to lands described in the complaint and was commenced on October 26, 1944, on behalf of plaintiffs, by J. W. Jennette, an attorney at law, of Elizabeth City, N. C., the complaint being verified before a Notary Public in Elizabeth City, N. C., on October 24, 1944, by Frances Badham Howard, one of the plaintiffs.

"2. That on November 21, 1944, an answer to the complaint was filed on behalf of defendant by J. N. Pruden, an attorney at law, of Edenton, N. C., who is now dead.

"3. That the judgment now sought to be set aside was entered by

the Clerk on July 13, 1945, and consented to on behalf of plaintiffs by J. W. Jennette, their attorney of record, and by J. N. Pruden, defendant's attorney of record.

"4. That after the time of the entry of said judgment, none of the plaintiffs took any further action in regard to the prosecution of the cause of action alleged in the complaint until April 2, 1959, when they commenced a new action in the Superior Court of Chowan County to remove cloud from their alleged title to the same tract of land as that described in the complaint in this action.

"5. That on May 1, 1959, the defendant filed answer to the complaint in said new action, pleading among other things that the judgment of July 13, 1945, in the old action was a bar to the prosecution of the new action.

"6. That at the September Term, 1959, of Chowan County Superior Court, Hon. W. K. McLean, Judge Presiding, heard the new action and entered judgment to the effect that the judgment of July 13, 1945, in the old action was a consent judgment determining the rights of the parties in said cause and that the controversy in the new action being identical with the one in the old action and the parties being the same, the parties were bound by the former judgment dated July 13, 1945.

"7. That the plaintiffs appealed from said judgment of Judge McLean to the Supreme Court and on February 24, 1960, the Supreme Court affirmed the judgment of the lower court.

"8. That the present motion was filed on August 10, 1960.

"9. That prior to the filing of the present motion, none of the plaintiffs had ever asserted either in the old action or in the new action that their attorney of record was without authority to consent to the judgment of July 13, 1945, on their behalf, or that they had not consented thereto.

"10. That movants have failed to show that they have any meritorious cause of action against the defendant.

"11. That movants have been guilty of laches and unreasonable delay in the filing of the present motion to set aside the said judgment.

"Upon the foregoing facts, the Court is of the opinion that movants are estopped to prosecute their motion because of their laches and unreasonable delay, and also by reason of the aforesaid judgment of Judge McLean rendered at the September Term, 1959, and affirmed by the Supreme Court on appeal and that movants are not entitled to have the judgment of July 13, 1945, set aside;

"NOW, THEREFORE, IT IS by the Court ORDERED, ADJUDGED AND DECREED that the said motion to set aside the

judgment herein rendered on July 13, 1945, be, and the same is hereby denied."

Movants appealed.

Samuel S. Mitchell, R. Conrad Boddie, and Chance, Mitchell & Wells (New York City) for movants, appellants.

Weldon A. Hollowell and Pritchett & Cooke for defendant.

MOORE, J. Appellants seek to set aside the judgment of 13 July 1945 on the grounds that they did not consent thereto, did not authorize the attorney of record to appear for or represent them, and had no knowledge of the judgment prior to its entry.

The court below found as a fact that appellants (movants) have no meritorious cause of action and have been guilty of laches and unreasonable delay. It declined to set aside the judgment.

In the affidavits supporting the motion, movants asserted that they were made parties plaintiff to the 1944 action without their knowledge and consent, did not employ or confer with the attorney of record, and did not authorize him to act for them. They further declared that the compromise and settlement of the matters in controversy and the entry of the judgment were without their knowledge, authority or consent.

". . . (T)he early rule followed both in England and in this country was that . . . an unauthorized appearance (by an attorney) conferred jurisdiction over the party thus represented and that his only remedy after judgment was an action or other proceeding against the attorney, unless the latter were insolvent." Freeman on Judgments (5th Ed.), Vol. 1, s. 231, p. 456.

Chancellor Kent stated the early rule in *Denton v. Noyes,* 6 John., 295, in these words: "An attorney of this court appears for the defendant to a writ, which had been sued out, but not served, and he afterwards confesses judgment. . . . If the attorney has acted without authority, the defendant has his remedy against him; but the judgment is still regular, and the appearance entered by the attorney, without warrant, is a good appearance as to the court." He continues: "(I)f the attorney for the defendant be not responsible, or perfectly competent to answer to his assumed client they would relieve the party against the judgment, for otherwise a defendant might be undone." But the Chancellor disagreed with the rule, stating: "I am willing to go still further, and in every such case, to let the defendant into a defense to the suit. To carry our interference beyond this

point, would be forgetting that there is another party in the cause, equally entitled to our protection."

The early rule above stated was first adopted in England. *Alleley v. Colley* (1624), Cro. Jac. 695, 79 Eng. Reprint, 603; Anonymous case (1703), 1 Salk. 88, 91 Eng. Reprint, 82; Anonymous case (1698), 1 Salk. 86, 91 Eng. Reprint, 81. But the court did not adhere to this rule in *Robson v. Eaton* (1785), 1 T. R. 62, 99 Eng. Reprint, 973. It was definitely abrogated in *Bayley v. Buckland* (1847), 1 Exch. 1, 154 Eng. Reprint, 1, where a defendant who was not served with process and had no notice of the action was held entitled to have set aside a judgment based on unauthorized appearance by an attorney in his behalf. The attorney was solvent and responsible.

The modern rule, according to the overwhelming weight of authority in this country, is: "A defendant against whom a judgment is rendered without service of process upon him, based on an appearance on his behalf by an attorney who was not employed by him and had no authority to enter his appearance, is entitled to show such want of authority and to be relieved against the judgment on that ground, in a direct proceeding instituted for the purpose." 88 A.L.R., Anno. — Judgment-Validity-Unauthorized Appearance, 3. III a, p. 30. If the record discloses lack of authority, the judgment may be collaterally attacked. *ibid,* s. III b, p. 41. But collateral attack is not permitted if the judgment is valid on its face. In such case, the proper procedure for relief is a motion in the cause in the court in which the unauthorized appearance is entered. *ibid,* s. III c, p. 41. Conduct amounting to acquiescence and ratification, or unreasonable delay in moving to set aside the judgment, where such conduct or delay has been prejudicial to the rights of adverse parties or innocent third parties, is equivalent to an original grant of authority and will bar relief. *ibid.*, s. VIII, pp. 62-68.

The more recent North Carolina cases substantially embrace the modern majority view. But this Court has run the gamut of rule modification. As a result we find many inconsistencies in the opinions in this jurisdiction.

The early rule was applied by this Court in a number of cases during a relatively recent period. *Chadborn v. Johnston,* 119 N.C. 282, 25 S.E. 705 (1896); *University v. Lassiter,* 83 N.C. 38 (1880). The *Chadborn* case applied the early rule without qualification. There, movant was not served with summons, but the sheriff's return showed service on him. An unauthorized appearance was made by attorneys in his behalf, and judgment against movant was entered by agreement of counsel. Motion to set aside the judgment was allowed in

the lower court. This Court reversed, saying: ". . . (O)ne of . . . attorneys . . . is found to be 'amply solvent.' And it has been held by this Court that where this is the case the Court will not set aside the judgment otherwise regular."

The more liberal views of Chancellor Kent gained approval in *Gardiner v. May*, 172 N.C. 192, 89 S.E. 955 (1916), and *Ice Manufacturing Co. v. R.R.*, 125 N.C. 17, 34 S.E. 100 (1899).

Under certain circumstances it was held that judgments entered as a result of unauthorized appearance or consent of counsel could not be set aside or modified except on the ground of mutual mistake or fraud. The theory was that neither the courts nor other parties could look behind such acts on the part of attorneys to inquire into their authority or the extent and purport of clients' instructions — especially when innocent third parties would be prejudiced thereby. *Williams v. Johnson*, 112 N.C. 424, 17 S.E. 496 (1893); *England v. Garner*, 90 N.C. 197 (1884); *Stump v. Long*, 84 N.C. 616 (1881). As to the authority and liability of attorneys in their relationships with clients, see *Gardiner v. May*, *supra*.

However, certain principles, applicable to cases such as the one under consideration, now appear to be well settled.

It is generally held that, where a court has entered judgment against a party without having acquired jurisdiction, either by failure to serve process upon him or because of the institution of a suit entirely without authority, relief may be obtained by motion in the cause at the same or a subsequent term, provided there has been no ratification, laches or other interfering principle. If this lack of jurisdiction appears upon the face of the record, the judgment may be treated as a nullity when and wherever relied upon and is subject to collateral attack; but where a party, by unauthorized act of an attorney, appears of record as plaintiff, it is necessary that relief be obtained by motion in the cause. *Massie v. Hainey*, 165 N.C. 174, 81 S.E. 135; *Hatcher v. Faison*, 142 N.C. 364, 55 S.E. 284; *Doyle v. Brown*, 72 N.C. 393.

Our most recent case of unauthorized appearance by attorney is *Owens v. Voncannon*, 251 N.C. 351, 111 S.E. 2d 700. There movant sought to set aside a judgment entered by the unauthorized consent of counsel. Movant had been duly served with summons and the attorney had filed answer in her behalf. The answer had been verified by another. She alleged that the attorney had not been employed by or authorized to act for her. The Court declared:

> " 'The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and

the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.' *King v. King*, 225 N.C. 639, 641, 35 S.E. 2d 893. Moreover, when a purported consent judgment is void because the consent is by an attorney who has no authority to consent thereto, the party for whom the attorney purported to act is not required to show a meritorious defense in order to vacate such void judgment. *Bath v. Norman*, 226 N.C. 502, 505, 39 S.E. 2d 363, and cases cited.

"True, a judgment bearing the consent of a party's attorney of record is not void on its face. Indeed, it is presumed to be valid; and the burden of proof is on the party who challenges its invalidity. *Gardiner v. May, supra.* But if and when, absent ratification by the party, the court finds as a fact that the attorney had no authority to consent thereto, the essential element upon which its validity depends is destroyed."

Where the action or proceeding is regular on its face but the attorney was in fact not authorized to institute the action, bind the party, or consent to judgment, the judgment is at least voidable. An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole corpus of the controversy. *Bath v. Norman, supra.* To compromise his client's cause or enter a consent judgment with respect thereto, an attorney must be so authorized. But "when a compromise has been made and formally embodied in a court judgment, it is presumed to have been rightfully entered until the contrary is made to appear, and one who undertakes to assail such a judgment has the burden of making good his impeaching averments to the satisfaction of the court." *Chavis v. Brown*, 174 N.C. 122, 93 S.E. 471.

Unless procured by fraud or mutual mistake, a judgment which, upon the face of the record, is apparently valid may be set aside only by motion in the cause and by the court wherein it was rendered. *Chavis v. Brown, supra; Hatcher v. Faison, supra.* A jury trial is not allowed as a matter of right, and a jury verdict would only be advisory in character. *Chavis v. Brown, supra; Cleve v. Adams*, 222 N.C. 211, 22 S.E. 2d 567.

It is well established that in order to set aside an *irregular* judgment movant must show that he has been diligent to protect his rights, the judgment affects him injuriously and he has a meritorious defense. McIntosh: North Carolina Practice and Procedure (2d Ed.), Vol. 2, s. 1715, pp. 165, 166.

"According to the great weight of authority, the judgment defendant must, as a general rule, show that he had and has a meritorious defense to the original cause of action in which the judgment was rendered, in order to be entitled . . . to relief against the judgment on the ground that it was based on an unauthorized appearance by an attorney in his behalf." 88 A.L.R., Anno.-judgment-Validity-Unauthorized Appearance, s. VII, pp. 57, 58, and cases cited.

Some of our cases seem to make a distinction between judgments merely irregular, such as those listed on page 165 of the McIntosh citation above, and judgments apparently valid but challenged for want of jurisdiction or want of authority of attorney to consent thereto. A brief examination of cases is appropriate.

In *Bath v. Norman, supra,* there was a controversy concerning the ownership of land. A consent judgment was entered declaring defendants owners of the land. Consent was given by plaintiff's attorney. Plaintiff moved to set aside the judgment on the ground that the consent was unauthorized. The lower court found that plaintiff did not have a meritorious cause of action and denied the motion. This Court reversed, and said: "A consent judgment, however, depends for its validity upon the consent, without which it is wholly void. (Citing cases). A purported consent by one having no authority is in law no consent. . . . In this jurisdiction, a showing of merit either as to the cause of action or defense is not required in order to vacate a void judgment." The question of laches was not involved.

Monroe v. Niven, 221 N.C. 362, 20 S.E. 2d 311, involves a judgment in a tax foreclosure suit. There were a number of defendants, but only one had been served with summons. The record purported to show that all had been served. The judgment ordered a sale of lands owned by defendants. Three years after sale and confirmation defendants moved to set aside the judgment for want of jurisdiction. The trial court denied the motion but this Court reversed. The opinion declared: "Where the record shows service or appearance when in fact there had been none the judgment is apparently regular though void in fact and the party affected must take appropriate action to correct the record. . . . This is by motion in the cause. . . . No proof or suggestion of merit is required. . . . Nor are movants barred by the lapse of time. 'The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid.' " The Court declined to discuss the rights of innocent purchasers for value, declaring that this question was not then before the Court.

See also *Harrington v. Rice,* 245 N.C. 640, 97 S.E. 2d 239; *Flowers v. King,* 145 N.C. 234, 58 S.E. 1074.

Hatcher v. Faison, supra, seems to be in direct conflict with the *Monroe* case. In *Hatcher* the movant had not been served with summons, though the judgment recited service. An attorney made an unauthorized appearance in his behalf and declared that he had no defense. The judgment was adverse. The motion to vacate was made eleven years after entry of judgment. Rights of innocent purchasers were involved, and movant had engaged in conduct from which ratification might be inferred. The court held that, where a judgment regular upon its face recites that there has been service of process, an innocent purchaser will be protected. Further, that where there has been long delay and laches on the part of one seeking relief, the judgment will not be vacated.

In *Weaver v. Jones,* 82 N.C. 440, there was no service of process and an unauthorized appearance by an attorney. On the record the judgment was regular. Six years later there was a motion to vacate the judgment. The motion was denied on the grounds that there was no showing of meritorious defense and there had been unreasonable delay.

Further citation and discussion of cases would be superfluous. In some respects the conflicts in the holdings are, perhaps, more apparent than real. The decided cases should be examined more from the standpoint of the total factual situations presented than the exact language used. A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case. *Carpenter v. Carpenter,* 244 N.C. 286, 293, 93 S.E. 2d 617.

However, it clearly appears that the law in this jurisdiction now is that where a judgment is apparently valid upon the face of the record, but is in fact invalid for want of jurisdiction or for want of authority in an attorney to consent to judgment, the affected party is not required to show meritorious defense or cause of action as a condition precedent to vacating the judgment.

". . . (W)here a judgment is attacked upon the ground that the court granting it had no jurisdiction to do so, many courts take the view that such judgment is void and no meritorious defense need be advanced as a condition precedent to relief against it . . ." 174 A.L.R., Anno — Judgment-Relief From — Conditions, s. 22, p. 97.

The reasoning behind the rule seems to be that the sole question is the jurisdiction of the court, and the affected party's rights should not be prejudged.

The question of laches presents greater difficulty. It would appear

that positive acts amounting to ratification, or unreasonable delay after notice, resulting in prejudice to innocent parties would under certain circumstances work an estoppel. *Chemical Co. v. Bass*, 175 N.C. 426, 95 S.E. 766; *Hatcher v. Faison, supra.* But mere lapse of time will not, in the circumstances of the instant case, amount to laches. *Monroe v. Niven, supra; Patillo v. Lytle*, 158 N.C. 92, 94-5, 73 S.E. 200.

The primary question for the court below was whether or not the attorney of record had authority from appellants to compromise and settle the matters in controversy and approve a judgment in retraxit disclaiming on their behalf any right, title or interest in the land in question. There are no findings of fact determining this question. The judgment does not purport to determine this question. The cause must be remanded for this determination and for decision on all other related questions raised. *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E. 2d 302.

On the question of laches the record before us shows nothing more than considerable lapse of time and is insufficient to support the finding "that the movants have been guilty of laches and unreasonable delay." A further showing on this phase may be made when the motion is again heard.

There was a paucity of evidence before the court at the hearing on the motion. The advisability of a full and ample presentation of facts on rehearing is suggested. The burden is on movants.

Error and remanded.

NORINE U. TAYLOR v. ROBERT LINNIE PARKS.

(Filed 22 March, 1961.)

1. Automobiles § 54f—

Admission by defendant in his verified answer that he was, at the time of the collision, the owner of one of the vehicles involved in the accident, entitles plaintiff to the benefit of G.S. 20-71.1(a) when the action is brought within one year of the accident, and constitutes *prima facie* evidence that at the time of the collision the vehicle was being operated with the authority, consent, and knowledge of defendant.

2. Same—

Where plaintiff neither alleges or offers proof as to the registration of a vehicle involved in the collision in suit, G.S. 20-71.1(b) is not applicable.

3. Same— Plaintiff's evidence held to rebut presumption raised by G.S. 20-71.1(a), and nonsuit was proper.

Where defendant admits that at the time of the accident he was the owner of one of the vehicles involved in the collision, but plaintiff elicits testimony from her own witnesses of declarations made by defendant to the effect that at the time in question the driver had taken defendant's automobile without defendant's authorization, knowledge, or consent, and was not at the time defendant's agent or employee or acting in the course and scope of any employment by defendant, plaintiff's own evidence rebuts the presumption created by G.S. 20-71.1(a), and, such evidence not being contradicted by any other evidence of either plaintiff or defendant, nonsuit on the issue of agency is proper.

APPEAL by plaintiff from *Stevens, J.*, September Term 1960 of HERTFORD.

Civil action to recover damages for personal injuries sustained in a collision between two automobiles.

About 11:30 o'clock a.m. on 27 June 1959 plaintiff was riding in a 1956 Ford automobile owned by her husband, and operated by their daughter, Brenda Taylor, in a westerly direction along U.S. Highway No. 158 between the towns of Winton and Murfreesboro, about one-half mile from Murfreesboro. She was holding a small son in her arms. At the same time a 1946 Plymouth automobile was being driven in an easterly direction along the same highway by one Arnold Charlie Pope, and was meeting them.

Plaintiff alleges in paragraph four of her complaint: "That at all times hereinafter alleged, the defendant was the owner of a 1946 Plymouth Coupe, which was being operated by Arnold Charlie Pope with his consent or as his agent, servant or employee, and within the scope and course as said agent, servant or employee of this defendant." Defendant's answer thereto is as follows: "Answering paragraph 4, defendant admits that he was the owner of the 1946 Plymouth Coupe, but the remaining allegations of paragraph 4 are denied."

Plaintiff offered evidence as follows:

Brenda Taylor testified in respect to the collision: "As I came down the hill there, I saw this car coming around the side of the curve, off on the shoulder, and it was driving as fast as it could go; it was an old car. Then I saw the car swerving back and forth off the shoulder, and then it came onto the road, on his side of the road, and it was going so fast that the wheels were wobbling, and then the next thing I knew, it came right on into us and hit us. . . . I do not remember anything that happened after that; the only thing I remember is lying on the other side of the road, and remember being

taken to the hospital in Ahoskie. My mother was hurt in the accident. My little brother was killed in the accident." She saw no other car there. The road is a two-lane paved highway, and is a main thoroughfare.

W. T. Liverman, a police officer of the town of Murfreesboro, went to the scene of the collision between 11:30 o'clock a.m. and 12:00 o'clock noon. He saw there a 1946 or 1947 Plymouth automobile, with its left door open, and the feet and hips of Arnold Charlie Pope were lying on the left side of the front seat of the automobile, and his head and shoulders were lying on the dirt. No one else was in the Plymouth automobile. He helped place plaintiff, her daughter and the little boy in an ambulance, and then Pope was loaded into his car and he carried him to the hospital. In Liverman's opinion, Pope had been drinking and was unconscious when he arrived.

Thad Jernigan, a state highway patrolman and a witness for plaintiff, arrived at the scene about 12:05 o'clock p.m. He saw there a 1956 Ford automobile and a 1946 Plymouth automobile, which had collided. Both automobiles were damaged extensively in front. Later he talked to Arnold Charlie Pope, who had no driver's license. He then testified on direct examination by plaintiff's counsel: "Yes, I talked to the defendant Robert Linnie Parks; I had some conversation with Parks about this accident. The first time I saw Parks, I believe was in the hospital in Ahoskie. He was there to get his wife out of the hospital, who was at that time in the hospital. I asked Parks about the automobile, and I believe he supplied me with the registration for the automobile. Parks said at that time he had been to a children's party sometime during the morning, and that he and Pope had gotten together and that Pope had taken his car, and also that he had a considerable sum of money in the automobile, in the neighborhood of $100.00, in the glove compartment, and that he had not seen it since the accident. At that time, Parks was drinking and had the odor of alcohol on his breath. As a result of his claim about the money, the automobile was rechecked, the money was not found and never was found. Later, Parks said that he and Pope had gone to a Ruth Early's home about four o'clock in the morning, or that he got up with Pope at Ruth Early's about 3:30 or 4:00 o'clock in the morning, and that they left there after a while and went to Ahoskie, and that he got some gas in Ahoskie and went to Union, and that he stayed in Union about two and a half hours. He said he left Pope at Byrdland. That is a joint that was situated in Union at that time. He said he left Pope there and went to see a woman. That he came back and got Pope and came to Winton to work on his car. He said

he was talking to Lessie Archer at the time the car was taken; that Virginia Reynolds told him his car was gone. He said he had been having trouble with the switch and that they had straight-wired the switch, and had taken one of the wires off and laid it down on the seat, and that Pope must have put it back to get the car started. I don't recall whether Parks did or did not tell me about drinking any whiskey that morning, but when I saw Parks, he had been drinking."

Jernigan testified on cross-examination: "I received a report that this particular automobile had been stolen. After I received that report, I received another report that there had been an accident, and I went to investigate the accident, and then realized it was the same vehicle . . . . I saw Parks later. He told me that this man had taken his car, and that the first time he knew his car had been taken was when Virginia Reynolds told him this man had gotten his car and gone. He told me he had had trouble with the switch, and had wired it straight. . . . When I found the car, in connection with what he told me about the car being straight-wired, I found that to be true. Yes, the wires had been put together so the car would start. There were no keys in the car. . . . He was saying he did not give him the keys or permission to put the wires together to take the car."

Harry Parker operates an automobile repair business in the town of Winton. Between 9:00 and 10:00 o'clock a.m. on 27 June 1959 a 1946 Plymouth automobile crossed Weaver Street, jumped a ditch, and hit a truck on his parking lot. A few minutes after this defendant came up, and said something to the effect that his car had been stolen. He did not get his exact words. Parker reported it to Thomas Pope, a police officer of the town of Winton.

Thomas Pope went to Parker's to investigate the collision. While he was talking to several people there, the defendant came up. The first thing he said to Pope was, "that boy has torn my car to pieces, I did not tell him to take it." Pope then testified on direct examination by plaintiff's counsel as follows: "I inquired whether he left the keys in the car or not. He said that he did not leave the keys in the car; that he had the keys in his pocket; that he must have wired it up straight. I inquired as to how it happened he took the car, and he said he and Arnold Pope were at a children's party that morning; that they had been together all morning, and that he had put Pope in the car in front of Virginia Reynolds' house and told him to sit in the car, but that Pope took the car without any permission but that he did not think that he intended to steal the car; that he thought he was intending to bring it back; that I could go down and talk to

Virginia Reynolds and she would tell me all about it. I took him in my car and went down to Virginia Reynolds' house. She said she did not know anything at all about it; that Parks and Pope were together but she did not know whether the car was stolen or not and knew nothing about it. I asked Parks if he wanted to report the car stolen, and he said he thought Pope would bring the car back and she also told me that Pope was intoxicated. At that time, when I was talking to Parks, he was about half-drunk and said he thought probably Pope would bring the car back. I told Parks if the car had been stolen, we would go to the Police Station and report it as stolen. I took him in my car and went down to the Police Station in Winton and I called Ahoskie Radio Station, which I had put on the air about the car being stolen. That was approximately 11:00 o'clock when I made the investigation, and about 11:15 when I reported the car as stolen." Pope testified on cross-examination: "He (defendant) told me then the car had been stolen, that he had his keys in his pocket, that his car must have been straight-wired, and that he knew it was Arnold Pope who was driving the car. . . . That was somewhere between 11:00 and 11:15 o'clock."

Robert Bruce Brady between 10:10 o'clock a.m. and 10:30 o'clock a.m. on 27 June 1959 saw Arnold Charlie Pope driving a 1946 Plymouth automobile on the Cofield Road. He was weaving back and forth across the road, and slumped down in the automobile. Pope turned into the Murfreesboro Road.

Reuben Stephens testified in substance: A little after 11:30 o'clock a.m. on 27 June 1959 Arnold Charlie Pope driving a Plymouth automobile hit his automobile parked at a store in or near Murfreesboro. Stephens drove up to Highway No. 158, and stopped. As he was stopping Pope passed him driving a Plymouth automobile along Highway No. 158 toward Winton.

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

Jones, Jones & Jones and Gay, Midyette & Turner for plaintiff, appellant.

Ruark, Young, Moore & Henderson by: J. C. Moore and J. Allen Adams, and Cherry & Cherry by: J. Carlton Cherry for defendant, appellee.

PARKER, J. Plaintiff instituted her action on 27 January 1960, within one year after her cause of action accrued. Consequently, she is allowed the benefit of G.S. 20-71.1.

The complaint and answer were verified. Defendant admits in his

answer ownership of the 1946 Plymouth automobile at the time of the collision of this automobile and the Ford automobile in which plaintiff was riding as a passenger. This is the judicial admission of a fact in the final pleadings defining the issues and on which the case went on trial (Stansbury, N. C. Evidence, p. 380; 31 C.J.S., Evidence, § 301), and by virtue of the provisions of G.S. 20-71.1 (a) constitutes *prima facie* evidence that the 1946 Plymouth automobile was being operated and used by Arnold Charlie Pope at the time of the collision here with the authority, consent, and knowledge of the owner, Robert Linnie Parks, in the very transaction out of which plaintiff's injury arose.

This Court said in *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767: "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." This Court in *Roberts v. Hill,* 240 N.C. 373, 82 S.E. 2d 373, after quoting the above, says: "This language appearing in the *Hartley* case was used advisedly. We adhere to what is there said."

Plaintiff's cause of action, as set forth in her complaint, is bottomed on the theory "the defendant was the owner of a 1946 Plymouth coupe, which was being operated by Arnold Charlie Pope with his consent or as his agent, servant or employee, and within the scope and course as said agent, servant or employee of this defendant."

However, plaintiff not content with the judicial admission in defendant's answer that he was the owner of the 1946 Plymouth automobile at the time of the collision here, which constitutes "*prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose," by virtue of the provisions of G.S. 20-71.1(a), went on and adduced on direct examination from her witnesses state highway patrolman Thad Jernigan and police officer Thomas Pope clear, convincing and uncontradicted statements made to them by defendant to the effect that Arnold Charlie Pope on 27 June 1959 had taken his Plymouth automobile and was driving it at the time of the collision here without his authority, consent, and knowledge, that he was at the time neither his agent, servant nor employee, and that he was not driving the Plymouth automobile at the time for his benefit, and not driving it at the time within the course and scope of any employment by him.

Not a single fact or circumstance appearing of record contradicts defendant's declarations offered in evidence by plaintiff by direct examination of her two above mentioned witnesses, and offered by her as worthy of belief.

If plaintiff had not brought out from her witnesses on their direct examination the above declarations of defendant, and if plaintiff had rested her case, and defendant had testified to the same facts as clearly, convincingly, and without contradiction, as such declarations of his appear in plaintiff's case, it seems that under the authority of *Travis v. Duckworth,* 237 N.C. 471, 75 S.E. 2d 309, defendant would have been entitled to have the trial court give a peremptory instruction to the effect that it should answer the issue of agency or of driving the automobile by Pope with the authority, consent, and knowledge of defendant in the negative, if it "found the facts to be as the evidence tended to show." To the same effect, *Jyachosky v. Wensil,* 240 N.C. 217, 81 S.E. 2d 644; *Davis v. Lawrence,* 242 N.C. 496, 87 S.E. 2d 915; *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301; *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295. See the elaborate and scholarly opinion in *Bradley v. S. L. Savidge, Inc.,* 13 Wash. 2d 28, 123 P. 2d 780, where decisions are collected from the Federal Courts, from 29 States, and from the District of Columbia, including North Carolina, which announce and adhere to the rule that the presumption or inference of fact as to agency in cases of the nature of the case here is overcome by evidence which is uncontradicted, clear and convincing, regardless of whether it comes from interested or disinterested witnesses.

G.S. 20-71.1(b) is not applicable, for the reason that plaintiff has neither allegation nor proof as to the registration of the 1946 Plymouth.

The question presented for decision is this: Does plaintiff's own proof rebut the rule of evidence created by G.S. 20-71.1(a), and show that Arnold Charlie Pope was driving defendant's Plymouth automobile at the time of the collision here without defendant's authority, consent and knowledge, and was not at the time defendant's agent, servant or employee acting in the course and scope of his employment in the very transaction out of which plaintiff's injuries arose?

Teague, et al., v. Pritchard, et al., Court of Appeals of Tennessee, 2 March 1954, *certiorari* denied by Supreme Court 23 July 1954, 279 S.W. 2d 706, is directly in point, because Tennessee has two statutes substantially similar to G.S. 20-71.1. These four cases, which were tried jointly, arose out of an automobile collision on 16 May 1952, in Memphis, Tennessee, when the car of plaintiff, Edgar Teague, driven

by the plaintiff, Laverne Teague, and occupied by the other plaintiffs, was struck by a Ford station wagon owned by the defendant, Ralph Pritchard, negligently operated by an unidentified youth about eighteen years of age, who ran a stop light. The young driver ran off immediately after the collision, and has never been apprehended or identified. The suits were for personal injuries and property damage. Upon the trial plaintiffs offered substantial evidence as to their injuries and the negligence of the driver of the Ford station wagon, that the defendant, Pritchard, had loaned the car to the defendant, Mrs. Williams, to collect certain rentals for Mr. Pritchard, that the car was left parked at night by Mrs. Williams during the Cotton Carnival while she had gone to Mississippi for a visit, and soon therafter some unidentified person, without the knowledge or permission of the owner, Pritchard, or the bailee, Mrs. Williams, took the station wagon and caused plaintiffs' injuries sued on in this cause. Upon the conclusion of plaintiffs' evidence, the defendants moved for, and were granted directed verdicts in each of the four cases. Plaintiffs appealed to the Court of Appeals. In the Court of Appeals they insisted they were entitled to go to the jury by reason of the provisions of Sections 2701 and 2702 of the Tennessee Code, which sections are quoted in the Court's opinion. These sections of the Code quoted in the Court's opinion are set forth in Tennessee Code, Annotated, Official Edition, Volume 10, 59-1037 and 59-1038. Sections 2701 and 59-1037, which are indentical, read as follows: "*Prima facie evidence of ownership of automobile and use in owner's business.* — In all actions for injury to persons and/or to property caused by the negligent operation or use of any automobile, auto truck, motorcycle, or other motor propelled vehicle within this state, proof of ownership of such vehicle, shall be *prima facie* evidence that said vehicle at the time of the cause of action sued on was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which said injury or cause of action arose." Sections 2702 and 59-1038, which are identical, read as follows: "*Registration prima facie evidence of ownership and that operation was for owner's benefit.*—Proof of the registration of said motor propelled vehicle in the name of any person, shall be *prima facie* evidence of ownership of said motor propelled vehicle by the person in whose name said vehicle is registered; and such proof of registration shall likewise be *prima facie* evidence that said vehicle was then and there being operated by the owner or by the owner's servant for the owner's use and benefit and within the course and scope of his employment." Section 2702 and 59-1038 were not applicable, because, after Prit-

chard's attorney admitted Pritchard owned the automobile involved in the collision, plaintiffs offered no evidence as to the registration of the car. The Court said: "However, if we assume that the plaintiffs' attorney understood defendant to be admitting the registration as well as the ownership, we do not think that this would give him the right to go to the jury on the presumption created by Sections 2701 and 2702. Our Courts have often held that this presumption is rebuttable in the face of credible evidence that the car at the time of the injuries complained of was driven without the owner's permission. *Wright v. Bridges,* 16 Tenn. App. 576, 65 S.W. 2d 265; *Southern Motors v. Moton,* 25 Tenn. App. 204, 154 S.W. 2d 801; *McMahan v. Tucker,* 31 Tenn. App. 429, 216 S.W. 2d 356. In the instant case plaintiffs' own proof rebuts the presumption and shows that the car was driven without the knowledge or permission of both defendants. . . . From a consideration of all the evidence in an aspect most favorable to the plaintiffs, as required by our decisions, we find that the evidence was insufficient upon which a jury could predicate a verdict in favor of the plaintiffs and, hence, it was the duty of the Trial Court to direct a verdict for the defendants, as he did in this case. *Lawson v. City of Chattanooga,* 37 Tenn. App. 309, 263 S.W. 2d 538, 543." The judgments of the lower court were affirmed.

We have examined the statutes of a number of the States concerning the same subject matter as our G.S. 20-71.1. There are many variations of this statutory rule of evidence. Of all the statutes we have examined, the Tennessee statutes alone are almost identical with our own. For instance, the Massachusetts statute, Annotated Laws of Massachusetts, Vol. 8, C. 231, §85A, provides that "evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be *prima facie* evidence that it was then being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defense to be set up in the answer and proved by the defendant."

In *Felski v. Zeidman,* 281 Pa. 419, 126 A. 794, the facts were these: "On May 16, 1922, the plaintiff, John Felski, with his wife and three sons, was passing along Eighth street, Charleroi, in an automobile, and when crossing McKean avenue an auto truck so violently collided with the automobile as to demolish it and kill plaintiff's wife. The truck was owned by the defendant, Jacob Zeidman, a furniture dealer, and the accident apparently happened by the fault of the driver, Louis Glenn. It was developed, however, by witnesses called for plaintiff, that Glenn was not in defendant's employ, had taken the

truck without leave, and was using it for a purpose of his own. Under such circumstances the trial judge granted a nonsuit, and the refusal to take it off forms the basis of this appeal by plaintiff." The Court said: "True, it was a business truck with defendant's name thereon, which would raise a presumption that it was being used in his business (*Sieber v. Russ Bros. Ice Cream,* 276 Pa. 340, 120 A. 272; *Williams v. Ludwig Floral Co.,* 252 Pa. 141, 97 A. 206; *Holzheimer et ux. v. Lit Bros.,* 262 Pa. 150, 105 A. 73); but in the instant case this presumption cannot stand in the face of the evidence of plaintiff's witnesses to the contrary. Had the defendant offered oral testimony to rebut the presumption, its credibility would have been for the jury (*Gojkovic v. Wageley et al.,* 278 Pa. 488, 490, 123 A. 466, and cases there cited), but plaintiff cannot question the credibility of his own uncontradicted witnesses. Moreover, he was bound by the testimony of the defendant, given as under cross-examination, for it was neither contradicted nor qualified (*Krewson, Ex'x, v. Sawyer et al., Ex'rs,* 266 Pa. 284, 287, 109 A. 798; *Dunmore et ux v. Padden,* 262 Pa. 436, 439, 105 A. 559), and that testimony was fatal to plaintiff's case."

The following cases are cases where the plaintiff was nonsuited at the close of his evidence on the same principle as set forth in *Felski v. Zeidman, supra; Magee v. Hargrove Motor Co.,* 50 Idaho 442, 296 P. 774; *Kish v. California State Automobile Assn.,* 190 Cal. 246, 212 P. 27; *Rawlings v. Clay Motor Co.,* 287 Ky. 604, 154 S.W. 2d 711. See also, *Potts v. Pardee,* 220 N.Y. 431, 116 N.E. 78; *Potchasky v. Marshall,* 211 App. Div. 236, 207 N.Y.S. 562.

In 5 A.L.R. 2d 196 — 249 appears a most helpful Annotation entitled "Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile." On page 199, §2, it is stated: "That the presumption or the inference of an owner's consent to another's operation of his automobile, or the agency of such operator, arising from proof of ownership, or proof of ownership coupled with proof that the driver was in the general employment of the owner, is rebuttable and will be overcome by proper countervailing evidence, is universally held or conceded." This is said on page 237, §9: "The common-law presumption flowing from proof or admission of ownership of the car, in some jurisdictions with, and in others without, proof that the driver was in the general employment of the owner, that at the time of accident the driver was acting in the business of the owner and within the scope of his employment, is made statutory in some jurisdictions. Generally speaking, the rules formulated and applicable to the rebuttal of the common-law presumption are applicable to the rebuttal of the identical statutory presumption."

What this Court said in an unanimous opinion in *S. v. McNeill*, 225 N.C. 560, 35 S.E. 2d 629, is apposite here: "The only question presented by this appeal is the sufficiency of State's evidence to carry the case to the jury. The State offered the testimony of two officers to the effect that on the occasion alleged they found in defendant's bedroom in her home three pints of untax-paid whiskey in a jar. However, one of these witnesses testified that the defendant, the mother of three children, was present, and that she said she had the whiskey there for a sick child. This testimony which came from the witness offered by the State, was the only evidence on this point, and was uncontradicted. The defendant offered no evidence. There was no evidence that the liquor here in question was being kept for the purpose of being sold. The State's evidence, by incorporating and offering as worthy of belief the defendant's declaration, negatived possession for the purpose of sale. But it was contended that the *prima facie* effect given possession of intoxicating liquor by G.S., 18-11, was sufficient to carry the case to the jury. With this we cannot agree." The ruling of the lower court in denying defendant's motion for judgment of nonsuit was reversed. The authority of the *McNeill* case on this precise point is not impaired in any degree by *S. v. Hill*, 236 N.C. 704, 73 S.E. 2d 894, which overrules it and *S. v. Peterson*, 226 N.C. 255, 37 S.E. 2d 591 "to the extent, and only to the extent, that they hold that the *prima facie* evidence rule created by G.S. 18-11 is not applicable to prosecutions based on criminal accusations which employ the phraseology of G.S. 18-50 and charge in express terms that the intoxicating liquor allegedly possessed for the purpose of sale was of the 'illicit' or 'non-tax paid' variety." *S. v. Hall*, 240 N.C. 109, 81 S.E. 2d 189.

Considering plaintiff's evidence in the light most favorable to her, as we are required to do in passing on a motion for judgment of involuntary nonsuit, the statutory rule of evidence created by G.S. 20-71.1 (a) —the subsection (b) is not applicable here — is rebutted and overcome by the clear, convincing and uncontradicted declarations of defendant, which plaintiff introduced in evidence as part of her case and offered as worthy of belief, and which show that Arnold Charlie Pope was driving defendant's Plymouth automobile at the time of the collision here without defendant's authority, consent, and knowledge, and was not at the time defendant's agent, servant or employee acting in the course and scope of his employment in the very transaction out of which plaintiff's injuries arose. Such evidence offered by plaintiff is fatal to her case.

The judgment of involuntary nonsuit is

Affirmed.

MARY M. PRITCHARD v. WILLARD SCOTT AND WIFE, EDNA A. SCOTT, ETHEL S. COBB, DOROTHY MEADS JAMES AND HUSBAND, REUBEN C. JAMES, GERTIE SCOTT HALSTEAD AND HUSBAND, CALVIN HALSTEAD, AND D. V. PRITCHARD, JR. AND WIFE, DOROTHY B. PRITCHARD.

(Filed 22 March, 1961.)

1. Appeal and Error § 3: Highways § 14—

Judgment that petitioner is entitled to have a cartway laid off in accordance with G.S. 136-69 across the lands owned by one group of respondents or across the lands owned by another group, and remanding the cause to the clerk with directions that a jury of view be appointed to lay off the cartway, is final in that it adjudicates that the land of the appealing respondents is subject to the easement, and they have the right of immediate appeal from the judgment without waiting to see where the jury of view may locate the cartway.

2. Easements § 3—

An easement appurtenant, based upon a visible way of access to a public road existing across other lands of grantor or testator at the time of the severance of title, is distinct from a way of necessity, which is created by operation of law whenever land conveyed or devised is shut off from access to a public way by other lands of the grantor.

3. Same: Highways § 12—

The statutory procedure for the condemnation of a cartway, G.S. 136-67 and G.S. 136-69, is separate and distinct from the right to establish an easement by necessity, and the grantee or devisee of a tract of land which is cut off from access to a public way by other lands of the grantor or testator is not relegated to the statutory procedure to establish his easement by necessity.

4. Highways § 12—

A petitioner is not entitled to condemn a cartway if she presently has reasonable access to a public road, but in proceedings to establish a cartway under the statute, the respondent has the burden of proving the existence of such other way.

5. Same—

Where the owner of a tract of land devises that part thereof having access to a public road to his son and devises the other part thereof to his widow, the widow is not entitled to condemn a cartway over the land of strangers to the title, since she can have no better right than her testator, and he, having access to a public way, was not entitled to condemn an additional right-of-way.

APPEAL by defendants Willard Scott and wife, Edna A. Scott, Ethel S. Cobb, Gertie Scott Halstead and husband, Calvin Halstead, from *Bone, J.*, September Term, 1960, of PASQUOTANK.

Special proceeding under G.S. 136-68 and G.S. 136-69 to establish a cartway (private way) from petitioner's land to a public road.

D. V. Pritchard, Sr., prior to his death in 1959, owned and cultivated, as one farm, a tract of land in Salem Township, Pasquotank County, on which he resided. A road, known as the Meads Pier Road, extended along the southern boundary of said farm. It provided access to the (hard-surfaced) Weeksville Road.

Pritchard, Sr., devised the northern portion of said farm, thirty-four acres of arable land, to petitioner, his wife, and the remainder, the southern portion, to D. V. Pritchard, Jr., his son by a former marriage. The dwelling house (fronting on the Meads Pier Road, where Pritchard, Jr., lives) and outbuildings were on said southern portion.

No part of petitioner's land abuts a public road. The Meads Pier Road extends along the southern boundary of the land of Pritchard, Jr. Pritchard, Sr., "in cultivating the property when it was on one tract of land used the Meads Pier Road in getting out to the hard surface road."

Appellants (Scotts) own lands adjoining and lying north and west of petitioner's land. A lane on the Scott lands extends from the "old Scott home," now owned by Ethel S. Cobb, to the Weeksville Road. A portion of the Scott lane is near the northwest corner of petitioner's land.

Petitioner testified: "The Meads Pier Road and the Scott lane generally speaking run parallel to each other, . . . the Scott lane is further to the North, that is in the direction of Elizabeth City." The record does not disclose the acreage devised to Pritchard, Jr., or the distance from the southern boundary of petitioner's land (across the land of Pritchard, Jr.) to the Meads Pier Road. The only evidence bearing thereon discloses that the distance to the Weeksville Road (1) from the northwest corner of petitioner's land via the Scott lane and (2) from the Pritchard, Jr., dwelling (in the southwest corner of his land) via the Meads Pier Road, was approximately the same, some two-tenths or three-tenths of a mile.

Petitioner alleges that "it is necessary, reasonable, and just" that she "have a private way to a public road over the existing lane or roadway (Scott lane) leading directly to the . . . Weeksville Highway from the westerly corner of said property *or* over some other portion of lands of *some* of said respondents." (Our italics)

Pritchard, Jr., answering, alleges that "it is necessary that petitioner have a private way to the public road over the existing lane or road-

way (Scott lane) leading directly from the westerly corner of the aforesaid tract of land to the hard-surfaced Weeksville Highway."

Appellants (Scotts), answering, alleged that, during the ownership of Pritchard, Sr., and theretofore and thereafter, "an apparent and visible farm road or way (was) used by the owner and owners of said lands for the benefit, in part, of the lands now owned by the petitioner, and across the lands now owned by the defendant, D. V. Pritchard, Jr., which said way or ways led to a public road," and that an easement to use said apparent and visible farm road vested in petitioner as appurtenant to the land devised to her by Pritchard, Sr. If not, so the Scotts alleged, petitioner is legally entitled to *an* outlet from her land across the land of Pritchard, Jr., as a way of necessity, to the Meads Pier Road. In either event, the Scotts asserted, petitioner is not entitled to condemn a cartway (private road) across their lands.

Defendants Dorothy Meads James and Reuben C. James did not answer.

The parties waived a hearing before the clerk as to "whether petitioner is entitled to a cartway under G.S. 136-69," and in the superior court waived jury trial and agreed that the court might find the facts and render judgment.

After recitals, the judgment provides:

". . . the COURT FINDS THE FOLLOWING FACTS:

"1. That the petitioner is the owner of the tract of land described in the petition.

"2. That petitioner is engaged in the cultivation of crops upon said tract of land.

"3. That there is no public road leading to said tract of land.

"4. That there is no other adequate means of transportation affording necessary and proper means of ingress to and egress from said tract of land.

"5. That the petitioner has not acquired any easement across the lands of respondent D. V. Pritchard, Jr., as alleged in the amendment to the answer of certain of the respondents, which would constitute any adequate means of transportation affording necessary and proper means of ingress to and egress from petitioner's tract of land.

"6. That petitioner has not acquired any easement in the lane referred to in the answer of respondents D. V. Pritchard, Jr. and Dorothy B. Pritchard, which would constitute adequate means of transportation affording necessary and proper means of ingress to and egress from petitioner's tract of land.

"The Court CONCLUDES AS A MATTER OF LAW that petitioner is entitled to have a private way from her tract of land across the lands of some of the respondents to a public road to have a cartway laid off in accordance with the provisions of General Statute 136-69.

"NOW, THEREFORE, IT IS by the Court ORDERED, ADJUDGED AND DECREED that petitioner is entitled to have a cartway laid off across the lands of some of the respondents in accordance with the aforesaid statute and this proceeding is REMANDED TO THE CLERK, who is directed to appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway and otherwise to proceed in accordance with the provisions of law."

Appellants excepted, *inter alia,* to the denial of their motions for judgment of nonsuit, to Findings of Fact Nos. 4 and 5, to the court's Conclusion of Law, and to the judgment, and appealed.

McMullan, Aydlett & White for plaintiff, appellee.
M. B. Simpson, Jr., for defendants Pritchard, appellees.
John H. Hall for defendants, appellants.

BOBBITT, J. Appellants' basic contention is that, whatever rights petitioner may have to condemn a cartway or to establish an appurtenant easement or a way of necessity over the land of Pritchard, Jr., she has no right to condemn a cartway over their lands.

While the judgment does not expressly authorize or direct the jury of view to lay off a cartway over appellants' lands, the clear implication is that they *may* do so. Is the appeal premature? May an appeal be taken unless and until the jury of view actually locates the cartway, in whole or in part, over appellants' lands?

In *Triplett v. Lail,* 227 N.C. 274, 41 S.E. 2d 755, and cases cited, it was held that a landowner may appeal to the superior court from an order of the clerk adjudging the right of petitioner to a cartway over his land. The basis of decision is that an order adjudging petitioner's right to a cartway is a final order. The judgment of Judge Bone, in effect, adjudges petitioner's right to a cartway over appellants' lands. In this respect, it is a final judgment.

Appellants' defense has no relation to where (on their lands) the cartway should be located. It challenges petitioner's right to a cartway over any portion of their lands. It extends to the whole cause of action as between petitioner and appellants. In short, it is a plea in

bar. *Solon Lodge v. Ionic Lodge,* 245 N.C. 281, 287, 95 S.E. 2d 921, and cases cited.

True, appellants may have preserved their exceptions to Judge Bone's judgment, to be brought forward upon appeal in the event of an adverse final judgment locating the cartway, in whole or in part, over their lands. They were not required to do so. They were entitled, if so minded, to except to Judge Bone's judgment and appeal therefrom forthwith. *Pritchett v. Supply Co.,* 153 N.C. 344, 69 S.E. 249; *Gaither v. Hospital,* 235 N.C. 431, 442, 70 S.E. 2d 680.

"It is a well-settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary for their fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. This doctrine is usually called the rule of visible easements." 17A Am. Jur., Easements § 41.

Invoking this doctrine, the plaintiffs, in *Potter v. Potter,* 251 N.C. 760, 112 S.E. 2d 569, and cases cited, sought to establish, by civil action, an easement, as appurtenant to their lands, to use a specific roadway, allegedly in existence and in use prior to the severance of title, extending across the defendant's land to a public road. In *Potter, Moore J.,* sets forth fully the prerequisites for the establishment of such appurtenant easement.

Petitioner does not allege she is legally entitled to access to the Meads Pier Road over the land of Pritchard, Jr. Appellants, by way of affirmative defense, assert petitioner has such right, either as an appurtenant easement over a specific farm road or as a way of necessity. Hence, the burden of proof was on appellants to establish the facts necessary to support their alleged affirmative defense. *Wells v. Clayton,* 236 N.C. 102, 106, 72 S.E. 2d 16, and cases cited.

The court, in the challenged findings of fact, did not attempt to distinguish between an appurtenant (visible) easement and a way of necessity. We are of opinion, and so hold, that there was ample evidence to support a finding that petitioner has no appurtenant easement in a specific roadway leading from her land across the land of Pritchard, Jr., to the Meads Pier Road. Whether, under the undisputed facts, petitioner has a legal right to a way of necessity over the land of Pritchard, Jr., as a means of access to the Meads Pier Road, requires separate and further consideration.

The generally recognized distinction between a way of necessity and an appurtenant easement in a specific roadway arising from pre-

existing use is set forth in the following excerpt from 17A Am. Jur., Easements § 58.

> "Although a way of necessity is sometimes confused with an easement arising, on severance of title, from a pre-existing use, there is a definite distinction between them, mainly because a way of necessity does not rest on a pre-existing use but on the need for a way across the granted or reserved premises. A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessity *(sic)* for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. Thus, the legal basis of a way of necessity is the presumption of a grant arising from the circumstances of the case. This presumption of a grant, however, is one of fact, and whether a grant should be implied depends upon the terms of the deed and the facts in each particular case.
>
> "A way of necessity arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway."

In accord: 28 C.J.S., Easements §§ 35-37; Tiffany, Real Property, Third Edition, Vol. 3, § 793; Thompson, Real Property, Permanent Edition, Vol. 2, § 533; Mordecai's Law Lectures, Second Edition, Vol. 1, p. 466.

The doctrine of ways of necessity as distinguished from the doctrine of visible easements has been set forth in the opinions of this Court. *Lumber Co. v. Cedar Works,* 158 N.C. 161, 167, 73 S.E. 902; *Carmon v. Dick,* 170 N.C. 305, 308 and 309, 87 S.E. 224; *Carver v. Leatherwood,* 230 N.C. 96, 98, 52 S.E. 2d 1; *Smith v. Moore, ante,* 186, 118 S.E. 2d 890.

"A way of necessity is a temporary right in the sense that it con-

tinues only so long as the necessity exists, varies as the necessity varies, and ceases to exist upon the termination of the necessity which gave rise to it." 17A Am. Jur., Easements § 100. The rule applicable where a general (unlocated) right of way is granted (17A Am. Jur., Easements § 101 *et seq.*) is applicable *to the location* of a way of necessity. "As in the case of easements generally the rule has been established that the right to select the location of a way of necessity belongs to the owner of the servient estate, provided he exercises the right in a reasonable manner, with regard to the convenience and suitability of the way and to the rights and interests of the owner of the dominant estate." 17A Am. Jur., Easements § 108.

Where a general (unlocated) right of way was granted, this Court held the rights of the parties in respect of the location thereof "are the same as when 'a way of necessity' to the designated highway (has) been established *in invitum.*" *Brick Co. v. Hodgin,* 190 N.C. 582, 585, 130 S.E. 330; *Mfg. Co. v. Hodgins,* 192 N.C. 577, 579, 135 S.E. 466. In *Andrews v. Lovejoy,* 247 N.C. 554, 556, 101 S.E. 2d 395, *Rodman, J.,* says: "Cate's deed for plaintiffs' land did not fix the location of the road which was appurtenant to the property conveyed. As the owner of the servient estate he had the right to fix the location of that road. (Citations)"

Although the doctrine of ways of necessity is set forth in opinions of this Court, we have found no decision where a plaintiff, by action in the superior court, has established his right to and the location of a way of necessity. In *Carver v. Leatherwood, supra,* where the hearing was on demurrer, there is a clear intimation that, in an appropriate factual situation, a plaintiff may do so. *Barnhill, J.* (later *C.J.*), cites with approval "17 A.J. 959, sec. 48 *et seq.*" The discussion in the cited reference is brought forward in substance in the excerpt from 17A Am. Jur., Easements § 58, quoted above.

While the evidence was in conflict as to whether Pritchard, Sr., during his ownership, used a specific roadway for such purpose, all the evidence shows that his only access from the portion of his (cultivated) land devised to petitioner to a public road was over the land devised to Pritchard, Jr., to the Meads Pier Road. It is noted that Pritchard, Sr., did not assert, nor does petitioner, any legal right of access to the Weeksville Road via the Scott lane or other route over any portion of appellants' lands.

Nothing in the evidence indicates that Pritchard, Sr., intended that his widow, in respect of the portion of the farm devised to her, should be deprived of access to the Meads Pier Road. Under the evidence, the necessity for such access was absolute and the only reasonable

implication is that Pritchard, Sr., intended that his widow should have such right of access.

Whether the Meads Pier Road, in a technical sense, is a public road or a neighborhood public road (G.S. 136-67), need not be determined. Suffice to say, the right of the public generally to use the Meads Pier Road is not challenged.

It is well settled that petitioner is not entitled to condemn a cartway if she presently has reasonable access to a public road. *Kanupp v. Land,* 248 N.C. 203, 206, 102 S.E. 2d 779. This is true even if such reasonable access is permissive. *Garris v. Byrd,* 229 N.C. 343, 49 S.E. 2d 625; also, see *Burwell v. Sneed,* 104 N.C. 118, 10 S.E. 152, and cases cited. Thus, if petitioner is presently entitled to a way of necessity over the land of Pritchard, Jr., to the Meads Pier Road, her petition for a cartway should be denied.

Petitioner relies largely on *White v. Coghill,* 201 N.C. 421, 160 S.E. 472. She contends the only way of necessity now recognized by our law is such as may be condemned under G.S. 136-68 and G.S. 136-69. Candor compels the admission that petitioner finds support for her contention in the cited case.

In *White v. Coghill, supra,* the plaintiff, by civil action, sought to establish a way of necessity over the land of the defendant. The factual situation would be quite similar to that here involved *if* this were a civil action by petitioner to establish a way of necessity *over the land of Pritchard, Jr.* There, the action was between the devisees of portions of a single tract owned by the devisor. Land of strangers to the devisor's title was not involved. There was no allegation in the petition as to a pre-existing specific roadway for the benefit of the land owned by the petitioner. Too, as here, there was no provision in the devise with reference to an easement. A judgment of nonsuit was affirmed. The opinion concludes: "Hence, the situation is that, according to the allegations of the plaintiff, she owns lands not accessible to a highway except by crossing the lands of defendants. These facts invoke the application of C.S. 3835 and 3836 as the exclusive remedy to which plaintiff is entitled. Therefore, the ruling of the trial judge was correct."

In *White v. Coghill, supra,* the opinion cites, with apparent approval, prior cases in which the law of "way of necessity" is stated. Too, the opinion quotes Mordecai's exposition thereof, cited above. It is noted that Mordecai, after discussing generally the law of "way of necessity," states, in part, *in a subsequent separate paragraph:* "In this state we have a peculiar way of necessity. It is a way, known as a cartway, given by statute to one whose lands are cut off from

access to the public highway, and which is obtained by condemnation proceedings." Since the quotation from Mordecai is the only authority cited to support the conclusion reached, it appears that the court concluded that the quoted statement supported the view that our "peculiar way of necessity" superseded and nullified the general law of "way of necessity" previously discussed in detail. Further consideration convinces us that Mordecai's statement does not support this conclusion.

It is noted that this Court, in the subsequent cases of *Carver v. Leatherwood, supra,* and *Smith v. Moore, supra,* stated and recognized the general law as to "way of necessity" in like manner as in cases decided prior to *White v. Coghill, supra.*

Material differences between a way of necessity under the general law and a cartway condemned in accordance with G.S. 136-68 and G.S. 136-69 include the following: If entitled to a "way of necessity" under the general law, a person is entitled thereto as a matter of right. No payment of compensation therefor is required. On the other hand, the "peculiar way of necessity" is obtained by condemnation and payment of compensation for a specific cartway in those instances where petitioner has no reasonable access to a public road as a matter of legal right or by permission.

Pritchard, Jr., did not appeal. Nothing in the record indicates whether he excepted to Judge Bone's judgment. As indicated above, petitioner does not assert she is legally entitled to a way of necessity over the land of Pritchard, Jr., to the Meads Pier Road. Rather, she asserts her right *to condemn* a cartway. Under the circumstances we deem it inappropriate to discuss further the rights and liabilities of petitioner and of Pritchard, Jr., *inter se.*

Referring to The Code, sec. 2056, which, as amended, is now codified as G.S. 136-69, *Merrimon, J.* (later *C.J.*,) said: "This statutory provision is in derogation of the free and unrestricted use and enjoyment of the land by the owner thereof, over which the cartway is established, and must be construed strictly." *Warlick v. Lowman,* 103 N.C. 122, 9 S.E. 458; *Warlick v. Lowman,* 104 N.C. 403, 10 S.E. 474; *Brown v. Glass,* 229 N.C. 657, 50 S.E. 2d 912. In *Warlick v. Lowman, supra* (104 N.C. 403), *Clark, J.* (later *C.J.*), said: ". . . a petitioner is not entitled to have a cartway laid out over another's land simply because it would give him a shorter and better outlet to the public road. If he already have a private way, or by parol license an unobstructed way, across the land of another, the petition should be denied, and evidence tending to show that the desired cartway would be shorter than the outlet in use should be excluded as immaterial."

Pritchard, Sr., during his ownership, had access from all portions of his land (over his own land) to the Meads Pier Road. Obviously, Pritchard, Sr., could not have condemned a cartway over the lands of appellants. The question arises: Did his devisee acquire a greater right by reason of the fact that, in devising a portion thereof, he did not expressly provide that she should have a right of access to the Meads Pier Road? In our view, petitioner acquired no greater right than Pritchard, Sr., had in respect of the condemnation of a cartway over the lands of appellants.

Common fairness, as well as strict statutory construction, impels the conclusion that petitioner has no right to condemn a cartway over the land of strangers to the title of Pritchard, Sr., when, as the undisputed facts show, a cartway may be laid off over the land of Pritchard, Jr., which, with that of petitioner, constituted a single tract before the severance of title.

Hence, for the reasons stated, we are of opinion, and so hold, that appellants' motion for judgment of nonsuit, interposed at the close of petitioner's evidence and renewed at the close of all the evidence, should have been allowed. Accordingly, there is error in the judgment. On account thereof, the cause is remanded for modification of the judgment so as to include therein an adjudication that, as to appellants, petitioner's proceeding is nonsuited.

Error and remanded.

MARJORIE GRAY, FORMERLY MARJORIE CLARK v. STATE CAPITAL LIFE INSURANCE COMPANY.

(Filed 22 March, 1961.)

1. Evidence §§ 29, 30: Insurance § 46—

In an action by the beneficiary on an accident policy providing, in addition to death benefits, benefits for hospital and surgical fees and compensation for hospital confinement, and reserving the right to insured to change the beneficiary, a declaration of insured to an officer some time after the fatal injury that insured was shot in an attempt to break in a store, while not competent as a part of the *res gestae*, *is held* competent as an admission against interest, since the insured and not the beneficiary had a vested interest in the policy at the time the declaration was made.

2. Insurance § 34—

"Accidental death" relates to the causation of death while death pro-

duced by "accidental means" relates to the occurence or happening which produces the death, so that death resulting directly from insured's voluntary act and aggressive misconduct is not death by accidental means even though the death be the result of an accidental injury.

3. Same—

Evidence tending to show that insured was attempting to break into a store at nighttime and that operator of the store, living on the premises and hearing noises, went on the outside of the building with a gun, and that insured brushed past him while his finger was on the trigger, causing the gun to discharge, inflicting fatal injury, is held to disclose that the death resulted through the means of insured's voluntary act and aggressive misconduct and therefore that his death was not solely the result of external, violent and accidental means within coverage of the policy in suit.

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

APPEAL by plaintiff from *Campbell, J.*, September-October Term 1960, of CLEVELAND.

This is an action instituted by the plaintiff to recover the sum of $2,500 under the provisions of an insurance policy, dated 1 December 1958, and issued by the defendant to Bruce E. Clark, naming the plaintiff, Marjorie R. Clark, his mother, as beneficiary. The beneficiary is now Marjorie Gray.

It was stipulated that the policy was in full force and effect at the times involved herein; that Bruce E. Clark came to his death on 15 March 1959 as the result of a gunshot wound inflicted by Sam Lovelace on 14 March 1959; that the plaintiff has made demand of defendant for payment under the terms and provisions of the policy and that the defendant has failed and refused to make payment and denies that it is liable in any amount to the plaintiff.

The policy of insurance involved contains the following provisions with respect to accidental death: "The State Capital Life Insurance Company of Raleigh, North Carolina, does hereby insure the person named as Insured (Bruce E. Clark) in the Schedule against loss resulting directly and independently of all other causes from bodily injuries sustained by the Insured solely through external, violent and accidental means, while this Policy is in force * * *."

Under "Exclusion," the policy contains the following: "The insurance under this Policy shall not cover death, loss of limb, or sight, or other loss caused directly or indirectly, wholly or partly, (1) by the intentional act of Insured or any other person, whether sane or insane * * *."

It was agreed between counsel representing the respective parties,

that the court might hear the evidence in this matter and determine the facts and decide the case without the intervention of a jury.

The court below, on the stipulations and the evidence offered, found the following facts:

"1. The court finds and includes in this judgment, the stipulations entered, which stipulations appear of record.

"2. That Bruce E. Clark, the named assured in the policy of insurance on March 14, 1959, was attempting to break into a building which building was a combination store building and residence, the store portion thereof entering upon the ground floor in front and the residential portion thereof entering from the ground level at the rear, the building itself being situated on a slope; that there was no way of entrance from the living quarters of the building to the store quarters of the building except by going out the entrance of the living quarters in the rear of the building, going up the hill and coming into the store portion from the front.

"3. That Bruce E. Clark on the occasion in question, March 14, 1959, in the night time at about 11 o'clock p.m., unsuccessfully tried to break in the front door to the store portion of the premises, breaking glass out of the door and made other efforts to gain entrance, thereby creating sufficient noise to arouse the owner of the premises who was living in the living quarters on the lower level.

"4. That the owner of the premises, Mr. Sam Lovelace, procured a shotgun, loaded it and went outside the living quarters going around the building for the purpose of seeing what was going on on the upper level at the store entrance; that after ascertaining that the glass of the door had been broken but no entrance had been made, he withdrew to the side of the building when he heard his wife down below scream and the door slam; that thereupon he cocked the gun and about the same time the flood lights or outside lights of the building were turned on; that he was proceeding to return to the lower level and the entrance to the living quarters, but before going around the corner of the building for that purpose, Bruce E. Clark ran around the corner of the building and between Lovelace and the building, the distance between Lovelace and the building being some 3 or 4 feet; that at this time Lovelace had the gun cocked and was carrying it parallel with the ground and about waist level and with his finger on the trigger; that Clark, in trying to run between Lovelace and the building ran into Lovelace, the gun discharged and Clark was shot through the muscle of his right arm and into his chest cavity, thereby producing his death the next day.

"5. That Lovelace had made full preparations for shooting the gun

but did not take aim or deliberately shoot Clark and the actual discharge of the gun came simultaneously or practically simultaneously with Clark bumping into Lovelace as he, Clark, was running around the building."

The findings of fact are supported by the evidence and from such findings the court concluded as a matter of law "that the conduct of Clark on this occasion was such conduct that a reasonably prudent person would or should have known or anticipated that his own misconduct in attempting to break into the building would create circumstances that would render a homicide likely and the death which ensued was not sustained solely through accidental means within the terms and provisions of the policy."

Judgment was accordingly entered to the effect that the plaintiff should recover nothing from the defendant.

Plaintiff appeals, assigning error.

Horn & West for plaintiff appellant.

Allen, Hipp & Steed; Falls, Falls & Hamrick for defendant appellee.

DENNY, J. The plaintiff assigns as error the admission in evidence in the hearing below of a statement made by the insured to an officer who arrived at the scene of the shooting a few minutes after it occurred. The officer found Clark lying on the ground at the point where he had been shot and inquired of him as to what happened. He said: "We tried to break in and I got shot."

Spontaneous utterances, in order to be a part of the *res gestae,* must be made "during the happening of the main transaction or immediately and instantly after the transaction and in direct connection with it. They must be forced out, as it were, as the utterance of truth; they must be declarations as to something being done, and not as to what has been done." *Bumgardner v. R.R.,* 132 N.C. 438, 43 S.E. 948; *Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757; *Johnson v. Meyer's Co.,* 246 N.C. 310, 98 S.E. 2d 315.

Since some time elapsed between the shooting and the arrival of the officer who interrogated Clark, the statement was not admissible as part of the *res gestae.* However, we think this statement was admissible as a declaration against interest.

The policy of insurance involved, in addition to the death benefits provided therein, contains provisions for hospital benefits and nursing fees, not exceeding $300.00 for each, if such hospital benefits and nursing fees are required as the result of an accident. The policy

also provides for the payment of an amount not exceeding $50.00 for physician's or surgeon's fees, if such fees are required as the result of such accident. Provision is further made for the payment of a weekly income of $50.00 for four weeks if the insured is confined in a hospital as the result of an accident, provided such accidental injuries do not result in any of the losses provided for in Part I of the policy. Moreover, the insured reserved the right to change the beneficiary in the policy without the consent of the beneficiary. Therefore, the plaintiff had no vested interest in this policy at the time the statement under consideration was made. *Pollock v. Household of Ruth,* 150 N.C. 211, 63 S.E. 940; *Wooten v. Order of Odd Fellows,* 176 N.C. 52, 96 S.E. 654.

In *Whitford v. Insurance Co.,* 163 N.C. 223, 79 S.E. 501, a written note from the insured to his wife, in which it appeared the insured was contemplating suicide, was held to be properly admitted as a declaration against interest in an action brought to recover on a life insurance policy.

Likewise, in *Schaffner v. Equitable Life Assur. Soc.,* 290 Ill. App. 174, 8 N.E. 2d 212, which involved an action upon the double indemnity provision in a life insurance policy, it was held that statements of the insured made prior to his death, after he had been shot by an officer, in which the insured admitted he had entered into a conspiracy to commit burglary and was upon the premises to be robbed at the time he and his accomplice were apprehended, was held to be admissible as a declaration against interest. *Smith v. Moore,* 142 N.C. 277, 55 S.E. 275; *Benefit Ass'n. of Railway Employees v. Armbruster,* 221 Ala. 399, 129 So. 78; *Brown v. Mystic Workers of the World,* 151 Ill. App. 517.

It is said in 31 C.J.S., Evidence, section 218 (b), page 960, *et seq.*: "Where a declarant is unavailable as a witness because of his death, it is well settled that evidence may, in a proper case, be received of his declarations against his interest, whether or not such declarations are part of the *res gestae.* The absence of privity between declarant and the parties to the suit does not preclude the admission of his declarations, provided they were adverse to his interests." See also 20 Am. Jur., Evidence, Section 556, page 467, *et seq.*

The plaintiff is relying on the case of *Evans v. Junior Order,* 183 N.C. 358, 111 S.E. 526, as authority for the exclusion of the insured's declaration in this case. We think the cases are distinguishable and that the *Evans* case is not controlling on the facts in the present case. This assignment of error is overruled.

The second assignment of error is based on the plaintiff's objection

to the verdict, the denial of her motion for a new trial, and to the signing of the judgment based on the verdict.

Therefore, the question posed for determination is whether or not the insured's death was the result of accidental means within the terms of the policy.

Our Court has pointed out in a number of decisions that there is an important and fundamental distinction between an "accidental death" and one produced by "accidental means." *Harris v. Insurance Co.*, 204 N.C. 385, 168 S.E. 208; *Mehaffey v. Insurance Co.*, 205 N.C. 701, 172 S.E. 331; *Scott v. Insurance Co.*, 208 N.C. 160, 179 S.E. 434; *Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687.

In *Fletcher v. Trust Co., supra*, this Court said: "'Accidental means' refers to the occurence or happening which produces the result and not to the result. That is, 'accidental' is descriptive of the term 'means.' The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation — not upon the accidental nature of the ultimate sequence of the chain of causation."

In the case of *Clay v. Insurance Co.*, 174 N.C. 642, 94 S.E. 289, L.R.A. 1918B, 508, in construing the policy of insurance, this Court said: " * * * (I)n case of death by 'external, violent, and accidental means,' without more, we hold that the true test of liability in cases of this character is whether the insured, being in the wrong, was the aggressor, under circumstances that would render a homicide likely as the result of his own misconduct."

In *Scarborough v. Insurance Co.*, 244 N.C. 502, 94 S.E. 2d 558, the insured, Adrian C. Midgett, advanced upon one Baldwin, using vituperative language, and continued to advance as if he intended to do violence to Baldwin's person. Baldwin was on the front porch of his home; he pushed Midgett backwards; Midgett fell and struck his head on a water meter from which injury he died ten days later. The Court held this not to be death by accidental means. *Devin, J.*, later *C.J.*, said: "Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury. 45 C.J.S., 779."

In construing an identical provision in a policy of insurance as that

now before us, in the case of *Mehaffey v. Insurance Co., supra,* we said: "The liability clause of the policy of insurance rested upon death or injury 'solely through external, violent and accidental means.' Therefore, in order to warrant recovery for death in such event, such death must not only be accidental but must be produced by 'accidental means.'"

We think the facts in this case justify the conclusion reached by the court below, to the effect that the conduct of the insured was such that a reasonably prudent person would or should have known or anticipated that his own misconduct in attempting to break into the store operated by Mr. Lovelace, and in which building Mr. and Mrs. Lovelace maintained and occupied living quarters, would create circumstances that would render a homicide likely.

Therefore, we hold that the death of the insured was not produced by "accidental means" within the terms of the policy.

Affirmed.

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

MARY H. PRIDGEN, ADMINISTRATRIX OF THE ESTATE OF JOHN JACOB PRIDGEN, DECEASED v. T. R. UZZELL, ADMINISTRATOR OF THE ESTATE OF CLARENCE HAYWOOD SPEIGHT, DECEASED.

(Filed 22 March, 1961.)

1. Automobiles § 41p—

It is not required that the identity of the driver of an automobile at the time of an accident be established by direct evidence but such identity may be established by circumstantial evidence, either alone or in combination with direct evidence.

2. Trial § 22a—

On motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference therefrom.

3. Automobiles § 41p— Circumstantial evidence of identity of driver of car held sufficient to be submitted to the jury.

Evidence tending to show that for some three weeks prior to the accident in suit defendant's intestate had the automobile in question in his possession, that he was seen to drive it almost daily, that no one else was seen to drive the vehicle, that on the morning in question defendant's intestate drove the vehicle to a store and had gasoline put into it, that several minutes later he drove the vehicle away with plaintiff's intes-

tate riding as a passenger, and that some twenty or twenty-five minutes later the car overturned as a result of recklessness, demolishing the car and fatally injuring both occupants, *is held* sufficient, together with evidence of other facts and circumstances, to permit a reasonable and legitimate inference that defendant's intestate was operating the car at the time, and nonsuit was erroneously entered.

APPEAL by plaintiff from *Hooks, S.J.*, September-October 1960 Civil Term of WILSON.

Civil action to recover damages for personal injuries, pain and suffering prior to death, for medical expenses, and for the alleged wrongful death of plaintiff's intestate.

This is a summary of plaintiff's evidence:

About three months prior to 12 May 1958 Clarence Haywood Speight began living in a house about 300 yards behind Carris Lucas' store at Lamm's Crossroads. For about three weeks before 12 May 1958 Speight had in his possession a 1952 two-tone blue Chevrolet automobile. Carris Lucas, who lives at Lamm's Crossroads and operates a store there, saw Speight operate this automobile about every day. He never saw anyone else operate it.

About 8:20 o'clock a.m. on 12 May 1958 Speight drove the automobile up to Carris Lucas' store from the direction of the city of Wilson, and stopped. A man, whom Lucas did not know, was riding in the automobile on the front right side. Lucas put ten gallons of gas in the automobile for Speight. In three or four minutes Speight drove the automobile away, turning to the right on the paved road leading toward Horne's Church down by Lamm's School. The man was in the automobile, when Speight drove away.

On the morning of 12 May 1958 Sidney Godwin and Kinzey Allen, Jr., were working in a field on the north side of the road leading to Lamm's Crossroads. Allen heard a heavy roaring, and saw an automobile travelling at a very fast speed enter a curve in the road. Then a house right in the curve blocked his view, but he could see the back end of the automobile after it turned over. Godwin heard Allen say "he is turned over." Both started to the road. Allen reached there first, and called to Godwin, "he is not dead, get an ambulance, and get him to the doctor." Godwin did not go all the way, but before leaving to call an ambulance saw a body lying on the south side of the road, and a man in the automobile, and it looked to him like his feet were hanging out through the windshield.

C. E. Bottoms was working in a tobacco patch about 100 yards from the road. He went to the scene. Allen was there, Godwin had gone to call the Highway Patrol. He saw John Jacob Pridgen, plaintiff's intestate, lying with his back down in the automobile between the steering

wheel and the door and his legs up to his knees hanging out of the place where the windshield had been, and a man's body lying out in a corn field. There was glass all in the road. The automobile was lying across the road on its left side. He saw about 15 or 20 feet from the automobile a pile of brains about the size of a terrapin shell lying on the paved road. He went and looked at the body in the field. It was the body of defendant's intestate Speight, was lying face down, and it looked as if the whole back of his head was gone.

C. J. Cole, a State highway patrolman, according to his direct examination, arrived at the scene at 8:45 o'clock a.m., and saw a 1952 Chevrolet automobile overturned on the road, "which connects Lamm's Crossroads with Horne's Church." Cole testified on redirect examination that he was notified at 8:45 o'clock a.m., and arrived at the scene at 9:00 o'clock a.m. He saw the dead body of Speight lying in a field. Pridgen was not there. The weather was fair. The road was dry. The pavement on the road was twenty feet wide, and it had on each side shoulders three feet wide. The automobile was lying on its left side on the left side of the road facing Lamm's Crossroads, partially on the left side of the pavement and partially on the shoulder. Its top was mashed in, its left side was damaged and bent in, most of the automobile had some bent in or dented places on it, the windshield had been separated from it, and was lying broken on the road.

Plaintiff offered in evidence for the purpose of illustrating the testimony of the witnesses, what is called in the record a diagram and marked Exhibit 6, which diagram is before us. Exhibit 6 is an actual survey by Lewis L. Ellis, a registered land surveyor, of the curve where the Chevrolet automobile overturned showing also adjacent land. Cole used this survey extensively to illustrate his testimony. This survey shows that it is 1.9 miles from the overturned automobile to Lamm's Crossroads.

Cole testified in substance: There were tire markings on the pavement beginning at the rear of the overturned automobile, and these markings continued on the south side of the paved road towards the shoulder 59 feet by his measurement. There were further marks, partially on the pavement and partially in the ditch extending in a westerly direction 69 feet. There were further marks westerly on the pavement at an angle in a northwesterly direction for 52 feet, continuing to the edge of the pavement, where it connects with the shoulder. There were further marks continuing in a north or northwestern direction continuing down the shoulder and ditch on the north side of the pavement in a westerly direction for 132 feet: these markings were partially on the pavement and partially in the ditch. These markings were not

continuous: they had gaps in them. The markings on the pavement had rubber. There was no sign of rubber on the dirt shoulders. These markings or marks appeared to be fresh. Cole saw a spot of blood in about the center of the right-hand traffic lane of the paved road going east from Horne's Church to Lamm's Crossroads, which he marked with the letter F on Exhibit 6. He saw a second spot of blood near the center line of the road, which he marked with the letter G on Exhibit 6. In addition to the blood at these points, which appear to be only a few feet apart as shown on Exhibit 6, he saw brains mixed with blood and hair. The body of Speight was in a field 148 feet from the second spot of blood and brains and hair he saw on the paved road, and 20 feet from the pavement where the overturned automobile was lying.

Pridgen was carried to the Carolina General Hospital. He had a broken neck, head injuries, and other injuries. He was confused. He had the odor of alcohol on his breath. Two holes were bored in his head, Crutchfield Tongs were inserted therein, and his head was put in traction with a certain amount of weight as treatment for his broken neck. On 3 July 1958 he became a patient at the Veterans Administration Hospital at Durham, where he died on 24 July 1958. Dr. Horace B. Cupp, Jr., found by the court to be a medical expert witness in the field of neurological surgery, who saw Pridgen in the Veterans Administration Hospital and diagnosed his condition, testified: "My clinical impression is that he (Pridgen) died from shock secondary to overwhelming infection. Approximately 25% of the entire bone covering of the brain was removed from Mr. Pridgen's skull after the performance of these two operations." He had testified earlier: "It was my opinion that the infection resulted from the presence of the traction in the skull."

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

Lamb, Lamb & Daughtridge and Finch and Narron for plaintiff, appellant.

Gardner, Connor & Lee for defendant, appellee.

PARKER, J. Plaintiff has plenary evidence tending to show that the driver of the overturned Chevrolet automobile was guilty of actionable negligence in operating it carelessly and heedlessly in violation of G.S. 20-140, and in driving it at a very fast rate of speed when approaching and going around a curve in violation of G.S. 20-141(c).

The primary question presented for decision is whether plaintiff

has sufficient evidence to carry her case to the jury that defendant's intestate Speight was driving the automobile when it overturned.

What is said in *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492, is applicable here: "Plaintiff did not offer any direct evidence showing that William Graham was driving the automobile at the time it overturned. She was not required to do so. Circumstantial evidence, either alone or in combination with direct evidence, is sufficient to establish this crucial fact."

Plaintiff's evidence tends to show the following facts: For about three weeks before the Chevrolet automobile overturned Clarence Haywood Speight had had it in his possession, and during this time he drove it nearly every day. During this period Speight lived in a house behind Carris Lucas' store at Lamm's Crossroads, and Carris Lucas saw no one else drive it. About 8:20 o'clock a.m. on 12 May 1958 Speight drove this automobile up to Carris Lucas' store. A man, whom Lucas did not know, was in the automobile sitting on the right front side. Lucas put ten gallons of gas in the automobile, and three or four minutes later Speight drove it away turning to the right on the paved road leading towards Horne's Church. The man was in the automobile with him, when it left. In about twenty or twenty-five minutes after Speight drove this automobile away from Carris Lucas' store, it overturned on the road leading from Lamm's Crossroads to Horne's Church. After the automobile had overturned and come to rest lying on its left side on the left side of the road facing Lamm's Crossroads, partially on the left side of the pavement and partially on the shoulder, Speight's dead body was lying face down in a cornfield, and it looked as if the whole back of his head was gone. Two spots of blood near together mixed with blood and hair were on the paved road twenty feet from the overturned automobile, and 148 feet from Speight's dead body in the cornfield. After the automobile had overturned and come to rest, plaintiff's intestate, John Jacob Pridgen, was living, and was lying with his back down in the automobile between the steering wheel and the door and with his legs up to his knees hanging out of the place where the windshield had been. The top of the automobile was mashed in, its left side was damaged and bent in, most of it had some bent in or dented places on it, the windshield was out of it, and was lying broken in the road.

Taking plaintiff's evidence as true, and considering it in the light most favorable to her, and giving her the benefit of every reasonable inference to be drawn therefrom, as we are required to do in passing on a motion for judgment of involuntary nonsuit (*Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1; *Polansky v. Insurance Ass'n.,* 238 N.C. 427, 78 S.E. 2d 213), it is our opinion, and we so hold, plaintiff has

sufficient evidence to permit, but not to compel, a jury to make a reasonable and legitimate inference from the facts shown by her evidence that Clarence Haywood Speight was driving the automobile at the time it overturned, resulting in his death, and in injuries to plaintiff's intestate, which her evidence tends to show resulted in his death. In our opinion, plaintiff has offered sufficient evidence to take the question as to the driver of the automobile at the time it overturned out of the realm of conjecture and into the field of legitimate inference from established facts.

The facts in this case have many similarities to the facts in *Bridges v. Graham, supra,* which we held was a case for the jury.

The facts in *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258, are easily distinguishable.

The judgment of involuntary nonsuit below is

Reversed.

STATE v. LEVI ALDRIDGE.

(Filed 22 March, 1961.)

1. Bastards § 6—

Evidence in this prosecution of defendant for willful failure to support his illegitimate child held sufficient to be submitted to the jury.

2. Bastards § 5: Parent and Child § 1—

In a prosecution of defendant for willful failure to support his illegitimate child by a married woman, the woman is incompetent to testify as to non-access of her husband, and the admission of such testimony by her is of such prejudicial nature that the harm may not be cured by the later withdrawal of the testimony and instructions to the jury not to consider it, even though there is competent testimony by other witnesses relating to non-access.

3. Criminal Law §§ 91, 162—

The act of the court in withdrawing incompetent testimony theretofore admitted and in instructing the jury not to consider such testimony cannot be held to cure the error when the nature of the incompetent testimony is such that it is virtually impossible to erase the prejudicial effect from the minds of the jurors.

4. Criminal Law § 161—

Where the prejudicial effect of testimony erroneously admitted for the State is such that error in its admission is not cured by the subsequent withdrawal of the testimony, the cross-examination of the witness by the defendant relative to the matter in an effort to discredit the credi-

bility of the witness in regard thereto, will not be held to waive defendant's objection to the admission of the testimony.

APPEAL by defendant from *Burgwyn, Emergency Judge,* September Term, 1960, of CRAVEN.

Criminal prosecution on warrant charging that, on or about May 5, 1960, defendant did "unlawfully and willfully refuse and neglect to support and maintain Robert Brimage Williams, an illegitimate child, begotten by him upon the body of Selma Russell Williams," a violation of G.S. 49-2, tried *de novo* in superior court on appeal by defendant from conviction and judgment in the Recorder's Court of New Bern.

The jury returned a verdict of guilty and the court pronounced judgment thereon. Defendant appealed, assigning errors.

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

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

BOBBITT, J. The evidence, when considered in the light most favorable to the State, was sufficient to warrant submission to the jury and to support the verdict and judgment. Hence, assignments of error directed to the court's refusal to allow defendant's motions for judgment as in case of nonsuit (G.S. 15-173) are overruled. In this connection, see *S. v. Bowman,* 231 N.C. 51, 55 S.E. 2d 789, and cases cited.

The prosecutrix was, and for some years had been, married to one Joseph Larosa Williams.

On direct examination, the prosecutrix, the State's first witness, in response to a question asked by the court, stated that she was married. Thereupon, in response to further questions by the court, the prosecutrix testified that the child was born in April, 1960, that she did not know where her husband lived, and that she had not seen her husband for over two years. In a discussion, in the presence of the jury, as to the competency of the prosecutrix's said testimony, the court said: "She said she had no access to her husband in over two years." At the conclusion of said discussion, the court instructed the jury to "disregard" the prosecutrix's testimony "about her non-access to her husband."

No testimony as to non-access was elicited during the further direct examination of the prosecutrix. However, during cross-examination, the prosecutrix testified that she had not had sexual relations with her husband and had not seen him for over two years.

The prosecutrix's testimony as to the non-access of her husband

was incompetent. *S. v. Bowman*, 230 N.C. 203, 52 S.E. 2d 345, and cases cited; *Biggs v. Biggs*, 253 N.C. 10, 14, 116 S.E. 2d 178, and cases cited. In *S. v. Bowman, supra* (230 N.C. 203), a criminal prosecution for violation of G.S. 49-2, a new trial was awarded for error in admitting testimony of the prosecutrix as to non-access similar to that elicited from the prosecutrix herein.

In *S. v. Strickland*, 229 N.C. 201, 207, 49 S.E. 2d 469, *Seawell, J.*, said: "In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed. (Citations)" This statement is quoted with approval in *S. v. Green*, 251 N.C. 40, 46, 110 S.E. 2d 609.

While the State offered the testimony of other witnesses relevant to non-access, obviously such testimony had much less probative force than the testimony of the prosecutrix. In our opinion, notwithstanding the court's instruction, it was virtually impossible for the jurors to erase from their minds the impact of said incompetent testimony of the prosecutrix.

The more difficult question is whether defendant lost the benefit of his exception when the prosecutrix, in answering questions asked on cross-examination, gave testimony of like import.

The testimony of the prosecutrix, if accepted by the jury, was sufficient to establish that defendant was the father of her child. This, as indicated by the charge, was the controverted issue.

The evidence before us is in narrative form. However, it seems clear that the questions asked on cross-examination were not general questions for the purpose of eliciting information but for the sole purpose of impeaching the prosecutrix's testimony as to non-access. In short, the cross-examiner proceeded on the theory that the prosecutrix's incompetent testimony, notwithstanding the court's instruction, was in fact imbedded in the minds of the jurors. Hence, he undertook, with indifferent success, to impeach her testimony as to non-access.

In *Hamilton v. Lumber Co.*, 160 N.C. 47, 75 S.E. 1087, it was held, as stated in the second headnote, that "(t)he erroneous admission of evidence on direct examination is held not to be prejudicial when it

appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer." This general statement is quoted with approval in *Ledford v. Lumber* Co., 183 N.C. 614, 616, 112 S.E. 421; *Cook v. Mebane,* 191 N.C. 1, 7, 131 S.E. 407; *Hanes v. Utilities Co.,* 191 N.C. 13, 19, 131 S.E. 402; and *Tyler v. Howell,* 192 N.C. 433, 437, 135 S.E. 133. The rule indicated by this general statement has been applied in the cited cases and others in relation to diverse factual situations. Whether the erroneous admission of incompetent evidence on direct examination should be deemed cured and held nonprejudicial under such circumstances would seem to depend largely upon the nature of the evidence and the circumstances of the particular case.

In *Shelton v. R.R.,* 193 N.C. 670, 674, 139 S.E. 232, *Brogden, J.,* after quoting, with apparent approval, the general rule stated in *Hamilton v. Lumber Co., supra,* continued: "but when a trial judge admits evidence over objection, it thereupon becomes proper evidence to be considered by the jury so far as the particular trial in the Superior Court is concerned, and the rule does not mean that the adverse party may not, on cross-examination, explain the evidence or destroy its probative value, or even contradict it with other evidence, upon peril of losing the benefit of his exception." In this connection, see *S. v. Godwin,* 224 N.C. 846, 32 S.E. 2d 609; *S. v. Tew,* 234 N.C. 612, 68 S.E. 2d 291; *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768.

In *Shelton v. R.R., supra,* the specific holding was that the defendant did not by cross-examination waive the benefit of his exception to incompetent evidence elicited on direct examination and erroneously admitted. *Brogden, J.,* quotes from *Marsh v. Snyder* (Neb.), 15 N.W. 341, the following: "Where an exception is duly taken to the admission of illegal testimony, it is not waived by mere cross-examination of the witness respecting it." The opinion cites numerous cases from other jurisdictions to like effect. In this connection, see Stansbury, North Carolina Evidence, § 30; 3 Am. Jur., Appeal and Error § 277, p. 53; 5A C.J.S., Appeal & Error § 1735(c)(1), p. 1034.

Whether the rule enunciated and applied in *Hamilton v. Lumber Co., supra,* and the rule enunciated and applied in *Shelton v. R.R., supra,* are in irreconcilable conflict or may be harmonized, is not presently determined. The precise question is not presented by this appeal.

Here, the prosecutrix's testimony as to non-access was erroneously elicited by the court and thereafter the jury was instructed to "disregard" it. Defendant's counsel was confronted by the fact that the

prosecutrix's incompetent testimony as to non-access was in the minds of the jurors and that an unfavorable verdict was probable unless her testimony was impeached. We are constrained to hold that defendant did not lose the benefit of his exception to the eliciting of the prosecutrix's incompetent testimony on account of his counsel's attempt to impeach the credibility of the prosecutrix in respect of such incompetent testimony. It seems probable that the jury's verdict was based in substantial part on incompetent evidence bearing directly on the crucial issue notwithstanding the court instructed the jury to "disregard" it. Hence, a new trial is awarded.

New trial.

STATE v. C. V. PARRISH.

(Filed 22 March, 1961.)

1. Constitutional Law § 23—

A license to engage in a business or practice a profession is a property right that cannot be suspended or revoked without due process of law.

2. Constitutional Law § 24—

The term "law of the land" as used in the State Constitution is synonymous with "due process of law" as used in the Federal Constitution, and requires notice and opportunity to be heard.

3. Same: Criminal Law § 130—

Judgment against a defendant convicted of collecting fees in excess of those allowed by Chapter 673, Session Laws of 1945, while acting as an attorney in fact for a professional bondsman may not include a provision suspending the license of the bondsman, who had no notice of the entry of the provision suspending his license and was given no hearing and was not present in court in person or by attorney, since such provision is void as being in violation of Article I, § 17 of the State Constitution.

On *certiorari* from *Bundy, J.*, November 1960 Criminal Term, of NEW HANOVER.

Defendant Parrish was charged in the bill of indictment with collecting fees, as a professional bondsman, in excess of those allowed by law and in violation of the penal provisions of Chapter 673, Session Laws of 1945. The indictment designates Parrish as "Attorney in Fact for J. J. Mohn, a professional bondsman." J. J. Mohn is not named defendant in the bill.

The case was tried at the November 1960 Term. Parrish entered

a plea of *nolo contendre*. Prayer for judgment was continued to the December 1960 Term. At the latter term judgment was entered against Parrish. He did not appeal.

The judgment contained the further recitals and provisions:

> "The Court finds further from the evidence in these cases that the defendant did not have a professional bondsman's license in his own name, but operated as Attorney in Fact for J. J. Mohn, and under the authority of the license of J. J. Mohn, receiving 60% of all bond premiums, and J. J. Mohn receiving 40%, and that forfeitures were paid by them jointly in like proportions;
>
> "Therefore, under authority of Chapter 673 of the 1945 Session Laws of North Carolina, the license issued in the name of J. J. Mohn, under which J. J. Mohn and the defendant C. V. Parrish have operated, be, and the same is hereby Ordered suspended for a period of two years."

Mohn was not a party to the action. The evidence in the record does not show that he had any knowledge of the excessive fees allegedly collected by Parrish, or that he profited thereby.

Upon learning that judgment had been entered suspending his license, Mohn forthwith applied to this Court for writs of *certiorari* and *supersedeas*. His verified affidavit in support of the application tends to show that he had not been indicted, arrested or tried, had no notice of the entry of judgment suspending his license, was not given a hearing, and was not present in court in person or by attorney when the judgment was entered. There is nothing in the record to contradict these averments. The writs were issued.

Petitioner Mohn assigns error.

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

W. G. Smith for Petitioner Mohn.

MOORE, J. Chapter 673, Session Laws of 1945, provides for the regulation of the business of professional bondsman in New Hanover County. It defines a professional bondsman as "any individual, group of individuals, or corporation, who shall, for pay or profit, execute any bond for the release of any person or property from custody of law, or for the guarantee of any penalty contained in any bond, or recognizance." Among other regulations, it requires that a license be procured before engaging in this business, and establishes a schedule of maximum fees. It declares that the violation of any provisions of the Act shall constitute a misdemeanor. There are two provisions for

suspension or revocation of license: (1) ". . . upon conviction the court shall suspend or revoke the license of such professional bondsman for two years"; and (2) "The Governing Board of the City of Wilmington or the board of county commissioners shall have the power to inquire into the violation of any of the provisions of this Act and to revoke the license of any professional bondsman upon satisfactory proof of such violation, after said bondsman has been given an opportunity to be heard in his defense."

The petitioner has not been indicted, arrested, tried or convicted for the violation of any of the provisions of the Act in any criminal court. Furthermore, his conduct as a professional bondsman has not, so far as the record discloses, been the subject of inquiry by the official board of either the County or City, and he has had no hearing before these boards. It is not permissible that he be tried by proxy. The court was without authority to suspend or revoke his license.

A license to engage in business or practice a profession is a property right that cannot be taken away without due process of law. The granting of such license is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process. *Boyce v. Gastonia,* 227 N.C. 139, 41 S.E. 2d 355; *In re Carter,* 195 F. 2d 15 (D. C. 1951), cert. den. 342 U.S. 862; *In re Carter,* 177 F. 2d 75 (D. C. 1949), cert. den. 338 U.S. 900; *Laisne v. Board of Optometry,* 101 P. 2d 787 (Cal. 1940); *In re Greene,* 130 A. 2d 593 (D. C. 1957).

"Article I, Section 17, of the North Carolina Constitution was copied in substance from Magna Charta by the framers of the Constitution of 1776, and prescribes that 'no person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.' The term 'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." *Surety Corp. v. Sharpe,* 232 N.C. 98, 103, 59 S.E. 2d 593.

"The significance of the law of the land in its procedural aspect is laid bare by a famous phrase used by Daniel Webster in his argument in the *Dartmouth College* case. 'By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.' The *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 4 L. Ed. 629." *Eason v. Spence,* 232 N.C. 579, 584, 61 S.E. 2d 717.

The court was without jurisdiction to enter the judgment insofar as it purports to suspend or revoke the license of J. J. Mohn to engage in the business of professional bondsman or insofar as it purports to adjudicate any of his rights, and the portion of the judgment affect-

ing him or his license is utterly void. The cause is remanded that a proper order be entered striking out and declaring void all portions of the judgment affecting petitioner's license and right to do business as a professional bondsman. The portion of the judgment relating to Parrish is, of course, not disturbed.

In fairness, it is pointed out that the Attorney General, in his brief, with commendable candor, admitted error.

Error and remanded.

WRESTON MORGAN v. TOWN OF SPINDALE, A MUNICIPAL CORPORATION.

(Filed 22 March, 1961.)

1. Taxation § 5—

Taxes may be levied only for a public purpose, and a public purpose is one for the support of the government or for any of the recognized objectives of government. Constitution of North Carolina, Article V, § 3.

2. Same—

A municipality may issue its bonds with approval of its voters to provide funds to aid in the construction of an armory, since the mobilization and training of a state militia is for a public purpose for which a municipality may be called upon to contribute.

3. Same—

Where municipal bonds are issued to provide funds to aid in the construction of a facility to be used for the public purposes of an armory and the training of the municipality's law enforcement officers and for a public meeting place, the fact that the facility is to be constructed some half mile outside the municipality's corporate limits and the fact that the land is to revert to the county if it should cease to be used for an armory, do not affect the public character of the purposes for which the bonds are issued.

APPEAL by plaintiff from *Clarkson, J.*, January 1961 Term, of RUTHERFORD.

Plaintiff, a taxpayer, instituted this action to enjoin the issuance and sale of bonds by Spindale. He alleges the funds to be derived from the sale will not be used for a public purpose.

A jury trial was waived. The court found the facts, which, summarized, are: Spindale, a municipal corporation situate in Rutherford County, proposed to issue and sell $17,000 of bonds to provide funds

to supplement available Federal and State funds to be used for construction of armory facilities for the North Carolina National Guard.

"That an ordinance was duly and regularly adopted by the Town of Spindale on September 19, 1960, authorizing said Armory Bonds and a resolution adopted calling for a special election thereon; that an election was duly and regularly held on 29th day of October, 1960, at which election a majority of the qualified voters who voted at said election voted in favor of approval of the ordinance authorizing the issuance of said bonds and the levying of taxes to pay the principal thereof and the interest thereon. The vote being 116 in favor and 8 against approval.

"That the land upon which the proposed Armory is to be constructed (5.95 acres) is located about 5/10 of a mile east of the corporate limits of the Town of Spindale, and title is vested in the State of North Carolina with reversionary provisions in favor of Rutherford County, if ceased to be used for military purposes.

"That the proposed Armory shall be available for use by Civic organizations for public functions, and the rifle range and Armory will be available for instructions and use by law enforcement officers of Rutherford County and the Towns in the County."

Based on the findings the court concluded the bonds were "for a public purpose within the purview of the applicable Statutes of North Carolina and the Constitution of said State," and when issued will be valid obligations of the town of Spindale. Injunctive relief was denied, and the action dismissed. Plaintiff appealed.

J. S. Dockery for plaintiff appellant.
A. Clyde Tomblin for defendant appellee.

RODMAN, J. Plaintiff's assignments of error present only one question, *viz.*: Is the proposed expenditure for a public purpose? Unless for a public purpose, no tax can be levied for payment, because by express constitutional language, "taxes shall be levied only for public purposes." Art. V, sec. 3.

The constitutional permission to tax for public purposes is a denial of the right to tax for private purposes. *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d 209. What then is a public purpose? *Ervin, J.,* said in *Green v. Kitchin,* 229 N.C. 450, 50 S.E. 2d 545: "A tax or an appropriation is certainly for a public purpose if it is for the support of government, or for any of the recognized objects of government." *Seawell, J.,* said in *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803: " ' 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. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion."

Protection against invasion and the maintenance of peace and order are governmental functions recognized by express provisions in our Constitution. Art. XII, sec. 2, charges the General Assembly with the duty of providing for the organization, arming, equipping, and discipline of the militia. The Governor is commander in chief of the militia except when called into the service of the United States. Art. III, sec. 8, N.C. Constitution. Clearly, then, the construction of an armory is a public purpose conforming to the express mandate of our Constitution. Plaintiff says conceding the construction of armories in general may serve a public purpose, the fact that the armory here proposed is to be constructed outside of the corporate limits of Spindale and on property which will revert to Rutherford County in the event it is abandoned for military purposes, negatives a public purpose as to Spindale.

Neither of these facts affects *the purpose* for which the expenditure is to be made. Funds for the construction of the armory will be provided in the following proportions: United States, 75%; State of North Carolina, 7%; Spindale, 9%; Forest City, 9%. In addition to the cost of construction, Rutherford County provided the land on which the building is to be erected. The mere fact that it is to be located half a mile beyond the corporate limits of Spindale does not affect *the purpose* for which the construction is to be made.

The court's finding that the armory will be available for use by civic organizations for public functions, and the rifle range and armory will be available for instruction and use by law enforcement officers of Spindale is not challenged. All of these are public purposes. The right to enjoy and not the place where the right may be exercised is the test. Municipalities frequently establish their sewerage disposal plants, their water supply systems beyond the corporate limits, but we do not suppose that anyone would suggest that the fact that these are not located within the corporate limits would destroy the purpose for which they are constructed. By no stretch of the imagination can it be said that the location of the armory outside of the corporate limits makes it a private purpose.

The Supreme Court of the State of Washington was called upon to decide in *State v. Clausen,* 163 P. 744, whether a political subdivision of the State could use public funds to acquire land for the

training of the armed forces of the United States pursuant to authorization given by State legislation. The Court said: "While the mobilization and training of the federal soldiery to aid in the suppression of insurrection or the repelling of invasion is in a sense a duty of the federal government, it is likewise a state duty to which the state may be called upon to contribute its aid. The mobilization and training of a state militia may be a state purpose, but it is likewise a public purpose to which every political subdivision of the state may be called upon to contribute to the full extent of its power and ability."

Parker, J., said in *Jamison v. Charlotte*, 239 N.C. 682, 80 S.E. 2d 904: "We have stated in *Martin County v. Trust Co.*, 178 N.C. 26, 100 S.E. 134, that the construction of roads and bridges is a matter of general public concern, and that 'the Legislature may cast the expense of such public works upon the State at large, or upon territory specially and immediately benefited, even though the work may not be within a part of the total area attached." See also *Briggs v. Raleigh*, 195 N.C. 223, 141 S.E. 597; *Wood v. Oxford*, 97 N.C. 227; *Taylor v. Commissioners*, 55 N.C. 141; 25 N.C. Law Rev. 504 *et seq.* for an article summarizing the North Carolina cases interpreting the meaning of the phrase "public purpose."

The mere fact the property will revert to Rutherford County if, at some indefinite time in the future, it is no longer needed or suitable for armory purposes does not defeat the purpose for which the expenditures are now to be made. *Green v. Kitchin, supra.*

Based on the unchallenged findings of fact the court correctly concluded that the proposed expenditure was for a public purpose. The electorate having authorized bonds for a public purpose, the court properly declined to restrain the sale and dismissed the action.

Affirmed.

STATE OF NORTH CAROLINA v. MALGRAM BAREFOOT.
AND
STATE OF NORTH CAROLINA v. DOC J. BRANTLEY.

(Filed 22 March, 1961.)

1. Poison § 2—

A bill of indictment under G.S. 14-329 which fails to charge that the spirituous liquors manufactured, sold, or dealt out by defendant were to be used as a drink or beverage, is fatally defective. Further, averment that the whiskey contained "foreign properties or poisonous ingredients to the human system" is defective, the proper charge being that the whiskey contained "foreign properties or ingredients poisonous to the human system."

2. Indictment and Warrant § 9—

An indictment for a statutory offense should follow the language of the statute or specifically set forth the facts constituting the offense with such certainty as to advise defendant of the offense of which he is charged, prevent him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment.

3. Criminal Law § 121—

The arrest of judgment for fatal defect in the indictment does not preclude a subsequent prosecution upon a valid bill.

APPEAL by defendants from *Fountain, Special Judge,* October Criminal Term, 1960, of WILSON.

The defendants were placed on trial on the third count in separate bills of indictment, the first two counts in each bill having been disposed of previously. The cases were consolidated for trial. The counts upon which the defendants were tried were identical except as to the names of the respective defendants. The third count in the bill of indictment against the defendant Doc J. Brantley reads as follows: "The Grand Jurors for the State upon their oath do present, that on said day and year aforesaid (the 10th day of June, A.D., 1960), at and in the County and State aforesaid Doc J. Brantley, late of said County, unlawfully and wilfully and feloniously did manufacture, sell or deal out spirituous liquors, to wit, 42 gallons of whiskey containing foreign properties or poisonous ingredients to the human system in violation of G.S. 14-329, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The jury returned a verdict of "guilty as charged," as to both defendants and the court imposed a sentence on each defendant of not less than five nor more than seven years in the State's Prison. The defendants appeal, assigning error.

Attorney General Bruton, Asst. Attorney General H. Horton Rountree for the State.

Robert A. Farris; Gardner, Connor & Lee for defendants.

DENNY, J. Each defendant assigns as error the refusal of the court below to sustain his motion in arrest of judgment.

The indictments are bottomed on the provisions of G.S. 14-329 which, in pertinent part, reads as follows: "If any person shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, he shall be guilty of a felony and shall be imprisoned in the State's prison not less than five years, and may be fined in the discretion of the court."

The bills of indictment do not follow the language of the statute in that they do not charge that defendants did manufacture, sell, or deal out spirituous liquors, *to be used as a drink or beverage,* to wit, 42 gallons of whiskey containing "foreign properties or *ingredients poisonous* to the human system, in violation of G.S. 14-329." (Emphasis added.) Instead, the bills of indictment charge that the defendants did manufacture, sell, or deal out spiritous liquors, to wit, 42 gallons of whiskey containing "foreign properties or *poisonous ingredients* to the human system in violation of G.S. 14-329 * * *." (Emphasis added.)

In our opinion, these bills as drawn do not require the State to show that any foreign properties contained in the whiskey were poisonous to the human system.

In light of the evidence offered by the State in the trial below, the bill or bills should have charged that the defendants unlawfully, wilfully and feloniously did manufacture, sell, or deal out spirituous liquors to be used as a drink or beverage, to wit, 42 gallons of whiskey, containing foreign properties and ingredients poisonous to the human system, to wit, lead salts and isopropyl alcohol, in violation of G.S. 14-329, *etc. S. v. Albarty,* 238 N.C. 130, 76 S.E. 2d 381; *S. v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81; *S. v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241.

In *S. v. Liles,* 78 N.C. 496, it is said: "Where the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, so as to bring it within all the material words of the statute * * *. Nothing can be taken by intendment." This statement was cited with approval in *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149.

In the last cited case, it is said: "An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the bill must either charge the offense in the language of the act, or specifically set forth the facts constituting the same."

In *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917, *Parker, J.,* speaking for the Court, said: "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; S. v. Morgan, 226 N.C. 414, 38 S.E. 2d 166; S. v. Miller, 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883." *S. v. Walker,* 249 N.C. 35, 105 S.E. 2d 101.

In the last cited case, this Court said: "And while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where as here the words do not in themselves inform the accused of the specific offense of which he is accused, so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." See also *S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245.

In our opinion, in order for the State to sustain a conviction upon an indictment based on the provisions of G.S. 14-329, the State must show that the defendant did manufacture, sell, or deal out spirituous liquors, to be used as a drink or beverage, containing poisonous foreign properties or ingredients in such quantity as to be injurious or dangerous to the human system.

The assignment of error by each defendant to the refusal of the court below to sustain his motion in arrest of judgment, is sustained. The verdict and sentences of imprisonment entered below are vacated.

The State, if so advised, may proceed against the defendants upon a proper bill or bills of indictment. *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413.

We deem it unnecessary to discuss the remaining assignments of error.

Judgments arrested.

DAWSON CONSTRUCTION CO., INC. v. THE HYDE COUNTY BOARD OF EDUCATION (A BODY CORPORATE).

(Filed 22 March, 1961.)

1. Pleadings § 7—

The answer should contain an admission or denial of the allegations of the complaint together with the statement of any new matter relied on as an affirmative defense and, in regard to any counterclaim, should allege with the same clearness and conciseness as a complaint the ultimate facts constituting the basis for the demand for affirmative relief.

2. Pleadings § 34—

Where the answer contains allegations of evidentiary matter, conclusion and argument, an order striking much of the detail from the answer proper and all of the counterclaim, including material allegations, will not be disturbed on appeal when the order also allows defendant further pleading both as to the answer proper and the counterclaim.

Here for review by appeal and by *certiorari* is an order entered on plaintiff's motion by *Cowper, J.,* striking certain parts of defendant's answer and all of its counterclaim.

The defendant excepted to the order and appealed, but apparently fearful of 4a, Rules of Practice in the Supreme Court, applied for a writ of *certiorari,* which the Court allowed.

George T. Davis, Fletcher & Lake, John A. Wilkinson, for defendant, appellant.

LaRoque and Allen, for plaintiff, appellee.

HIGGINS, J. Now before us is a new facet of the Mattamuskeet School row. The plaintiff is here for the first, the defendant for the

fourth time. *Topping v. Board of Education,* 248 N.C. 719, 104 S.E. 2d 857; *Topping v. Board of Education,* 249 N.C. 291, 106 S.E. 2d 502; and *Board of Education v. Mann,* 250 N.C. 493, 109 S.E. 2d 175. May we hope the history of this Hyde County School dispute, as disclosed by these cases, is about written and that hereafter more attention may be given to education and less to litigation.

However, this chapter of the case is yet in the pleading stage. The plaintiff, in substance, alleges: (1) A contract (in writing) to construct "a building to be known as 'Mattamuskeet High School' . . . at a base price of $114,328," monthly payments to be made as the work progressed. (2) Partial performance of the contract. (3) Breach and refusal on the part of the defendant to pay as agreed. (4) Cancellation of the contract by the plaintiff because of defendant's failure to meet payments. (5) Loss and damage by reason of the breach in the sum of $39,495.20. (6) Demand for and refusal to make payment.

The defendant filed answer which consisted of more than nine closely typed pages of the record. Because of the mass of evidentiary detail, summary is difficult. However, the following seems to be the framework of the answer proper: (1) The defendant did not have power and authority to execute the alleged contract or to obligate the county to carry it out. (2) The defendant at all times had full knowledge of this lack of authority. (3) All payments under the alleged contract were unlawfully made to, and wrongfully received by the plaintiff. (4) In no event did the plaintiff render services worth more than $6,000, and is estopped to claim more.

In addition to the answer proper, the defendant set up a counterclaim to recover approximately $20,000 unlawfully received from the public school funds and wrongfully retained by the plaintiff.

Upon plaintiff's motion, the court entered an order striking much of the detail from the answer proper and all of the counterclaim. The order, however, provides for further pleading on the part of the defendant, both as to the answer and as to the counterclaim. The answer as filed does not conform to the rules of good pleadings. "The function of a complaint is not the narration of the evidence but the statement of the substantive and constituent facts upon which . . . claim to relief is founded . . . Hence, 'the facts constituting a cause of action' required by the statute are the material, essential, and ultimate facts which constitute the cause of action — but not the evidence to prove them . . . . When a good cause of action is thus stated, evidence of the facts alleged, including every material detail, fact, and circumstance tending to establish the ultimate and issuable facts, is admissible." *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47.

Ordinarily, denial of the allegations of the complaint is sufficient to entitle the defendant to offer evidence to controvert the allegations. However, "The answer must contain any new matter relied on by the defendant as constituting an affirmative defense. G.S. 1-135. Setting forth new matter as a defense is an affirmative pleading on the part of the defendant and the facts should be alleged with the same clearness and conciseness as in the complaint." (citing authorities) *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530. For full citation of authorities, see Strong's North Carolina Index, Vol. 3, Pleadings, Sections 2 and 7.

While the defendant's answer contains much evidentiary detail, conclusion and argument, which the court properly struck out, nevertheless throughout the stricken matter appear some allegations of ultimate facts which, if true, may be pertinent to the defendant's alleged defense. After critical examination of the order we conclude the learned trial judge, in his attempt to prune the dead limbs from the tree, actually snipped off some live ones from which the defendant hopes to gather fruit.

The Court will not undertake to rewrite the answer. In the redraft the defendant, in addition to denying the plaintiff's allegations, may allege ultimate facts involving any new matter relied on as a defense. The counterclaim as an affirmative pleading should follow the rules stated in *Smith v. Smith, supra,* and *Guy v. Baer, supra,* and allege basic facts (not evidence) upon which it relies to establish its right to recover from the plaintiff. Judge Cowper's order makes ample provision for the defendant thus to proceed. At this stage we deal with pleadings only. Merits are not involved.

The order of Judge Cowper is

Affirmed.

STATE v. MARY ALICE CLOUD.

(Filed 22 March, 1961.)

Homicide §§10, 27—

Where defendant's evidence is to the effect that deceased had knocked her husband down with a table leg and was further threatening both defendant and her husband when defendant shot him, the error of the court in refusing to give the jury defendant's requested instructions upon her right to kill in defense of her husband is not cured by a reference to this principle near the end of the charge when in the main

portion of the charge the right to kill was repeatedly related solely to the right to do so in her own defense.

APPEAL by defendant from *Nettles, E.J.*, November 14, 1960 Special Term, MECKLENBURG Superior Court.

Criminal prosecution upon an indictment charging Mary Alice Cloud with the murder of Marshall F. Grier. Upon arraignment the Solicitor for the State announced he would only ask for a verdict of guilty of murder in the second degree or manslaughter, as the evidence might warrant. The defendant entered a plea of not guilty. Both the State and defendant presented evidence, upon which the jury returned a verdict of guilty of murder in the second degree. The court imposed a sentence of five to seven years in the Woman's Division of State's Prison. The defendant appealed, assigning errors.

T. W. Bruton, Attorney General, G. A. Jones, Assistant Attorney General, for the State.

Basil M. Boyd, for defendant, appellant.

HIGGINS, J. The evidence for the State disclosed the defendant and her husband, age 70, went to the Hi Fi Club in Charlotte, listened to the band and watched the dance. At about 1:30 at night they went downstairs to the cafeteria for something to eat. Richard Brown and Jessie Lee Bryant, his girl friend, were with them at the table. Brown and Jessie Lee had a dispute and Brown slapped her. At the time, Annie Mae Grier and her husband, the deceased, were working in the cafeteria — Marshall F. Grier in the kitchen and his wife serving the food. Mrs. Grier reprimanded Brown for striking Jessie Lee and as a result Brown and Mrs. Grier were scuffling and Brown picked up a chair. At this time the deceased came from the kitchen with a table leg in his hand. He struck at Brown and by accident hit Cloud on the head. As a result of the blow, Cloud fell to the floor, apparently unconscious. At this time the defendant went to her husband, kneeled down to ascertain his injuries, or to help him up.

To this point the evidence of both parties appears to be in agreement. Thereafter the evidence most favorable to the State tended to show the defendant, while the deceased was still holding the table leg, drew from her bosom a .22 pistol, fired two shots at Grier, one of which caused his death.

The defendant's evidence tended to show that after the deceased knocked the defendant's husband down with the table leg, he was further threatening both the defendant and her husband. Whereupon,

the defendant shot Grier to protect her husband and herself from further injury.

In apt time the defendant requested the court to charge the jury:

> "Insofar as the right to take human life is dependent upon the surrounding circumstances at the time, the defendant here, acting in defense of her husband would be in the same position as her husband acting in defense of himself. The facts and surrounding circumstances which excuse the killing of a person in defense of oneself, likewise excuses the killing in defense of a member of one's own family and the right in *this case* to defend her husband (from further serious injury) would be co-extensive with the right to defend herself."

The court failed to give the requested instruction but charged the jury repeatedly as to the defendant's rights to kill in her own self-defense:

> "In order to have the benefit of this principle of law the prisoner must show that he was free from blame; that the assault upon him was with a felonious purpose, or appeared to be such; that he took life only when apparently necessary to protect himself from death or great bodily harm. But if the one attacked uses such means or force only as may be necessary or as appears to be necessary to repel the attack and save himself from and the death of his assailant ensues, it is justifiable or excusable homicide. If, however, the person attacked used excessive force, or more force than appears to be necessary at the time of the encounter, to repel the assault, and kills his assailant, he is guilty of manslaughter.
>
> "It is the law of this State that if a man provokes a fight by unlawfully assaulting another, and in the progress of the fight he kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for his alleged assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary, in a plea of self defense it is necessary for the accused to show that he couldn't retreat before the mortal wound was given or retreat before he did so with safety and whether the necessity was real or apparent, kills his adversary for the preservation of his own life or to protect herself from death or great bodily harm.
>
> "In order to be guilty at all the prisoner must have fought willingly but wrongfully. If she fought willingly but rightfully,

that is exclusively in her own defense, no excessive force being employed, she should be acquitted, but she is entitled to have the jury judge her conduct by circumstances as they appeared to her at the time of the homicide."

The substance of the part of the charge just quoted was repeated thereafter more than once in the charge. True, near the end the court did tell the jury that the defendant had the same right to defend her husband that he had to defend himself, and if he was without fault in bringing on the difficulty, that she would have the same right to defend him that he would have to defend himself. However, so overbalanced was the charge on her right to defend herself, we fear the jury lost sight of her principal contention that she shot in defense of her husband.

While her testimony suggests that she had some fear for her own safety, her principal fear was for the safety of the husband who had already been knocked unconscious by the deceased who still retained his weapon, threatened to use it further, and was in a position to do so. Other witnesses lend stronger support to her fears for further injury to the husband than to herself.

Under the facts in this case the defendant was entitled to the instructions requested. *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *State v. Gaddy,* 166 N.C. 341, 81 S.E. 608; *State v. Greer,* 162 N.C. 640, 78 S.E. 310. The court's charge respecting her right to defend her husband was so inconsequential and so covered up in the charge as to her right to shoot in her own defense, we fear the result was unduly to focus the jury's attention on the weakness and away from the strength of her position.

The verdict and judgment are set aside and the defendant is awarded a

New trial.

STATE v. ROBERT FRANKLIN BURELL.

(Filed 22 March, 1961.)

1. Criminal Law § 173—

In a hearing under the Post-conviction Hearing Act the court should make findings of fact sufficient to support its order.

2. Same: Criminal Law § 17—

When the court, in a hearing under the Post-conviction Hearing Act, finds that the area in which the offense was committed was one in which the U. S. Government had assumed and exercised exclusive control in connection with a project for housing military personnel and civilian employees of the Federal Government, without a finding that the offense occurred within the boundary of a military base or that the Federal Government had exclusive criminal jurisdiction over the area, judgment that the Federal courts had exclusive jurisdiction must be remanded for the finding of sufficient and definite facts.

Proceeding under the North Carolina Post-conviction Hearing Act, G.S. 15-217, *et seq,* heard by *Morris, J.,* at the November 18, 1960 Term, of CRAVEN.

This case is before the Supreme Court upon a writ of *certiorari* pursuant to a petition by the solicitor on behalf of the State, as a result of an order entered in the proceeding below.

Robert Franklin Burell was tried at the November 1959 Term of Craven County Superior Court on an indictment charging rape. The defendant pleaded not guilty. The court appointed counsel to represent him. The jury returned a verdict of guilty of an assault with intent to commit rape, and the defendant was sentenced to imprisonment in the State's Prison for 15 years. He appealed to the Supreme Court and substitute defense counsel was appointed to represent him on appeal. This Court found no error. *S. v. Burell,* 252 N.C. 115, 113 S.E. 2d 16. Subsequently defense counsel instituted a proceeding under the Post-conviction Act referred to above and the matter was heard. The pertinent findings of fact of the judge are as follows:

"The court finds that the offense of which the defendant has been convicted was committed within an area over which the U. S. Government has taken, assumed and exercises exclusive custody and control for the purpose of housing project for military personnel and for civilian employees of the U. S. Government. The court finds as a fact that, while there is no evidence that there was a letter or other declaration issued by the U. S. Government to the Governor of the State of North Carolina, the declaration itself and the order entered in the U. S. District Court for the Eastern District of North Carolina indicates unequivocally that said area is within the custody,

control, possession of the U. S. Government for the purposes hereinbefore set forth."

Thereupon, on the basis of such findings, the court ruled that the Superior Court had no jurisdiction to try the defendant for the offenses and the jurisdiction was vested in the United States District Court for the Eastern District of North Carolina. The court then ordered that the defendant be held in custody to be delivered to the Marshall of the U. S. Court for the Eastern District.

The solicitor gave notice that he would apply for writ of *certiorari,* filed his petition therefor, and the same was granted by this Court.

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

Charles L. Abernethy, Jr., for defendant.

WINBORNE, C.J. The single assignment of error in case on appeal is that the court below erred in entering the order finding that the Superior Court of Craven County did not have criminal jurisdiction over the offense in this case. In this connection G.S. 15-221 requires that "When the said hearing is completed, the court shall make appropriate findings of fact, conclusions of law thereon and enter judgment upon said hearing * * *." See also *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513.

Upon a thorough reading of case on appeal it appears that Judge Morris failed to make certain "appropriate" findings of fact. There was no finding of fact as to where the alleged offense took place except "within an area over which the U. S. Government has taken, assumed and exercised exclusive custody and control for the purpose of housing project for military personnel and for civilian employees of the U. S. Government." There is no finding of fact that the alleged offense occurred on and within the boundary of the 337.01 acres that were added to the Cherry Point Base by condemnation proceedings in the Federal Court. There was no finding of fact that the United States Government had exclusive criminal jurisdiction over the area. The judge's order says "exclusive custody and control for the purpose of housing" military personnel and civilian employees of the Federal Government. In short there are not sufficient subsidiary findings of fact to support the ultimate conclusion reached by the court.

Therefore, in the absence of sufficient and definite findings of fact, the case should be remanded to the Superior Court to the end that the facts may be sufficiently and definitely found, that the court can more accurately and safely pass upon the conclusion of law.

Error and remanded.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. CAROLINA COACH COMPANY.

(Filed 22 March, 1961.)

Carriers § 4: Utilities Commission § 5—

The order of the Utilities Commission denying petition for authority to abandon bus service between designated points is properly affirmed when the findings of the Commission are supported by competent, material and substantial evidence and the Commission's order based thereon is reasonable and just.

APPEAL by Carolina Coach Company from judgment of *Paul, J.*, entered December 20, 1960, MARTIN Superior Court.

Petitioner, Carolina Coach Company, is a common carrier of passengers by motor vehicle under interstate and intrastate franchises. Its system covers approximately 3,800 highway miles. Its North Carolina intrastate franchise routes include the following: "Williamston to Columbia over U. S. Highway 64 via Plymouth, Roper, Scuppernong and Creswell."

On July 8, 1958, petitioner filed with the North Carolina Utilities Commission (Commission) a petition for authority to abandon its franchise and to discontinue its existing services over this segment (approximately 17 miles) of said franchise route: "Between Columbia and the junction of U. S. Highway 64 and N. C. Highway 32 approximately 4.1 miles west of Scuppernong via U. S. Highway 64." Petitioner would continue its service on U. S. Highway 64 between Williamston and said junction and on N. C. Highway 32 between said junction and Norfolk.

The specific result, if the petition were granted, would be the elimination of its bus (Run #151), which leaves Columbia at 8:30 a.m. and arrives in Williamston at 9:55 a.m., and of its bus (Run #150), which leaves Williamston at 7:25 p.m. and arrives in Columbia at 8:50 p.m. This would deprive Columbia, the county seat of Tyrrell County, and the towns of Creswell and Scuppernong in Washington County, of bus service. There would be no scheduled passenger service by bus in Tyrrell County. (Note: There is no passenger service by train in Tyrrell County.)

Petitioner asserted, in substance, (1) that public convenience and necessity do not require or justify the continuance of regularly scheduled operations over said route, and (2) that, in its present operations over said route, the revenue per mile is considerably less than the cost per mile.

Protest was made by Tyrrell County, the towns of Columbia and Creswell, and certain individuals.

At a hearing on October 3, 1958, at Williamston, N. C., before Commissioner Worthington, petitioner and protestants presented their evidence. By Order of October 28, 1958, the Commission denied said petition. Petitioner's exceptions thereto were overruled by the Commission's Order of January 23, 1959.

The Commission's Order includes (1) an extended narrative of factual data, and (2) the following findings of fact:

> "1. Public convenience and necessity requires that the Petitioner continue its present bus service between Williamston, North Carolina, and Columbia, North Carolina.
>
> "2. Public convenience and necessity requires that the Petitioner not abandon its franchise route between Columbia, North Carolina, and the intersection of U. S. Highway 64 with N. C. Highway 32 at Pea Ridge.
>
> "3. Public convenience and necessity requires that the Petitioner provide a regular bus stop for both of its buses at Creswell, North Carolina, and deliver express shipments consigned to Creswell at Creswell instead of Columbia.
>
> "4. The over-all operation of the Petitioner is such that it is not justified in discontinuing bus service between Williamston, North Carolina, and Columbia, North Carolina, and in abandoning its franchise between Columbia and the intersection of U. S. Highway 64 with N. C. Highway 32 at Pea Ridge."

The Commission's Order, based on said findings of fact, was as follows:

> "IT IS THERFORE ORDERED that the petition of Carolina Coach Company to abandon its franchise route between Columbia and the intersection of U. S. Highway 64 and N. C. Highway 32 at Pea Ridge be, and the same is hereby denied.
>
> "IT IS FURTHER ORDERED that the petition of Carolina Coach Company to discontinue its present scheduled bus service of Runs 150 and 151 between Williamston and Columbia be, and the same is hereby denied.
>
> "IT IS FURTHER ORDERED that Carolina Coach Company make arangements for a station at Creswell where the bus will regularly stop and where passengers and express shipments may be picked up and discharged."

After the hearing in the superior court, judgment was entered over-

ruling petitioner's exceptions and confirming the Commission's Order. Petitioner excepted and appealed, assigning as error the entry of said judgment and particularly the overruling of its several exceptions to statements of fact and findings of fact set forth in the Commission's Order.

H. L. Swain for protestants, appellees.
Allen, Hipp & Steed and Griffin & Martin for petitioner, appellant.

BOBBITT, J. After a careful analysis of the evidence in relation to petitioner's exceptions, Judge Paul held "that the facts found and approved by the Utilities Commission are supported by competent, material and substantial evidence, and that said Commission's conclusions and Order based thereon are reasonable and just."

Discussion of the evidence in relation to each of petitioner's eleven assignments of error, based on its thirty-two exceptions, would serve no useful purpose. Suffice to say, the evidence has been considered carefully; and consideration thereof, in the light of the legal principles recently stated in *Utilities Commission v. R. R.*, 254 N.C. 73, 118 S.E. 2d 21, impels the conclusion that Judge Paul's (quoted) ruling and judgment are correct. Hence, Judge Paul's judgment is affirmed.

Affirmed.

ANDERSON LEWIS HELTON v. J. P. STEVENS COMPANY, INC., AND JOHN MARABLE.

(Filed 22 March, 1961.)

1. Bill of Discovery § 3—

Where plaintiff sues to recover for brain injury received in the accident in suit, the court has inherent and discretionary power to grant defendants' application for order requiring plaintiff to submit to an examination by a specialist to obtain evidence as to the extent of plaintiff's injury, plaintiff having denied defendants' request for such medical information.

2. Same—

In granting defendants' application for an examination of plaintiff by an expert to determine the extent of plaintiff's brain injury, the court should make the selection of the expert independently of either party, and where the court selects the expert requested by the one and opposed by the other, the cause will be remanded.

APPEAL by plaintiff from *Craven, S.J.*, January 16, 1961 Term, GASTON Superior Court.

The plaintiff instituted this action to recover $75,000 for personal injuries alleged to have been the proximate result of defendants' actionable negligence. According to his allegations the plaintiff suffered severe brain injuries in a collision between his automobile and a "sleeping cab tractor" operated by the individual defendant as agent of the corporate defendant.

By answer the defendants denied their negligence and the plaintiff's injury. The defendants applied to the court for an order requiring the plaintiff to submit to a specifically designated neurologist for examination as to the nature and extent of the plaintiff's brain injury, request for such medical information having been denied. The court made the order as requested by the defendant. The plaintiff assigned error on two grounds: First, the lack of authority on the part of the court to order the plaintiff to submit to the examination; second, the selection of the neurologist nominated by the defendants. The plaintiff excepted and appealed.

Dolley & Dubose, for petitioner, appellant.
Mullen, Holland & Cooke, for defendants, appellees.

HIGGINS, J. As a general rule, judges of trial courts have inherent power in their discretion to order physical examinations of the character here involved. The ends of justice, and the particular facts of each case, dictate the manner in which the court shall exercise the power. *Flythe v. Coach Co.*, 195 N.C. 777, 143 S.E. 865; 27 C.J.S., "Discovery," Sections 37 and 38; 17 Am. Jur., "Discovery and Inspection," Sec. 43. Under the facts as disclosed by the motion and the verified pleadings, the plaintiff's first assignment of error is not sustained. 51 A.L.R. 183; 108 A.L.R. 142.

The plaintiff's second assignment presents a procedural question. To make the examination, the court, over plaintiff's objection, designated the particular specialist suggested by the defendants in their motion. It goes without saying the exclusive duty to make the selection rests with the Court. Neither party should have advantage in the selection. "When the examination is compulsory, there is obvious propriety in the selection of the experts by the court rather than by one or both of the parties . . . The court, in making the order . . . and in designating the experts to execute it, is serving the interest of neither the defendant nor the plaintiff, but the ends of justice." 17 Am. Jur., "Discovery and Inspection," Sec. 45.

We are certain the learned trial judge did not intend to hold the scales unevenly between the parties when he selected the specialist requested by one and opposed by the other. It was the duty of the court to make the selection independently of the wishes of either. To the end that even appearances of favoritism may be removed, the order is modified and the cause is remanded for the court to select the specialist to execute its order for the examination. The defendants will pay the costs of this appeal.

Modified and affirmed.

ROY L. JONES, ADMINISTRATOR OF THE ESTATE OF MARVIN COMER JONES, DECEASED, PLAINTIFF v. DOUGLAS AIRCRAFT CO., INC., ORIGINAL DEFENDANT AND BOYD & GOFORTH, INC., ADDITIONAL DEFENDANT.

(Filed 22 March, 1961.)

Torts § 6—

Where the original defendant settles the controversy between it and plaintiff by compromise judgment, and irrevocably assigns the judgment to a trustee to prosecute the action against the additional defendant for contribution, there is no case in court in which the claim for contribution in the name of the original defendant against the additional defendant may be prosecuted. G.S. 1-240.

APPEAL by original defendant Douglas Aircraft Co., Inc., from *Craven, S.J.*, February 13, 1961 Special Term, MECKLENBURG Superior Court.

The original defendant attempted to assert a cross action for contribution against the additional defendant, Boyd & Goforth, Inc. For full discussion of the pleadings and the issues involved, see *Jones, Administrator v. Douglas Aircraft, Inc.*, 253 N.C. 482, 117 S.E. 2d 496.

The present appeal involves an order of the superior court denying the original defendant's motion further to amend its cross action for contribution against the additional defendant. The Superior Court of Mecklenburg County certified to this Court its consent judgment decreeing that the plaintiff recover of the original defendant the sum of $50,000 in discharge of its liability to the plaintiff on account of the death of plaintiff's intestate. The record discloses the judgment was paid in full by Douglas Aircraft Co., Inc., and transferred to its trustee. "This assignment is without recourse and vests in William B. Webb, Trustee for Douglas Aircraft Co., Inc., complete, absolute

and irrevocable power — to prosecute for the benefit of Douglas Aircraft Co., Inc., the benefits of the provisions of Section 1-240, General Statutes of North Carolina." The original defendant excepted to the court's order refusing to permit further amendment, and appealed.

Carpenter, Webb & Golding, for original defendant, appellant.

Helms, Mulliss, McMillan & Johnston, for additional defendant, appellee.

PER CURIAM. This appeal involves another attempt on the part of the orginial defendant to assert against the additional defendant a cross action for contribution. As pointed out in the prior appeal, the demurrer to the cross action was sustained for failure to allege sufficient facts to show breach of duty upon the part of the additional defendant as a contributing cause to the death of plaintiff's intestate. The amendment now involved does not cure that defect. It does not supply allegations of fact sufficient for that purpose.

By the compromise judgment and the assignment thereof, the original parties have settled their controversy. There is no case left in court in which the original defendant may now proceed against the additional defendant. Moreover, all the original defendant's rights are irrevocably assigned to its trustee who appears now to be the real party in interest. Another stumbling block in appellant's way is the right of appeal from an order which appears to have been entered in the court's discretion.

Whether the original defendant, or its trustee, may maintain an independent action for contribution is not now before us. The order denying the motion to amend is

Affirmed.

WILMER CREEL v. PIEDMONT NATURAL GAS COMPANY, INC.

(Filed 22 March, 1961.)

Injunctions § 1—

The issuance of a preliminary mandatory injunction rests in the sound discretion of the trial court, and its order denying the relief will not be disturbed unless contrary to some rule of equity or abuse of discretion is made to appear.

CREEL *v.* GAS COMPANY.

APPEAL by plaintiff from *Farthing, J.*, 15 August Term 1960, of MECKLENBURG.

This is a civil action in which the plaintiff seeks to recover actual and punitive damages against the defendant, resulting from the discontinuance of service to the plaintiff, and for a mandatory injunction requiring the defendant to furnish gas to the plaintiff and to reconnect the service without charge therefor.

When this matter came on for hearing, it was stipulated and agreed by the parties that service would be restored upon payment to the defendant by the plaintiff of $20.15, the amount of the accumulated and unpaid bills due the defendant by the plaintiff, plus the additional charge of $1.00 as a reconnection fee.

The court below heard the plaintiff upon his application for a preliminary mandatory injunction to require the defendant to supply him with natural gas at his residence in the City of Charlotte.

The court, after considering the affidavits filed by the parties, the stipulation of facts, the oral testimony of witnesses, and the argument of counsel, found the facts and set them out in its order.

Upon the facts found, the court held that the plaintiff has suffered no irreparable injury; that he has an adequate remedy at law; and has failed to show that he is entitled to a mandatory injunction. Whereupon, the court, in its discretion, denied the plaintiff's application for a preliminary mandatory injunction and entered an order accordingly.

The plaintiff appeals, assigning error.

Don Davis for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman; Edgar Love, III, for defendant appellee.

PER CURIAM. The question whether a preliminary mandatory injunction should be issued, rests in the sound discretion of the trial court and will not be disturbed on appeal "unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." *Whaley v. Taxi Company*, 252 N.C. 586, 114 S.E. 2d 254, and cited cases.

No abuse of discretion is made to appear in this cause.

Affirmed.

JOSEPH DANIEL BISTANY v. WALTER BOYCE McGEE AND BETTY DIXON McGEE.

(Filed 22 March, 1961.)

APPEAL by defendant from *Huskins, J.*, August 29, 1960, Schedule "A" Civil Term, of MECKLENBURG.

Personal injury action in which the jury, having answered issues of negligence and contributory negligence in favor of plaintiff, awarded damages in the amount of $3,500.00.

At the close of all the evidence, judgment of voluntary nonsuit was entered as to Betty Dixon McGee, originally a defendant herein. Hence, the word "defendant" refers solely to Walter Boyce McGee.

Plaintiff's injuries were caused by a collision between a 1953 Mercury operated by plaintiff and a 1957 Chevrolet operated by defendant. The collision occurred in Charlotte, N. C., on October 31, 1958, about 7:40 p.m., at the intersection of Independence Boulevard and Hawthorne Lane. Automatic traffic control signals, erected for the regulation of traffic at this intersection, were functioning properly at the time of the collision.

Independence Boulevard is a six-lane street, three lanes for eastbound and three for westbound traffic. It is approximately 82 feet wide from curb to curb. Hawthorne Lane, a north-south street, is approximately 44 feet wide. In the center of Independence Boulevard, at the approaches to Hawthorne Lane, a cement traffic island (some seven inches high) separates the eastbound from the westbound lanes.

Plaintiff, driving east on Independence Boulevard, approached the intersection in the left (north) lane for eastbound traffic in order to make a left turn into and proceed north on Hawthorne Lane. Defendant's purpose, driving west on Independence Boulevard, was to proceed through the intersection and continue west on Independence Boulevard. There was evidence that the collision occurred in that portion of the intersection where the center westbound lane of Independence Boulevard crosses Hawthorne Lane.

Conflicting evidence as to the basic factual situation includes the following:

Plaintiff's evidence tends to show that, as he approached said intersection, the traffic light facing him was green; that he proceeded some five feet into Hawthorne Lane and stopped; that cars were in the left (south) lane for westbound traffic, the proper lane from which to make a left turn and proceed south on Hawthorne Lane; that he turned left and started across the lanes for westbound traffic on Independence Boulevard and headed north on Hawthorne Lane (1) after

the traffic light facing him had changed to yellow, (2) after a car or cars in the left (south) lane for westbound traffic on Independence Boulevard had stopped, and (3) after looking but observing no westbound car in either the center or right (north) lane for westbound traffic on Independence Boulevard; and that the traffic light facing defendant (after first changing to yellow) had changed to red before defendant reached and entered the intersection.

Defendant's evidence tends to show that he approached and entered the intersection in the center lane for westbound traffic on Independence Boulevard when the traffic light facing him was green; that he observed plaintiff had stopped in the intersection, apparently waiting for westbound traffic to clear the intersection before he attempted to make a left turn; and that, just as defendant reached the intersection, plaintiff made a sudden left turn across defendant's line of travel.

Judgment was entered in accordance with the verdict. Defendant excepted and appealed, assigning errors.

Robert F. Rush, John F. Ray and Charles T. Myers for plaintiff, appellee.

Pierce, Wardlow, Knox & Caudle and Stuart R. Childs for defendant, appellant.

PER CURIAM. The conclusion reached is that the evidence, when considered in the light most favorable to plaintiff, presented a question for jury determination upon the issues submitted. Defendant's motions for judgment of nonsuit were properly overruled.

Careful consideration of each of the assignments of error brought forward and discussed in defendant's brief fails to disclose any error of law deemed of sufficient perjudicial effect to warrant a new trial. As to assignments of error relating to the court's charge, the instructions given were sufficient to draw into focus the crucial questions of fact for jury determination and to apply the law thereto in substantial accord with the decisions of this Court. No new question of law is involved. Hence, it would serve no useful purpose to discuss each of defendant's assignments of error in detail.

No error.

AARON THOMAS DEAL v. LEISURE LADS, INC.

(Filed 22 March, 1961.)

APPEAL by plaintiff from *Sharp, S.J.*, 9 January 1961 Special Civil Term of MECKLENBURG.

Civil action to recover damages for personal injuries.

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

Hugh M. McCauley and J. C. Sedberry for plaintiff, appellant.

Carpenter, Webb & Golding by: John G. Golding for defendant, appellee.

PER CURIAM. Fairview Church Road intersects almost at right angles U. S. Highway No. 21 about three miles south of the town of Mooresville. U. S. Highway No. 21 has a posted 60 miles an hour speed limit. There were traffic islands east and west of the intersection and stop signs on the Fairview Church Road. About 11:30 a.m. on 11 May 1959 plaintiff, a man 69 years old, drove an automobile from Fairview Church Road into this intersection, and was crossing the intersection at a speed of five to eight miles an hour, when there was a collision between his automobile and a station wagon driven by an employee of defendant on U. S. Highway No. 21 at a speed of 60 miles an hour, resulting in injuries to plaintiff.

It would serve no useful purpose to state a summary in detail of plaintiff's evidence. After a careful study of all the evidence, it is our opinion that what *Stacy, C.J.*, said for the Court in *Houston v. City of Monroe*, 213 N.C. 788, 197 S.E. 571, is applicable here: "In the circumstances thus disclosed by the record, we are constrained to hold that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence."

The judgment of nonsuit below is

Affirmed.

ADELL Q. HENDERSON v. ROCHESTER AMERICAN INSURANCE COMPANY.

(Filed 29 March, 1961.)

1. **Insurance § 62—**

Conditions in a policy of automobile liability insurance that insured should give notice and cooperate in the defense of any action which might result in a judgment against the insured is, in the absence of statutory provision to the contrary, binding on the parties and enforceable.

2. **Same—**

The cooperation clause in a policy of liability insurance must be given a reasonable interpretation to accomplish the purpose intended, which is to put the insurer on notice and afford it opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and insured's violations of the clause which do not affect this purpose but which are merely technical or immaterial and do not prejudice insurer, will not prevent recovery on the policy.

3. **Same— Whether insurer was prejudiced by false statements of insured, corrected years before the trial, held question of fact upon the evidence.**

Where the evidence is to the effect that insured repeatedly made false statements after the accident that he was not driving the vehicle at the time, that shortly after the institution of action against insured, insured corrected his statement and notified insurer that he was driving the vehicle, that voluntary nonsuit was taken in the action and another action instituted within one year thereof, that insurer, on the ground of breach by insured of the cooperation clause of the policy, refused to defend either action, and that the action against insured was tried some three years after insured had corrected his misstatement and notified insurer thereof, *is held* to raise the issue of fact as to whether insured's misstatements prejudiced insurer, and the determination of such question of fact by the court adversely to insurer in a trial by the court under agreement of the parties is affirmed.

PARKER, J., dissents.

APPEAL by defendant from *Paul, J.*, December 1960 Term, of DUPLIN.

Defendant issued plaintiff (hereafter called Henderson) an automobile liability insurance policy. It was in force in January 1955. Subject to the conditions of the policy, defendant agreed to pay on behalf of Henderson all sums, within the policy limits, which Henderson became obligated to pay as damages because of bodily injury or death resulting from the ownership or use of the automobile named in the policy; defend any suit against Henderson growing out of the

operation of the motor vehicle; and pay all costs taxed against Henderson as a result of such litigation.

Defendant's obligation was on condition that Henderson "shall cooperate with the company and, upon the company's request, shall attend hearings and trials, and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." The policy contained this further condition: "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. . ."

About 1:00 a.m., 30 January 1955, Henderson was operating the insured automobile. William J. Parker, Jr., was riding as a guest in the front seat of the automobile. When Henderson attempted to round a curve, he lost control of the vehicle and an accident ensued, resulting in Parker's death. Henderson said to Roscoe English, the first to arrive at the scene of the accident: "It is my car but he (meaning Parker) was driving." Henderson informed Highway Patrolman Briley, investigating the accident, the vehicle was operated by Parker and not by Henderson. Similar statements were made to the attorney for defendant insurance company. All of these statements were made shortly after the accident. Henderson gave defendant a written statement dated 1 February 1955 to the effect that Parker was operating the motor vehicle at the time of the accident.

On 18 May 1955 the administratrix of Parker's estate instituted suit for $25,000 damages for the wrongful death of her intestate. On 29 May 1955 and after process had been served in the action for damages for wrongful death, Henderson made an affidavit which he gave to Briley, stating that he, Henderson, was driving, and "William Jr. Parker was riding in the right front. . . I was driving between 65 and 75 mph. We met a car and his lights blinded me. I ran off on the right shoulder, when I pulled it back to the left, it went out of control, and turned over several times. I had drank some beer that night, 3 cans since midnight."

On 20 May 1955 Henderson notified defendant of the action against him for damages and that he, Henderson, was driving the vehicle. On 23 May 1955 Henderson agreed with defendant that it might investigate the accident without prejudice to its rights under the contract. On 15 June 1955, defendant notified Henderson "that because of your failure to cooperate in giving the company the true facts about this matter that you have voided your insurance policy . . . we hereby disclaim all liability to you by reason of the accident which occurred on or about January 30, 1955."

The personal representative of Parker, in her action for damages at the February 1957 Term of Duplin County, submitted to a voluntary nonsuit. Thereafter and within one year from the judgment of nonsuit she brought a new action. Defendant was notified of the new action. It again declined to defend, asserting Henderson's conflicting statements as to the driver as a breach of the contract provisions. That action was tried at the December 1958 Term of Duplin. Judgment was rendered against Henderson for the sum of $4,291 and $31.25 costs. Henderson has paid $250 and is obligated to pay an additional $500 attorney's fees for services rendered him in the actions for damages for Parker's death. Henderson has paid the damages and costs awarded Parker's administratrix to avoid a sale of his property under execution.

The parties waived jury trial. They stipulated the facts as summarized above. In addition to the facts stipulated they agreed: "that the Court may find such additional facts which it considers necessary or advisable for a complete determination of this controversy, together with such inferences as may be drawn by the Court from the stipulated facts or those which may be found by the Court."

The court found any misstatements made by Henderson were corrected and defendant given final version of the accident on 20 May 1955, that defendant had from that date until December 1957 in which to make any investigation and prepare such defense as it deemed advisable.

"That the defendant insurance company, as insurer, was not materially prejudiced by the original false statements of the said Adell Q. Henderson, its insured, or by the alleged non-cooperation on his part, the said false statements having been corrected long prior to the trial of the cause which resulted in the judgment against the insured; that the said defendant insurance company had the facts and was in a position to settle if it saw fit to settle, or to defend if it saw fit to defend.

"That the said original misstatements by the insured, corrected by him as herein recited, did not constitute a material deviation from the contract of insurance and did not result in the substantial impairment of any of its policy rights, or any detriment or injury; that the said defendant insurance company had sufficient time to investigate and prepare for trial or adjust the claim if it were deemed the preferable course; that said defendant insurance company suffered no detriment or injury by reason of the original misstatements on the part of its insured and the same did not constitute a breach of the provisions of the contract of insurance which plaintiff had with the defendant and, consequently, did not work a forfeiture."

Based on the facts as stipulated and found by the court, it concluded as a matter of law that defendant was liable on its insurance policy for the amount adjudged owing by Henderson to the Parker estate, costs incurred, and the sum of $750, attorney's fees. Defendant excepted and appealed.

Beasley & Stevens for plaintiff appellee.

Rivers D. Johnson, Jr., C. D. Hogue, Jr., and W. J. P. Earnhardt, Jr., for defendant appellant.

RODMAN, J. The provisions of liability insurance policies imposing as conditions to liability the duty of insured to give notice of accidents and cooperation in the defense of actions which might result in a judgment against insured are, except where otherwise provided by statute, binding on the parties. Properly interpreted, they will be enforced. *Muncie v. Insurance Co.*, 253 N.C. 74; *Peeler v. Casualty Co.*, 197 N.C. 286, 148 S.E. 261.

The provisions are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with insurer in the defense of any action which may be brought against insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial. *Ball v. Assurance Corp.*, 206 N.C. 90, 172 S.E. 878; *Mewborn v. Assurance Corporation*, 198 N.C. 156, 150 S.E. 887; *Hunt v. Fidelity Co.*, 174 N.C. 397, 93 S.E. 900; *MacClure v. Casualty Co.*, 229 N.C. 305, 49 S.E. 2d 742, where it is said: "While there is some contrary authority, the better reasoned cases hold that the failure to co-operate in any instance alleged must be attended by prejudice to the insurer in conducting the defense. Blashfield, Automobile Law, Vol. 6, sec. 4059, p. 78."

The criticism of *MacClure v. Casualty Co., supra,* in *Muncie v. Insurance Co., supra,* was not directed to the question now under consideration but to the question of who carried the burden of proving reasonable notice given to insurer of the accident and potential liability under its policy.

Circuit Judge Parker said, in *State Automobile Ins. Co. v. York*, 104 F 2d 730: "It is well settled that, to relieve the insurer of liability

on the ground of lack of cooperation, discrepancies in statements by the insured must be made in bad faith and must be material in nature and prejudicial in effect. *Medico v. Employers' Liability Ins. Corp.*, 132 Me 422, 172 A 1; *Ocean Accident & Guarantee Corp. v. Lucas*, 6 Cir., 74 F 2d 115, 98 A.L.R. 1461."

In *Griffin v. Fidelity & Casualty Company, New York*, 273 F 2d 45, the insured notified the insurer that he was operating the car at the time of the collision which occurred in July 1957. Insured pleaded guilty to a charge of aggravated assault caused by the collision. In December 1957 action for damages was instituted. Not until 28 February 1958 did the insured give the insurer a correct statement of the facts. His position was that he was seeking to protect his nephew, who was actually driving, from criminal charges. The court disposed of the insurer's contention that the policy had been breached by lack of cooperation by the false statement. It said: ". . .(U)nder the overwhelming weight of authority, including that of the courts of Texas, it is the law that it is essential to proof of breach of the cooperation clause, that actual, not merely suppositious or theoretical prejudice to the insurer therefrom be shown . . ."

These statements of the law find support in *Norwich Union Indemnity Co. v. Haas*, 179 F 2d 827; *Juvland v. Plaisance*, 96 N.W. 2d 537; *General Acc. Fire & Life Assur. Corp. v. Rinnert*, 170 F 2d 440; *Rowoldt v. Cook County Farmers Mut. Ins. Co.*, 26 N.E. 2d 903; *Bernadich v. Bernadich*, 283 N.W. 5; *Cowell v. Employers' Indemnity Corporation*, 34 S.W. 2d 705; 5A Am. Jur. 138-9.

What conduct suffices to relieve the insurer from liability for breach of the cooperation clause in policies similar to the one under consideration is the basis for annotations appearing in 34 A.L.R. 2d 266, 139 A.L.R. 780, 98 A.L.R. 1469, and 72 A.L.R. 1455.

As might be expected, courts have been called upon to decide cases based on many differing factual situations. Where there has been evidence tending to show collusion between the injured and the insured, courts have been careful to protect the insurer. Courts usually hold that misstatements persisted in until the trial or subsequent to the filing of pleadings by insured requiring a shifting of ground and a new and different defense suffice as a matter of law to establish a failure to cooperate. Except for these classes of cases, courts generally hold the question of materiality and prejudice is a question for the jury. This case falls in the latter category. There is nothing to suggest collusion. Judge Paul inquired of the parties if there was any evidence in addition to the stipulation on the question of insured's noncooperation or on the effect of prejudice because of misstatements made

prior to the institution of the civil action. He was informed no further evidence would be offered.

We are of the opinion and hold that the question of compliance with the cooperation clause was a question of fact to be determined by the court, acting by agreement of the parties as a jury.

Affirmed.

PARKER, J., dissenting. Judge Paul found as facts in substance that defendant, as insurer, was not materially prejudiced, and suffered no detriment or injury by the false statements of plaintiff, the insured. Defendant assigns this as error, for the reason there is no evidence to support such findings of fact. I think the assignment of error No. 1 is good, and should be sustained.

In my opinion, the judge's conclusions of law and judgment, which are assigned as errors by defendant, are erroneous.

The policy provides: *"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 . . . ."* Emphasis mine. One of the terms of the policy is the co-operation clause set forth in the majority opinion. This provision as to co-operation is material, and the deliberate breach thereof by plaintiff here releases the insurer from the obligations imposed by the contract of insurance, although no prejudice may have resulted. This principle of law is supported by the overwhelming weight of authority. *Peeler v. Casualty Co.*, 197 N.C. 236, 148 S.E. 261; *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474; *Houran v. Preferred Acc. Ins. Co. of New York*, 109 Vt. 258, 195 A. 253, where an abundance of authority is cited in support of the rule; *State Farm Mut. Auto Ins. Co. v. Cassinelli*, 67 Nev. 227, 216 P. 2d 606, 18 A.L.R. 2d 431; 98 A.L.R. 1467; 18 A.L.R. 2d p. 452 — Annotation, § 5, where compliance is expressly made a condition precedent. These cases and the annotations are concerned with the insured's failure to give timely notice, but the principle of law is the same as the principle of law applicable to the facts and the policy provisions here.

Plaintiff has no allegation in his complaint that the insurer has by waiver or estoppel lost its right to defeat a recovery under the provisions of its policy in this case.

The greater weight of current authority and the sounder reason, I think, support the views expressed by *Chief Judge Cardozo* in *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443, where he said speaking for a unanimous Court: "The plaintiff makes the point that the default should be condoned,

since there is no evidence that co-operation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free. The argument misconceives the effect of a refusal. Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent."

In *Buckner v. Buckner,* 207 Wis. 303, 241 N.W. 342, 344, it is said that "co-operation" was defined almost universally as in the *Coleman* case, *supra.* It was further held: "It is quite apparent that, if the insurer is to prepare an adequate defense in cases of contested liability, or make a just settlement, it must have from the insured a complete and truthful statement of the facts made in a spirit of co-operation and helpfulness by the insured who is, in many cases at least, the only source of information available to the insurer. This is not to say that any slight error in the statement of facts or failure to disclose some collateral fact will necessarily be held to amount to a breach of the contract, but the withholding of information, the making of untruthful statements, and the concealing of necessarily relevant and material facts can have but one purpose, and that is to help the claimant rather than the insurer."

In *United States Fidelity & Guaranty Co. v. Wyer,* 60 F. 2d 856, it was held: Non co-operation of insured held established as matter of law in action against insurer by person injured, where insured admittedly misrepresented to insurer facts respecting accident.

In *Brogdon v. American Automobile Ins. Co.,* 290 Mich. 130, 287 N.W. 406, it was held: Where automobile liability insurance policy required insured to furnish truthful account of circumstances leading up to and attending accident in which automobile might be involved, and insured claimed that he was not driving the automobile when it struck pedestrian and did not disclose that he was driving the automobile at such time until one-half day of trial of pedestrian's action against insured and insurer had elapsed, and insurer was diligent in its investigation of the facts and insured's false statement prevented earlier knowledge of liability, insured's conduct voided policy and absolved insurer from liability to pedestrian.

My views here have been well expressed by the statements and the reasoning of the Supreme Court of Appeals of Virginia in *State Farm Mut. Automobile Ins. Co. v. Arghyris,* 189 Va. 913, 55 S.E. 2d 16, a case with somewhat similar facts, where it is said: "It

seems perfectly apparent that the conduct of Bohler was a clear violation of the conditions of the policy. The evidence discloses a willful and deliberate breach by him of a material and essential clause, whereby he repeatedly misled the insurance company over a period of many months. He not only failed to claim the protection of the policy; but denied the liability of the company to him or to any one claiming through him, and this handicapped the insurer in the consideration of its liability. The insurer was, by the acts of Bohler, deprived of an opportunity to determine for itself, through an immediate investigation, aided by a true statement from its insured, whether it was liable and, if liable, whether it was advisable to make a settlement with the insured person without suit. There was a withholding of information, the making of untruthful statements, and the concealment of necessary, relevant, and material facts, actions not calculated to aid the insurer. There is no question of a minor variance in his testimony of unintentional or inadvertent statements, or of mere failure to disclose some collateral fact. Bohler failed to give to the company written notice of the accident of May 7th 'as soon as practicable.' He never gave any notice, except indirectly, until the day of the trial of the proceedings against him, that is, on December 5, 1947. His credibility was destroyed by reason of his contradictory testimony and affidavits, and whether or not he had any defense to the charge of negligence in operating the automobile, the conclusion is inescapable, that it could have made little difference had the company been required to rely upon his testimony. He did not merely neglect the performance of the cooperation condition, he willfully and deliberately failed to comply with it. Nothing is more mischievous or dangerous in litigation than a client who deliberately falsifies the facts in the preparation of his case." The *Virginia* case cites voluminous authority to support its position.

In my opinion, the deliberate and wilful conduct of plaintiff, the insured, was such a refusal to co-operate as to violate the policy. If the express conditions precedent to liability could be disregarded, insurers would be helpless to defend themselves against the chicanery and covin of their insured, and would be at their mercy. The law cannot make for plaintiff here a better contract than he chose to make for himself. *Whittle v. Associated Indemnity Corp.*, 130 N.J.L. 576, 33 A. 2d 866. By the majority opinion plaintiff here is allowed to profit by his own deliberate and false statements, which false statements are admitted by plaintiff. I vote to reverse, and to remand the case for a judgment of nonsuit.

FRANK G. TEMPLETON AND WIFE, EVELYN B. TEMPLETON, PETITIONERS, v. STATE HIGHWAY COMMISSION, RESPONDENT.

(Filed 29 March, 1961.)

1. Eminent Domain § 5—

The measure of compensation for the taking of a part of a tract of land for highway purposes is the difference in the fair market value of the entire tract before the taking and the fair market value of that remaining immediately after the taking, ascertained by adding the fair market value of the land taken to any diminution in value of the remaining land, and subtracting any general and special benefits resulting to the remaining land.

2. Eminent Domain § 6—

In proceedings to assess compensation for the taking of a part of a tract of land, any evidence which aids the jury in fixing the fair market value of the land taken and the diminution in value of the remaining land is competent, but evidence having only a conjectural or speculative bearing upon this question is incompetent.

3. Same—

Where there is no evidence from which the jury could find the amount, if any, of mud and silt which flowed into petitioners' lake as the result of the taking of a part of petitioners' land for highway purposes, evidence in regard thereto is incompetent.

4. Same—

Where the taking of a part of petitioners' land for highway purposes results in the flow of mud and silt into petitioners' lake on their remaining lands, petitioners are entitled to recover any resulting diminution in value, but are not entitled to recover the costs of removing the mud and silt from the lake, and evidence of such costs is relevant only as a circumstance tending to show any diminution in value of the remaining land.

5. Same—

If mud and silt, adversely affecting fishing in petitioners' lake, flows into the lake as a result of respondent's taking a part of petitioners' land for highway purposes, petitioners are not entitled to recover loss of revenue from fishing as a separate item of damage but such loss may be considered only insofar as it affects the fair market value of the land remaining after the taking.

6. Same—

Where the record discloses that petitioners' witnesses considered the value of other property in the area in arriving at the value of petitioners' property, respondents are entitled to cross-examine the witnesses for the purpose of testing the witnesses' knowledge of values and for the purpose of impeachment.

7. Evidence § 58—

The right to cross-examine a witness upon every phase of his examination-in-chief is an absolute right and not a mere privilege.

8. Eminent Domain § 5—

In proceedings to assess compensation for the taking of a part of petitioners' land for highway purposes, respondent is entitled to have the testimony of his witnesses as to the increase in value of the land in the area, including petitioners' land, resulting from the construction of the highway, admitted upon the question of general and special benefits. G.S. 136-112.

APPEAL by respondent from *Farthing, J.*, October 10, 1960, Schedule B, Regular Civil Term, of MECKLENBURG.

On or about 29 May 1956, the State Highway Commission commenced the construction of projects 8.16522 and 8.16524 in Mecklenburg County for the purpose of making a link in Interstate Highway #85, or sometimes referred to as Highway #29 by-pass. Petitioners were the owners of three tracts of land, over which the respondent appropriated a right of way for the purpose of constructing said Interstate Highway #85. But it was stipulated by counsel that the land described in tract #1 be struck out. Respondent appropriated 13.4 acres of petitioners' property in connection with this project.

The parties were unable to agree as to compensation to be paid to the petitioner, and on 6 January, 1959, petitioners filed a petition against the State Highway Commission. Subsequently three commissioners were appointed and they filed a report of damages in the amount of $39,660.00. Thereafter the clerk confirmed the report. Thereupon the respondent appealed to the Superior Court.

The action came on for hearing and the verdict of the jury was that petitioners had been damaged in the sum of $38,200.00 with interest at the rate of six per cent from 29 May 1956. Respondent moved to set aside the verdict and for a new trial. To the overruling of these motions and the signing of the judgment respondent objects and excepts, and appeals to the Supreme Court and assigns error.

Orr & Osborne for petitioners appellees.

Attorney General Bruton, Assistant Attorney General Harrison Lewis, Andrew H. McDaniel, Trial Attorney, McDougle, Ervin, Horack & Snepp for respondent appellant.

WINBORNE, C.J. The purpose of this proceeding is the determination of compensation to be paid by the respondent to petitioners for the land taken in the construction of the portion of the highway described in the pleading.

The rule of law to be applied in this case is stated in *Proctor v. Highway Comm.*, 230 N.C. 687, 55 S.E. 2d 479, as follows: "Where only a part of a tract of land is appropriated by the State Highway & Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the land owner from the utilization of the property taken for a highway."

See also *Highway Comm. v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314; *Robinson v. Highway Comm.*, 249 N.C. 120, 105 S.E. 2d 287.

"Any evidence which aids the jury in fixing a fair market value of the land and its diminution by the burden put upon it is relevant and should be heard." *Gallimore v. Highway Comm.*, 241 N.C. 350, 85 S.E. 2d 392.

"The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking and not merely the condition it was in and the use to which it was then applied by the owner. But compensation should not exceed just compensation, and value should not exceed fair market value * * *." *Barnes v. Highway Comm.*, 250 N.C. 378, 109 S.E. 2d 219.

Considerations that may not reasonably be held to aid the jury in determining the "fair market value of what is left immediately after the taking" without resort to conjecture and speculation should be excluded.

I. In this connection the respondent first assigns as error the admission of testimony as to an estimate of the cubic yardage of mud that had flowed into a lake on petitioners' land and the cost per cubic yard of removing the mud.

Upon due consideration the conclusion is that respondent's exception is well taken and that the evidence of the mud and cost of removing it from the lake is not evidence which would aid the jury in fixing the fair market value after the taking.

The petitioner's testimony was not limited to an estimate of how much mud the respondent may have caused to flow into the lake, but he was permitted to testify to the total amount of mud in the lake. Furthermore, he was permitted to testify as to the cost of removing the mud from the lake without regard to the amount of mud which

may have been there because of the respondent's action. Indeed, petitioner testified that mud had flowed into the lake on previous occasions and that silting went on in the lake under any condition. In short, there is no evidence in the record from which the jury could find the amount, if any, of mud and silt in the lake which was caused by the respondent, or that the mud affected the fair market value of the remaining property after the taking.

It is also possible that the jury could have gotten the impression from this testimony that the removal of the silt and mud from the lake was compensable as a separate item of damage. "Such adverse effects are not separate items of damage, recoverable as such, but are relevant only as a circumstance tending to show a diminution in the overall fair market value of the property." *Gallimore v. Highway Comm., supra.*

II. Indeed in the next assignment of error it is apparent that the witnesses Trotter, Masten and Barrett, whose testimony is the subject of exception, gave the impression that the removal of the silt and mud from the lake was compensable as a separate item of damages. For instance, the witness Trotter testified in respect to this question, "What you did, you didn't really make an estimate of its value after the taking, but you took certain damages and subtracted them from your before figure to arrive at your after figure?", said "That is correct."

It is also evident from the record that these witnesses just named considered the loss of revenue from fishing as a separate item of damage without taking into account what affect, if any, this had on the fair market value of the land after the taking. The correct rule is stated hereinabove. See *Proctor v. Highway Comm., supra; State Highway v. Hartley, supra,* and *State Highway v. Black,* 239 N.C. 198, 79 S.E. 2d 778.

III. The next assignment of error relates to the respondent's right of cross-examination to test petitioner and petitioner's witnesses' knowledge and basis of values. The better rule, we think, is stated by *Moore, J.,* in *Barnes v. Highway Comm., supra,* at 394, "The majority rule is that an expert witness may be questioned on cross-examination with respect to the sales prices of nearby property to test his knowledge of values and for the purpose of impeachment, but not for the purpose of fixing value. This is especially true if the witness used such sales as a basis for his appraisal of the property taken, or if he had actually appraised the property sold (citations omitted) * * *. It would seem that utmost freedom of cross-examination with reference to sales and sales prices in the vicinity should be accorded the (re-

spondent) subject to the right and duty of the presiding judge to exercise his sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality."

The petitioner and his witnesses testified on direct examination to the effect that they were familiar with petitioners' property and with the market values of lands in the area, and that they considered the value of other property in the area in arriving at the value of petitioners' property. Applying these facts to the principle of law stated above, the conclusion is that the lower court erred in denying the respondent the right to cross-examine the petitioner and petitioners' witnesses for the limited purpose stated above. "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief, is an absolute right and not a mere privilege." *Milling Co. v. Highway Comm.*, 190 N.C. 692, 130 S.E. 724.

The respondent next contends that the court below committed error in not admitting evidence of general and special benefits accruing to the petitioners' remaining property.

G.S. 136-112 provides that in all instances where a portion of a tract of land is taken for highway purposes the general and special benefits shall be assessed as offsets against damages.

"The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Ordinarily the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, from proximity to desireable object, or in various other ways." Nichols Eminent Domain, 3rd Ed., Vol. 3, Sec. 8.6203.

Respondent's witness Todd was not permitted to give an opinion as to whether the construction of the highway had raised or lowered property values along the highway. His answer would have been that the highway greatly increased the property values of all the property along the highway. Respondent's witness Rhyne was not permitted to state his opinion as to the value of the land along the highway after its construction. His answer would have been that the highway had increased the value of the land all along the highway, and that the petitioners' property had tripled in value since the highway was con-

structed because the petitioner now had approximately 3,000 feet of paved road frontage, whereas before he had none on that particular tract.

The jury should have been allowed to hear this testimony in determining what general and special benefits, if any, the petitioners received.

For reasons stated there should be a new trial, and it is so ordered.

New trial.

LEROY REEVES v. TAYLOR-COLQUITT COMPANY AND C. L. HICKMAN.

(Filed 29 March, 1961.)

1. Master and Servant § 22—

Where plaintiff employees' testimony tends to show that he had used the same equipment for more than two years in loading, transporting, and unloading timber, that the accident in suit was not the result of the failure to provide his truck with safety chains for holding the logs, and there is no evidence that safety chains were approved and in general use in hauling timber, the evidence fails to disclose negligence on the part of the employer in this respect.

2. Same— Evidence held insufficient to show that employer was negligent in failing to provide reasonably safe place to work.

Plaintiff's evidence tended to show that he had been engaged in the same work with the same equipment for over two years in hauling timber to a lumber plant, that he apparently fixed his own hours, that he was unloading timber at night, and that after he had gotten under the truck to knock out the standards so that the timber would fall and was getting out from under the truck on the opposite side, his foot slipped on a stick or piece of wood, throwing his leg under the falling timber. *Held:* The employer was not under duty to furnish lights that would illuminate under the truck, and the presence of the stick or piece of wood under the truck was not an unusual circumstance and was more easily discoverable by the employee than by the employer, and nonsuit was correctly entered.

3. Appeal and Error § 45—

Where, in an employee's action against his superior, the evidence is insufficient to be submitted to the jury on the issue of negligence, the exclusion of evidence that the superior was not an independent contractor, offered for the purpose of holding the corporate defendant liable under the doctrine of *respondeat superior*, cannot be prejudicial.

APPEAL by plaintiff from *Bundy, J.*, November, 1960 Civil Term, NEW HANOVER Superior Court.

The plaintiff instituted this civil action to recover for personal injury received while he was unloading logs from a truck at the Taylor-Colquitt lumber plant. At the time of the injury he was employed by the defendant Hickman and was using Hickman's equipment. For two years and five months prior to the night of the injury the plaintiff had operated this same truck and delivered logs to the Taylor-Colquitt yard. On the night of the injury the plaintiff was admitted to the yard by the night watchman and proceeded to the unloading ramp. There were no lights at this ramp.

On direct examination, the plaintiff testified:

> "The way you would unload the truck was to drive up a ramp and put two poles so they would roll off on them. You would take the chains off first, and then you would have a crowbar and you prize off your standards, and the poles roll off. . . . I had to go under the truck to trip the chains. There were no other chains in usual use where you could unload the truck without having to get under it.
>
> "I didn't have a safety chain or unloading chains, and there were such chains in use. I saw those safety chains on the Taylor-Colquitt trucks, I saw one . . . The truck I was driving didn't have one of those safety chains, and to unload it you had to get under your truck and knock out the standards. You had to get under it with a crowbar and prize the chains off.
>
> "The way I was working when I was injured was that I put my poles to unload as I always did, and I went to the back and tripped the back standard first and returned to the front, and when I tripped the load, I started out under the truck to the opposite side from where the load was falling, and I stepped on a piece of round wood, and it shoved my left leg out. The round wood was some of the trash that I described as being on the ground at that point. This round piece of wood threw my leg outward, and I went down on my knee, and the pole hit me. Yes, that block of wood knocked my leg out under the falling pole, and it broke my left leg. That block of wood kept me from getting out of the way of the pole, and there was not sufficient light for me to see there was a block of wood in the way."

On cross-examination, he testified:

> "I had been driving a truck for Floyd Huffham two years and for Hickman five months, and I drove the same truck for Mr. Huffham that I drove for Hickman. The truck was not new when I started driving for Mr. Huffham, but it was in good

condition. I know the manner in which to load the truck and the manner in which to unload it, and I am familiar with it in every respect. I had been furnished a regular loading chains and have used them for two years and five months prior to the accident and had no trouble with the chain and no trouble with the truck . . . I drove the truck into the yard, and at that time didn't see the object I stepped on. It was about two feet long, and I had not driven the truck on top of it. I was under the trailer part, and didn't see it until after I had stepped on it. I probably wouldn't have been hurt if that object had not been there. . . . The manner in which the poles were loaded had nothing to do with my getting hurt . . . I got under the truck to trip the standards. . . . I worked for Mr. Hickman five months and for Mr. Huffham two years, and I had driven this truck for two years and five months."

The plaintiff also offered medical testimony as to his injury. The court, upon defendants' objection, excluded the contract between Taylor-Colquitt Company and Hickman with respect to hauling and delivering the poles. Defendant Hickman employed the plaintiff to make the deliveries at $5.00 per load.

The plaintiff bases his right to recover on (1) failure to have the yard lighted at night; (2) failure to keep the vicinity of the loading ramp free from obstructions; (3) and failure to furnish safe devices and implements for unloading.

At the conclusion of the plaintiff's evidence, the court entered judgment of involuntary nonsuit from which the plaintiff appealed.

Addison Hewlett, Jr., Isaac C. Wright, for plaintiff, appellant.

S. Bunn Frink, for defendant C. L. Hickman, appellee.

Stevens, Burgwin, McGhee & Ryals, for defendant Taylor-Colquitt Company, appellee.

HIGGINS, J. After careful consideration, this Court concludes that the evidence offered is insufficient to show actionable negligence on the part of either defendant. ". . . As we view the entire evidence, plaintiff's fall is just one of those events which sometimes occur without one's foresight or expectation, and therefore not anticipated, the consequences of which must be borne by the unfortunate sufferer." *Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411.

The plaintiff's evidence disclosed that he was engaged in hauling poles at $5.00 per load for the defendant Hickman, whose duty it was to deliver them to Taylor-Colquitt Company's plant. The plaintiff had been engaged in this work for two years and five months, using

the same truck and the same loading and unloading equipment. He was thoroughly familiar with the equipment and the conditions at the plant. He apparently fixed his own hours. The evidence indicates nothing to the contrary. Much of the unloading was done at night. On one occasion only did either Hickman or Taylor-Colquitt assist. "The company unloaded my truck one time with the crane when I was carrying three 90-foot poles and couldn't get them off." During the two years and five months the plaintiff knew of one instance only in which an unloading chain different from his equipment was used at the plant. So far as the record shows, no other accident or injury resulted from the use of Hickman's equipment, or others like it. Likewise, the evidence is totally lacking that unloading conditions had changed for the worse during the time of plaintiff's employment.

The plaintiff thus explains the accident: "I got under the truck to trip the standards and the chains had nothing to do with my getting hurt. The chains had been taken off the load and the poles had been properly secured. The poles could not fall off until I tripped it and when I tripped it I stepped on something and my foot slipped and my left foot stuck out and I got hurt. My stepping on that object was the reason for my getting hurt and nothing else. That is what I would say was the sole cause of the injury . . ."

The plaintiff actually stepped on a stick or pole about two feet long. This was a part of the "trash" on the ground. "There were no lights . . . where you unload and I needed lights to see how to unload in safety."

The plaintiff had been hauling nine or ten loads per week for two years and five months. The evidence does not disclose anything unknown to him or different from what is to be expected at a large timber and lumber plant. Yet he chose to unload at night with full knowledge of these conditions. His accident happened at a place and in a manner and under conditions which had proved safe for nine or ten operations per week for two years and five months. The accident happened because the plaintiff's foot slipped on a stick at the exact moment a pole fell from the truck. The plaintiff's contention that one or both defendants were negligent in failing to provide an unloading chain is not supported by the evidence. Boiled down to its essence, during all the time the plaintiff worked at the plant he knew of only one instance in which an unloading chain or crane was used.

We conclude the plaintiff's evidence is insufficient to charge either defendant with actionable negligence. The danger of slipping on a stick was as obvious to the plaintiff as to any employee, officer or agent of either defendant. Under such circumstances, when the servant is permitted to do the work in his own way, as here, "The servant cannot

recover against the master . . . This rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works, or machinery of the master, but from the manner in which they are used, and when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time." *Simpson v. R.R.*, 154 N.C. 51, 69 S.E. 683.

The facts here disclosed do not indicate any duty on the defendants, or either of them, to install such lighting fixtures as would illuminate the ground under the truck.

Whether the contract between Hickman and Taylor-Colquitt made the former an independent contractor is immaterial. The exclusion of the contract, therefore, was nonprejudicial.

"A careful examination of the case leads us to the conclusion that if the injury to the plaintiff was caused by negligence, it was not that of the defendant, and the motion for a nonsuit should have been granted." *Simpson v. R.R., supra.*

The judgment of compulsory nonsuit in the court below is

Affirmed.

W. L. ABERNETHY, JR. v. THE HOSPITAL CARE ASSOCIATION, INC.

(Filed 29 March, 1961.)

1. Insurance § 32—

In an action on a policy of hospital insurance, the burden is on the plaintiff to show coverage and on the insurer to show that the claim fell within the exclusions from liability, if relied on by insurer.

2. Insurance § 30—

In an action on a policy of hospital insurance, evidence that pain felt by insured prior to the issuance of the policy was consistent with but not diagnostic of the existence at that time of the disease necessitating an operation some eighteen months after the issuance of the policy, raises an issue of fact for the jury, or for the court when jury trial is waived.

3. Appeal and Error § 49—

The findings of fact by the court in a trial by the court under an agreement of the parties are conclusive when conflicting evidence raises such issues of fact.

APPEAL by defendant from *Farthing, J.*, August 22, 1960 Term, MECKLENBURG Superior Court.

Civil action to recover hospital and surgical expenses for the treat-

ment of plaintiff's wife, Bobby Abernethy. By its certificate of insurance which became effective February 15, 1957, the defendant agreed "to pay to the extent herein limited and provided . . . benefits for services required and received by the subscriber or his eligible dependents . . . for illness or injury of the affected participant . . ." The policy further provided: "None of the benefits . . . shall be available for any condition, disease or injury which existed or had its beginning on or before the effective date of this policy."

The parties waived a jury trial and stipulated the court might find the facts and if it be determined the defendant is liable, the recovery shall be $563.75. The defendant called Dr. Thompson, the surgeon who performed the operations. His testimony will be referred to in the opinion. The court, among others, made the following findings of fact:

"4. Mrs. Bobby Abernethy, wife of plaintiff, was admitted to Charlotte Memorial Hospital on four separate hospital admissions, viz: (a) Admitted 8-13-58. Discharged 8-25-58. (b) Admitted 9-14-58. Discharged 9-17-58. (c) Admitted 9-29-58. Discharged 10-10-58. (d) Admitted 11-4-58. Discharged 11-7-58.

"The first admission on 8-13-58 was diagnosed as acute pancreatitis. On admission an operation laporotomy was performed. On the second admission 9-14-58 examination revealed certain stones in the gall bladder but surgery was delayed because of recent pancreatitis.

"The hospital and surgeon claims for the first two admissions, that is 8-13-58 and 9-14-58 were paid by The Hospital Care Association, Inc., and no claim for the expenses of these two admissions is involved in this action. * * *

"7. That the pre-existing pain and symptoms experienced by Mrs. Abernethy (as recited hereinabove) are compatible with but not diagnostic of the condition or disease for which plaintiff seeks compensation in this action.

"8. That the defendant has failed to prove by the greater weight of the evidence that the condition or disease suffered by Mrs. Bobby Abernethy causing her admittance to Charlotte Memorial Hospital on 9-29-58; and again on 11-4-58, and the medical and surgical services which she received in said hospital, for the recovery of expenses of which two admissions this action was instituted, was a physical condition or disease that had its beginning at and prior to February 15, 1957, the effective date of said Certificate issued by the Hospital Care Association, Inc."

The court rendered judgment for the plaintiff for $563.75, from which the defendant appealed.

Wm. H. Abernethy, for plaintiff, appellee.
Claude V. Jones, for defendant, appellant.

HIGGINS, J. In order to recover under an insurance policy, the insured must carry the burden of showing coverage. If, thereafter, the insurer relieves itself of liability, it must carry the burden of showing exclusion from coverage. *Fallins v. Ins. Co.*, 247 N.C. 72, 100 S.E. 2d 214; *Collins v. Casualty Co.*, 172 N.C. 543, 90 S.E. 585. The question before the trial court was whether the evidence established the presence of "gall bladder trouble" at the time the policy became effective. Or does the evidence go no further than present an issue of fact to be determined from the evidence? It may be noted the insurer paid for the first two operations without question.

Dr. Thompson, the surgeon who performed the operations, described in finding No. 4, testified for the defendant. Here is his summary: "I have an opinion as to whether the character of these complaints which I have enumerated to you would suggest to me, as a physician, the presence of gall bladder disease. My opinion that this history of pains is compatible with but not diagnostic of gall bladder disease . . . The presence of gallstones is one of the diseases that can cause some of the symptoms or history of pains that have been described. They are not entirely typical, but suggestive of it. In my opinion, as a physician, these complaints are consistent with the presence of stones in the ducts or tubes leading from the gall bladder, not strongly suggestive of them."

Apparenty Dr. Thompson considered all symptoms up to the time of the operations and attempted to relate them back to Mrs. Abernethy's condition on February 15, 1957. At the time of the operation the policy had been in effect 18 months. Dr. Thompson was unable to determine when the trouble had its onset. His evidence leaves the date in the realm of conjecture.

In weighing the testimony in this case, the court acted as the jury and found the defendant had not carried the burden of showing Mrs. Abernethy suffered from "gall bladder trouble" prior to the effective date of the policy. The rule of law applicable under such circumstances is correctly stated by *Justice Parker* in *Cudworth v. Ins. Co.*, 243 N.C. 584, 91 S.E. 2d 580: "The evidence, and the reasonable inferences to be drawn therefrom, are in conflict as to whether Cudworth's lung cancer did, or did not, originate while the policy was in force . . . and we cannot usurp the province of the jury to resolve

this conflict." See also, *Hill v. Casualty Co.*, 252 N.C. 649, 114 S.E. 2d 648.

The evidence at best involves inferences of fact which must be determined by the fact-finding body — in this instance the trial judge. The finding is conclusive.

After careful examination of all assignments of error and the authorities cited in support, we conclude that error of law or legal inference does not appear. Hence, the judgment of the superior court is

Affirmed.

STATE v. LAWRENCE GUSS.

(Filed 29 March, 1961.)

1. Criminal Law §§ 80, 111—

Where defendant testifies in his own behalf and produces evidence of his good character, such character evidence is to be considered not only upon his credibility as a witness but also as substantive evidence on the question of his guilt or innocence, and an instruction limiting its substantive character to a consideration of defendant's evidence is prejudicial.

2. Homicide § 9—

Evidence tending to show that defendant was at the place he had a right to be, was without fault in bringing on and entering into the difficulty, that deceased had ill will against him, and was advancing upon him at a distance of ten or twelve feet with an open knife, presents the principle that a person upon whom an assault with murderous intent is made is not under obligation to flee but may stand his ground and kill his adversary if necessary in his self-defense.

APPEAL by defendant from *Parker, J.*, November 1960 Term, of WAYNE.

This is a criminal action.

Indictment: Murder.

The Solicitor elected not to ask for a verdict of guilty of murder in the first degree, but announced that he sought only a verdict of guilty of murder in the second degree or manslaughter as the facts might justify.

Plea: Not guilty.

The State's evidence of the *corpus delicti* is comprised almost entirely of defendant's statement to investigating officers.

Summary of State's evidence:

Defendant is a member of the United States Air Force and stationed at Seymour Johnson Air Force Base. About midnight 10 July 1960 defendant, in company with Rosa Lee Anderson, was at the corner of James and Pine Streets in Goldsboro. Deceased, Roger Glenn Williams, and Bobby Cook were "tussling" and fighting in the street. Williams and Rosa Lee Anderson were cousins. Williams came over to defendant and challenged him to wrestle. Defendant declined and started walking away. Williams started toward defendant with his hand in his pocket. Someone in the crowd yelled, "Cut him up." Defendant drew a pistol and fired once. Williams walked a few feet and fell. At the time of the shooting defendant and Williams were 15 to 20 feet apart, defendant was in the middle of the street and Williams was on the sidewalk adjacent to a tavern. Williams fell against the tavern wall. Defendant left the scene and hid the pistol near his barracks. The officers found no knife on Williams' person. It was stipulated that Williams died as a result of the wound inflicted when defendant shot him with the pistol.

Evidence for defendant:

Williams was mad with defendant and other airmen. Williams had threatened defendant about three months before and warned him to stay away from Rosa Lee. As Williams advanced on defendant he had a knife in his hand — the blade was about 5 inches long. Another man was advancing on defendant from the rear. When the shot was fired Williams and defendant were 10 to 12 feet apart. Williams turned and fell against the tavern. At the time Williams started toward defendant, defendant was on the sidewalk but started backing into the street. Defendant was backing away when he fired.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in State's Prison for a term of "not less than 8 nor more than 12 years."

Defendant appeals.

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

Earl Whitted, Jr., for the defendant.

PER CURIAM. Defendant testified in his own behalf and produced witnesses who gave testimony of his good character. The court instructed the jury as to this evidence of good character: ". . . it is to be received and considered by you for a two-fold purpose, first as going to the credibility of the defendant, Lawrence Guss, and secondly, as substantive evidence bearing directly upon his *evidence.*"

(Emphasis added). The instruction is erroneous. If a defendant is a witness in his own behalf and produces evidence of his good character, the character evidence is to be considered as substantive evidence on the question of his *guilt* and *innocence,* and also as bearing upon his credibility as a witness. Stansbury: North Carolina Evidence, s. 108, p. 205. *State v. Reddick,* 222 N.C. 520, 522, 23 S.E. 2d 909.

The instant case was tried upon the theory that defendant was required "to retreat and avoid the altercation if possible," otherwise he was not entitled to rely on his plea of self-defense. Defendant testified that Williams was advancing upon him at a distance of 10 or 12 feet with an open knife containing a five-inch blade and that Williams had ill will against him and had threatened him. "When an attack is made with a murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be." *State v. Godwin,* 211 N.C. 419, 422, 190 S.E. 761. See also *State v. Washington,* 234 N.C. 531, 67 S.E. 2d 498. The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation.

All the evidence is to the effect that defendant was at a place he had a right to be, was without fault in bringing on or entering into the difficulty, and attempted to avoid the altercation. Deceased was committing either a felonious or non-felonious assault upon him. *Quaere:* Under these circumstances, has the State by its own showing rebutted the malice presumed from the use of a deadly weapon by defendant, and may defendant be convicted of more than manslaughter? We do not answer here for upon a retrial the evidence may be at variance with the record before us.

New trial.

STATE v. GEORGE L. JONES.

(Filed 29 March, 1961.)

1. Bastards § 6—

Testimony of prosecutrix that defendant was the father of her child, that he admitted paternity, that he had contributed monies to prosecutrix for a short time and then continuously refused further support, notwithstanding that he was gainfully employed, is sufficient to be submitted to the jury on a charge of willful failure to support an illegitimate child.

2. Bastards § 4—

In a prosecution for willful failure of defendant to support his illegitimate child, the burden is upon the State to show beyond a reasonable doubt the element of paternity and the element of willfulness of the refusal to furnish support, and an instruction which places such burden of proof solely upon the element of paternity is prejudicial.

APPEAL by defendant from *Parker, J.,* October 31, 1960 Term, of LENOIR.

Defendant was tried on a bill of indictment which charged wilful failure to support his illegitimate child. From the verdict of guilty and a judgment based thereon defendant appealed.

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

J. Harvey Turner for defendant appellant.

PER CURIAM. The court properly overruled defendant's motion for nonsuit. The testimony of the mother that defendant was the father of the child, that he had admitted paternity, and had provided monies for her confinement and for the support of the child for a short time after birth, coupled with the testimony that defendant was gainfully employed and had been for several years, that requests had been made for the support of the child, that defendant had refused to pay anything, which refusal continued several months prior to the indictment, was sufficient to require submission of the question of his guilt to the jury.

Defendant is, however, entitled to a new trial. He excepts to the following portion of the charge: "The Court instructs you that in order to justify a verdict of guilty the State must satisfy you of two propositions: First, that the defendant is the father of the illegitimate child, Anthony L. Connor, and it must satisfy you of that fact beyond a reasonable doubt. Secondly, as being the father of this illegitimate child that he willfully failed and refused to provide adequate support for the child." This portion of the charge limits the duty of the State to establish guilt beyond a reasonable doubt to one element—paternity. It is as much the duty of the State to establish wilful failure to support by evidence showing that fact beyond reasonable doubt as it is to so establish paternity. *S. v. Cook,* 207 N.C. 261, 176 S.E. 757.

New trial.

MENZEL *v.* MENZEL AND WILLIAMS *v.* BLADES.

PAUL T. MENZEL AND WIFE, SARAH E. MENZEL (NEE SARAH E. CREEKMORE) V. LUCILLE R. MENZEL AND PAULINE C. MENZEL, INFANT CHILDREN OF PLAINTIFFS; MILES N. OVERTON AND GRANDY B. OVERTON.

AND

PAULINE MENZEL WILLIAMS, PETITIONER, MOVANT V. CHARLES CAMDEN BLADES, MELICK WEST BLADES, AND LEMUEL SHOWELL BLADES, JR., TRUSTEES UNDER THAT CERTAIN AGREEMENT RECORDED IN DEED BOOK 98 AT PAGE 402, OFFICE OF THE REGISTER OF DEEDS OF PASQUOTANK COUNTY; SARAH E. MENZEL (NEE SARAH E. CREEKMORE), AND KILLIAN BARWICK, GUARDIAN AD LITEM.

(Filed 12 April, 1961.)

1. Judgments § 27—

While the judgment roll alone is to be considered in determining a motion to set aside a judgment for irregularity, a recorded deed and deeds of trust executed by the person acquiring title under the judgment may be considered by the court for the purpose of showing knowledge of the claim of fee simple title by virtue of the judgment in determining the question of laches.

2. Appeal and Error § 41—

Appellant may not assert the admission of certain evidence as error when he himself has introduced evidence of the same import.

3. Infants § 6: Process § 9—

Defects in the application for service of process by publication and in the order directing publication are rendered immaterial when the guardian *ad litem* for the minors sought to be served, appears and defends the action.

4. Judgments § 2—

The recitals in an order of the judge presiding at the term that the parties consented to the hearing of the case out of term and in a designated county, and the recital in the judgment of the judge thereafter hearing the case in the designated county that the case came on for hearing in that county by consent decree and that all parties were then before the court, are sufficient to support a finding that the hearing out of the county and out of term was by consent.

5. Same: Judgments § 27—

The hearing of the cause and the rendition of judgment out of term and out of county by consent does not transfer the cause to the county in which judgment is actually entered, and such judgment properly appears on the judgment roll in the county in which the action was instituted, and that judgment roll and judgment signed by the judge holding the term in the county in which the action was heard establish the rendition of the judgment notwithstanding nothing appears in the judgment roll in the county in which the judgment was actually rendered.

6. Estates § 7—

A judgment that a named person owned a life estate in the lands

in suit with remainder over to others, and directing that the lands be sold for reinvestment and that the value of the life estate be ascertained, contemplates the sale of the fee simple and not merely the life estate for reinvestment.

7. Infants § 6—

Where it is ordered that by consent of the parties a cause should be heard and judgment rendered in another county of the district, such order does not remove the cause from the county in which it was instituted, and the clerk of the court of that county has authority to appoint a guardian *ad litem* for minor defendants in the action and to accept and file such guardian's verified answer, and the guardian's appearance in the adjoining county and participation in the hearing waives any objection to the hearing outside the county.

8. Same: Judgments § 21—

An order for the appointment of a guardian *ad litem* which finds that a named person was a proper and suitable person to represent the minors, but leaves blank the space provided for naming the appointed person, is irregular, but when the person named as a suitable person files verified answer and represents the minors at the hearing no prejudice results, and the judgment is at most voidable for irregularity and not void.

9. Appeal and Error § 49—

Findings of fact by the trial court are conclusive on appeal when supported by competent evidence.

10. Judicial Sales § 5—

In the absence of fraud or the knowledge of fraud, the purchaser at a judicial sale is required only to ascertain from the record that the court had jurisdiction of the parties and the subject matter and that the judgment authorized the sale, and when the record is regular on its face in these respects, the *bona fide* purchaser acquires good title.

11. Same—

Where the commissioner's deed identifies the lands as those owned by a certain person and more particularly described in designated registered deeds, and it further appears that a map of the lands had been recorded, the description in the commissioner's deed is sufficient, since that is certain which can be made certain.

12. Judicial Sales § 4—

A judgment of confirmation of a judicial sale is a final judgment.

13. Judgments §§ 24, 27—

Upon the hearing of a motion in the cause to set aside a judgment for irregularity, evidence that the judgment had been obtained by extrinsic fraud is properly excluded, since the sole remedy to set aside a final judgment for fraud is by independent action.

14. Judgments § 21—

While the court may set aside an irregular judgment at any time,

it will not do so when movant has been guilty of unwarranted laches, particularly when the rights of *bona fide* purchasers for value are involved.

15. Same: Judicial Sales § 5—

Lands in which minors owned a remainder were ordered sold for reinvestment and judgment confirming the sale was duly entered. Irregularities appeared on the face of the record of the proceedings which rendered the judgment voidable but not void. The *bona fide* purchaser at the sale had been in possession for some forty-five years after the execution of commissioner's deed to him and thirty-one years elapsed after movant became of age. *Held:* The record discloses laches warranting the refusal of the court to set aside the judgment for irregularity.

16. Estates § 3—

While the statute of limitation does not begin to run against a remainderman until the death of the life tenant, a remainderman may attack a judgment adjudicating title in a stranger at any time after the rendition of such judgment, and the failure of the remainderman to do so may be imputed to him as laches, in proper instances, even during the life time of the life tenant.

APPEAL by movant from *Bone, J.*, September Term 1960, of CAMDEN.

This is a motion in the cause, filed by Pauline Menzel Williams on or about 30 December 1958. The reasons for filing said motion and the factual background giving rise thereto are fully set out in detail in the opinion of this Court in the case of *Menzel v. Menzel* and *Williams v. Blades,* 250 N.C. 649, 110 S.E. 2d 333. The motion on that appeal had been dismissed by Paul, J., upon consideration of Pauline Menzel Williams' notice and motion and her affidavits and petition, and the respondents' request for denial of the motion. This Court held that the motion and affiidavits were "sufficient to require the court to investigate the charge of irregularities, hear the evidence, and make proper findings based thereon."

The case is now before us a second time, on appeal from Judge Bone's order based on his findings of fact and conclusions of law made pursuant to the former opinion of this Court.

Pertinent portions of the facts found by the court below are in substance as follows:

1. That summons was issued against the defendants by the Clerk of the Superior Court of Camden County on 12 February 1912, and on the same date a prosecution bond was signed by Paul T. Menzel, Sarah E. Menzel, and Charles W. Priddy.

2. The summons was received by the Sheriff of Camden County on 27 February 1912 and returned with the endorsement thereon, "All within defendants not to be found in my county."

3. That on 12 May 1912, Sarah Creekmore Menzel signed and swore to an application for an order directing service of summons by publication but it was not set forth in said application that the defendants had property in this State, nor that they had or claimed any contingent lien or interest in real property which was the subject of the action, nor that the relief demanded consisted wholly or partly in excluding them therefrom.

4. That at the Spring Term 1912 of Camden Superior Court the Clerk signed an order reciting in substance the facts appearing in the aforesaid application and directing service by publication.

5. Publication was had as directed, requiring the defendants to answer or demur to the complaint but not giving the purpose of the action other than to state that it was "concerning real estate, of which the Superior Court of said County had jurisdiction."

6. At the Fall Term 1912 of Camden County Superior Court a complaint was filed in which it was alleged that it was for the best interest of those who might own the land to sell it and invest the proceeds. The complaint prayed for judgment declaring that Sarah E. Menzel owned said lands in fee simple. There was no allegation or prayer in the complaint regarding the computation of the cash value of the life estate of Sarah E. Menzel. The complaint was signed by Peatross & Savage and Pruden & Pruden, attorneys for plaintiffs, and verified by the plaintiff Paul T. Menzel.

7. That at the Spring Term 1913 of Camden County Superior Court, Pruden & Pruden, attorneys for the plaintiffs, applied to the court for the appointment of a guardian *ad litem* to represent the interest of Lucille and Pauline Menzel, infant defendants. On 12 March 1913 the Clerk of said court signed an order directing that C. E. Thompson was a suitable and discreet person to represent their interest in the court and adjudging "that ..... be and is hereby appointed guardian *ad litem* to represent the infant defendants in this cause and is directed to appear and defend the same in their behalf."

8. That on 12 March 1913, C. E. Thompson as guardian *ad litem* for said infant defendants verified before the clerk and filed an answer to the complaint admitting all the facts alleged but denying the legal conclusions.

9. That on 11 March 1913, Judge B. F. Long, who presided over the Spring Term 1913 of Camden Superior Court, entered an order reading as follows: "In this cause all parties consenting it is considered and adjudged that the same be heard out of term and out

of the County at Spring Term 1913 of Chowan County Superior Court."

10. That at the Spring Term 1913 of Chowan County Superior Court, which term began on 31 March 1913, Judge H. W. Whedbee heard the matter pursuant to the aforesaid order of Judge Long and rendered judgment which was recorded in the Minute Docket of Camden County Superior Court immediately following the order of Judge Long, both said order and said judgment being among the minutes for the day of 11 March 1913 (erroneously dated 11 March 1912).

11. That after considering all the facts and circumstances surrounding the matter, as disclosed by the record and evidence, the court concluded and found as a fact that the hearing before Judge Whedbee in Chowan County was heard by consent of the attorneys for the plaintiffs and of C. E. Thompson, guardian *ad litem* for the infant defendants.

12. That the aforesaid judgment of Judge Whedbee adjudged: That the land in question was owned by the plaintiff Sarah E. Menzel for life, with remainder in fee simple to such issue as might survive her, and if none, over to Miles N. Overton and Grandy B. Overton in fee simple; that it was for the best interest of all parties to the action that the land be sold at public auction and the proceeds be reinvested under order of the court; that J. N. Pruden be appointed commissioner to make the sale and report the same to the next term, and further ordering that the value of the life estate of Sarah E. Menzel be computed and paid to her, or allowed in payment for said land, should she become the purchaser.

13. That J. N. Pruden, commissioner, advertised and sold said lands pursuant to said judgment at the courthouse door of Camden County on 6 October 1913, and reported to the November Term 1913 of Camden County Superior Court that he had done so and that Sarah E. Menzel became the purchaser at the price of $3,200 and recommended that the sale be confirmed.

14. That in said report the commissioner stated that Sarah E. Menzel was dissatisfied with the clerk's computation of the value of her life estate and had appealed to the court and he requested that the court decide the matter and instruct him as to the sum which should be allowed her in settlement for the purchase price.

15. That at the November Term 1913 of Camden County Superior Court, Judge Stephen C. Bragaw, who presided over said term, entered a decree confirming said sale, directing the commissioner to make title to the said Sarah E. Menzel upon compliance with the terms of sale, sustaining her contention as to the value of her life estate, and

directing the commissioner to pay to the clerk the balance of the proceeds of the sale to be held by him for investment under order of the court.

16. That on 3 December 1913, J. N. Pruden filed with the clerk his account as commissioner, showing that he had received $3,200 as proceeds of the sale of the land, had paid costs in the sum of $70.35, had paid $2,658.68 to Sarah E. Menzel for her life interest and had paid to J. W. Walston, Clerk of the Superior Court of Camden County, the sum of $470.97 as the interest of the infants, Pauline and Lucille Menzel.

17. That on 3 December 1913, said clerk signed a receipt showing that he had received of the commissioner $470.97 in full settlement of the amount due the infants Pauline and Lucille Menzel out of the proceeds of said sale, and on 26 December 1913 Sarah E. Menzel signed a receipt showing that she had received from the commissioner $2,658.68 in full settlement of the amount due her as life tenant out of the proceeds of the sale of said land, both of said receipts being among the papers in this action.

18. It further appears that on or about 31 January 1914, Paul T. Menzel qualified as guardian for the infants Pauline and Lucille Menzel in the court of Hustings, City of Portsmouth, State of Virginia, and apparently received the said sum of $470.97 as guardian for said infants.

19. That on 25 November 1913, J. N. Pruden, commissioner, made a deed to Sarah E. Menzel sufficient in form to convey to her the fee simple title to the lands involved in this action, which deed was duly registered in the office of the Register of Deeds of Camden County on 29 November 1913.

20. That on 26 November 1913, Sarah E. Menzel and husband executed a deed of trust to J. N. Pruden, trustee, conveying the fee simple title in the aforesaid lands as security for a debt of $2,450 due to John Q. A. Wood; that the acknowledgment of said instrument and the private examination of Sarah E. Menzel was had before the Clerk of the Superior Court of Pasquotank County and the instrument was duly registered in the office of the Register of Deeds of Camden County on 29 November 1913.

21. That on 16 May 1917, Sarah E. Menzel and husband executed a deed of trust to H. G. Kramer, trustee, conveying in fee simple the lands in question as security for a debt of $4,850 due the Savings Bank and Trust Company; that the acknowledgement and private examination of Sarah E. Menzel as to said instrument was had before W. I. Halstead, a Notary Public, and the same was duly registered

in the office of the Register of Deeds of Camden County on 28 May 1917.

22. That the aforesaid deed of trust to H. G. Kramer was foreclosed, and acting in accordance with the power of sale therein said trustee sold the land at public auction at the courthouse door in Camden County on 30 July 1923, after due advertisement as required by law, at which sale C. E. Thompson became the highest bidder for the price of $8,200, which bid was not raised within the time allowed by law and said C. E. Thompson having transferred his bid to L. S. Blades, the trustee, on 10 August 1923, conveyed the said lands in fee simple to said L. S. Blades upon payment by him of the purchase price and said deed of conveyance was duly recorded in the office of the Register of Deeds of Camden County on 15 August 1923.

23. That on 1 July 1940, L. S. Blades and wife conveyed said lands in fee simple to the trustees who are respondents to the present motion and the deed of conveyance was duly recorded in the office of the Register of Deeds of Camden County on 8 July 1940.

24. That soon after his purchase of said lands in August 1923, the said L. S. Blades went into possession of the same, claiming it as his own, making improvements thereon, cutting some of the timber therefrom in 1923 or 1924, causing a survey thereof to be made and a map labeled "Property of Dr. L. S. Blades" to be prepared and recorded, cultivating crops thereon each year and engaging in the usual acts of ownership openly, notoriously and continuously until the time when respondents took possession thereof and since said time respondents have been in possession of said lands exercising similar acts of ownership.

25. That prior to the filing of the present motion, the movant, Pauline Menzel Williams, had taken no action to have the various orders, decrees, judgments, and other proceedings herein set aside.

26. That movant was born 31 August 1906, being five years of age at the time of the commencement of this action, 17 years of age when the land was bought by L. S. Blades at the foreclosure sale, about 17 years of age when she was married, 21 years of age in August 1927, and 52 years of age when the present motion was filed.

27. That Sarah E. Menzel, movant's mother, and Paul T. Menzel, movant's father, were married in 1900; that movant's sister, Lucille Menzel, died at age 24 years without issue; that movant is the only living issue of Sarah E. Menzel, who was 79 years of age in September 1958; that Paul T. Menzel died about 1954.

28. That in 1912 movant was living in Portsmouth, Virginia, with her family where she continued to reside until 1914 when she and

her family moved on the land in question and lived there until June 1923 when they moved off and went to Norfolk, Virginia; that movant lived in Norfolk, Virginia until her marriage in 1924 when she came to South Mills, North Carolina, and after living there for a short while moved with her husband to Elizabeth City, North Carolina, where she has continued to live until the present time.

29. That movant is an intelligent, well-informed woman who attended high school and took a high school course at Blackstone College but did not finish high school; that she has worked for the Pasquotank County Public Library for about ten years, operating a bookmobile in both Pasquotank and Camden Counties; that she is familiar with the land in question, has seen it frequently and has lived about five miles from Camden County Courthouse most of the time since her marriage; that movant's husband is a former member of the State Legislature, a man of considerable business experience, has business interest in Camden County and is familiar with the public records.

30. That the evidence does not show what education or business experience Sarah E. Menzel, movant's mother, has had but there is no suggestion that she is either illiterate or ignorant of ordinary business transactions; that although now at the age of 79 years, disclaims in her affidavit any knowledge of the proceedings herein, the records show that she signed several of the papers in connection with the same, had the fee simple title to the land in her name and executed several instruments conveying the fee simple title in trust to secure debts; that although she asserts in her affidavit that her husband practiced a fraud upon her she does not give any particulars as to what the fraudulent representations were.

31. That movant, in the exercise of ordinary business prudence, could have and should have discovered the irregularities of which she now complains, at least 20 or more years ago, and could have or should have known that respondents and their predecessor in title were claiming ownership in fee simple of the land in question; that in failing to take action herein before December 1958, movant has been guilty of laches and unreasonable delay.

32. That L. S. Blades was a *bona fide* purchaser for value of the land in question without notice of the irregularities in this action of which movant now complains, and respondents took title from him without notice of such irregularities.

33. That the defendants Miles M. Overton and Grandy B. Overton are both dead and there is no evidence before the court from which the names, indentity or legal status of their living issue, or their

successors in interest, can be ascertained; that pursuant to an order of Judge Frizzelle dated 13 April 1960 a notice was published requiring contingent remaindermen and claimants to appear and answer or demur, but no one has appeared in response thereto; that Killian Barwick was appointed as guardian *ad litem* for all contingent remaindermen and claimants, by order of the clerk dated 17 August 1960, and has filed answer requesting the court to determine the interests of the persons for whom he was appointed and to protect their interest but he has taken no definite position on the question as to whether or not movant's motion should be allowed, nor has he informed the court as to the names, identity or legal status of the persons whom he was appointed to represent, apparently not being able to do so.

Upon the foregoing facts the court concluded:

"1. That although there are irregularities in the proceedings herein, the movant, who has been guilty of laches and unreasonable delay in making her motion, is not entitled to have the same allowed against respondents, who hold title under a *bona fide* purchase for value without notice, and who themselves took title without notice of such irregularities, and

"2. That Killian Barwick, guardian *ad litem,* is not entitled to any affirmative relief herein on behalf of contingent remaindermen, claimants and persons whose names, identity and legal status cannot be ascertained.

"Now, therefore, it is by the court, ordered, adjudged and decreed:

"1. That the said motion of Pauline Menzel Williams be and it is hereby denied.

"2. That no affirmative relief be granted to Killian Barwick, guardian *ad litem.*

"3. * * *"

Movant appeals, assigning error.

Leroy, Goodwin & Wells; Pritchett & Cooke for movant appellant.

Worth & Horner; John H. Hall for respondents appellee.

DENNY, J. Assignments of error Nos. 1, 2, 3, 4, 5, 6, and 8 are to the admission in evidence of the deed from J. N. Pruden, commissioner, to Sarah E. Menzel, dated 25 November 1913, purporting to convey a fee simple title to the lands in controversy, and recorded in Book 7, at page 557, in the office of the Register of Deeds in Camden County, and six deeds of trust, duly executed and acknowledged by Sarah E. Menzel and her husband after the execution and registration

of the above deed, each of which purported to convey the fee simple title to said lands to secure the indebtedness indicated in the respective instruments, each of said instruments having been duly recorded in the office of the Register of Deeds of Camden County.

In our opinion, these assignments of error are without merit since the movant introduced in evidence the affidavit of her mother, Sarah E. Menzel, in which she disclaimed any knowledge of the proceeding which the movant seeks to set aside. The movant takes the position that her mother, Sarah E. Menzel, was seized only of a life estate in the lands involved and that she never became aware of the fact that her remainder interest was claimed by the respondents until 1957. It is not controverted, however, that Mr. and Mrs. Menzel and their infant children lived in Portsmouth, Virginia, prior to 1914. Moreover, after Sarah E. Menzel procured the deed from J. N. Pruden, commissioner, conveying to her the fee simple title to said lands, she and her husband and their infant children moved on the land and continued to reside thereon until June 1923, the month before the sale of the lands under foreclosure pursuant to the terms of a deed of trust executed by Sarah E. Menzel and her husband, dated 16 May 1917, to secure an indebtedness of $4,850. These assignments of error are overruled.

Assignment of error No. 7 is based on an exception to the introduction in evidence of a plat, recorded in Plat Book 1, page 21, in the office of the Register of Deeds of Camden County, which map bears the legend "Property of Dr. L. S. Blades, Camden County, North Carolina."

The movant likewise introduced in evidence in the hearing below the affidavit of her mother, Sarah E. Menzel, in which she swore that the lands in which she inherited a life interest and her daughter the remainder were the lands "shown on a map recorded in Plat Book 1, page 21, Camden County Register's office." She further offered the affidavit of one Issac Meiggs to the effect that he had cut timber off this land "at the instance of Dr. L. S. Blades." We do not think the introduction of this map was prejudicial to the movant, and this assignment of error is overruled.

Assignment of error No. 9 challenges findings of fact Nos. 4 and 5 with respect to the application for service of process by publication and the order directing publication. As we construe the findings of the court below, it is not contended that proper service on the infant defendants was obtained either by personal service or by publication. It would seem, however, that the irregularities and defects in the attempted service by publication are immaterial if the appointment of

the guardian *ad litem* for the infant defendants is held to be valid. Hence, this assignment of error is overruled.

The movant's assignments of error Nos. 10 and 11 are to findings of fact Nos. 10 and 11. Finding of fact No. 10 is to the effect that at the Spring Term 1913 of Chowan County Superior Court, which began on 31 March 1913, Judge Whedbee heard this cause pursuant to the order of Judge Long and rendered a judgment which was recorded on the Minute Docket of Camden County. The movant contends that there is no evidence to support the finding that Judge Whedbee heard the cause at the 1913 Spring Term of Chowan Superior Court. The movant further contends there is no evidence to support finding of fact No. 11, to the effect that the "hearing before Judge Whedbee in Chowan County was had by consent of the attorneys for plaintiffs and of C. E. Thompson, guardian *ad litem* for the infant defendants."

In this connection it was stipulated in the hearing below that "Judge Harry W. Whedbee held the Spring Term of Superior Court for Chowan County 1913 and that said term commenced on March 31, 1913, and adjourned April 3, 1913."

The judgment roll in Camden County, introduced by the movant in the hearing below for the purpose of attack and by the respondents for all purposes, contains a judgment purporting to have been signed by Judge Whedbee. The judgment, among other things, contains the following: "Superior Court, Camden County, N. C. (Title of case.) Present Hon. Harry W. Whedbee, Judge Presiding. This cause coming now to be heard by the court at Chowan Superior Court by consent decree, upon the pleadings and exhibits therein, and being heard after argument, by counsel, all parties being before the court and the infant defendants represented by C. E. Thompson, Esq., guardian *ad litem,* duly appointed: It is considered and adjudged by the court:" etc. In this judgment Sarah E. Menzel was adjudged to be the owner of a life estate in the lands devised to her by Bailey J. Overton, with remainder to such issue of Sarah E. Creekmore (now Sarah E. Menzel) as should be living at her death and if none should then be living, then to Miles N. Overton and Grandy B. Overton in fee simple. It is set forth in the said judgment that it was for the best interest of the parties to sell the lands involved and invest the proceeds from such sale under orders of the court. J. N. Pruden was appointed commissioner to sell the lands and to report the sale to the next term of court, succeeding date of sale, and the judgment further provided for the value of the life interest of Sarah E. Menzel to be ascertained and credited on the purchase price of said lands should she

become the purchaser thereof. This confirms the fact that the court contemplated the sale of the lands involved in fee simple, otherwise there could have been no possible reason for ascertaining the value of the life estate of Sarah E. Menzel. These assignments of error are overruled.

The movant's assignment of error No. 12 is to the judgment signed by Judge Whedbee, on the ground that it was entered without consent, out of term and out of the county. She therefore contends that said judgment was null and void.

It appears from the court records in Camden County, introduced in the hearing below, that during the Spring Term 1913 of the Camden Superior Court that B. F. Long, Judge Presiding, entered the following order in this case: "In this cause all parties consenting it is considered and adjudged that the same be heard out of term and out of county at Spring Term 1913 of Chowan County Superior Court." This order was not dated, but the evidence tends to show it was entered 11 March 1913, since it appears in the minutes of the court under that date. However, on 12 March 1913, C. E. Thompson filed a verified answer as guardian *ad litem* of the infant defendants in this cause in the office of the Clerk of the Superior Court of Camden County. The fact that Judge Long ordered the hearing out of term and out of the county did not remove the case from Camden County. Therefore, the Clerk of the Superior Court of Camden County had authority to appoint a guardian *ad litem* for the infant defendants if it be conceded that application for such appointment was made after the above order was entered. Likewise, the court had the power to accept and file the guardian *ad litem's* verified answer in Camden County after the order for the hearing in Chowan County was made. Moreover, if the guardian *ad litem* was before the court and participated in the hearing in Chowan County as recorded in Judge Whedbee's judgment, and found as a fact by Judge Bone, such appearance would constitute a waiver of any objection to the hearing before Judge Whedbee.

The irregularity complained of in the appointment of the guardian *ad litem* for the infant defendants appears to be a mere clerical error or omission, and the fact that C. E. Thompson who was found by the Clerk of the Superior Court of Camden County to be a suitable person to represent the defendants, coupled with the fact that he filed a verified answer on behalf of the defendants and represented them in the hearing before Judge Whedbee, and so found as a fact by Judge Bone, leads us to the conclusion that such court had jurisdiction of the infant defendants and that no predudicial error in connection

therewith is made to appear. Therefore, the judgment entered by Judge Whedbee was not void, and at most was only voidable for irregularity not apparent on its face. *Franklin County v. Jones,* 245 N.C. 272, 95 S.E. 2d 863, and cited cases; *Gillikin v. Gillikin,* 252 N.C. 1, 113 S.E. 2d 38; *Glisson v. Glisson,* 153 N.C. 185, 69 S.E. 55; *Tate v. Mott,* 96 N.C. 19, 2 S.E. 176. This assignment of error is overruled.

Assignments of error Nos. 13 and 14 challenge the correctness of the finding that J. N. Pruden advertised the lands involved herein and sold them on 6 October 1913 and reported such sale to the November Term 1913 of the Camden County Superior Court and that Sarah E. Menzel became the purchaser at the price of $3,200 and recommended that the sale be confirmed; and further attacking the finding of fact that Sarah E. Menzel was dissatisfied with the Clerk's computation of the value of her life estate. Such findings are supported by the records in Camden County which were introduced in the hearing below; therefore, these assignments of error are overruled.

Assignment of error No. 15 presents no prejudicial error and is overruled.

Assignments of error Nos. 16, 17, 18 and 19 challenge findings of fact Nos. 19, 20, 21 and 22, set out hereinabove. The movant denies that there is any evidence to support finding of fact No. 19 with respect to the execution of the deed on 25 November 1913 by J. N. Pruden, commissioner, sufficient in form to convey to her the fee simple title to the lands involved. The other assignments are to the findings with respect to the execution of the deeds of trust set out in findings of fact Nos. 20 and 21 and with respect to the foreclosure of the deed of trust as set out in finding of fact No. 22. The movant contends these findings are immaterial, irrelevant, and incompetent. In our opinion these assignments of error are without merit and are overruled.

The movant's assignments of error Nos. 20 and 21 are to findings of fact Nos. 24 and 31. The movant contends that the court should have found that L. S. Blades refused to guarantee title to said lands and that he had received many times the purchase price for the life estate in said tract of land. The movant further contends that there is no evidence to support finding of fact No. 31, to the effect that in the exercise of ordinary business prudence she could have and should have discovered the irregularities of which she complains, at least twenty or more years ago, and should have known that the respondents and their predecessors in title were claiming ownership in fee simple of the lands in question. We think the findings of fact Nos.

24 and 31 are supported by competent evidence and, therefore, overrule these assignments of error.

The additional assignments of error are to finding of fact No. 32, to the effect that L. S. Blades was a *bona fide* purchaser for value of the lands in question, without notice of irregularities in this action of which the movant now complains, and to the conclusions of law and to the judgment entered pursuant thereto. In our opinion, these assignments of error are likewise without merit and are overruled.

No irregularity appears on the face of the record with respect to the judgment entered ordering the sale of the property, the sale, or the commissioner's report, or in the confirmation thereof. Neither is there any irregularity appearing on the record in connection with the foreclosure sale of the property in 1923, when the fee simple title to the lands involved was foreclosed and sold for the sum of $8,200 pursuant to the provisions of the deed of trust executed by Sarah E. Menzel and her husband on 16 May 1917 and duly registered in the office of the Register of Deeds of Camden County, North Carolina, on 28 May 1917.

It is well established in this jurisdiction that " * * * (I)n the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding and that the judgment on its face authorized the sale. *Graham v. Floyd,* 214 N.C. 77, 197 S.E. 873 * * *." *Cherry v. Woolard,* 244 N.C. 603, 94 S.E. 2d 562; *Franklin County v. Jones, supra.*

The contention that the description in the commissioner's deed was insufficient to convey the lands involved is untenable. The deed conveys "all the lands described * * * in the last will and testment of Bailey J. Overton, and more particularly described in the following deeds": (then follows a list of nine deeds executed by various grantors to Bailey J. Overton; in all but two of these deeds the book and page where the respective deeds were registered in Camden County were given. In one of the deeds the names of the grantors were given and the year the deed was executed, but the book and page where the deed was registered were not given. In the other deed the names of the grantors were given and the book where the deed was registered, but not the page in said book.) Following the listing of the above deeds there appears the following: "Together with all other lands of which said Bailey J. Overton died seized and possessed in Camden County."

Nothing in the hearing below challenged the accuracy of the survey

which Dr. L. S. Blades had made of the listed tracts of land or the correctness of the map of such lands recorded in Plat Book 1, at page 21, in the office of the Register of Deeds of Camden County. Moreover, the parties in the hearing below informed the court that the lands in controversy consisted of 426 acres.

That is certain which can be made certain, and lands may be conveyed by reference to an identifiable source of title. We so held in *Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440, and in *Moore v. Fowle,* 139 N.C. 51, 51 S.E. 796.

As pointed out by Judge Bone in finding of fact No. 30, Sarah E. Menzel asserted in her affidavit that her husband practiced a fraud upon her; she did not, however, give any particulars as to what the fraudulent acts or representations were. Moreover, the judgment confirming the sale of the lands involved constituted a final judgment. *McLaurin v. McLaurin,* 106 N.C. 331, 10 S.E. 1056. Therefore, any statement or inference with respect to fraud in connection with the movant's motion in this cause is mere surplusage. *Carter v. Rountree,* 109 N.C. 29, 13 S.E. 716.

In the last cited case, it is said: "It is well settled that pending an action before the final judgment an interlocutory order or judgment may be attacked for fraud by a motion or proceeding in the action, but after the final judgment the remedy for fraud is by an independent action brought for the purpose." McIntosh, North Carolina Practice & Procedure, 2nd Ed., Vol. 2, section 1718; *Burgess v. Kirby,* 94 N.C. 575; *McLaurin v. McLaurin, supra.*

The lapse of time will not bar the right to move to vacate a void judgment. *Monroe v. Niven,* 221 N.C. 362, 20 S.E. 2d 311. On the other hand, all our decisions seem to hold that a motion to set aside a voidable or irregular judgment must be made within a reasonable time.

In *Glisson v. Glisson, supra,* a proceeding to sell lands to create assets to pay debts was instituted. The petitioners were never served with summons but a guardian *ad litem* was appointed. The decree authorizing the sale was entered on 9 February 1883. The motion in the cause to set aside the judgment was made on 16 December 1908. This Court said: "It is true that courts have power to correct their records and set aside irregular judgments at any time, but it is settled practice that they will not exercise the power where there has been long delay or unexplained and unwarranted laches on the part of those seeking relief against the judgment."

In *Harrison v. Harrison,* 106 N.C. 282, 11 S.E. 356, a proceeding was instituted by the administrator to create assets for the payment

of debts. The sale took place in 1870. No service of any kind was made on the heirs of the decedent, nor was a guardian *ad litem* appointed for the infant heirs. This Court held that the motion to set aside the decree should be granted on the ground that the proceeding was utterly void and the lapse of nineteen years could not make it valid. The rights of the purchaser at the sale were left undetermined.

In *Harrison v. Hargrove,* 109 N.C. 346, 13 S.E. 939, in an ejectment proceeding a new trial was granted in order to give the plaintiffs an opportunity to explain the delay of nineteen years. The Court said: "The decree and sale were made in 1870, and this action was brought in 1887. The motion to set aside the decree was made in 1889, and thus we have seventeen years or more of inaction on the part of the plaintiffs, who during this time were under no disabilities whatever. In addition to this, the purchaser was in possession of the property, and there is evidence showing that these plaintiffs with their mother lived about three hundred yards distance on an adjacent tract. It is true that the mother, under the will, had a life estate in the land and that she did not die until 1887. * * * These plaintiffs having a right to be supported from said land during the life of their mother, and also entitled in remainder, could have moved to set aside the decree at any time after it was rendered, for some cause, they failed to do so until 1889.

"Taking these circumstances, together with the fact that they must have known of the long and adverse possession by the defendant of the adjoining land, and we are entirely clear that we should not exercise this '*quasi* equitable' (Black on Judgments, *supra*), power of the court and grant the plaintiffs relief as upon setting aside the decree."

The new trial resulted in a verdict in favor of the innocent purchaser for value. The plaintiffs appealed and this Court affirmed. See *Harrison v. Hargrove,* 120 N.C. 96, 26 S.E. 936, 58 Am. St. Rep. 781.

In the present cause the judgment confirming the sale of the lands in controversy was entered in 1913, forty-five years before the movant filed her motion, and thirty-one years after she became of age. In view of the finding that L. S. Blades was a *bona fide* purchaser of the lands involved, without notice of the irregularities of which the movant complains, in our opinion she is not entitled to the relief she seeks. *Morris v. Gentry,* 89 N.C. 248; *Harrison v. Hargrove, supra Glisson v. Glisson, supra; Rawls v. Henries,* 172 N.C. 216, 90 S.E. 140; *Wynne v. Conrad,* 220 N.C. 355, 17 S.E. 2d 514; *Gardner v. Price,* 242 N.C. 592, 89 S.E. 2d 147.

It is true that the statute of limitations in an ejectment action

does not begin to run against the remainderman until the death of the life tenant. "This does not mean, however, that such remainderman may not move to vacate a void or voidable judgment until after the expiration of the life estate. This he may do at any time if the action is taken seasonably and laches cannot be imputed to him." *Narron v. Musgrave*, 236 N.C. 388, 73 S.E. 2d 6. See also *Harris v. Bennett*, 160. N.C. 339, 76 S.E. 217.

It will be noted that the movant did not except to or assign as error findings of fact Nos. 1, 2, 3, 6, 7, 8, 9, 16, 17, 18, 23, 25, 26, 27, 28, 29, 30 or 33.

The judgment entered below will be upheld.

Affirmed.

IN THE MATTER OF: THE WILL OF ALFRED T. SESSOMS, DECEASED.

(Filed 12 April, 1961.)

1. Wills § 6—

Where a will is written on two separate sheets, it is not required that the sheets be physically attached or that the signature of the testator appear on each sheet, and if the signature of testator appears on the second page, it is sufficient, G.S. 31-3.3.

2. Same: Wills § 25—

Where the evidence tends to show that the paper writing probated consisted of two sheets of paper, that the typewritten words thereon were typed at three separate times, but there is testimony that the instrument offered for probate was the paper which was witnessed and signed as a will in the presence of the witness, and that the same two pages were stapled together when delivered to the clerk for probate, there is sufficient credible proof of the identity of the sheets as one will, and it is not required that the court instruct the jury upon the rules of physical attachment or identification as one instrument by internal sense or coherence.

3. Wills § 25—

Where there is no evidence tending to show any alterations in the dispositive parts of the instrument offered for probate, the only material alteration being in the designation of the executor prior to the execution of the instrument by the testator, it is not prejudicial for the court to fail to charge on the principle of law in regard to alterations.

4. Same—

The charge of the court in this case is held to have stated caveators' evidence in detail and to have instructed the jury upon what circum-

stances the issue should be answered in the negative, and caveators' contention that the jury was not given an opportunity to make a finding favorable to them is untenable.

5. Wills § 26—

Where the only contention is as to whether the paper writing propounded was executed according to the formalities required by law, the answer of the jury to the issue directed to this question determines the answer to the issue as to whether the paper writing is a valid will, and the court properly instructs the jury that if they answer the first issue in the affirmative they should answer the second issue in the affirmative also, and that if they answer the first issue in the negative, the second issue should also be answered in the negative.

APPEAL by caveators from *Paul, J.*, September 1960 Term of SAMPSON.

Issue of *devisavit vel non*, raised by a caveat to the will of A. T. Sessoms, the same person as Alfred T. Sessoms.

A. T. Sessoms, a resident of Sampson County, died on 4 January 1960. His heirs and distributees were his widow, and a son and daughter born of a former marriage. On 25 January 1960 O. B. Tew, Jr., named executor therein, offered for probate as A. T. Sessoms' will an attested paper writing. The instrument was probated in common form, and recorded in Will Book 13, page 267, in the office of the clerk of the Superior Court of Sampson County. This instrument devised and bequeathed to his widow, Inez Sessoms, in fee simple all of his property, real, personal and mixed. On 21 April 1960 Beatrice Sessoms Spell, a daughter, and R. S. Sessoms, a son, filed a caveat thereto on the alleged ground that the instrument is not the last will and testament of their father, A. T. Sessoms. Thereupon the proceeding was transferred to the Superior Court docket for trial.

During the trial of the caveat, and while propounder was introducing his evidence, the caveators stipulated that they did not question the mental capacity of A. T. Sessoms to execute the instrument, and further that the instrument "was not obtained by reason of undue influence."

The following issues were submitted to the jury without objection, and answered by it as indicated:

"1. Was the paper writing propounded, bearing date of March 4, 1955, executed by Alfred T. Sessoms, according to the formalities of law required to make a valid last will and testament?
Answer: Yes.

"2. Is the last will and testament referred to in Issue No. 1,

propounded in this cause, and every part thereof, the last will and testament of Alfred T. Sessoms, deceased?

Answer: Yes."

The court entered judgment in accord with the verdict adjudging and decreeing that the last will and testament of Alfred T. Sessoms, deceased, is that certain paper writing heretofore offered for probate and probated in common form in words and figures as recorded in Will Book 13, at page 267, in the office of the clerk of the Superior Court of Sampson County.

From the judgment, caveators appeal.

Butler & Butler by Edwin E. Butler for Propounder, Appellee.

Nance, Barrington, Collier & Singleton for R. S. Sessoms, Caveator, Appellant.

Hubbard and Jones by Howard H. Hubbard for Beatrice Sessoms Spell, Caveator, Appellant.

PARKER, J. Caveators have no assignments of error as to the evidence. They have three assignments of error, other than two formal ones, and all three are to the charge of the court to the jury.

Propounder's evidence tends to show the following facts: A. (Alfred) T. Sessoms was a business man engaged in various activities, farming, sale of gasoline, operation of a cafe and a store, and had a franchise for Linen White bleach covering three states. He did business and made deposits in the The Scottish Bank in Salemburg. A. T. Sessoms was twice married. Caveators are children of his first marriage. A. T. Sessoms married his second wife, Inez, about 1943: no children were born of this marriage. Inez Sessoms took an active part in the operation of her husband's business affairs, working also in the fields, at times seven days a week, and helped him accumulate a lot of property. A. T. Sessoms was not a strong man, and could not do too much labor. He carried a number of different accounts in The Scottish Bank in Salemburg. Mrs. Inez Sessoms had the right to sign his name to cheques on these accounts, did so, and her writing was very similar to his. These cheques were signed A. T. Sessoms.

One J. V. Baggett, who attended the Law School at the University of North Carolina and is director of admissions and public relations at Edwards Military School in or near Salemburg, helped A. T. Sessoms on Saturdays in Sessoms' office with his books, correspondence, and tax work. About 1954 A. T. Sessoms told Baggett that he wanted him to write a will for him and his wife, Inez Sessoms; that "he wanted

to will everything to his wife, and a will for her willing everything to him." Thereafter Baggett wrote with a typewriter a will of two pages for A. T. Sessoms as requested, leaving everything to his wife. It seems from the record, and a photostatic picture of the instrument probated in common form filed with the record, that all the dispositive parts of the will consisting of Items 2, 3 and 4 (Item 1 provided for the payment of his debts), were written on the first page, and on the second page Inex Sessoms, A. T. Sessoms' wife, was appointed as executrix. About a year and a half or two years later A. T. Sessoms told Baggett his wife, Inez Sessoms, was not experienced in business matters of that kind, and he wanted to change his will, and appoint Mr. O. B. Tew, Jr., as executor. Tew was then and is now cashier of The Scottish Bank in Salemburg. Baggett called Tew asking if he would accept as executor, and Tew replied "Yes." Whereupon, Baggett unstapled the two pages, took the second page out, rewrote the second page of the instrument on 4 March 1955 constituting and appointing O. B. Tew, Jr., as executor, restapled the first page and the rewritten second page, and seeing that the second rewritten page was about an inch longer than the first page, he cut off that amount so the two sheets would be the same length, and gave the two page stapled instrument back to A. T. Sessoms. Baggett did not see the instrument again until after A. T. Sessoms' death.

In about October or November 1958 A. T. Sessoms came into The Scottish Bank in Salemburg bringing his will, and asked O. B. Tew, Jr., to read it, and see if he thought it was all right. Tew read it, and in his opinion it looked all right. Sessoms talked about his son and his wife's brother, and said he wanted to add something to his will. Tew testified: "He (Sessoms) told me Mrs. Sessoms' brother John had bothered him a lot. He was a bad drinker and would run through with anything he got. He said, 'I've worked mighty hard to get what I have, my wife and I together. I don't want it thown away. Whatever John gets will just go to the wind. My boy is the same way.'" After making those statements, Sessoms asked Tew if he would put an addition in his will. Tew told him he would get Geraldine Hudson, who worked in the bank, to typewrite the addition he wanted in his will. Whereupon, she wrote with a typewriter Item 5 on the first page of the instrument, which reads as follows: "It is my will and order that at my death R. S. Sessoms and John A. Sessoms shall not receive any part of my estate whatsoever unless the same shall first be approved by my Executor." After it was typed, Sessoms and Tew read Item 5. After Sessoms read it, Sessoms asked Tew whom he could get to witness his will. Tew told him he could get Miss Hudson

and L. A. Bethune, who were younger than Sessoms and would live longer than he did. Sessoms said "that is fine." Then in Sessoms' presence Tew asked them to witness Sessoms' will. Whereupon, A. T. Sessoms in the presence of Miss Hudson, L. A. Bethune and O. B. Tew, Jr., signed the paper writing, and Bethune and Miss Hudson then in Sessoms' presence and in the presence of each other signed the instrument as witnesses. Miss Hudson made no corrections in the instrument, and merely typewrote Item 5 on the first page. She signed the instrument as Jerlene Hudson. She was married in June 1959.

At A. T. Sessoms' death this instrument was found in his lockbox at the bank.

Rev. G. N. Ashley, president of Pineland College and Edwards Military School for a while, preached in the Salemburg community for 23 years. He knew A. T. Sessoms intimately, and knows his signature. In his opinion, the signature on the instrument on the right side on the second page probated in common form is that of A. T. Sessoms.

This is a copy of the written instrument:

PAGE 1

"NORTH CAROLINA
SAMPSON COUNTY

LAST WILL AND TESTAMENT

"I, ALFRED T. SESSOMS, of Sampson County, North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and declare this my Last Will and Testament, to wit:

"1st. My executrix, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all my just debts, out of the first moneys that shall come into her hands, belonging to my estate.

"2nd. I will and bequeath to my beloved wife Inez Sessoms all my real estate, consisting of the two stores at the northwest corner of the North Carolina Highway No. 24 intersection with the Autryville-Clement Highway, my home on the east side of the street leading from the said intersection to the Atlantic Coast Line Railroad Depot, and my farm land in Beaverdam Township, Cumberland County, North Carolina; said real estate to be held by my said wife in fee simple estate.

"3rd. I will and bequeath to my beloved wife Inez Sessoms all my personal property of every description, including all my household and kitchen furniture, automobiles, trucks, book accounts, goods and stock in my stores wherever found, cash in hand and in bank,

stocks and bonds, and any and all other personal property of any kind wherever found; said personal property to be hers absolutely in fee simple.

"4th. All the residue of my estate, real, personal, and mixed, not hereinbefore devised or bequeathed, I will and devise to my said beloved wife Inez Sessoms in fee simple forever.

"5th. It is my will and order that at my death R. S. Sessoms and John A. Sessoms shall not receive any part of my estate whatsoever unless the same shall first be approved by my Executor.

PAGE 2

"I hereby constitute and appoint O. B. Tew, Jr., my Executor to execute this my Last Will and Testament according to the true intent and meaning of the same, and every part or parcel thereof, and to act without bond, hereby revoking and declaring utterly void any and all other Last Wills and Testaments by me heretofore made.

"This the 4th day of March, 1955.

A. T. SESSOMS (SEAL)

Signed, sealed, published and declared by the said Alfred T. Sessoms to be his Last Will and Testament in the presence of us, who, at his request and in his presence, and in the presence of each other, do affix our names as witnesses thereto.

JERLENE HUDSON
L. A. BETHUNE"

Caveators offered evidence in substance: James Calvin Sessoms, a brother of A. T. Sessoms, and Beatrice Sessoms Spell, a daughter of A. T. Sessoms, knew A. T. Sessoms' signature, and in their opinion the name A. T. Sessoms appearing on the second page of the purported will is not in the handwriting of A. T. Sessoms. In the opinion of Wilton Spell, husband of Beatrice Sessoms Spell, the name A. T. Sessoms appearing on the second page of the purported will is not in the handwriting of A. T. Sessoms, but the name of A. T. Sessoms was written by his wife, Inez Sessoms.

L. A. Kelly, held by the court to be an expert witness in the field of indentification of documents, testified in substance: The texture of the two pages of the purported will was different: page two was a heavier and coarser type paper than page one, and there was a difference in the color of the two sheets of paper. From his examination and tests it is his opinion that the first four paragraphs on the

first page of the purported will were not written with the same typewriter as paragraph 5 on that page; that page two was not written with the same typewriters which were used in writing page one. In other words, it is his opinion there were three different writings on the two pages of the purported will.

W. D. Hall is sheriff of Sampson County. Shortly after A. T. Sessoms' death he and Captain J. C. Sessoms, a brother of A. T. Sessoms, with a photostatic copy of the purported will of A. T. Sessoms, went to J. V. Baggett's home. Baggett examined the photostatic copy of the purported will, and said he wrote the first four items on the first page, but did not write Item 5 on the first page and did not write the second page, and did not know who wrote Item 5 and the second page. Baggett, according to Hall's testimony, further said A. T. Sessoms on one occasion asked him to make an addition to his will or write a new will, but he never did. According to Captain Sessoms' testimony, Baggett said A. T. Sessoms called him in one day, "and asked him if he wanted to change his will, and he made some mental notes or some, some short scratch pad notes; that my brother looked at the will and said, 'No, it's just like I want it; don't change it'." Baggett also said the signature on the purported will looked like it could have been a traced signature, but that A. T. Sessoms' and Mrs. Sessoms' signatures were so much alike they were hard to detect. After talking to Baggett Sheriff Hall talked to O. B. Tew, Jr., who said he did not know who had written Item 5: "he knew it was like Mr. Sessoms intended for it to be, but he did not know who wrote it."

J. C. Moore, clerk of the Superior Court of Sampson County, testified in substance: The purported will was brought into his office by Mr. Butler or O. B. Tew, Jr. It was stapled together in the usual manner. The staples were removed when it was taken to the Commercial Printing Company for photographing. When the staples were removed, there were nine staple holes in the blue manuscript cover. On the first sheet there were nine staple holes on the left side, and nine on the right side. There were six holes in the left corner of the second sheet and six in the right corner. In February 1960 he took the instrument to Mr. Hubbard's office, so J. V. Baggett could examine it. Baggett did so, and told Mr. Hubbard and him he wrote the first page, except the 5th paragraph, he did not write the second page.

Caveators offered evidence to this effect: A. T. Sessoms' lockbox in the bank vault was opened in the absence of the clerk of the Superior Court. A. T. Sessoms kept large amounts of cash in his lockbox. When the lockbox was opened after his death, no cash was found in it. When A. T. Sessoms was carried to the hospital, he had a large

amount of cash on his person. Inez Sessoms took possession of this money.

Caveators contend that the testimony of L. A. Bethune and Geraldine Hudson as to the date of the execution of the purported will was vague and contradictory, as in fact it was, and therefore the purported will was not properly witnessed.

When J. V. Baggett was recalled as a witness by propounder, he testified on cross-examination: "Yesterday while on the stand I remembered having written the second page. I remembered that after having told you positively that I did not write it. . . . I know I rewrote it on a longer piece of paper than I used the first time. I unstapled the will one time. I stapled it when I first wrote it; then when I rewrote the second page, I unstapled it and restapled it. It had not been previously unstapled; so when I finished with it, it had two staple holes, the first and second one. That is right as far as I know. I don't think anything will refresh my recollection about that."

Judge Paul's charge to the jury appears on pages 64 to 90, both inclusive, in the record. The learned judge, after reading the issues to the jury, charged them accurately and lucidly in respect to the legal requirements and formalities to execute a valid, attested, written last will and testament, as set forth in G.S. 31-3.3, defined correctly the term the greater weight or preponderance of the evidence, stated the evidence accurately in great detail, and properly placed upon propounder the burden of proof on the first issue, *In re Will of Morrow*, 234 N.C. 365, 67 S.E. 2d 279; *In re Will of Hedgepeth*, 150 N.C. 245, 63 S.E. 1025.

Judge Paul then charged the jury as follows: "And so, Gentlemen, on the first issue, I charge you, that if you find from the evidence in this case and by its preponderance or greater weight, the burden being upon the propounders to so satisfy, that sometime after 1946 and prior to 1955, A. T. Sessoms requested J. V. Baggett to prepare a last will and testament for him, advising Baggett how he, Sessoms, desired his property to be left after his death, and that following such conversation J. V. Baggett typed a two page instrument and gave it to A. T. Sessoms; and that a year or two later Sessoms again talked to Baggett about one O. B. Tew being named in his will as executor, rather than his wife, Mrs. Inez Sessoms; that Baggett then called Tew and Tew consented to act as executor. That Baggett then took the two page instrument he had theretofore prepared for A. T. Sessoms, unstapled it and took out the second page, wrote by typewriter a new second page, bearing date March 4, 1955, and gave it back to Sessoms; that is, gave back to him the two pages, the first page as

he had first typed it, and the newly typed second page; that thereafter, in October or November 1957 or 1958, A. T. Sessoms went to The Scottish Bank in Salemburg and discussed with O. B. Tew a change he wanted made in his will, and at his, Sessoms' request, O. B. Tew had Miss Geraldine Hudson type a new paragraph, numbered five, at the bottom of the first page of the instrument; and that on that occasion A. T. Sessoms had before him the two page typewritten instrument bearing date of March 4, 1955, which has been offered in evidence in this proceeding as Propounders' Exhibit A, the typewritten portion of the two-page instrument then being in words as it now reads; and that at that time A. T. Sessoms, intending to sign the instrument as his will, did so, by signing his name thereto in the presence of Geraldine Hudson and L. A. Bethune, who had been requested by Sessoms or by Tew, at Sessoms' request, and in his presence, witnessed his, Sessoms' will, and that Geraldine Hudson and L. A. Bethune, in the presence of A. T. Sessoms, attested the same by signing their names as witnesses to the instrument; if the propounders in this case have so satisfied you from the evidence in the case and by its preponderance or greater weight, it will be your duty to answer the first issue yes. (If the propounders have failed to so satisfy you from the evidence in the case and by its preponderance or greater weight, it will be your duty to answer the first issue no)." Caveators assign as error the last sentence in parentheses from the quoted part of the charge.

Immediately thereafter Judge Paul charged as follows: "As I have heretofore instructed you, gentlemen, the burden of proof on the first issue is on the propounders. (Now, Gentlemen, if you answer the first issue yes, that is, if you find from the evidence in this case and by its preponderance or greater weight that the paper writing propounded, bearing date of March 4, 1955, was executed by Alfred T. Sessoms according to the formalities of law required to make a valid last will and testament, and if you answer the first issue yes, you will then answer the second issue yes. If you answer the first issue no, that is, if the propounders have not satisfied you from the evidence in the case and by its preponderance or greater weight that the paper writing propounded, bearing date of March 4, 1955, was executed by Alfred T. Sessoms, according to the formalities of law required to make a last will and testament, and if you answer the first issue no, it will then be your duty to answer the second issue no)." This part of the charge in parentheses is assigned as error by caveators.

Caveators' third assignment of error is that Judge Paul did not comply with the provisions of G.S. 1-180, in that in respect to caveators' contentions the judge failed to declare and explain the law

arising on the evidence, and made no application thereof to any of the evidence from which the jury could have found in favor of caveators.

Caveators in their brief state their contentions were: One, the purported will was not properly witnessed. Two, the signature on the instrument offered for probate was not that of A. T. Sessoms. Three, Mrs. Sessoms, the widow, and O. B. Tew, Jr., the executor, conspired to and did offer for probate a forged will, or one in which the first page in which Mrs. Sessoms was named sole beneficiary had been substituted for the original, thereby effecting a forged instrument. And four, the will was written on three different typewriters and was, at best, an altered instrument, if not one forged in part.

It is true as contended by caveators, "there was no direct evidence by either Mr. Bethune or Miss Hudson (Mrs. Naylor), witnesses, or anyone else, as to whether the sheets of paper alleged to comprise the Will were stapled together at the time it was executed." However, O. B. Tew, Jr., testified in respect to the instrument offered for probate, "this is the paper which was signed in my presence, in the presence of Mr. Sessoms, Mr. Bethune and Miss Hudson." J. C. Moore, clerk of the Superior Court of Sampson County, testified the two pages of the purported will were stapled together, when it was delivered to him.

Where a will is written on two separate sheets, G. S. 31-3.3 does not require that they be physically attached, or that the signature of the testator appear on each sheet. The signature of the testator may appear on the second page, and if so, that is sufficient. *In re Will of Roberts,* 251 N.C. 708, 112 S.E. 2d 505; *In re Will of Williams,* 234 N.C. 228, 66 S.E. 2d 902.

In the *Roberts* case this is written: "The general rules have been stated as follows: 'A will need not be written entirely on one sheet of paper, but may be written on several separate sheets, even though there is confusion in the order of their arrangement, provided the sheets are so connected together that they may be identified as parts of the same will. A valid will may be written on several sheets of paper without attaching them where the principle of integration may be applied. While connection by the meaning and coherence of the subject matter is sufficient, as physical connection by mechanical, chemical, or other means is not required, although it is sufficient when made, in the absence of such physical connection, the papers must be identified as one will by their internal sense, by coherence, or adoption of the several parts. Where there is sufficient credible proof of the identity of disconnected sheets propounded as one will, neither the physical nor coherent rule of attachment is applicable.'" It is clear that the

two sheets of the will here are identified as one will by their internal sense, by coherence, or adoption of the several parts, because all of its dispositive provisions and Item 5 appear on the first page, and the second page contains only the appointment of an executor. The failure to charge the above rule of law under the facts here and the charge as given was not prejudicial error.

While the caveators offered evidence tending to show that A. T. Sessoms once said about a year and a half or a year before his death that he was going to see that Wilton Spell and his wife, Beatrice Sessoms Spell, are taken care of, there is no evidence tending to show that A. T. Sessoms ever had a will written to do so. All the evidence tends to show that the only will he had written was one leaving everything he had to his widow. There is no evidence tending to show that any alteration was ever made in the dispositive parts of the instrument offered for probate, but the only change, other than the addition of Item 5, was the appointment of a different executor on page 2. Such being the case the failure of the judge to charge the jury on the principle of law as to alterations was not prejudicial to caveators in the light of the evidence and the charge given.

Judge Paul in charging the jury on the first issue clearly, accurately and in great detail applied the law to the factual situation having support in propounder's evidence, as required by G.S. 1-180. Then immediately thereafter, Judge Paul charged the jury. "If the propounders have failed to so satisfy you from the evidence in the case and by its preponderance or greater weight, it will be your duty to answer the first issue no." Judge Paul had in a previous part of the charge stated caveators' evidence in great detail, and had stated to the jury that caveators contended the jury should answer the first issue No. By this instruction an opportunity was afforded the jury for an alternative finding, or in other words to answer the first issue No, as contended by caveators. No such opportunity for an alternative finding was afforded the jury in *Williamson v. Williamson,* 245 N.C. 228, 95 S.E. 2d 574, which is relied upon by caveators.

Judge Paul's charge on the second issue is correct, for the reason that it necessarily follows that the second issue should be answered Yes by the jury, if they answered the first issue Yes, and should be answered No, if the jury answered the first issue No.

Caveators have not successfully carried the burden (*Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657) of showing that Judge Paul in his charge failed to comply with the provisions of G.S. 1-180. All caveators' assignments of error are overruled. No prejudicial error is shown. In the trial below there is

No error.

STATE v. JAMES ALBERT BAILEY, JR. AND LEROY JONES.

(Filed 12 April, 1961.)

1. **Criminal Law § 81—**

The testimony of an accomplice, whether supported or unsupported, is subject to the rule of scrutiny, since an accomplice is generally regarded as interested in the event.

2. **Criminal Law § 111—**

Where one witness has testified to facts establishing that he was an accomplice and there is testimony to the effect that two other witnesses were also accomplices, it is the duty of the court, upon apt request for special instructions, to charge the jury upon the rule requiring them to scrutinize the testimony of the admitted accomplice, and to scrutinize the testimony of the other two witnesses, if the jury should find them to be accomplices, and an instruction that it is dangerous to convict a defendant upon the unsupported testimony of an accomplice, is more than that to which the defendant is entitled.

3. **Criminal Law § 113—**

Where special instructions requested are not supported by the evidence, the court is not required to give such instructions either verbatim or in substance.

4. **Same—**

The court is not required to give special instructions requested in the language of the request even though the principle of law embodied therein arises upon the evidence, but the court is required to give the requested instructions in substance insofar as they arise upon the evidence and contain a correct statement of the applicable law.

5. **Homicide § 4—**

Murder in the perpetration or the attempt to perpetrate a robbery from the person is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought.

6. **Criminal Law §§ 9, 10—**

An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact.

APPEAL by defendant LeRoy Jones from *Carr, J.*, March 1960 Term of SCOTLAND.

Criminal prosecution upon two separate indictments — one charging the defendant James Albert Bailey, Jr., with the felony of murder in the first degree of Frank Allred on 10 December 1959, and the other charging the defendant LeRoy Jones with the felony of murder in the first degree of Frank Allred on the same day.

Before the selection of the jury began the court ordered that the two indictments be consolidated for trial.

Each defendant entered a plea of Not Guilty.

Jury Verdict: As to the defendant James Albert Bailey, Jr., Guilty of murder in the first degree with a recommendation of mercy, according to the record. As to the defendant LeRoy Jones, Guilty of murder in the first degree.

A certified copy of the Minutes of the Superior Court of Scotland County by the clerk of the Superior Court of that county shows that in fact the verdict in the defendant Bailey's case was Guilty of murder in the first degree with recommendation of life imprisonment.

From a judgment of imprisonment for life in the State's prison, the defendant Bailey did not appeal. (*S. v. Locklear*, 253 N.C. 813, 117 S.E. 2d 763).

From a judgment of death, the defendant Jones appeals.

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

Gilbert Medlin for defendant Jones, appellant.

PARKER, J. The State's evidence tends to show the following facts:

Defendant LeRoy Jones, 25 years of age, owns a Chevrolet automobile, and in December 1959 was living and working near Angier in Harnett County. On the morning of 10 December 1959 Jones, with Charles Thomas, 23 years of age, and defendant James Albert Bailey, Jr., 19 years of age, riding as passengers in his automobile, drove it to the home of Rellie Barber near Angier. William Gibson, 17 years of age, was there eating breakfast. After breakfast Gibson got in the automobile with Thomas and Bailey, and Jones drove it away. Jones asked Gibson about his pistol, saying something about killing hogs. Gibson told Jones his pistol was at the house of Pauline Covington. Jones drove to Pauline Covington's house, where Gibson got his pistol, and gave it and bullets to Jones. There was a jar of liquor in the pocket of the automobile.

Later on in the morning, Jones, with Thomas, Bailey, Gibson and one Hattie Mae McEachern in his automobile, drove to Scotland County. All four men were drinking. Upon reaching Scotland County Hattie Mae McEachern got out at her father's house. About 3:00 o'clock p.m. on this afternoon Jones was driving his automobile on U. S. Highway No. 1 between the towns of Marston and Laurinburg in Scotland County. Gibson was in the front seat, and Thomas and Bailey in the back seat. They stopped at a crossroads. At the time a Ford automobile with a trailer hitched to it was coming into the highway from a dirt road.

Charles Thomas testified in substance, except when we quote his language:

"LeRoy said, 'there comes a s. o. b. that (sic) has plenty of money.' " Jones drove on down the road, and the automobile with the trailer followed. "LeRoy said he was going to stop down the road and get that man's money. . . . I begged him not to bother the man." Jones drove on about a mile, parked his automobile on the shoulder, got out and waved the automobile with the trailer to stop. It stopped about 30 yards in front of Jones' automobile. Jones walked to the back of the trailer. The white man got out of his automobile with a paper sack. He had fruit in the trailer. Jones pulled a pistol out of his pocket and levelled it on him. The white man backed up four or five feet. While he was backing up, Jones called defendant Bailey to get out of the automobile and come to where he was. Bailey did so, but before he got to where Jones was, Jones shot the white man in the face. The white man fell backwards. Bailey got there, turned the white man over, and took a pocketbook out of his pocket. The man was dead. Bailey handed the pocketbook to Jones. There was a fishing tackle box in the front of the trailer, and Jones took it. Jones and Bailey got back in the automobile, and they left. There was some silver money in the fishing tackle box. Later, Jones opened the pocketbook, and it had some green money in it and a cheque made out for $36.00. That night Jones cashed the $36.00 cheque at S. J. Lindsey's store. Jones gave Bailey ten dollars. The white man's name was Frank Allred. He had only one arm. On cross-examination by Bailey's counsel Thomas testified he heard Jones tell Bailey "Get his pocketbook."

William Gibson testified in substance, except when we quote his language: We first noticed this automobile and trailer near the cross-roads leading to the town of Marston. "LeRoy Jones said that he was going on down the road a little piece and stop that man because 'he has got plenty of money.' " A little farther down the road, Jones stopped, got out of his automobile, and flagged the peddler man to stop. The peddler man stopped his automobile on the same side of the road in front of Jones' automobile. Jones walked up to the trailer, and asked him about some oranges. The white man started to put oranges in a bag, and Jones pulled his pistol on him, and called Bailey to come to the trailer. Jones had Gibson's pistol in the peddler man's face. Just as Bailey was getting out of the automobile to go to Jones, Jones shot the peddler man, and he fell. Bailey turned the peddler man over, and took a pocketbook out of his hip pocket. Jones took a fishing tackle box out of the trailer. The peddler man was Frank Allred. Jones and Bailey got in Jones' automobile, and he drove away. Farther on down the highway Jones said: "If any of you tell any-

thing, I will let you have the other five balls. . . . I know that s. o. b. is dead, because I got him between the eyes." Later that night Jones cashed a cheque, gave Bailey ten dollars, and told him to keep it.

About 4:00 o'clock p.m. on this afternoon I. P. Brown was driving on U. S. Highway No. 1. He saw the dead body of Frank Allred lying in the highway behind a trailer hooked to an automobile. There was a hole in his forehead about as big as the end of Brown's little finger.

Dr. George O. Creed, a doctor of medicine, examined the dead body of Frank Allred at a funeral home. There was a penetrating wound between the eyes. He probed the wound, and the probe passed on through the skull into the anterior part of the skull. He found part of a bullet. In his opinion, Frank Allred's death was caused by the penetration of his skull by a lead bullet.

Frank Allred peddled fruit in the community. He cashed Mrs. Corinna Gibson's welfare cheque for $36.00. Jones, the night Allred was killed, cashed this cheque at S. J. Lindsey's store, receiving $33.00 in money and $3.00 in gas. He told Lindsey he had sold Mrs. Gibson a pig.

After the State rested its case, defendant Bailey testified in his own behalf in substance: He was present when Frank Allred was killed. Jones shot him and then he took a pocketbook out of Frank Allred's pocket.

After defendant Bailey had testified in his own behalf, defendant Jones testified on direct examination in his own behalf in substance, except when we quote his language: After they left the town of Angier, "all the while, Bailey, Gibson and Thomas were talking about getting some 'fast' money, and I asked him what he meant. He said, 'I mean to stick somebody up for it.' I said 'I ain't never done nothing like that.' " He stopped his automobile on the edge of the woods below Mr. Gordon's store, took whiskey out of the automobile, and at Bailey's request let him have his car. Bailey said he would be back in 10 or 15 minutes. While they were gone, he sat down at the edge of the woods, and took another drink. In a little while Bailey, Thomas and Gibson came back. Thomas was driving my car. Jones said he would do the driving, and went to his house. When they arrived there and got out, Gibson had something covered up with Thomas' coat. When they got in Jones' house, Gibson pulled out a basket and emptied it on the bed. When he did this, Jones said, "I know now where you all have been." "They admitted they robbed Mrs. Dupree, but did not say a word about shooting her." Later on all four of them with Hattie Mae McEachern left in Jones' automobile for Scotland County. They put her out at her father's home in Scotland County. He went by to see his wife, and then to Paradise Inn. They left there

and on their way to the town of Ellerbe they came upon an automobile with a trailer. Jones knew the driver was Frank Allred, and Allred knew him. He did not say "there is a s. o. b. who has plenty of money." Bailey asked him to stop so he could get some oranges and food. He stopped the car. Bailey got out, went to Allred at the trailer, and said he wanted to buy some oranges. Jones remained seated under the steering wheel with the engine running. When Allred reached and got a paper sack, Bailey suddenly drew a pistol on Allred, and told him he did not want any damned oranges, that he wanted his money. Allred sort of smiled, and used his hand to push Bailey away from him. When he did this, Bailey shot him, and he fell. Bailey reached down, and took his pocketbook. Thomas, who was near the trailer with Bailey, took the fishing tackle box off the trailer. Both came back, and jumped in the car. Jones did not have his hands on the pistol but one time during the day, and that was when Bailey asked him to get rid of it after he had shot Allred. Later on that night Jones pawned the pistol in a gambling game at Charlie Jones' home. A $36.00 government cheque was in the fishing tackle box. Later on that night Jones cashed this cheque at S. J. Lindsey's store, telling him he had sold a hog to Mrs. Corinna Gibson. Lindsey gave Jones $33.00 in money, and took out $3.00 for gas. They split the money: Bailey taking $10.00, Jones keeping $10.00, and the balance was divided between Thomas and Gibson. Jones does not know who killed Mrs. Dupree, because he was not there. "I'm an accessory before and after the fact because I hauled these men around after I knew that Bailey had killed Mr. Allred. I am guilty of being an accessory after the fact of robbery because they told me they had robbed Mrs. Dupree." On cross-examination by defendant Bailey's counsel, he said it was Gibson's pistol. Gibson was talked into letting his pistol be pawned in the card game. He was talked into cashing the $36.00 cheque at S. J. Lindsey's store, because Lindsey knew him, and did not know the other men. On cross-examination by the solicitor for the State, Jones said in substance: After Allred was shot, Bailey got in his car on the back seat. He had Allred's pocketbook, took the money out, and put the pistol in his pocket. It looked like $25.00 or $30.00. They drove into a pine thicket. Bailey and Thomas gave him, Jones, $5.00.

Defendant LeRoy Jones assigns as error the refusal of the trial judge to give to the jury his following written prayers for special instructions tendered to the judge at the close of all the evidence, and before the commencement of argument of counsel:

"1. In North Carolina a defendant may be convicted upon the unsupported testimony of an accomplice, if the jury is satisfied from such testimony and beyond a reasonable doubt of his guilt; and, in

this case, the witnesses William Gibson, Charles Thomas and James Albert Bailey, Jr., are which is known in law as accomplices; and their testimony as to the guilt of the defendant is unsupported by any other evidence.

"2. However, the Court further instructs you that it is dangerous to convict a defendant upon the unsupported testimony of an accomplice; that it will be dangerous to convict the defendant in this case upon the testimony of William Gibson, Charles Thomas and James Albert Bailey, Jr., although it is your duty to do so if their testimony has satisfied you beyond a reasonable doubt of the defendant's guilt; and that is your duty to scrutinize their testimony with caution and with care and in the light of their interest and bias, if any, in the case."

It bears against the credibility of a witness that he is an accomplice in the crime charged and testifies for the prosecution, and he is generally regarded as interested in the event. *S. v. Hale,* 231 N.C. 412, 57 S.E. 2d 322; *S. v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277. "The rule of scrutiny, therefore, applies to the testimony of an accomplice whether such testimony be supported or unsupported by other evidence in the case." *S. v. Hale, supra.*

In *Rex v. Jones,* 2 Camp., 131, 132, Lord Ellenborough observed: "No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness." In his comment upon this case *Judge Gaston* said in *S. v. Haney,* 19 N.C. 390: "We are not aware of any judicial decision in our country, at variance with the rule brought hither by our ancestors." This Court has consistently adhered to that rule as to its being a matter of the trial judge's discretion, in the absence of a request to charge the rule, from Judge Gaston's day to ours, and the trial judge is not required to charge on the rule in the absence of a request to do so, and his voluntary reference to it rests in his sound discretion. *S. v. Holland,* 83 N.C. 624; *S. v. Miller,* 97 N.C. 484, 2 S.E. 363; *S. v. Ashburn,* 187 N.C. 717, 122 S.E. 833; *S. v. Herring,* 201 N.C. 543, 160 S.E. 891; *S. v. Wallace,* 203 N.C. 284, 165 S.E. 716; *S. v Kelly,* 216 N.C. 627, 6 S.E. 2d 533; *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *S. v. Hale, supra; S. v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690; *S. v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *S. v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745. A refusal

by the trial judge to instruct the jury on this rule of scrutiny as to the testimony of an accomplice or accomplices, when requested by defendant in apt time to do so, is prejudicial error. *S. v. Hooker, supra.* See also cases above cited as to this rule of scrutiny.

The prayers for special instructions in this case are quoted above, were tendered to the trial judge by defendant's counsel in apt time, and are in the identical language of the prayers for special instructions in *S. v. Hooker, supra,* with the exception of the names of the alleged accomplices. It is a well established rule with us that if a request is made for a specific instruction as to the rule of scrutiny in the event of an accomplice testifying for the prosecution, which is correct in itself and supported by evidence, the trial judge, while not required to parrot the instructions "or to become a mere judicial phonograph for recording the exact and identical words of counsel," must charge the jury in substantial conformity to the prayer. *S. v. Henderson,* 206 N.C. 830, 175 S.E. 201; *S. v. Hooker, supra.*

The first prayer for specific instructions requested by defendant Jones is not supported by the evidence, in that it contains the explicit statement that William Gibson and Charles Thomas are accomplices in the crime charged against Jones, and the testimony of each does not admit he is an accomplice, although Bailey's testimony admits he is an accomplice. For this reason it was not error to fail to give the first prayer for specific instructions verbatim or in substance.

The second prayer for specific instructions to the effect that it is dangerous to convict upon the unsupported testimony of an accomplice, and it will be dangerous to convict defendant Jones upon the testimony of William Gibson, of Charles Thomas, and of James Albert Bailey, Jr., is more than defendant Jones was entitled to as a matter of law, if Gibson, Thomas, and Bailey are accomplices. *S. v. McKeithan,* 203 N.C. 494, 166 S.E. 336; *S. v. Ashburn, supra. S. v. Hooker, supra,* does not overrule or modify *S. v. McKeithan, supra.* The *Hooker* case merely states the specific prayer for instructions there finds support in *S. v. Barber,* 113 N.C. 711, 18 S.E. 515; *S. v. Williams,* 185 N.C. 643, 116 S.E. 570; *S. v. Ashburn, supra.* In the *Barber* case, the Court said: "The defendant had no just ground to complain of the instruction 'that they (the jury) might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; etc.'" In the *Williams* case, the trial judge charged the jury in substantial accord as to the testimony of an accomplice in the *Barber* case, and the Court said: "What more could he have said, or how better could he have said it?" The Court cited no authority to support such a statement. In *S. v. Ashburn, supra,* the trial judge charged: "You may convict on the unsupported testi-

mony of an accomplice, but *that it is dangerous and unsafe to do so.*" In respect to that charge this Court said: "The charge was all, and perhaps more, than the defendant was entitled to."

Defendant LeRoy Jones was tried on an indictment charging murder in the first degree in the language of G.S. 15-144. This indictment includes the charge of murder committed in the perpetration of a robbery. *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114. G.S. 14-17 specifically provides, that "a murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death." The statute contains a proviso as to imprisonment for life, if the jury so recommend in its verdict.

When a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G.S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11; *S. v. Kelly, supra, S. v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *S. v. Bunton,* 247 N.C. 510, 101 S.E. 2d 454. The evidence for the State tends to show that defendant LeRoy Jones shot and killed Frank Allred while perpetrating a robbery from his person. *S. v. Alston, supra; S. v. Maynard, supra.*

It seems that the various definitions of the term "accomplice" convey the same idea, that an "accomplice" is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact. The generally accepted test as to whether a witness is an "accomplice" is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony. *McLendon v. United States,* 19 F. 2d 465, where Federal and State cases are cited; *Guthrie v. Com.,* 171 Va. 461, 198 S.E. 481, 119 A.L.R. 683; Wharton's Criminal Evidence, 12th Ed., Vol. II, § 448, p. 229; Black's Law Dictionary, 4th Ed., p. 33; 14 Am. Jur., Criminal Law, § 108 and § 109; 22 C.J.S., Criminal Law, § 786. The more generally accepted view is that an accessory after the fact is not an accomplice. 22 C.J.S., Criminal Law, § 792.

All the evidence in the case, including his own, shows that James Albert Bailey, Jr. was an accomplice in the crime charged against defendant Jones, and he was found guilty by a jury of the murder of Frank Allred as a principal.

The testimony of defendant LeRoy Jones tends to show that William Gibson, Charles Thomas and James Albert Bailey, Jr. were all accomplices in the crime charged against him, LeRoy Jones.

A skeptical approach to accomplice testimony is a mark of the fair administration of justice. Lord Cobham's misplaced hope for immunity that caused him to give testimony that helped send Sir Walter Raleigh to the Tower and to the scaffold is on the same level with the hope of some other poor wretch who endeavors to save his life or to preserve his liberty by laying the entire blame of a crime on a friend or an associate. Howell, State Trials, Vol. 2, London 1816, The Trial of Sir Walter Raleigh, Knt. at Winchester, for High Treason: I James I, 17th of November, A.D. 1603, pp. 1-62; Catherine Drinker Bowen, "The Lion and the Throne — The Life and Times of Sir Edward Coke," Chapters XV, XVI, Trial of Sir Walter Raleigh, pp. 190-217; Philip Magnus, "Sir Walter Raleigh," pp. 111-153. The aged Lord Chief Justice of England Sir John Popham before passing sentence of death on Sir Walter Raleigh said, "I never saw the like Trial, and hope I shall never see the like again." Howell, *ibid,* p. 31. Mr. Justice Gawdie, another of the professional judges who sat with the Chief Justice and the Commissioners during the trial, on his deathbed declared that Sir Walter Raleigh's trial had degraded English justice, Magnus, *ibid,* p. 120.

The trial court refused to give to the jury defendant Jones' prayers for instructions tendered in apt time, and further he did not charge the jury at all in respect to the rule as to accomplice testimony. The learned judge in failing to charge the rule as to accomplice testimony, a request for such having been made in apt time, committed prejudicial error.

The trial judge should have instructed the jury in respect to the testimony of Bailey in substance as follows: The court instructs you in passing upon the testimony of Bailey you should scrutinize it closely, whether it is supported or unsupported, and you should only believe the same, if you do believe it, after careful and cautious consideration, and your consideration of his testimony should be in connection with the fact that he, Bailey, is interested in the event, and with the further fact that he, himself, upon his own admission, is guilty as an accomplice of the crime charged against defendant Jones.

The trial judge should have instructed the jury in respect to the testimony of Gibson and Thomas in substance as follows: The court instructs you that if you merely find from the evidence that Gibson and Thomas are accomplices, or that either one of them is an accomplice, in the crime charged against defendant Jones, as a principal, or as an aider and abettor, or as an accessory before the fact, then

you should scrutinize closely the testimony of such witness or witnesses as you find is an accomplice, or are accomplices, whether his testimony or their testimony is supported or unsupported, and you should only believe the testimony of such as you find is an accomplice, if you do believe it, after careful and cautious consideration, and your consideration of such testimony should be in connection with the fact that an accomplice is interested in the fact, and with the further fact that you have found that such witness is guilty as an accomplice, either as a principal, or as an aider and abettor, or as an accessory before the fact, in the crime charged against defendant Jones.

Defendant Jones is entitled to a new trial, and it is so ordered.

New trial.

RALPH D. CHADWICK AND OLIVE WILLIS v. HUGH SALTER, SHERIFF OF CARTERET COUNTY, CARTERET COUNTY AND THOMAS WADE BRUTON, ATTORNEY GENERAL OF NORTH CAROLINA.

(Filed 12 April, 1961.)

1. Appeal and Error § 1: Constitutional Law § 4: Injunctions § 5—

A party may enjoin the enforcement of an unconstitutional statute when it clearly appears that either his fundamental property or personal rights are threatened, but a party may not attack the constitutionality of a statute by injunction when the action is not to protect any constitutional right directly and immediately threatened.

2. Same—

This action was instituted to enjoin a sheriff from removing plaintiffs' cattle from Shackleford Banks. *Held:* Plaintiffs are not entitled to challenege the constitutionality of Chapter 1057, S.L. 1957, since the 1957 Act does not purport to authorize the destruction or removal of cattle from any portion of the Outer Banks but provides for enforcement of its provisions solely by criminal prosecution, and plaintiffs would be entitled to attack the constitutionality of that statute only as a defense to a criminal prosecution thereunder.

3. Declaratory Judgment § 1—

An action may not be maintained under the Declaratory Judgment Act to determine rights, status or other relations unless the action involves a present actual controversy between the parties, G.S. 1-253.

4. Statutes § 2: Nuisance § 10: Penalties—

The provisions of Chapter 782, S.L. 1959, confiscating cattle and other designated animals remaining upon the designated area of the Outer Banks after July 1, 1959, may not be upheld as providing for a penalty

or forfeiture since the seizure of animals designated in the statute is not predicated upon conviction or prosecution for violation of any law, and if the statute provides for confiscation to abate a public nuisance, it relates solely to a designated segment of the Outer Banks and is therefore void as a local act relating to the abatement of a public nuisance.

APPEAL by plaintiffs from judgment of *Bundy, Resident Judge,* entered in Chambers December 13, 1960. From CARTERET.

Plaintiffs allege they own certain cattle on Shackleford Banks; that defendant Salter, as Sheriff, pursuant to an order of the Board of Commissioners of Carteret County, is threatening to destroy or to remove plaintiffs' said cattle; that defendant Salter and Carteret County assert their threatened action is authorized by Chapter 1057, Session Laws of 1957, and Chapter 782, Session Laws of 1959; that said 1957 and 1959 statutes are unconstitutional; and that said defendants should be enjoined.

Plaintiffs, asserting their action is brought under the Declaratory Judgment Act, G.S. 1-253 *et. seq.*, "and for affirmative relief," served the Attorney General with a copy of the proceeding. G.S. 1-260.

Defendants Salter and Carteret County, hereinafter referred to as "defendants," filed a joint answer. Plaintiffs filed a reply to the further answer set forth therein. A separate answer was filed by the Attorney General.

The hearing was on the verified pleadings. The judgment recites that it was "agreed by counsel for all parties that no issues of fact were raised and that this hearing should be a final hearing . . ." The judgment recites further that the court gave careful and deliberate consideration to whether said 1957 and 1959 statutes "are valid and in the exercise of the police powers of the State, or whether they are void as contravening the due process (clauses) of the Constitutions of the State and Federal Governments." The judgment concludes as follows:

"The Court finds as relating to the cattle in question that the facts are substantially as set forth in the complaint of the plaintiffs, and that the allegations respecting jurisdiction are as therein laid.

"The Court also takes note of the fact that there is neither allegation nor proof of the insolvency of the defendants or any showing that the plaintiffs would not have adequate remedy at law should they suffer the loss of their cattle by unlawful or wrongful means. The Court also takes the position, and so holds as a matter of law, that the referred-to statutes attacked by

this proceeding are not in contravention of the Constitution of either the State or Federal Government, but are valid as in the exercise of the recognized police powers of the State of North Carolina.

"It is hereupon ORDERED that the Temporary Restraining Order heretofore issued in this cause be, and the same is hereby, dismissed, with costs taxed against the plaintiffs."

Plaintiffs excepted to said judgment and appealed.

Charles W. Stevens and Harvey Hamilton, Jr., for plaintiffs, appellants.

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

Hamilton, Hamilton & Phillips for defendant Salter and defendant Carteret County, appellees.

BOBBITT, J. Admissions in the pleadings establish these facts: (1) Shackleford Banks (Carteret County) is between Beaufort Inlet and Barden's Inlet, being a portion of the Outer Banks between Beaufort Inlet and Ocracoke Inlet. (2) The land comprising Shackleford Banks is owned by private individuals. (3) Plaintiffs own and have approximately thirty head of cattle (cows, bulls and calves) on Shackleford Banks. (4) Defendants, by virtue of said 1957 and 1959 statutes, assert they have the right to destroy plaintiffs' said cattle or to remove them from Shackleford Banks.

The judgment is based upon a finding that the facts relating to plaintiffs' cattle "are substantially as set forth *in the complaint.*" (Our italics.) In addition to the facts stated above, *the complaint* alleges that plaintiffs have kept their cattle on Shackleford Banks over the years and do so now with the permission or acquiescence of the (private) owners of the land. No findings were made as to other factual matters alleged in defendants' further answer and in plaintiffs' reply thereto.

The allegations in defendants' further answer and in plaintiffs' reply thereto are in accord as to these facts: For many years, cattle have been permitted to run at large on the Outer Banks, including Shackleford Banks, and have been and are now dependent for their sustenance on whatever provision has been made by Mother Nature herself, "without any other or outside assistance."

Conflicting allegations, as to which the court made no findings of fact, are as follows:

1. Defendants allege: (a) The cattle, in search for provender,

"eat all green plant life that the beaches or banks land, where they roam, afford, or at least so much thereof as their stomachs will accommodate"; (b) they have no shelter or protection from harmful weather conditions, even in winter; (c) they are not treated for ticks and other insects abounding on the Outer Banks; (d) they are given no care whatsoever and at times, through neglect, are reduced to such state of want "as to make them literally walking skeletons"; and (e) they have no appreciable market value.

2. Plaintiffs' reply: (a) The cattle "remain almost altogether on the north or lagoon side of the banks and live and feed mainly and almost altogether in and on the open marshes." (b) The natural condition of the marshes and myrtle bushes on the Outer Banks provide sufficient protection against "most any weather conditions." (c) The cattle swim in the salt waters of the Sound and Creeks daily and "need no veterinarian treatment for ticks or other insects." (d) Mother Nature herself has amply and abundantly provided for the cattle, which are as healthy and fat "as those cattle which have been fed by the human hand." (e) ". . . when the cattle became grown and plump," plaintiffs, and other owners of such cattle, have removed them from time to time and sold them on the open market at a price substantially the same as that brought by cattle raised on the mainland, averaging at least $75.00 per cow. In addition, plaintiffs allege the damage to the Outer Banks has not been caused by the roaming of cattle thereon, a condition that has existed for over one hundred years, but that the serious damage to the Outer Banks has occurred "since the year 1954, with the advent of Hurricane Hazel."

Prior to the enactment of the 1957 Act now challenged by plaintiffs, the General Assembly of 1957 enacted (S.L. 1957, c. 995) "AN ACT TO PREVENT DAMAGE OR DESTRUCTION TO SAND DUNES ALONG THE OUTER BANKS OF NORTH CAROLINA." It declares unlawful and a misdemeanor, punishable as provided therein, "for any person . . . to damage, destroy, or remove any sand dune, or part thereof, lying along the outer banks of this State or to destroy or remove any trees, shrubbery, grass or other vegetation growing on said dunes unless such person . . . shall have first obtained a permit authorizing such proposed destruction or removal." It provides such permit may be granted by a municipal or county governing body if it "shall find as a fact that the particular damage, destruction or removal proposed will not materially weaken the dune as a means of protection from the effects of high wind and water, taking into consideration the height, width, and slope of the dune or dunes and the amount and type of vegetation thereon." The term "outer banks of this State" is defined as "all of that part of North Carolina which is

separated from the mainland by a body of water, such as an inlet or sound, and which is in part bounded by the Atlantic Ocean, and in New Hanover, Onslow and Brunswick Counties this shall include the land areas lying between the Inter-Coastal Waterway and the Atlantic Ocean."

This 1957 Act (S.L. 1957, c. 995), ratified June 4, 1957, and in force from and after July 1, 1957, is now codified as Chapter 104B, Article 3, G.S. Vol. 2C (Replacement 1958). Its purpose is set forth in the (quoted) preamble. Its provisions manifest a legislative determination that, unless a contrary factual determination is made in respect of specific areas as provided therein, it is necessary to prohibit the destruction or removal of trees, shrubbery, grass or other vegetation growing on the sand dunes along the Outer Banks in order to prevent further damage to this portion of the State's territory. Enforcement of its provisions is by criminal prosecution.

The said 1957 Act (S.L. 1957, c. 995) is not challenged by plaintiffs in this action. Defendants refer thereto only as declaratory of the State's public policy, namely, to take such action as may be appropriate and necessary to prevent further damage to the Outer Banks. Hereafter, we consider the two statutes directly challenged by plaintiffs and relied on by defendants.

The 1957 Act (S.L. 1957, c. 1057, now codified as G.S. Chapter 68, Article 4, 1959 Cumulative Supplement), challenged by plaintiffs, was ratified June 5, 1957, and is entitled "AN ACT TO PROHIBIT STOCK AND CATTLE FROM RUNNING AT LARGE ALONG THE OUTER BANKS." Section 1 provides: "From and after July 1, 1958, it shall be unlawful for any person, firm or corporation to allow his or its horses, cattle, goats, sheep, or hogs to run free or at large along the outer banks of this State. This Act shall not apply to horses known as marsh ponies or banks ponies on Ocracoke Island, Hyde County. This Act shall not apply to horses known as marsh ponies or banks ponies on Shackelford *(sic)* Banks between Beaufort Inlet and Barden's Inlet in Carteret County. Saving and excepting those animals known as 'banker ponies' on the Island of Ocracoke owned by the Boy Scouts and not exceeding 35 in number." Section 1½ provides: "Notwithstanding any other provisions of this Act, the Director of the Department of Conservation and Development shall have authority to remove or cause to be removed from Ocracoke Island and Shackelford *(sic)* Banks all ponies known as banks ponies or marsh ponies if and when he determines that such action is essential to prevent damage to the island. In the event such a determination is made, the director, in lieu of removing all ponies, may require that they be restricted to a certain area or corralled so as to

prevent damage to the island. In the event such action is taken, the director is authorized to take such steps and act through his duly designated employees or such other persons as, in his opinion, he deems necessary and he may accept any assistance provided by or through the National Park Service." Section 2 declares the violation of this statute a misdemeanor, punishable as provided therein. Section 3 declares the provisions of "G.S. 68-24 to G.S. 68-30," relative to the impounding of stock running at large, shall apply with equal force and effect along the Outer Banks of this State. Section 4 defines the term "outer banks of this State" as "all of that part of North Carolina which is separated from the mainland by a body of water, such as an inlet or sound, and which is in part bounded by the Atlantic Ocean."

The 1957 Act (S.L. 1957, c. 1057), challenged by plaintiffs, contains no provision for its enforcement in respect of cattle otherwise than by criminal prosecution. Nothing therein purports to authorize either the destruction or removal of cattle allowed to run free and at large in violation of its provisions.

Plaintiffs attack the challenged 1957 Act on the ground the provisions thereof relating to "marsh ponies or banks ponies on Ocracoke Island, Hyde County," and to "marsh ponies or banks ponies on Shackelford *(sic)* Banks," constitute an unreasonable and arbitrary classification, citing *S. v. Glidden Co.,* 228 N.C. 664, 46 S.E. 2d 860. There are no allegations or findings relevant to whether there is a reasonable factual basis for placing "marsh ponies or banks ponies" in a classification different from cattle. Suffice to say, plaintiffs, if prosecuted for violation of the challenged 1957 Act, may, as in *S. v. Glidden Co., supra,* assert fully their contentions as to its unconstitutionality.

Ordinarily, the constitutionality of a statute or municipal ordinance will not be determined in an action to enjoin its enforcement. *Jarrell v. Snow,* 225 N.C. 430, 35 S.E. 2d 273, and cases cited; *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. 2d 650, and cases cited. The well established exception to this rule is stated by *Higgins, J.,* as follows: "An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees." *Roller v. Allen,* 245 N.C. 516, 518, 96 S.E. 2d 851, and cases cited. It is noteworthy that plaintiffs do not allege *they* own any land on Shackleford Banks. The gist of their allegations is that they own cattle which, without interference by the owners of the land, run at large on Shackleford Banks.

As to plaintiffs' attack on the challenged 1957 Act, we are of opinion that the general rule stated in the preceding paragraph applies to the present factual situation. It is noted that an action is maintainable under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, "only in so far as" it "affects the civil 'rights, status and other relations' in the present actual controversy between parties." *Calcutt v. McGeachy,* 213 N.C. 1, 195 S.E. 49.

The 1959 Act (S.L. 1959, c. 782) challenged by plaintiffs is entitled "AN ACT TO PROVIDE FOR THE REMOVAL OF CATTLE REMAINING ON CORE BANKS IN CARTERET COUNTY." Its provisions, quoted in full, are as follows:

> "WHEREAS, under the provisions of Chapter 1057 of the Session Laws of 1957, it is unlawful to permit cattle, sheep, goats, or swine to run at large on the Outer Banks of this State from and after July 1, 1958; and
>
> "WHEREAS, there are numbers of such livestock remaining on the Outer Banks in Carteret County; and
>
> "WHEREAS, it is necessary to provide for the removal of such cattle: Now, therefore,

"*The General Assembly of North Carolina do enact:*

> "Section 1. All cattle, sheep, goats and swine remaining on the Outer Bank, between Beaufort Inlet and Ocracoke Inlet in Carteret County on or after July 1, 1959, shall become the property of Carteret County and the sheriff of said county is authorized and directed to remove said cattle, sheep, goats and swine from said Banks by whatever method he may deem necessary and turn the same over to such charitable or educational institutions in Carteret County as may be designated by the Board of County Commissioners of said county.
>
> "Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.
>
> "Sec. 3. This Act shall be in full force and effect from and after its ratification.
>
> "In the General Assembly read three times and ratified, this the 9th day of June, 1959."

While the preamble refers to the challenged 1957 Act, the effective provisions of the 1959 Act are complete within themselves. They relate to *a portion* of the Outer Banks, namely, the segment thereof in Carteret County between Beaufort Inlet and Ocracoke Inlet. They relate to *all* cattle, etc., *remaining* on said segment on and after July

1, 1959. They make no distinction between cattle running at large and cattle that are confined and for which provision is made as to their food and shelter otherwise than by Mother Nature.

No provision of the 1959 Act purports to authorize the Sheriff of Carteret County, with or without purported authority from the Board of Commissioners of Carteret County, to destroy plaintiffs' cattle.

The 1959 Act purports, by legislative fiat, to divest plaintiffs' title to the cattle and to vest title in Carteret County, and to authorize the Sheriff of Carteret County to remove the cattle from Shackleford Banks "by whatever method he may deem necessary and turn the same over to such charitable or educational institutions in Carteret County as may be designated by the Board of Commissioners of said county." In short, the 1959 Act confiscates plaintiffs' cattle and authorizes disposition thereof by gift to a charitable or educational institution in Carteret County.

True, as stressed by plaintiffs, the 1959 Act makes no provision for the payment of compensation to plaintiffs. Where private property is appropriated for a public purpose or use in the exercise of the power of eminent domain, and the statute authorizing such appropriation provides no adequate remedy for compensation, the owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor. *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144. However, defendants are not asserting any rights, in the exercise of the power of eminent domain, to appropriate plaintiffs' cattle for a public purpose or use.

Defendants contend that personal property, although harmless *per se,* may become *a public nuisance* when used in violation of the criminal laws of the State, and that in such case the General Assembly may provide for the forfeiture of personal property so used. Defendants rely largely on *Daniels v. Homer,* 139 N.C. 219, 51 S.E. 992; *Lawton v. Steele,* 152 U.S. 133, 38 L. Ed. 385, 14 S. Ct. 499; and similar cases.

It is noted that G.S. 18-6, relating to vehicles used in the unlawful transportation of intoxicating liquor, provides for the forfeiture (confiscation) and sale of such vehicles only upon conviction of the criminal offense. In this connection, see *Skinner v. Thomas,* 171 N.C. 98, 87 S.E. 976.

Nothing appears herein to indicate plaintiffs have been prosecuted and convicted of violating the challenged 1957 Act. Nor do plaintiffs admit they have violated any valid criminal statute. Compare *Daniels v. Homer, supra.* The 1959 Act provides no procedure for a judicial determination as to whether plaintiffs' cattle constitute a public

nuisance in violation of the challenged 1957 Act or other penal statute. True, it was held in *Daniels v. Homer, supra,* where the use of fish nets in defined waters was banned from January 15th to May 15th, that the owner of the fish nets, upon the seizure thereof for alleged unlawful use, had an adequate remedy at law by claim and delivery or for recovery of the value thereof. (Note: In *Daniels v. Homer, supra,* two of the five members of the Court dissented. See dissenting opinions of *Connor, J. and Walker, J.*) The majority opinion emphasizes the fact that, if seizure were forbidden pending a judicial determination, either in a criminal prosecution or otherwise, as to whether such seizure was lawful, the "close" season would pass and the objective of the statute would be nullified.

The 1959 Act goes far beyond the challenged 1957 Act. Moreover, the authority purportedly conferred thereby is not conditioned on the violation, much less the establishment of such violation after hearing, of the challenged 1957 Act.

There are many facets to the legal problems suggested in the preceding paragraphs. 12 Am. Jur., Constitutional Law §§ 676-679; 16A C.J.S., Constitutional Law § 645. This statement appears in 23 Am. Jur., Forfeitures and Penalties § 5: "Statutes imposing forfeitures by way of punishment are subject to the general rules governing the interpretation and construction of penal statutes. Hence, statutes authorizing the forfeiting of property ordinarily used for a legal purpose are to be strictly construed, since they are very drastic in their operation." See 37 C.J.S., Forfeitures § 5. In *Daniels v. Homer, supra, Hoke, J.* (later *C.J.*), in his *concurring* opinion, referring to legislation creating a criminal nuisance and directing its summary abatement, says: "When such legislation, however, involves the destruction of private property, it must be limited to the reasonable necessities of the case which calls it forth, and may under given circumstances become the subject of judicial scrutiny and control."

Upon the present record, we deem it inappropriate to pass upon whether, if the 1959 Act were considered applicable only to cattle allowed to run at large in violation of the challenged 1957 Act, the forfeiture and confiscation might be upheld upon legal principles underlying the decision in *Daniels v. Homer, supra,* and similar cases. Apart from the fact it is unnecessary to decision, the minimum factual findings and the less than exhaustive exploration of this subject in the briefs suggest it would be better to deal with this question upon another record.

The sole ground on which a forfeiture and confiscation of plaintiffs' cattle could be sustained is that they are running at large in violation of the challenged 1957 Act and therefore constitute a public nuisance.

The challenged 1957 Act does not provide for such forfeiture and confiscation. As stated above, the 1959 Act relates solely to the segment of the Outer Banks in Carteret County between Beaufort Inlet and Ocracoke Inlet. It purports to authorize and *direct* the Sheriff of Carteret County, without judicial inquiry of any kind, to remove and dispose of *all* cattle, *etc.*, in this particular area. In the light most favorable to defendants, it is a local act relating to the abatement of a public nuisance. If so, it is unconstitutional and therefore void as violative of Article II, Section 29, Constitution of North Carolina.

The conclusions reached are these: No opinion is expressed herein as to the constitutionality of the challenged 1957 Act. The 1959 Act, being unconstitutional and void, confers no authority on defendants to destroy or remove plaintiffs' cattle. Plaintiffs are entitled to a judgment enjoining defendants from such acts. For error in failing to enter such order and in entering judgment dismissing plaintiffs' action, the judgment is vacated and the cause is remanded for judgment in accordance with the law as stated herein.

Error and remanded.

NANCY BAZEMORE v. BERTIE COUNTY BOARD OF ELECTIONS.

(Filed 12 April, 1961.)

1. Constitutional Law § 1: Elections § 2—

The States have broad powers to determine the conditions under which the right of suffrage may be exercised, and the literacy test prescribed by G.S. 163-28 is a constitutional qualification of the right to be registered as a voter in this State.

2. Elections § 2—

G.S. 163-28 requires only a reasonable proficiency in reading and writing any section of the State Constitution in the English language; under the statute neither excessive reading and writing nor writing from dictation may be required.

3. Same—

G.S. 163-28 does not require that literacy tests be administered to all applicants for registration, and the registrar need not require the test of those whom he knows to have the requisite ability, but the test must be administered without discrimination in those instances where uncertainty of ability exists.

4. Statutes § 6—

A statute which is constitutionally fair and impartial on its face may

be unconstitutional in its application in a particular instance if it is administered so as to result in unjust and illegal discrimination between persons in similar circumstances.

5. Elections § 2: Administrative Law § 2—

While a person must exhaust his administrative remedies before applying to the courts, on an appeal to the county board of elections by a person refused registration, such person is within her rights in refusing to submit to a literacy test not sanctioned by G.S. 163-28, and is given the statutory right to appeal from the refusal of such board to determine her right to registration until she should submit to and pass the unauthorized tests. G.S. 163-28.1 through G.S. 163-28.3.

PARKER, J. concurs in the result.

APPEAL by plaintiff from *Stevens, J.*, August-September 1960 Term of BERTIE.

This is a civil action.

Plaintiff, Nancy Bazemore, is a Negro, 47 years of age, and for many years has resided within the boundaries of Woodville Township voting precinct, Bertie County. On 14 May 1960 she applied to the registrar of that precinct to register as an elector. The books were open for registration. As a qualifying test the registrar required her to write, from his reading and dictation, a portion of the Constitution of North Carolina. When the test was completed the registrar declared that she was not qualified to register and declined to list her as an elector in the precinct.

In apt time and in compliance with the pertinent statute plaintiff appealed to the Bertie County Board of Elections. All members of the Board were present when the appeal was heard. Plaintiff was present in person and represented by counsel. The Board offered to test her ability "to read and write any section of the Constitution of North Carolina in the English language." A member of the Board began to read a section of the State Constitution and requested plaintiff to write it from his dictation. Upon advice of counsel she declined to take this test. Thereupon, the Board refused registration because she would not submit to this test.

Plaintiff appealed to the Superior Court. Defendant, Board of Elections, moved to dismiss the appeal on the ground *inter alia* that plaintiff refused to submit to the test offered by the Board.

The court made findings of fact. Those essential to this appeal are:

At the hearing before the Board "the plaintiff took a seat at the table opposite the members of the said Bertie County Board of Elections preparatory to writing; . . . a member of the Board then be-

gan to read in a clear and reasonable tone of voice and at a reasonably slow rate of speed a section of the Constitution of North Carolina to the said Nancy Bazemore who was requested to write as the same was being read to her, . . . that she failed and neglected at said time to take and submit to the reasonable test offered and begun to be administered to her upon the *de novo* hearing before said board. . . . (T)he . . . Board . . . decided that her appeal should be denied and registration refused . . . ."

Thereupon the court entered judgment "that the motion of defendants to dismiss said action . . . be and the same is hereby allowed and the said action is hereby dismissed from the Docket . . . ."

Plaintiff filed exceptions and appealed.

James R. Walker, Jr., Samuel S. Mitchell, and Robert L. Harrell, Sr., for plaintiff.

John R. Jenkins, Jr., and Pritchett and Cooke for defendant.

Attorney General Bruton and Assistant Attorney General Moody for the State of North Carolina, amicus curiae.

MOORE, J. It is undisputed that the States have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope v. Williams,* 193 U.S. 621, 632 (1903); *Mason v. Missouri,* 179 U.S. 328, 335 (1900). The right of suffrage is not a necessary attribute of citizenship. The right to vote in the States comes from the States. *United States v. Cruikshank,* 92 U.S. 542, 555-6 (1875).

In North Carolina every citizen of the United States who shall have resided in the State for one year and in the precinct ward, or election district in which he or she offers to vote, thirty days preceding the election shall, unless otherwise disqualified, be entitled to exercise the privilege of suffrage. G.S. 163-25.

Persons under twenty-one years of age, idiots and lunatics, and persons who have been convicted of a felony and have not had their citizenship restored in the manner prescribed by law, shall not be allowed to register or vote in this State. G.S. 163-24.

"Only such persons as are registered shall be entitled to vote . . . ." G.S. 163-27.

"Every person presenting himself (or herself) for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section." (Parentheses added). G.S. 163-28.

The decision in the instant case depends primarily upon the interpretation and construction of G.S. 163-28. So far as the record discloses plaintiff was not denied the right to register because of any of the provisions of G.S. 163-24 or G.S. 163-25. We must determine this question: Is the educational or literacy test, which the registrar required of plaintiff and which the Bertie County Board of Elections attempted to employ, a reasonable application of the purpose, design and meaning of the phrase, "read and write any section of the Constitution of North Carolina in the English language"?

Parenthetically, it is settled that this particular statute (G.S. 163-28) is constitutional. Its constitutionality was directly challenged in *Lassiter v. Board of Elections,* 248 N.C., 102, 102 S.E. 2d 853 (1958). *Winborne, C.J.,* delivered the opinion of the Court and reviewed the constitutional and statutory history of the literacy test as a qualification for voting in this State, beginning with chapter 218, P. L. 1899, and the constitutional amendment of 1902, and continuing through the enactment of G.S. 163-28 in its present form in 1957. The opinion recognizes that the decision in *Guinn v. United States,* 238 U.S. 347 (1915), in effect struck down the "grandfather clause" and, by reason of the indivisibility section, the other provisions of the 1902 amendment. But the Court decided that the 1945 amendment incorporates by reference the literacy test and gives constitutional basis for the 1957 version of G.S. 163-28. The opinion states: "In this light, the 1945 amendment so proposed and later adopted had the effect of incorporating and adopting anew the provisions as to the qualifications required of a voter as set out in Article VI, freed of the indivisibility clause of the 1902 amendment. And the way was made clear for the General Assembly to act." The opinion continues: "In this connection, a doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it."

The plaintiff in the *Lassiter* case appealed from this Court to the Supreme Court of the United States. *Lassiter v. Northampton Election Bd.,* 360 U.S. 45 (1959). There the judgment of this Court was affirmed by unanimous decision. *Douglas, J.,* delivered the opinion and made the following pertinent observations:

". . . (W)hile the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough,* 110 U.S. 651, 663-665; *Smith v. Allwright,* 321 U.S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not

contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U.S. 299, 315. . . . .

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. . . . The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. . . . (I)n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . .

"The present (North Carolina) requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device un-related to the desire of North Carolina to raise the standards for people of all races who cast the ballot." (Parentheses added).

Reasonable literacy tests to determine qualifications for voting have been consistently held constitutional. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898); *Davis v. Schnell*, 81 F. Supp. 872, 876 (1949), aff'd. 336 U.S. 933 (1949). See also *Allison v. Sharp*, 209 N.C. 477 (1936). In 1955 there were nineteen States with constitutional or statutory requirements of literacy as a qualification for exercise of suffrage: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Mississippi, North Carolina, New Hampshire, New York, Oklahoma, Oregon, South Carolina, Washington, Wyoming and Virginia. 31 Notre Dame Lawyer, 255 *et. seq.*

The North Carolina statute requires ability to read and write any section of the State's Constitution in the English language. It demands more than the mere ability to write one's own name and to recognize and read a few simple words. In the first place, the reading and writing must be in the English language — the common language of the Nation. The standard or level of performance is the North Carolina Constitution. To be entitled to register as an elector one must be able to read and write any section thereof. Admittedly, the standard is relatively high, even after more than a half century of free public schools and universal education. But the Constitution is the fundamental law of the State and defines the form and concept

of our government. It is the framework for democracy. It contains the same basic guaranties of individual rights and liberties and the same principles of representative government and division of powers as are embodied in the Constitution of the United States. There is a direct relationship between the standard of literacy thus imposed and citizenship of the type which should entitle one to exercise the ballot. Furthermore, there is little excuse for illiteracy in this State. North Carolina has a constitutional obligation to provide for the education of all its children. *Allison v. Sharp, supra.* "The General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." Constitution of North Carolina, Art. IX, s. 2 (1868-1961). This constitutional provision has been well implemented for more than fifty years.

We have consulted five unabridged dictionaries, all in general use. A definition of "literacy," common to all these, is: "Ability to read and write." In Webster's New International Dictionary, 2d Ed. (1951), the definitions, of widest application, of the words "read" and "write" are: "read — To utter aloud or render something written . . . .", "Write — To form, as characters, or to trace the letters or words of, on paper, parchment, etc, with a pen or pencil . . . ." There are many other definitions, but they are more limited in application. For instance, in oratory, declamation, drama or music the word "read" has a more specialized meaning. Likewise, to an author or composer "write" means something more than the tracing of words.

Educators have an expression "functional literacy." ". . . (A) person is functionally literate when he has acquired the knowledge and skills in reading and writing which enable him to engage effectively in all those activities in which literacy is normally assumed in his culture or group." William S. Gray — The Teaching of Reading and Writing: An International Survey (1956). Functional literacy is a praiseworthy goal in education, and a high standard of literacy among all citizens is extremely desirable. But it is our opinion that the General Assembly intended the words "read" and "write" as used in G.S. 163-28 to have those meanings commonly attributed to them in ordinary usage. In construing that section, we give to the words their ordinary, natural and general meaning.

The Constitution of Wyoming provided that "No person shall have the right to vote who shall not be able to read the constitution of this State." In interpreting this provision the Supreme Court of Wyoming said: ". . . (W)e think it should follow that any provision

which excludes any class of citizens from the exercise of the elective franchise ought to receive a strict construction, without, however, doing violence to or distorting the language, to the end that none shall be held excluded who are not clearly designated." (p. 822) A concurring opinion comments further: "But the requirement of the Constitution is much more than that the voter shall simply be able to read. It is that he shall be able to read a particular instrument, — 'the Constitution of this state.' These additional words cannot be treated as mere surplusage, and rejected from our consideration. . . . The requirement is not that the voter shall have studied or shall understand and comprehend the contents or substance of it, but that he shall be able to read the specific instrument. He must have that much and that character of education." (p. 829). *Rasmussen v. Baker,* 50 P. 819 (1897).

In the instant case, it is our opinion that G.S. 163-28 requires nothing more than the mere ability to read and write any section of the State Constitution in the English language. We hold that under the provisions of this section a test of literacy that requires an applicant for registration to write a section or sections of the Constitution from the reading and dictation of another, however fairly and clearly the same might be read and dictated, is unreasonable and beyond the clear intent of the statute. The statute contemplates that the applicant shall utter aloud and render in the English language any section of the North Carolina Constitution from a legible copy of such Constitution furnished applicant for that purpose, and put down in his own handwriting any section thereof with such section before him for reference in writing the same. It is not a spelling test. Furthermore, the taking of dictation, even in longhand, requires skill, learning and practice over and beyond the ordinary process of writing.

It is suggested in the *amicus curiae* brief that writing from dictation is not unreasonable for that a blind person would be unable otherwise to copy a section. We suggest that a blind person could not read from an ordinarily printed page. Neither could a deaf-mute read aloud or take dictation. One without hands could not write at all. For the handicapped fair tests may and must be devised and given if their capabilities are in question. But we deal here with one who is apparently possessed of her normal physical functions. Such a person would not be expected to read from Braille or understand sign language.

No case has come to our attention which directly involves the reasonableness of writing from dictation as a literacy test for voting. But we do find that such test has been involved as a component of

other unreasonable administrative requirements. The Oklahoma Constitution had a provision similar to that of N.C.G.S. 163-28. The election officials examined a school teacher of thirty years experience, required him to read seven or eight pages of the Constitution and to write from dictation until he had written twenty-one pages. After two hours and fifteen minutes the officials ruled that he was not qualified to register. Others had similar experiences. The Supreme Court of that State declared: "The conduct of the election officers at these precincts can find no justification in the law, and their protest that they acted in good faith is refuted by their conduct." (p. 37). Further: ". . . (W)hen such proposed voter read intelligibly and wrote legibly, the section of the Constitution designated by the election officers, he demonstrated his qualifications to vote, and acts on the part of the election officers requiring him to write at great length many provisions of the Constitution, or detaining him for any great length of time under a pretense of examination, and thereby delay other persons from entering the polls, was without authority of law." (p. 36). *Snyder v. Blake,* 129 P. 34 (1912).

G.S. 163-28 does not contemplate the utmost proficiency in reading and writing sections of the Constitution. Perfection is not the measure of qualification. The standard is reasonable proficiency in reading and writing any section of the Constitution in the English language. The occasional misspelling and mispronouncing of more difficult words should not necessarily disqualify. The manner of giving the test to physically unhandicapped applicants has been indicated above. Furthermore, it is not an endurance test, and the law does not require that a prospective registrant read and write all or a major portion of the Constitution. The length of the tests should not be such as to unnecessarily delay others waiting to register. The statute imposes the duty of administering the tests upon the registrars.

"It is, of course, impracticable to lay down any very accurate test for determining the voter's ability to read and write within the meaning of the statute. In a general way, we may say it is sufficient if the voter can read in a reasonably intelligible manner . . . though each and every word may not always be accurately pronounced. On the other hand, one is able to write who, by the use of alphabetical signs, can express in a fairly legible way (the) words . . . though each and every word may not be accurately spelled." (Parentheses added). *Justice v. Meade,* 172 S.W. 678, 679 (Ky. 1915).

Quaere: May the State Board of Elections by virtue of G.S. 163-10 (2), (15), prescribe rules and regulations for administering the provisions of G.S. 163-28?

It would be unrealistic to say that the test *must* be administered to all applicants for registration. For instance, it would be folly to require professors and teachers of political science, of known and recognized capabilities, to submit to the test. The statute only requires that the applicant *have* the ability. If the registrar in good faith knows that applicant has the requisite ability, no test is necessary. But there must be no discrimination as between citizens. The test shall be administered, where uncertainty of ability exists, to all alike.

It should not be overlooked that a law though fair on its face and impartial in appearance, may be declared unconstitutional if it is administered by public authority with an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances. *Lassiter v. Northampton Election Bd., supra; Lane v. Wilson,* 307 U.S. 268; *Williams v. Mississippi, supra; Yick Wo v. Hopkins,* 118 U.S. 356; *Davis v. Schnell, supra.*

We do not intimate or suggest that the registrar of Woodville Township precinct or the Bertie County Board of Elections have in any way acted in bad faith. But it is our opinion that the literacy test as administered by them is unreasonable and beyond the intent of the statute.

In summary, before a person may register for voting he or she must have the ability to read with reasonable proficiency any section from the Constitution of North Carolina, and to write in a reasonably legible hand any section of the Constitution put before him or her. Excessive reading and writing may not be required. Writing from dictation is not a requirement. The test may not be administered so as to discriminate between citizens.

Plaintiff was well advised to appeal from the decision of the registrar and to refuse the test offered by the County Board.

G.S. 163-28.1 to G.S. 163-28.3 make ample provision for appeals by rejected applicants. Upon appeal from a registrar the matter is heard *de novo* by the County Board of Elections. G.S. 163-28.2. When there is an appeal from the County Board the case is heard *de novo* in Superior Court; and appeals from Superior Court may be had to this Court. G.S. 163-28.3. Thus an applicant for registration is afforded ample opportunity to demonstrate and have adjudicated his or her qualifications for voting franchise; and under our statutes these opportunities may not be denied.

Defendant contends that plaintiff has no standing on appeal either in Superior Court or this Court for that she did not exhaust her administrative remedies. It is true that the State legislative process, administered by authorized officials and boards, must be completed

before resort may be had to the courts. But G.S. 163-28.1 to G.S. 163-28.3 provide for judicial procedure. For this reason the contention is invalid. *Lane v. Wilson, supra; Mitchell v. Wright,* 154 F. 2d 924 (5c 1946).

This cause is remanded to the end that the Superior Court make an order requiring the registrar of Woodville Township precinct forthwith, upon application by Nancy Bazemore, plaintiff herein, to administer to her the educational or literacy test in accordance with the provisions of G.S. 163-28 as interpreted by this opinion, and directing, if she be found qualified, that she be duly registered as of 14 May 1960. If plaintiff is found by said registrar not to be qualified for registration, she may, if so advised, employ the statutory provisions for appeal.

Error and remanded.

PARKER, J., Concurs in result.

MARY JONES v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 12 April, 1961.)

1. Trial § 26—

Where defendant pleads an affirmative defense, the court may not, ordinarily, rule on motion to nonsuit until all of the evidence has been introduced, but where defendant admits plaintiff's *prima facie* case, and plaintiff admits the facts constituting defendant's defense but pleads that defendant is estopped to assert the defense, the burden is upon plaintiff to allege and prove the facts relied upon as an estoppel, and upon his failure to carry such burden, nonsuit is proper.

2. Insurance § 26—

Where insurer admits plaintiff's *prima facie* case in an action on the life policy but alleges that the policy was issued upon false and material answers in the application and seeks cancellation of the policy, plaintiff's reply setting up estoppel of the insurer to assert the defense must allege facts constituting such estoppel, and when plaintiff's allegations or evidence is insufficient to defeat the cross action for cancellation, nonsuit of the action may be entered.

3. Insurance § 17—

Questions in an application for life insurance relating to the physical condition of applicant and her life expectancy are material to the risk, and warrant avoidance or cancellation of the policy when they are false, G.S. 58-20, even though the policy is written without a medical examination. G.S. 58-200, requiring proof of fraud to entitle insurer to cancel such policy was repealed by the Act of 1945.

4. Same—

Where an application for life insurance signed by insured stated that applicant had read the questions therein contained carefully and that the answers thereto were complete and true, the law will presume, in the absence of fraud or mistake, that the applicant had knowledge of any misrepresentations in the answers even though the answers were written by insurer's agent, and insurer may not be held to have waived such misrepresentations in the absence of evidence that insurer or its agent had actual or constructive knowledge that the answers appearing in the application were false in fact.

5. Waiver § 2—

Waiver is the intentional relinquishment of a known right, and a party may not be held to have waived a matter of which he had no knowledge.

6. Insurance § 17—

Even though the evidence be sufficient to show an insurer's agent wrote the answers in insured's application for a life policy with total indifference to their truth or falsity, insurer will not be estopped to rely upon their falsity as ground for forfeiture or cancellation unless insurer had actual or constructive knowledge of the falsity of the answers entered on the application by the agent. G.S. 58-197.

APPEAL by plaintiff from *Parker, J.*, September 12, 1960 Term of LENOIR.

On 1 December 1957 defendant issued its policy of life insurance in the sum of $1000 to Bessie Mae Tucker. She died 17 December 1957. Plaintiff, named as beneficiary in the policy, brings this suit to recover in accordance with its terms and provisions. Her complaint alleges the issuance of the policy, death of the insured, proof of death, and demand for and defendant's refusal to pay.

Defendant admitted issuing the policy, death of the insured, and its refusal to pay. It based its denial of liability on asserted material misstatements with respect to the health of insured appearing in the application, copy of which was attached to and made part of the policy. It not only denied liability but asserted a cross action and prayed for cancellation of the policy because of the alleged misstatements. It paid into court the sum of $1.59, the amount which the insured had paid as the first premium for the policy. It alleged insured died from bronchial pneumonia which had as its antecedent cause bronchial asthma, that the insured had for many years prior to the issuance of the policy suffered from bronchial asthma which was severe and chronic, that she had frequently been treated by qualified physicians for this asthmatic condition and upon several occasions, especially during 1957, insured had been hospitalized because of severe attacks of bronchial asthma, that both plaintiff and

the insured were aware of the serious health problem created by insured's asthmatic condition. Notwithstanding this knowledge, insured stated on the application that she had not been ill at any time during the past five years and did not have any form of malignant disease, did not have and had never had any disease or impairment of the heart or kidneys, high blood pressure, asthma, or other diseases specifically enumerated in the questions. On the questions directed to a description of any such illnesses or diseases she answered "none." To the question "Are you now free from disease or symptoms of disease and in good health?" she answered "yes." It averred that it relied upon the answers given in the application in issuing the policy and would not have issued the policy if it had known the true facts.

Plaintiff filed a reply to the further answer. She admitted that her daughter, the insured, "had suffered from asthma for sometime prior to November 26, 1957, and had been treated by a physician for said disease." She alleged defendant was estopped to deny the validity of the policy upon the ground of misrepresentation of the physical condition of the insured "by reason of its failure through its duly authorized agent and employee, to inquire of the plaintiff or the said insured at the time of the execution of the application for the issuance of the said policy, what the physical condition of the said insured was, and whether or not she had had medical treatment or been a patient in the hospital for treatment of any disease, including asthma."

Plaintiff offered the policy and pleadings to establish the issuance of the policy, death, demand and refusal to pay, and rested. Defendant moved for nonsuit. The motion was overruled. Defendant called attention to the application attached to the policy consisting of two parts. Part I relates to the kind of insurance, name of the insured, and other matters not here material except for the statement above the insured's signature reading: "The Applicant hereby declares that the above statements and answers to questions are true and complete and agrees that Part II of this application, containing answers to questions and statements by any one or more of the Applicant, Life to be Insured and any Purchaser, shall form part of this application, and that all the said answers and statements, whether herein or in the said Part II, shall form the basis of the contract, and that if any material misrepresentation or evasion is contained in the entire application the policy shall be void." Part II of the application relating to matters personal to the life to be insured is directed to disease, her present and prior health. Answers are given to each of the several questions asked. Following the answers is: "I DECLARE THAT I HAVE READ THE ABOVE QUESTIONS CAREFULLY and that the answers to the said questions are full, complete and true

and are in continuation of and form part of an application for insurance to The Home Security Life Insurance Company." Then follows the signature of the insured. Defendant offered evidence from physicians with respect to the hospitalization and treatment of the insured for asthma tracing back to 1955. It offered testimony of an official of the company who authorized the issuance and delivery of the policy that the policy would not have been issued if the application had shown that the insured suffered from asthma. It offered evidence tending to relate the death to the insured's asthmatic condition. It thereupon rested and renewed its motion to nonsuit. Plaintiff objected to the court's ruling on the motion until she had opportunity to introduce additional evidence in support of the allegations in her reply. The court overruled plaintiff's objection and allowed defendant's motion for nonsuit.

The court allowed plaintiff to put in the record an affidavit of the plaintiff showing the substance of testimony which she would give in support of the allegations in the reply but made no ruling upon the competency, relevancy, or materiality of the evidence so tendered. It permitted the same to become part of the statement of the case on appeal. From the judgment allowing defendant's motion to nonsuit plaintiff appealed.

Jones, Reed & Griffin for plaintiff appellant.
Wallace & Wallace for defendant appellee.

RODMAN, J. The first question to be disposed of is the right of plaintiff to offer evidence in support of allegations appearing in the reply to defeat defendant's crossaction for cancellation and its defense of misrepresentation. When a defendant asserts an affirmative defense, he in effect becomes the plaintiff and carries the burden of proof of his affirmative defense. When the party carrying the burden of proof rests, his adversary is entitled to offer evidence to defeat the claim or defense asserted. Ordinarily, therefore, a court cannot rule on the right to recover until it has heard all of the evidence; but when, as here, the plaintiff admits the facts pleaded and merely seeks to avoid the force of the admitted facts, plaintiff must both allege and prove the facts on which she relies. The facts alleged in the reply were not sufficient to defeat defendant's rights to cancellation or to impose liability on defendant.

In disposing of the case we treat the statements set out in the affidavit as evidence before the court when it allowed defendant's motion for nonsuit. She says that she and the insured, shortly before 1 December 1957, went to Mr. Davis, the agent of the defendant

for the purpose of increasing the amount payable on policies theretofore issued by defendant on the lives of her three children. She was informed that could not be done, but she could continue in force the existing policies and take new insurance for such additional amount as she desired. She elected to pursue that course. The agent inquired if the father of the insured was living. She replied in the negative. "He then asked me if Willis (a brother) had ever had TB, I said no. He asked me if he had been in the hospital and I told him no, that neither of my boys had been in the hospital. He did not ask Bessie Mae Tucker, my daughter, any questions at all, except to sign the application. . . . He did not ask me or either of my children any questions about any diseases."

The first application for insurance on which the policy in suit issued was dated 11 November 1957. That application showed that insured had two brothers living but did not show whether she had any brother who was dead. It showed one sister dead. When that application was received at defendant's home office, it was returned to ascertain if insured had any brothers who were dead. New applications were signed by insured on 26 November. They were identical with the applications of 11 November except for the additional information requested by defendant. Plaintiff, in her affidavit, speaking with reference to the last application, said the agent called her and insured to his office and told them that he had made a mistake in the application. He asked insured to sign another one. "He did not ask any questions at that time about any disease or about anything else. When the policies came, I put them away and did not read either of them and did not know what had been written in the applications until after the death of my daughter . . . I knew she had had asthma for sometime before her death, and I would have told Mr. Ronald Daniels that she had asthma and had been treated by doctors and had had hospital treatment if he had asked me."

Plaintiff neither alleges nor testifies that the agent for the insurance company in fact knew that the insured suffered from chronic asthma. There is no allegation or evidence suggesting illiteracy on the part of the insured or her inability to fully comprehend each of the questions appearing on Part II of the application. Her signature is neat and legible. There is neither allegation nor evidence suggesting that the insured was prevented from reading the questions or answers by any trick or device. The allegation stops with the assertion that the answers were not in fact written by the insured nor were the questions propounded to her.

Plaintiff points to two statutes: G.S. 58-30, which provides that statements in applications for life insurance are representations

which, unless material or fraudulent, will not defeat recovery on a policy based thereon, and G.S. 58-197, which makes a person who solicits an application for life insurance the agent of the company and not the insured, to support her contentions that the court committed error in allowing defendant's motion to nonsuit.

Manifestly the questions and answers relating to the physical condition of applicant and her life expectancy because of her chronic asthmatic condition were material to the risk the insured was asked to assume. *Swartzberg v. Insurance Co.*, 252 N.C. 150, 113 S.E. 2d 270; *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915; *Wells v. Insurance Co.*, 211 N.C. 427, 190 S.E. 744; *Schas v. Insurance Co.*, 166 N.C. 55, 81 S.E. 1014.

That the answers were false is conceded.

Since 1945 when the Act of 1899 (codified as C.S. 6460, later as G.S. 58-200) requiring insurers to establish fraud to defeat policies issued without medical examination because of false statements in the applications was repealed, it is not necessary to establish fraud. It is sufficient to defeat recovery on policies issued on representations which are false and material. *Wells v. Insurance Co., supra; Tolbert v. Insurance Co., supra.*

Plaintiff, to avoid the effect of the false and material representations, alleged the company issued the policy with knowledge that the answers were false and thereby waived the right which it otherwise would have to defeat her claim.

There is no evidence whatever that the company or its agent knew the answers appearing in the application were in fact false. The evidence is sufficient to permit a jury to find that defendant's agent wrote the answers with total indifference to their truth or falsity. If the acts of the agent as described by plaintiff suffice to establish waiver or to estop defendant from denying liability, the judgment should be reversed. Otherwise it should be affirmed.

"Waiver is the intentional relinquishment of a known right. It is usually a question of intent; hence knowledge of the right and intent to waive it must be made plainly to appear . . . There can be no waiver unless so intended by one party and so understood by the other, or unless one party has so acted as to mislead the other. 2 Hermon on Estoppel, Sec. 825." *Green v. P.O.S. of A.*, 242 N.C. 78, 87 S.E. 2d 14. The evidence is insufficient to support plaintiff's claim of waiver. Does it suffice to support the assertion that defendant, by the conduct of its agent, has estopped itself to deny liability on the policy? The answer is no.

In *Cuthbertson v. Insurance Co.*, 96 N.C. 480: "The plaintiff pro-

posed to prove, that the questions referred to were in fact not asked, and that he signed the application without knowing that it contained them. This was objected to, and the objection sustained, and this is excepted to. It is conceded that the plaintiff could read and write, and that he signed the application with his full name." On these facts *Davis, J.*, said: "There was no error in excluding the proposed evidence. In the absence of fraud or mistake, a party will not be heard to say that he was ignorant of the contents of a contract signed by him."

In *Weddington v. Insurance Co.*, 141 N.C. 234, *Walker, J.*, said: "It made no difference whether the plaintiff knew what was in the non-waiver agreement or not. He signed it, and the law presumes he did know what was in it, and he will not be heard, in the absence of any proof of fraud or mistake, to say that he did not." The law declared in those cases has been applied in *Inman v. WOW*, 211 N.C. 179, 189 S.E. 496; *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830; *Thomas-Yelverton Co. v. State Capital Life Ins. Co.*, 238 N.C. 278, 77 S.E. 2d 692. See also *Metropolitan Life Ins. Co. v. Alterovitz*, 14 N.E. 2d 570, 117 A.L.R. 770, with annotations to that case, p. 796; Annotations 81 A.L.R. 865, 148 A.L.R. 514; 44 C.J.S. 1107-1108. We give our approval to the statement appearing in 29 A Am. Jur. 236 that "the rule that the insured is not responsible for false answers in the application where they have been inserted by the agent through mistake, negligence, or fraud is not absolute, and applies only if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud."

Insurer's lack of knowledge, actual or constructive, of the falsity of statements appearing in the application, distinguishes cases typified by *Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574; *Cato v. Hospital Care Assoc.*, 220 N.C. 479, 17 S.E. 2d 671; and *Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429, from this case.

Affirmed.

EVA NIX v. IRA ENGLISH AND OPHELIA SMITH.

(Filed 12 April, 1961.)

1. Courts § 20—

An action on a transitory cause arising in another State is governed as to the substantive law by the law of such other State, but procedural matters, including the sufficiency of the evidence to require its submission to the jury, is to be determined by the laws of this State.

2. Same: Automobiles § 47—

In an action instituted in this State to recover for injuries received by plaintiff passenger in an automobile accident occurring in the State of Georgia, plaintiff must allege and prove gross negligence as required by the law of Georgia as a prerequisite to recovery.

3. Trial § 22b—

The rule that evidence offered by defendant which is favorable to plaintiff should be considered in determining whether plaintiff should be nonsuited is limited to such evidence offered by defendant which is relevant to the allegations in plaintiff's pleadings, and defendant's evidence favorable to plaintiff cannot warrant recovery on a theory of liability entirely foreign to plaintiff's allegations.

4. Pleadings § 11—

A reply must be consistent with the complaint and plaintiff should not be permitted to file a reply which sets-up a cause of action in substitution for and inconsistent with the cause alleged in the complaint.

5. Same: Automobiles § 35—

Where the complaint is predicated upon wrongful acts and omissions of defendant while in full possession of her faculties, it is error for the court to permit plaintiff to file a reply and to submit the cause to the jury upon allegations of the reply predicated upon plaintiff's loss of control of the vehicle because of loss of consciousness by reason of an attack of insulin shock, and alleging that defendant was grossly negligent in attempting to operate the vehicle when defendant knew or should have known she was likely to suffer such an attack.

APPEAL by defendant (Ophelia Smith) from *McLean, J.*, August Civil Term, 1960, of GASTON.

Plaintiff's action is to recover damages for injuries sustained on Saturday, May 31, 1958, in Habersham County, Georgia, allegedly caused by the gross negligence of Ophelia Smith, plaintiff's adult daughter, in the operation of an automobile in which plaintiff was a passenger.

As to Ira English, the action was dismissed for lack of service of process. Hence, "defendant," when used herein, refers to Ophelia Smith.

After the death of Arthur Smith, plaintiff's first husband and de-

fendant's father, plaintiff married Mr. Nix. On May 31, 1958, and prior thereto, plaintiff lived in Gastonia, North Carolina. On May 31, 1958, and for some three years prior thereto, defendant lived in the home of Ira English and wife, Mrs. Inez English, at or near Demorest (Habersham County), Georgia. Inez English is a sister of Arthur Smith, plaintiff's first husband. Wiley W. Smith, the father of Arthur Smith and of Inez English, also lived in the English home. (Since September, 1959, defendant has lived in Gastonia with plaintiff.)

On May 31, 1958, plaintiff left Gastonia on the 9:30 a.m. train to visit her said relatives. When she arrived at Cornelia, Georgia, shortly after 2:00 p.m., she was met by defendent and Inez English, who took her to the English home, defendant operating the English car. Later, when Inez English requested defendant to go to Clarkesville, Georgia, to purchase food for Sunday dinner, defendant invited plaintiff to go with her. Plaintiff, also Wiley W. Smith, rode (as passengers) with defendant on the trip to Clarkesville. In returning from Clarkesville, defendant turned off the Nachoochee Highway to tell a friend at the Sisk residence that her mother had arrived and was with her. Thereafter, defendant returned to the Nachoochee Highway, and while traveling thereon en route to the English home, the car left the paved portion of said highway, traveled some distance on the shoulder or ditch on one side and then crossed the paved portion and came to rest in a kudzu patch on the opposite side. While the car did not turn over, plaintiff was thrown about inside the car and was injured.

In her complaint, plaintiff alleged her injuries were proximately caused by the gross negligence of defendant in that the car left the narrow and winding road because it was being operated by defendant "at an excessive, improper, and unlawful rate of speed in excess of 60 miles per hour," without sufficient brakes, without proper control, without proper lookout, and in a careless and reckless manner.

Answering, defendant denied all allegations as to her negligence and asserted two further defenses. In her first further defense, she asserted, in substance, that she was a diabetic and was taking insulin to control her condition; that, while operating the car "at a rate of speed within the lawful speed limit of 60 miles per hour and in a careful and prudent manner," she was "suddenly . . . overcome by an attack of insulin shock and lost consciousness temporarily"; that the car, when it left the road, was out of her control on account of her then unconscious condition; that "she had never previously been afflicted with an attack of insulin shock during the daytime hours" and had no reason to anticipate such an attack on this occasion; and that plaintiff's injuries were caused by unavoidable

accident. In her second further defense, defendant pleaded contributory negligence, alleging if defendant was negligent in failing to anticipate a sudden attack of insulin shock on this occasion, which she denied, plaintiff, who knew of defendant's diabetic condition, should have also anticipated such attack, and in such event plaintiff was contributorily negligent in riding with defendant.

On behalf of defendant, the depositions of Wiley W. Smith, Ira English and Inez English were taken in Demorest, Georgia, on May 27, 1960.

At August Term, 1960, the case came on for trial on the issues raised by said pleadings.

Plaintiff's testimony was the only evidence offered by her as to what occurred on the occasion of her injury. She testified the highway was narrow and crooked. She was permitted to testify, over defendant's objections, that defendant was driving "fast"; that she (plaintiff) told defendant a time or two to slow down, that she was going too fast; that defendant "would slow down and then pick up again"; and that, on one occasion before the time the car left the road, defendant was driving at a speed of between 70 and 80 miles per hour. She testified defendant turned her head and spoke to Smith, who was in the back seat, saying, "Grandpa, you're not afraid of me, are you?" and that just as he answered, "No," the car "began to run off the road."

At the close of plaintiff's evidence, defendant moved for judgment of involuntary nonsuit and excepted to the court's denial thereof. Thereupon, defendant offered evidence, consisting of her testimony, the said depositions and portions of testimony given by plaintiff on adverse examination prior to trial.

Evidence offered by defendant tends to show she had suffered three prior attacks of insulin shock, the first in 1957 when she was hospitalized and her diabetic condition was discovered; that, as directed by her doctor, she had one insulin injection each day and was on a prescribed diet; and that she had never had an attack of insulin shock when awake, the three previous attacks having occurred when she was asleep. Defendant testified as to her insulin injection and meals on May 31, 1958.

Defendant testified she had no clear recollection of what happened after "hollering" at a friend while going down the Sisk driveway. She testified: "I have no recollection of the trip from leaving the friend's house to where the car wound up." She testified that, while in Clarkesville, she had a headache, but this was not unusual; and that the only recollection she had as to what occurred after she left

the Sisk home was that she remembered "hearing Mother praying" and remembered, vaguely, hearing gravel hit the side of the car.

Wiley W. Smith, defendant's 80-year old grandfather, testified, in substance, as follows: Defendant and Smith got out of the car at the Sisk home. Plaintiff stayed in the car. Defendant went over and said something to "Old Lady Sisk" and then went into the house. As defendant came back to the car, Smith noticed defendant "kind of staggered," and acted "like she couldn't walk." Nothing was said by Smith, by plaintiff or by defendant as to this. In leaving the Sisk premises, plaintiff was seated on the front seat to the driver's right and Smith was in the back. When about a half a mile from the Sisk home, defendant "wasn't looking at the road close enough to suit" Smith. Defendant "laid over" to her left. She looked like she was asleep. She was holding the steering wheel and had her foot on the "foot feed." Smith and plaintiff repeatedly asked, "What's the matter with you?" Defendant did not answer or move. Smith couldn't reach the ignition switch or the "foot feed." He told plaintiff to kick defendant's foot off the "foot feed." Plaintiff did nothing but holler and pray.

In rebuttal, plaintiff offered, and the court admitted over defendant's objection, a portion of plaintiff's testimony on adverse examination in which she stated the car operated by defendant was "going fast."

At the close of all the evidence, (1) defendant moved for judgment of involuntary nonsuit and excepted to the court's denial thereof, and (2) the court, over defendant's objection, granted plaintiff's motion for leave to file "the reply" referred to below.

Plaintiff's said reply is directed to defendant's said further defenses. Plaintiff admits paragraph 1 of defendant's first further defense in which defendant alleged: "1. This answering defendant is a diabetic and it has been and is necessary for her to control her condition by insulin injections at periodic intervals." Plaintiff admits paragraph 2 of defendant's first further defense except the portion thereof reading, "when suddenly this answering defendant was overcome by an attack of insulin shock and lost consciousness temporarily," which plaintiff denied. The admitted portions of said paragraph 2 are as follows: "2. On the occasion complained of by the plaintiff, this answering defendant was driving the automobile of Ira English with the plaintiff riding therein as a passenger at a point four or five miles north of Clarkesville, Georgia, *at a rate of speed within the lawful speed limit of 60 miles per hour and in a careful and prudent manner,* . . . This defendant is informed and believes and therefore

alleges that *while she was thus stricken*, the automobile which she was operating left the road and that the plaintiff received such injuries as she suffered while the automobile *was thus out of the control* of this defendant." (Our italics)

In plaintiff's said pleading, "by way of further Reply," plaintiff alleged: Defendant was guilty of gross negligence (a) in attempting to operate an automobile upon the public highway when she knew or should have known she was subject to insulin coma by reason of a diabetic condition, and that she might lapse into unconsciousness at any time, (b) in continuing to operate the automobile when she "had knowledge of an impending diabetic coma," and (c) in operating said automobile for a distance of more than one mile while "in a diabetic coma or insulin shock."

Thereafter, in the manner discussed in the opinion, issues of gross negligence, contributory negligence and damages were submitted to the jury. The jury answered the issues of gross negligence and contributory negligence in favor of plaintiff and awarded damages in amount of $15,000.00. Judgment, in accordance with the verdict, was entered. Defendant excepted and appealed, assigning errors.

O. A. Warren and Whitener & Mitchem for plaintiff, appellee.
Carpenter, Webb & Golding for defendant, appellant.

BOBBITT, J. The court's instructions refer solely to allegations of defendant's gross negligence set forth in plaintiff's "further Reply." They assume defendant lost control when stricken by an attack of insulin shock. The court's review of plaintiff's contentions on the first issue (gross negligence of defendant) was based on the testimony of defendant that she knew she had a headache when she was in Clarkesville and on the testimony of Smith that defendant staggered when she returned from the (Sisk) house to get back in the car. The sole question for jury determination on the first issue, under the court's instructions, was whether defendant drove the car from the Sisk home and continued to drive it when she knew or should have known she was likely to suffer an attack of insulin shock while operating the car and lose consciousness and endanger her passengers. In short, the first issue was submitted and tried on a theory first introduced by plaintiff in the "further Reply" filed at the close of all the evidence.

The complaint was not amended. Plaintiff did not seek leave to delete any of her original allegations as to defendant's gross negligence. The court did not instruct the jury to disregard plaintiff's original allegations or plaintiff's testimony in support thereof. There is nothing

in plaintiff's testimony tending to show anything in defendant's conduct indicating she was about to suffer or did suffer an attack of insulin shock. Plaintiff's testimony that defendant turned her head and spoke to her grandfather, who was on the back seat, at the time the car "began to run off the road," tends to show defendant was not then unconscious on account of an attack of insulin shock or otherwise. In short, the court ignored plaintiff's original allegations and her testimony in support thereof. The first issue was submitted and tried solely on allegations in the "further Reply," which, if supported, were supported by evidence offered by defendant.

The substantive rights and liabilities of the parties are to be determined in accordance with the law of Georgia, the *lex loci*. Procedural matters are to be determined in accordance with the law of North Carolina, the *lex fori*. *Clodfelter v. Wells*, 212 N.C. 823, 195 S.E. 11, and cases cited; *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558; *McCombs v. Trucking Co.*, 252 N.C. 699, 114 S.E. 2d 683.

Thus, in determining "(t)he actionable quality of the defendant's conduct," the Georgia law controls. *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101; *Harper v. Harper*, 225 N.C. 260, 34 S.E. 2d 185, and cases cited. Whether, under the substantive law of Georgia, the evidence offered by plaintiff is sufficient to require its submission to the jury is determinable in accordance with the law of this jurisdiction. *Clodfelter v. Wells, supra; Childress v. Motor Lines, supra.*

Under Georgia law, a guest passenger, to recover from his host, must allege and establish gross negligence. Gross negligence is defined by statute, Code of Georgia (Annotated), 1956 Revision, § 105-203, as the absence of "that degree of care which every man of common sense, howsoever inattentive he may be, exercises under the same or similar circumstances." *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E. 2d 558. Under *Austin v. Smith*, 96 Ga. App. 659, 101 S.E. 2d 169, plaintiff's original allegations of defendant's gross negligence appear sufficient. Too, under Georgia decisions, whether plaintiff's testimony tending to establish her said allegations was sufficient to support a finding of such gross negligence and its causal relationship to plaintiff's injury would seem a question for jury determination. *Parker v. Johnson*, 97 Ga. App. 261, 102 S.E. 2d 917, and cases cited.

We do not hold the court erred in overruling defendant's motion for judgment of nonsuit. Rather, we hold the court erred in permitting plaintiff to file such reply and in submitting the case to the jury upon the allegations of the "further Reply." Hence, we do not consider the sufficiency of the evidence to support the allegations of gross negligence set forth in the "further Reply."

Ordinarily, evidence favorable to plaintiff, although offered by defendant, is to be considered in passing upon motion for judgment of nonsuit. However, this rule applies only to evidence relevant to the allegations of the complaint. Here, the evidence offered by defendant on which plaintiff seeks to rely tends to establish a factual situation radically different from that alleged by plaintiff in her complaint and supported by her testimony.

Whether an amendment of the complaint, incorporating therein the allegations set forth in the "further Reply," would be permissible, is not presented. G.S. 1-163; *Stamey v. Membership Corp.*, 249 N.C. 90, 105 S.E. 2d 282; *Perkins v. Langdon*, 233 N.C. 240, 63 S.E. 2d 565. No motion for leave to so amend the complaint was made.

Where the answer contains new matter constituting a counterclaim or defense, the plaintiff, *by reply*, may allege "any new matter *not inconsistent with* the complaint, constituting *a defense* to the new matter in the answer." (Our italics) G.S. 1-141. A reply is a defensive pleading. Its purpose is to support, not to contradict, the complaint. 41 Am. Jur., Pleading § 185. "The plaintiff cannot in his reply set up a cause of action different from that contained in his complaint. Such a pleading is a departure, and is governed by the provision that the reply must not be inconsistent with the complaint." McIntosh, North Carolina Practice and Procedure, § 479. *Miller v. Grimsley*, 220 N.C. 514, 17 S.E. 2d 642. ". . . a party may not be allowed in the course of litigation to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication another which is entirely inconsistent." *Berry v. Lumber Co.*, 183 N.C. 384, 111 S.E. 707.

The gross negligence alleged in the complaint is predicated upon wrongful acts and omissions of a person in full possession of her faculties. The reply is predicated upon loss of consciousness and control when stricken by an attack of insulin shock, the alleged gross negligence consisting of the attempt to operate the car when defendant knew or should have known she was likely to suffer such attack. In our view, the cause of action asserted in the "further Reply" is a new cause of action and is radically inconsistent with the cause of action alleged in the complaint.

"The reply or replication must not depart from the complaint, petition, or declaration; and it follows that a reply or replication may not set up new causes of action, enlarge the original cause of action, broaden the scope of the complaint or petition, add or substitute new grounds of action or relief, or permit plaintiff to take a position inconsistent with that taken in the complaint. In other words, plaintiff

must recover, if at all, on the cause of action stated in the petition and not on one stated in the reply." 71 C.J.S., Pleading § 200.

It is well settled in this jurisdiction that a plaintiff must make out his case *secundum allegata*. His recovery, if any, must be based on the allegations of his complaint. *Andrews v. Bruton*, 242 N.C. 93, 95, 86 S.E. 2d 786, and cases cited; *Manley v. News Co.*, 241 N.C. 455, 460, 85 S.E. 2d 672, and cases cited.

For error in permitting plaintiff to file such reply and in submitting the case to the jury upon the allegations of the "further Reply," defendant is entitled to a new trial.The reply is stricken. In the absence of further orders, the pleadings consist of the complaint and answer.

New trial.

VIVIAN BEULAH JONES v. JAMES MATHIS, ORIGINAL DEFENDANT, AND GLADYS MATHIS, ADDITIONAL DEFENDANT.

(Filed 12 April, 1961.)

1. Judgments § 38—

It is within the discretion of the trial court to determine whether a plea of *res judicata* should be determined prior to the trial on the merits.

2. Same—

Whether a judgment dismissing an action upon demurrer will support a plea of *res judicata* is to be determined from the judgment roll.

3. Judgments § 35—

A judgment sustaining a demurrer is as much a bar as if the issuable matters had been established by a verdict.

4. Judgments § 28—

In an action by one driver against the other driver and the owner of the other vehicle, an unappealed judgment sustaining a demurrer is a bar to a cross action by the first driver in a subsequent action instituted by the second driver to recover for injuries sustained in the same collision.

5. Automobiles § 41h—

Allegations supported by evidence tending to show that defendant entered the highway without warning from a driveway as plaintiff's car was approaching, that in the emergency plaintiff swerved to the left, and that defendant, in about two hundred feet thereafter, turned to his left to enter his private driveway, resulting in the collision in suit, *is held* sufficient to be submitted to the jury on the issue of negligence.

6. Automobiles § 36—

Evidence that plaintiff's passenger was intoxicated and asleep on the front seat at the time of the accident in suit, without any evidence that plaintiff had drunk any intoxicant, would seem without relevance to the issue of plaintiff's negligence, and the exclusion of such evidence is held not prejudicial.

7. Automobiles § 55½—

Upon counterclaim by defendant owner of one car to recover for damages to his car alleged to have resulted from the negligence of the driver of the other car involved in the collision, the evidence *is held* to show that the negligence of the driver of defendant owner's car was a proximate cause of the accident as a matter of law, and also that the driver of defendant's car was acting as defendant's agent, and therefore nonsuit of the counterclaim was proper.

8. Automobiles § 35—

Where the complaint sufficiently alleges negligence on the part of the defendant, and plaintiff's reply to defendant's counterclaim alleges that the collision was proximately caused by the negligence of defendant as set forth in the complaint, the reply sufficiently sets up contributory negligence of defendant as a bar to the counterclaim, even though it fails to plead contributory negligence *eo nomine*.

9. Appeal and Error § 35—

Where the charge is not the record, it will be presumed that the court instructed the jury correctly on every principle of law applicable to the facts.

APPEAL by defendants from *Bundy, J.*, November Civil Term, 1960, of NEW HANOVER.

Personal injury action growing out of a collision that occurred on U.S. Highway #117, in Duplin County, about 9:45 p.m., on October 14, 1959, between a 1952 Nash Sedan, owned by Edgar L. Summerlin and operated by plaintiff, and a 1950 Chevrolet Sedan, owned by Gladys Mathis and operated by James Mathis.

Originally, James Mathis was sole defendant. Later, *on plaintiff's motion*, Gladys Mathis was made a defendant. The complaint was amended so as to include allegations against Gladys Mathis. Defendants filed a joint answer. They denied plaintiff's allegations as to their negligence, pleaded contributory negligence of plaintiff, and alleged, separately stated, two cross actions against plaintiff, one on behalf of James Mathis for personal injuries and the other on behalf of Gladys Mathis for damage to her car. Plaintiff, by reply, denied the material allegations of defendants' cross actions. In addition, plaintiff alleged, as a bar to the cross action of James Mathis, a final judgment entered April 26, 1960, in Duplin Superior Court, in

an action entitled *"James Mathis v. Beulah Fields Jones and Edgar L. Summerlin."*

Plaintiff's said plea in bar was heard before the jury was impaneled. The court, based on the judgment roll in said Duplin action, sustained plaintiff's said plea, thereby terminating the cross action of James Mathis.

At trial, evidence was offered by plaintiff and by defendants. At the close of all the evidence, the court allowed plaintiff's motion for judgment of nonsuit as to the cross action alleged on behalf of Gladys Mathis.

Three issues were submitted to and answered by the jury, to wit:

> "1. Was the plaintiff injured by the negligence of James Mathis, as alleged in the Complaint? ANSWER: Yes.
>
> "2. Was the defendant James Mathis the agent of Gladys Mathis, as alleged in the Complaint? ANSWER: Yes.
>
> "3. What amount is the plaintiff entitled to recover of the defendants? ANSWER: $3750.00."

Facts relevant to defendants' assignments of error are set forth in the opinion.

Judgment for plaintiff, in accordance with the verdict, was entered against both defendants. Defendants excepted and appealed.

Elbert A. Brown and Poisson, Marshall, Barnhill & Williams for plaintiff, appellee.

R. S. McClelland, W. Allen Cobb and L. Bradford Tillery for defendants, appellants.

BOBBITT, J. Assignment of error #1 is based on defendants' exception to the court's action in sustaining plaintiff's plea in bar to the cross action of James Mathis.

Plaintiff alleged, in substance, these facts: She was driving south on U.S. Highway #117. When she reached a point at or near the George Henry Grill, James Mathis "suddenly and abruptly" drove the Chevrolet from the private parking lot of said Grill without signal or warning, "onto the highway" directly in front of her, when the Nash "was almost opposite" the point where he entered the highway. She immediately applied brakes and turned sharply to her left in an effort to avoid a collision. About the same time, James Mathis, also headed south, drove to the left of the center of the highway in an attempt to enter a private driveway. James Mathis made the left turn toward

the private driveway "without notice, signal or warning of his intention to do so, thereby causing the two vehicles to collide." His said conduct created a sudden emergency.

Plaintiff alleged, in substance, that Gladys Mathis was the owner of the Chevrolet; that it was a family purpose car habitually operated by James Mathis, a member of the family, with her consent and approval; and that on this particular occasion it was being operated by James Mathis as the agent of Gladys Mathis.

In their answer, defendants alleged, *inter alia,* that plaintiff was operating the Nash "as agent, servant or employee of the owner, Edgar L. Summerlin, and under his control and supervision," and that Gladys Mathis owned the Chevrolet operated by James Mathis on the occasion of the collision. They alleged, as contributory negligence, that plaintiff ran into the Mathis car because she was operating the Nash at excessive speed, failed to keep a proper lookout, failed to pass to the left of the Mathis car when there was ample room for her to do so, and failed to avoid the collision when she, by the exercise of due care, could have done so.

The separate cross actions, except as to damages, contained substantially the same allegations. Each alleges, in substance, these facts: James Mathis had stopped at the George Henry Grill. Before entering U.S. Highway #117, he came to a complete stop. He entered the highway after first observing that no traffic was approaching from either direction. After he had proceeded south approximately 50 to 75 yards, he gave a proper signal for a left turn, observed that no vehicle was approaching from either direction, then proceeded to turn left into a dirt road to his home. He had commenced his left turn and had crossed the center line (some two feet to the left thereof) when the Summerlin car, operated by plaintiff, violently crashed into the Mathis car.

As a basis for recovery from plaintiff on their cross actions, each defendant set forth substantially the same allegations as to plaintiff's negligence theretofore asserted (set out above) as the basis for their plea of contributory negligence.

In the prior Duplin Action, James Mathis alleged the collision occurred when he was driving south on U.S. Highway #117; that he made a left turn, after giving a signal of his intention to do so, into a dirt road leading to his home; that his car was completely off the highway except for the rear bumper and trunk, when the car operated by defendant Jones, in which defendant Summerlin, the owner, was riding, struck the left rear of the Mathis car; and that defendant Jones was careless and negligent in traveling south on said highway at

an extremely high rate of speed, on the wrong side of the road, when she struck the Mathis car. (No reference is made to his having entered the highway from the driveway in front of the George Henry Grill.) While the alleged negligence of defendant Jones was not set forth as fully as in his cross complaint herein, the basic facts underlying the allegations made by James Mathis in both pleadings are essentially the same.

In the Duplin action, both defendants, by written demurrer, challenged the sufficiency of the complaint on three grounds: (1) It contained no allegations that defendant Jones was the agent of defendant Summerlin. (2) It did not allege facts sufficient to constitute actionable negligence on the part of either defendant. (3) The facts alleged disclosed contributory negligence as a matter of law.

By order of March 16, 1960, the court sustained the demurrer as to both defendants. The plaintiff (James Mathis) did not except. Nor did he, within thirty days, move for leave to amend. On April 26, 1960, on the defendants' motion, judgment was entered, in accordance with G.S. 1-131, dismissing the action. The plaintiff (James Mathis) excepted and gave notice of appeal. He did not perfect his appeal.

Ordinarily, it is for the trial judge, in the exercise of his discretion, to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits of plaintiff's alleged cause of action. *Gillikin v. Gillikin,* 248 N.C. 710, 712, 104 S.E. 2d 861, and cases cited; *Hayes v. Ricard,* 251 N.C. 485, 490, 112 S.E. 2d 123.

The court deemed it appropriate, on the threshold of the trial, to consider plaintiff's plea in bar to the cross action (in effect a complaint) of James Mathis. There had been no jury trial in the prior Duplin action. Hence, the plea was determinable on the basis of the facts disclosed by the judgment roll in the Duplin action. No question was raised as to the authenticity of the judgment roll in the Duplin action. It is incorporated in the *agreed* case on appeal. Too, it was admitted by defendants' counsel that the Duplin action arose out of the same collision and that Beulah Fields Jones, defendant in the Duplin action, was the same person as Vivian Beulah Jones, plaintiff in this action.

"It is the recognized principle that a judgment for defendant on a general demurrer to the merits, where it stands unappealed from and unreversed, is an estoppel as to the cause of action set up in the pleadings, as effective as if the issuable matters arising in the pleadings had been established by a verdict." *Swain v. Goodman,* 183 N.C.

531, 112 S.E. 36; *Johnson v. Pate,* 90 N.C. 334; *Willoughby v. Stevens,* 132 N.C. 254, 43 S.E. 636; *Marsh v. R.R.,* 151 N.C. 160, 65 S.E. 911; *Bank v. Dew,* 175 N.C. 79, 94 S.E. 708; *Blue v. Wilmington,* 186 N.C. 321, 119 S.E. 741; *State v. Oil Co.,* 205 N.C. 123, 170 S.E. 134. *Cf. Bowie v. Tucker,* 197 N.C. 671, 150 S.E. 200, and *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566. See Annotations, "Conclusiveness of judgment on demurrer," 13 A.L.R. 1104, 106 A.L.R. 437.

Under the well established legal principle stated above, the court was correct in sustaining plaintiff's plea in bar to the cross action of James Mathis. Under the circumstances, plaintiff's contention that the court considered the judgment roll in the Duplin action prematurely, that is, before it had been formally offered in evidence at trial, is unsubstantial. Defendants' said assignment of error is overruled.

Assignment of error #2, based on defendants' exceptions to the court's refusal to nonsuit plaintiff, is overruled. Plaintiff's testimony was substantially in accordance with her allegations. It tends to show that, while operating the Nash at a reasonable speed and in a prudent manner, she was confronted by an emergency created by the negligence of James Mathis in driving upon the highway directly in front of her and, by attempting to make a left turn into his private driveway, depriving plaintiff of any opportunity to avoid a collision. Defendants' contention that plaintiff's evidence disclosed contributory negligence as a matter of law is without merit.

Plaintiff testified Summerlin was on the front seat, to her right, *asleep,* and her two children were on the back seat, when the collision occurred. On cross-examination she testified Summerlin "may have had a beer or two, but was not drinking." (Note: Plaintiff was not then, but she is now, the wife of Summerlin.)

Assignment of error #3 is based on defendants' exception to the exclusion of proffered testimony of the investigating State Highway Patrolman that Summerlin "was under the influence of alcohol or some alcoholic beverage." The relevance of this proffered testimony, if any, was remote; and, under the circumstances, the exclusion thereof, in our opinion, was not sufficiently prejudicial to warrant a new trial. It is noted: (1) Summerlin did not testify. (2) Nothing in the evidence suggests plaintiff was under the influence of or had been drinking any intoxicant.

Assignment of error #4, based on defendants' exception to the court's action, at the close of all the evidence, in dismissing the counterclaim of Gladys Mathis, is overruled.

Plaintiff's testimony is explicit that the Mathis car was driven onto

the highway directly in front of her when she was no more than "two or three car-lengths" away, and that in such emergency she applied brakes and swerved to her left in an effort to avoid striking the Mathis car.

Defendants' evidence consisted of the testimony of James Mathis and of the investigating State Highway Patrolman. Defendants stress the testimony of the State Highway Patrolman that the measured distance from the *center* of the George Henry Grill driveway to the *center* of the Mathis driveway was 225 feet. The same witness testified the entrance to the Mathis driveway was "extremely wide" and the entrance to the George Henry Grill was "considerable *(sic)* wider than the driveway," and that he found a great deal of the scattered debris of the Mathis car on the "north edge" of the Mathis driveway. He testified: "Looking north from the George Henry Grill, there is an unobstructed view for about 600 yards. It was raining on this night and visibility was poor." There is no evidence that plaintiff was driving at a speed in excess of 45 miles per hour. According to the testimony of James Mathis, there were no electric signals on the Mathis car. He testified he had his arm out of the window "to give a left-hand signal and it got a little wet." James Mathis testified he did not see plaintiff's car at any time before it struck the Mathis car.

Assuming, but not deciding, the evidence, considered in the light most favorable to defendants, was sufficient to warrant a finding that plaintiff was in some respect negligent, careful consideration of the evidence impels the conclusion that Mathis, if not guilty of contributory negligence as a matter of law when he entered the highway, was guilty of contributory negligence as a matter of law in making a left turn from the highway towards a private driveway under the circumstances set forth above. Moreover, the verdict established the negligence of James Mathis and that he was acting as agent of Gladys Mathis.

We have not overlooked defendants' contention that plaintiff, by reply, did not, by name, plead contributory negligence. However, plaintiff had pleaded the negligence of defendants with particularity in her complaint and in her reply alleged the collision was proximately caused by the negligence of defendant "as specifically set forth in the complaint in this cause." Plaintiff's pleading is deemed sufficient. If defendants' negligence proximately caused the collision as alleged by plaintiff, defendants were, perforce, contributorily negligent.

It is noteworthy that the allegations as to plaintiff's contributory

negligence set forth in the answer are substantially the same as the allegations as to plaintiff's negligence set forth in the cross action of Gladys Mathis. Yet, defendants did not tender an issue as to the alleged contributory negligence of plaintiff or except to the court's failure to submit such issue. Nor do defendants, on appeal, assign as error the court's failure to submit such issue.

It is noted that the charge of the trial court was not included in the record on appeal. Hence, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. *Hatcher v. Clayton*, 242 N.C. 450, 453, 88 S.E. 2d 104, and cases cited.

Assignment of error #5, based on defendants' exception to the judgment, is formal and requires no discussion.

The verdict and judgment must be upheld, for we find no error in law sufficient to warrant a new trial.

No error.

VERNON LEE HUTCHENS, INFANT, BY HIS NEXT FRIEND, FOY HUTCHENS, v. DELORES RAYE BOYD SOUTHARD

AND

FOY HUTCHENS v. DELORES RAYE BOYD SOUTHARD.

(Filed 12 April, 1961.)

1. Negligence § 16—

A child between the ages of 7 and 14 is presumed incapable of contributory negligence, and therefore nonsuit on the ground of contributory negligence of such minor cannot be entered.

2. Automobiles § 25—

Even though speed is within the statutory maximum, a motorist is required to reduce speed when approaching an intersection when necessary to comply with the legal duty to exercise due care to avoid injury to persons or property, and failure to do so amounts to negligence *per se*. G.S. 20-141(c).

3. Automobiles § 7—

A motorist is under duty to keep a continuous lookout in the direction of travel and will be held to the duty of seeing what he ought to see.

4. Trial § 22—

On motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable intendment upon the evidence and every legitimate inference to be drawn therefrom.

5. Automobiles § 32—Evidence of defendant's negligence in striking bicyclist at intersection held sufficient to be submitted to jury.

Plaintiffs' evidence tending to show that defendant was travelling west about fifty miles per hour along a paved road on a clear day and drove into an intersection with a dirt road without decreasing speed, that the intersection was marked by appropriate sign along the paved road, that there was a dip in the highway and a hill to the east of the intersection obscuring the road to the east, and that plaintiff minor could have been seen either stopped at the edge of the pavement or entering the intersection from the dirt road on his bicycle, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in violating G.S. 20-141(c) under circumstances from which consequences of a generally injurious nature might have been anticipated, and also that such speed made it impossible for defendant to have avoided the accident after defendant saw the bicyclist or should have seen him in the exercise of reasonable care.

WINBORNE, C.J., DENNY and RODMAN, J.J., concur in result.

APPEAL by plaintiffs from *Johnston, J.*, 14 November 1960 Term of YADKIN.

These are two cases which by consent of counsel were consolidated for trial.

The first case is a civil action by Vernon Lee Hutchens, an infant appearing by his next friend, his father Foy Hutchens, to recover damages for severe personal injuries.

The second case is a civil action by the infant's father, Foy Hutchens, to recover a substantial sum for medical, doctors, and hospital expenses incurred by the treatment of his unemancipated thirteen-year-old son for severe personal injuries for which he, the father, is responsible.

From judgments of involuntary nonsuit in both cases entered at the close of plaintiffs' evidence, each plaintiff appeals.

H. Smith Williams and R. Lewis Alexander for plaintiffs, appellants.

Hudson, Ferrell, Petree, Stockton & Stockton. By: R. M. Stockton, Jr., and Norwood Robinson for defendant, appellee.

PARKER, J. Vernon Lee Hutchens was thirteen years old, when he was injured on 18 April 1958. This is stated in defendant's brief: "It is conceded by the defendant that under the law of the State of North Carolina a defendant cannot obtain a nonsuit on the grounds of contributory negligence where the minor plaintiff is 13 years of age. The presiding Judge advised counsel that he was not granting the nonsuit because of contributory negligence but because of in-

sufficient evidence of negligence on the part of the defendant."

Plaintiffs' evidence tends to show the following facts:

North Carolina Highway No. 67 about two miles west of the town of East Bend has pavement twenty feet and two inches in width, runs east and west, and there it is intersected at right angles on each side by a dirt road about eighteen feet wide running north and south. There is a center line on the pavement of the highway. There are Stop Signs beside the dirt road at the northwest and southeast corners of the intersection. At the northeast corner of the intersection there is a bank approximately twenty to twenty-five feet high some twelve feet from the northern edge of the paved portion of the highway. This intersection is "in the open countryside."

About 4:10 o'clock p.m. on 18 April 1958 Vernon Lee Hutchens riding his cousin's bicycle on the dirt road travelling south approached its intersection with Highway No. 67. Visibility was good: it was "clear as a bell and the pavement was dry."

This is a summary of Vernon Lee Hutchens' testimony: He was coming downhill on the dirt road sliding. There was a big, high bank on his left. He knew a Stop Sign was there. He stopped back from the pavement of Highway No. 67 about a foot. After he stopped — and he does not know how long he stopped —, he looked east and west on Highway No. 67 and across the highway. Seeing no automobile approaching, he started across the highway. He knows nothing more. He regained consciousness in a hospital. How long later, he does not know.

B. F. Holler, a State highway patrolman, arrived at the scene about 4:30 o'clock p.m. the same afternoon. When he arrived at the scene, he saw a cloth top Chevrolet Convertible two-door automobile. This automobile was about 93 feet west of the intersection. It was crossways on the highway with its front end pointing back a slight degree toward the intersection. Its front end was near the south edge of the pavement. Its hood was buckled in front, its windshield was broken out in the middle, its right headlight was out, its bumper and grill were pushed backwards. On the front of its hood and on the hood emblem there was blood and bits of flesh. On the pavement underneath the front part of the automobile there was a pool of blood, bits of bone, and parts of flesh. A badly broken up bicycle was lying under the front of the automobile. Patrolman Holler testified: "There were 93 feet of uninterrupted and continuous skid marks on the highway, headed west from the intersection. The marks veered off to the left of the road and led up to the Chevrolet. There were three black marks there. Toward Winston-Salem, east of the beginning of the three

marks, there was one black mark 17 feet long in the west bound lane near the center line which led to dug-out places in the pavement at the beginning of the other marks. I found no debris or anything else at the end of the 17-foot mark and the beginning of the other, except I found the dug-out places in the pavement." He found broken marks on the dirt road about two inches wide about the same width as the tires on the boy's bicycle, and roughly one or two feet in length that lead up to the pavement of the highway approaching from the north. He doesn't remember whether these marks touched the pavement or not. The spaces between the marks were about one or two feet wide, and their total length was nineteen feet and five inches. These marks went directly into the point on the highway where he found a gouged out place. Then he found a tire mark on the highway that was seventeen feet long and that went into the same point. Defendant was driving the Chevrolet automobile on Highway No. 67, travelling west from the town of East Bend and approaching this intersection. She told patrolman Holler that immediately before the collision of the automobile with the bicycle on which Vernon Lee Hutchens was riding, she was going about fifty miles an hour. She said the boy came out of the dirt road standing up on a bicycle right in front of her. Defendant admits in her answer in both cases that she and three adults were sitting in the front seat of the automobile at the time of the collision.

Patrolman Holler testified: "There is a dip in Highway No. 67 as you look toward East Bend from this intersection. From the point where I found the beginning of the three marks, or at the intersection where the scrape was, it is approximately three hundred feet to that dip in the highway. Some of a vehicle in this dip is visible from that point in the intersection where the scrapes were. Sitting in my car you could possibly see from the windshield up on the average car. There is a hill on the east side of this intersection, between the intersection and East Bend, a short distance approximately six hundred feet from this intersection. It is a pretty good hill. You could not see a car over it."

Vernon Lee Hutchens was severely injured in the collision, sustaining, among other injuries, a compound comminuted fracture of his left leg, a fracture of the pelvic bone, and a fracture of his skull.

Foy Hutchens, father of Vernon Lee Hutchens, has received for treatment of his son's injuries sustained in the collision doctors, hospital and ambulance bills in a very substantial amount.

Vernon Lee Hutchens was in the fifth grade in school in 1956-57

and 1957-58. He did not pass, and his grades were failing. He was classified by his teacher as slow.

In this State a *prima facie* presumption exists that an infant between the ages of seven and fourteen is incapable of contributory negligence, but this presumption may be overcome. *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Caudle v. R.R.,* 202 N.C. 404, 163 S.E. 122. See *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124. This presumption comes to the aid of Vernon Lee Hutchens, as defendant concedes in her brief. *Boykin v. R.R.,* 211 N.C. 113, 189 S.E. 177.

There is no evidence to show that defendant in the open countryside was driving the Chevrolet automobile at a speed greater than the maximum speed limit of 55 miles an hour. *Shue v. Scheidt, Comr. of Motor Vehicles,* 252 N.C. 561, 114 S.E. 2d 237. However, the fact that the speed of her automobile was 50 miles an hour, as she testified, did not relieve her "from the duty to decrease speed when approaching and crossing an intersection, . . . , and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, in compliance with legal requirements and the duty of all persons to use due care." G.S. 20-141(c). This statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter, the intersecting highway. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477. G.S. 20-141(c) prescribes the standard of care at intersections, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331. Proof of the breach of G.S. 20-141(c) is negligence. In essence, that is the meaning of *per se. Aldridge v. Hasty, supra; Conley v. Pearce — Young — Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

"It is the duty of the driver of a motor vehicle not merely to *look* but to *keep an outlook* in the direction of travel: and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

On 18 April 1958 on Highway No. 67 as defendant approached the intersection from the town of East Bend travelling west, there was a highway caution sign about two hundred feet east of the intersection indicating to her an intersection ahead in the direction of her travel.

Accepting plaintiffs' evidence as true, and considering it in the light most favorable to them, and giving them 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

motions for judgments of involuntary nonsuit, *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184, it would permit the jury to find as follows:

Plaintiff, a thirteen-year-old boy, approaching the intersection of the dirt road on which he was riding a bicycle with Highway No. 67 about 4:10 p.m. on a clear day with visibility good stopped his bicycle about a foot from the pavement of Highway No. 67, the high bank to his left was twelve feet from the pavement, looked east and west on Highway No. 67 and across Highway No. 67, saw no approaching automobiles, and then started across the intersection. That defendant was approaching this intersection from the east driving a Chevrolet automobile along Highway No. 67 travelling west, that as defendant approached this intersection about two hundred feet from the intersection on the highway there was a caution sign indicating an intersection ahead of her, which she saw or could have seen, if she was discharging her duty of keeping an outlook in her direction of travel. That there is a dip in Highway No. 67 as you look toward East Bend from the intersection about three hundred feet from the intersection, and that sitting in an automobile one could *possibly* see from the windshield up on the average automobile. That east of the intersection, was a pretty good hill, and you could not see an automobile over it. That in spite of the highway caution sign indicating an intersection ahead and the dip in the highway three hundred feet from the intersection and the pretty good hill six hundred feet from the intersection, defendant approached and drove her automobile into the intersection without decreasing speed at a speed of about fifty miles an hour, when if she had been keeping a proper lookout she could have seen as she approached the intersection Vernon Lee Hutchens stopped at the edge of the pavement or entering the intersection. That defendant was guilty of negligence *per se* in operating the Chevrolet automobile in violation of G.S. 20-141(c), and that she in the exercise of reasonable care might have foreseen from such negligence consequences of a generally injurious nature might be expected to follow, as it did, and that such negligence on her part was the proximate cause of her driving the Chevrolet automobile into Vernon Lee Hutchens and his bicycle inflicting upon him grievous personal injuries. The evidence would also permit the jury to find that defendant's negligence in driving the automobile into the intersection at a speed of about fifty miles an hour made it impossible for her to avoid the collision of the automobile with Vernon Lee Hutchens and the bicycle, after seeing the child, or when by the exercise of reasonable care she could have seen the child in time to avoid injuring him.

Plaintiffs' evidence presents a case for the jury. Though the facts are not similar, our position here finds support in the decisions in *Carter v. Shelton,* 253 N.C. 558, 117 S.E. 2d 391; *Hollingsworth v. Burns,* 210 N.C. 40, 185 S.E. 476.

The judgments of involuntary nonsuit entered below are

Reversed.

WINBORNE, C.J., DENNY & RODMAN, J.J., concur in result.

IN RE CUSTODY OF MICHAEL RANDOLPH HUGHES AND RICHARD JAMES HUGHES, MINORS.

(Filed 12 April, 1961.)

1. Constitutional Law § 24: Evidence § 58—

Where a party does not object to the introduction of affidavits in evidence or ask permission to cross-examine, he may not thereafter object that the findings of the court were based on the affidavits and that he was given no right to cross-examine the affiants.

2. Parent and Child § 5—

The right of a parent to custody of his child is not absolute and must yield to the welfare of the child, and where a parent neglects the welfare of his child, he waives his usual right of custody.

3. Habeas Corpus § 3: Infants § 8: Constitutional Law § 26—

A decree of divorce awarding the custody of the children of the marriage to their mother, entered in another state while the children of the marriage were resident in this State, does not deprive the courts of this State of jurisdiction to hear a subsequent proceeding for the custody of the children who continue to be residents here, the residence and not the domicile of the children being controlling.

APPEAL by Jeanie P. Hughes from *Huskins, J.,* at Chambers in YANCEY on November 25, 1960.

Elizabeth Clapp filed a petition seeking custody of the minors Michael, age three, and Richard, age four, named in the caption, children of Sgt. James F. Hughes, Jr. and Jeanie P. Hughes. She alleged James F. Hughes, Jr., a citizen of Yancey County, was a member of the armed forces of the United States, and by reason of such service was unable to care for and supervise his two children; Jeanie P. Hughes was not a proper person to have custody of the children; she had abondoned and refused to support them; since 1 March 1959

the children had been residing with petitioner. Based on this petition, Judge Huskins, on 10 September 1960, issued a writ of *habeas corpus* returnable 17 September 1960. On the date fixed in the order for the hearing, petitioner, her attorney, and the minors were in court. The father was neither present nor represented. The mother, appellant, was represented by counsel. At his request the hearing was postponed to a fixed date. Neither of the parents were present at the hearing, although both had been notified of the time and place of hearing and process had been served on them in Colorado. Petitioner offered affidavits to establish the facts alleged in the petition.

Appellant offered no evidence to controvert the facts alleged by petitioner. She challenged the right of the court to enter any order with respect to the custody of the minors. To support her challenge she offered in evidence an exemplified transcript of the records of the District Court of El Paso County, Colorado, in the case of *Jeanie P. Hughes v. James F. Hughes, Jr.* That was an action for divorce and alimony and for custody of the children. Summons was issued therein on 6 September 1960, served 8 September 1960. Plaintiff in that action gave notice that she would seek custody and temporary alimony, the hearing to be had on 19 September 1960. The court at that hearing, on the day fixed in the notice and with both parents before it, found: ". . .there has been no showing that the plaintiff is unfit or improper to have custody of the minor children of the parties. . .The events testified to occurred a number of years ago, before the birth of the younger child. . ." The court found the parents were residing in Colorado and subject to its jurisdiction. It found that the children were sent to North Carolina in the spring of 1959 with the understanding that they would be returned to the mother when the differences between the parents had been adjusted. Upon the findings so made the district court awarded custody to the mother.

At the hearing pursuant to the writ of *habeas corpus* Judge Huskins found that the father was a resident of Yancey County, N. C., serving in the armed forces of the United States, and, because of such service, not able to give supervision to his minor children; hence it would not promote their interest and welfare to award custody to him; that the mother lived for a while in the spring of 1959 in the home of petitioner; that she neglected the minors; that she abandoned the children and was not a fit and proper person to have their custody; that it would not best promote the interest and welfare of the children to award custody to her; that petitioner, the grandmother, was a fit and proper person to have custody and control of the minors.

He concluded the court had jurisdiction of the minors; that it was

not bound by the findings made by the district court of Colorado at a time when the children were in North Carolina. Based on the findings and conclusions, custody was given petitioner, with the reserved right to modify the award from time to time as provided by statute.

The mother excepted to the findings of fact, conclusions of law, and appealed.

Bill Atkins and Anglin & Bailey for petitioner appellee.
Joseph Corey and Fouts & Watson for respondent appellant.

RODMAN, J. Appellant's challenge to the facts found by Judge Huskins is based on her assertion that there was no competent evidence to support the findings, because all of the evidence offered by petitioner was by affidavit, thereby depriving her of her constitutional right to cross-examine the witnesses for petitioner. If appellant wished to cross-examine the witnesses, she should have objected when the affidavits were offered or asked permission to cross-examine. She did neither. Her silence gave assent to the manner in which the evidence was presented. She cannot now complain with respect to a method of trial approved by her. *Cotton Mills v. Local* 578, 251 N.C. 218, 111 S.E. 2d 457.

The other assignments are directed to the power of the Superior Court of North Carolina to determine the right to custody of children living in the county where the court was sitting. Appellant contends the District Court of Colorado had jurisdiction of the children then living in North Carolina, because it had jurisdiction of the parents; and because of such jurisdiction of the parents, findings made by that court were entitled to full faith and credit, foreclosing North Carolina's courts of the right to inquire as to the welfare of the infants.

It may be conceded that the parties before the Colorado Court are bound by the findings then made, but Judge Huskins was not investigating the rights of the parents *inter se*. He was investigating facts necessary to provide for the welfare of the children. They were before him and admittedly had been in North Carolina for more than a year before any court was called upon to pass on the question of custody.

Each parent has a duty to care for his or her minor child. When the failure is wilful, the neglect is criminal. G.S. 14-322. Because the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not

an absolute right. The welfare of the child is the crucial test. When a parent neglects the welfare and interest of his child, he waives his usual right of custody. *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114; *In re McWhirter,* 248 N.C. 324, 103 S.E. 2d 293; *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918; *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136. As said by *Parker, J.,* in *In re Gibbons,* 247 N.C. 273, 101 S.E. 2d 16: "It is an entire mistake to suppose the court is at all events bound to deliver over a child to his father, or that the latter has an absolute vested right in the child. Doubtless, parents have a strict legal right to have the custody of their infant children as against strangers. However, courts will not regard this parental legal right against strangers as controlling, when circumstances connected with the present and prospective welfare of the child clearly exist to overcome it, or when to enforce such legal right will imperil the personal safety, morals, or health of the child."

Because the welfare of the child is the crucial test, a court within whose jurisdiction a child is living has the right and duty, upon request of the person having custody of the child, to determine facts necessary to make an award. Neither the child nor the custodian is bound by an agreement between the parents or by facts found in an action in another State where they had no right to be heard. *Holmes v. Sanders,* 246 N.C. 200, 97 S.E. 2d 683; *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71; *Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228; *Gafford v. Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *Story v. Story, supra.*

The correct rule was succinctly stated by *Justice Cardozo* in *Finlay v. Finlay,* 148 N.E. 624, 40 A.L.R. 937. He said: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. (citations) For this, the residence of the child suffices, though the domicile be elsewhere. (citation) But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for the definition of parental rights dependant upon status."

Apparently the courts of Colorado apply the rule announced by this Court and by the New York courts. *People v. Torrence,* 27 P 2d 1038. There the father sought custody pursuant to a decree of a Wisconsin court of children in Colorado with the mother. The court said: "Here he was met face to face with the state, the third party in interest in cases of this character, ready to administer to the protection of the

helpless child found within its borders. This jurisdiction does not depend on the domicile of the parents, neither does it stand by for a judgment of another state. . ."

Since the Superior Court of Yancey County had the duty, upon petition filed, to investigate and find what was in fact for the best interest of the minors, and in the performance of that duty heard evidence relating to happenings and conditions in North Carolina, and made findings based thereon, it follows that the judgment should be and is

Affirmed.

C. H. CAUDELL v. J. S. BLAIR, ADMINISTRATOR OF THE ESTATE OF P. J. CAUDELL, DECEASED.

(Filed 12 April, 1961.)

1. Reference § 3—

A compulsory reference may be ordered in an action involving a course of dealing and accounting between the parties for a long period of time. G.S. 1-189.

2. Appeal and Error § 49—

Findings of fact by the referee approved by the trial judge are conclusive on appeal when supported by any competent evidence.

3. Reference § 13—

Upon the hearing on appeal from the report of a referee, the trial court may affirm, overrule, modify, or make different or additional findings of fact, and such action by the judge is not ground for exception unless there is error in receiving or rejecting evidence or the findings of the court are not supported by evidence. G.S. 1-194.

4. Appeal and Error § 1—

Where it is determined that defendant is entitled to recover nothing on his cross action, it is not necessary to determine whether the cross action is barred by plaintiff's plea of the statute of limitations.

BOBBITT, J., concurs in result.

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

APPEAL by both plaintiff and defendant from *Paul, J.*, at December 1960 Term, of DUPLIN.

Civil action instituted in the Superior Court of Duplin County on 12 March, 1949, as a special proceeding, for the purpose of ob-

taining an order permitting the plaintiff to pay the sum of $19,270.60 into the office of the clerk of the Superior Court of that county to the end that the controversy between the children born to the marriage between P. J. Caudell, then deceased, and Sarah B. Caudell, and J. S. Blair, Administrator of the estate of P. J. Caudell, deceased, might be determined as to the ownership of said funds.

A consent order was entered in the proceeding on 27 March, 1950, authorizing the payment of said sum of $19,270.60 into the office of the clerk of the Superior Court of Duplin County by C. H. Caudell, with the further stipulation that said order would not prejudice the rights of the parties to assert claim or claims against each other "in respect to any other fund or funds, property or properties, for which either of the said parties may be accountable to the other or others."

The order further transferred the cause to the Civil Issue Docket for appropriate inquiry to determine and adjudicate the ownership of said funds; and further provided that the cause of action involving settlement between the above-mentioned children and the Administrator be severed from the cause of action dealing with the further accounting between the Administrator and C. H. Caudell, and set up on the Civil Issue Docket under the title of: *"C. H. Caudell, Plaintiff, v. J. S. Blair, Administrator of the estate of P. J. Caudell, deceased, Defendant."*

On 2 June 1953, Sarah B. Caudell Paddison, former widow of P. J. Caudell, filed in the proceeding entitled *"C. H. Caudell v. Joyce Caudell, et al"* a waiver of her claim to the balance of the $19,270.60, so paid into the office of the clerk of the Superior Court, and assigned to the said minor children her personal interest, if any, in said fund. On 8 September 1953, an order was entered by consent of Sarah B. Caudell Paddison, Guardian for the said minor children, and individually, and by her attorney of record as Guardian, and by J. S. Blair, Administrator of the estate of P. J. Caudell, deceased, directing that the clerk of the Superior Court pay over to Sarah B. Caudell Paddison, Guardian for the said minor children, without prejudice to the other matters involved in the litigation, the balance of said funds in his hands.

Thereupon, on 11 December, 1953, J. S. Blair, Administrator of the estate of P. J. Caudell, deceased filed a cross-action in the above-entitled action, alleging that the plaintiff was indebted to the estate of P. J. Caudell as surviving partner, for rents, profits and other income in the sum of $75,000.00

The plaintiff, C. H. Caudell, replied to the cross-action and denied the material allegations therein, and alleges that a partnership existed

between him and his brother, P. J. Caudell, prior to 2 July 1942, pursuant to which real properties were acquired and a business known as Wanoca Theatre was conducted by the partnership. The plaintiff further alleged that on 2 June 1942, the co-partnership agreement was reduced to writing between the parties, and included the following provision: "It is understood and agreed that in the event of death of P. J. or C. H. Caudell, survivor partner shall have the business at a sum to be paid to the estate of the deceased, at a price in the sum of TEN THOUSAND DOLLARS ($10,000.00). It is agreed that the survivor shall have a lease on said building owned by said parties for a period of ten years, to be paid on a monthly basis of ONE HUNDRED ($100.00) Dollars per month, due and payable first of each month to the estate of the deceased."

The defendant filed a reply to plaintiff's reply and admitted the partnership agreement.

The proceeding came on for trial before Parker, Joseph W., J., at the September 1, 1958 Term of the Superior Court of Duplin County. Four issues were submitted to the jury:

> "First: Was the partnership operated as Wanoca Theatre by P. J. Caudell and C. H. Caudell dissolved on May 25, 1945, as alleged?
>
> "Second: If so, was said partnership terminated by a settlement between P. J. Caudell and C. H. Caudell, trading as Wanoca Theatre, on or about May 25, 1945, as alleged?
>
> "Third: Is the cause of action alleged by the defendant J. S. Blair, Administrator, barred by the three-year statute of limitations, as alleged?
>
> "Fourth: Is the defendant J. S. Blair, Administrator, estopped to maintain the above action, as alleged?"

The first issue was answered "Yes" by consent of the parties, and the other three issues were answered, under the direction of the court, "No." The plaintiff tendered judgment against the defendant upon the verdict for the sum of $9,270.60. The court refused the tendered judgment, and signed judgment based on the jury verdict as set out above. Then the court entered an order referring the matter. The referee conducted a hearing and made his report. Objections and exceptions to the report of the referee were filed by both sides.

The cause was re-referred to the referee by Paul, J., and a supplemental report was made by him. Both sides filed objections and exceptions to the supplemental report.

Thereupon the cause came on for hearing before Paul, J., upon the exceptions filed to the referee's report and supplemental report, at the September 1960 Term of the Superior Court of Duplin County, and judgment was entered at the December 5, 1960 Term of Duplin Superior Court.

The pertinent part of the judgment is as follows: "12. That the payment of said $19,270.60 by C. H. Caudell in the manner hereinbefore set forth represents the full share of P. J. Caudell in the said partnership business other than his interest in the real properties which have been partitioned in the manner hereinbefore set forth; that plaintiff is not indebted to the defendant in any amount beyond the sum heretofore paid into the clerk's office by him, litigated in the above-mentioned action.

"It is therefore ordered and decreed that said Referee's Report and Supplemental Report, as here modified, is approved and confirmed. Each exception by plaintiff, and each exception by defendant, to the Report and Supplemental Report of the Referee in this cause insofar as the findings and conclusions of the Referee do not conform to the judgment, is sustained. Each exception by plaintiff, and each exception by defendant, to the Report and Supplemental Report of the Referee in this cause insofar as the findings and conclusions of the Referee do conform to this judgment, is overruled.

"It is further ordered that the defendant have and recover nothing of the plaintiff, and that plaintiff have and recover nothing of the defendant * * *."

To the entry of the foregoing judgment both plaintiff and defendant object and except and appeal to the Supreme Court, and assign error.

Jones, Reed & Griffin for plaintiff.
Isaac C. Wright, Earlie C. Sanderson for defendant.

Defendant's Appeal

WINBORNE, C.J. The pivotal question on defendant's appeal is whether or not the findings of fact and conclusions of law incorporated in the judgment of the court below, and the portions of the referee's report and supplemental report approved therein, are supported by competent evidence.

This action involves a course of dealing between the parties for a substantial period of time, and necessarily contains a long and complicated account. In such case an order for a compulsory reference will be affirmed. G.S. 1-189. *Mfg. Co. v. Horn,* 203 N.C. 732, 167 S.E. 42.

Furthermore, it is well settled in this State that the findings of fact made by a referee and approved by the trial judge are not subject to review on appeal, if supported by any competent evidence. *Dorsey v. Mining Co.*, 177 N.C. 60, 97 S.E. 746.

Likewise the judge, upon hearing and considering exceptions to a referee's report and supplemental report, may affirm, overrule, modify or make different or additional findings of fact. This affords no ground for exception on appeal, unless such action by the judge is not supported by sufficient evidence, or error has been committed in receiving or rejecting testimony upon which they are based. G.S. 1-194. *Kenney v. Hotel Co.*, 194 N.C. 44, 138 S.E. 349; *Gurganus v. McLawhorn*, 212 N.C. 397, 193 S.E. 844. *Threadgill v. Faust*, 213 N.C. 226, 195 S.E. 798; *Ramsey v. Nebel*, 226 N.C. 590, 39 S.E. 2d 616.

Therefore, applying these principles of law to the present case, the conclusion is that the findings of fact by the court from the referee's report and supplemental report, are supported by competent and sufficient evidence. Indeed, the record contains no assignment of error as to the admission of evidence.

Matters to which other exceptions and assignments of error relate have been given due consideration, and in them prejudicial error is not made to appear.

For reasons stated, the judgment from which defendant appeals is affirmed.

Plaintiff's Appeal

Plaintiff's appeal is based on asserted error in failing to adjudge defendant's cross-action barred by the statute of limitations. He pleaded the statute because defendant's cross-action asserted liability beyond the sum which plaintiff paid into court. Judge Paul's judgment, now affirmed on appeal, fixes the amount of plaintiff's liability in the sum admitted by him. Hence it is unnecessary to determine whether the statute of limitations pleaded by plaintiff would have barred defendant's action for anything in excess of the amount adjudged. But having paid into court his admitted liability he will not now be permitted to change his position.

For reasons stated, the judgment from which the plaintiff appeals is affirmed.

On defendant's appeal — affirmed.

On plaintiff's appeal — affirmed.

BOBBITT, J., Concurs in result.

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

LEROY RAMSEY, PLAINTIFF v. JESS WILLARD CAMP AND BILLY LEE CAMP, ORIGINAL DEFENDANTS AND JERRY O. WILSON, ADDITIONAL DEFENDANT.

(Filed 12 April, 1961.)

1. Torts § 5—

A person is entitled to but one recovery for his damages sustained as the result of a single wrong, regardless of the number of persons from whom he is entitled to recover for the tort.

2. Same: Torts § 9—

While a covenant not to sue procured by one of the persons liable for a tortious injury, as distinguished from a release from liability, does not release other persons liable for the tort, the remaining tort-feasors are entitled to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured person.

3. Same—

Parties against whom judgment is obtained for a wrong are entitled, upon motion at any time prior to execution upon the judgment, to have the judgment credited with a sum theretofore paid by another as consideration for a covenant not to sue such other for the same tort.

4. Same—

The fact that the person who procures a covenant not to sue is found by the jury not to be a joint *tort-feasor* does not defeat the right of those against whom judgment is later rendered for the same tort to have the amount paid for the covenant credited to the judgment.

APPEAL by defendants from *Campbell, J.*, December Term 1960 of GASTON.

This was a civil action to recover for personal injuries and damages sustained in a collision on 12 July 1957, on Highway No. 29 in Gaston County, North Carolina, between the automobile owned by the plaintiff, in which he was riding and which was being driven by Jerry O. Wilson, and the automobile of the defendant Jess Willard Camp, driven by his son, Billy Lee Camp.

Jerry O. Wilson instituted an action against Jess Willard Camp and Billy Lee Camp growing out of this collision. The case was tried in August 1958 and the jury answered both issues as to negligence and contributory negligence in the affirmative. Upon appeal to this Court at the Spring Term 1959 we found no error. See *Wilson v. Camp*, 249 N.C. 754, 107 S.E. 2d 743.

On 3 June 1958 a covenant not to sue was entered into between the plaintiff LeRoy Ramsey and the additional defendant Jerry O. Wilson, pursuant to which covenant Wilson paid Ramsey the sum of $1,000.

The present action was instituted on 12 August 1957 against the

defendants Camp only. Thereafter, on 11 September 1957, upon motion of counsel for defendants Camp, Jerry O. Wilson was made an additional party defendant. The defendants Camp filed a cross-action against the additional defendant for contribution.

The case was tried in the court below and the jury returned a verdict for $1,000 against the defendants Camp and held that Wilson was not negligent as alleged in the cross-action. Thereupon, the defendants Camp, after verdict, through their counsel, moved that any judgment entered in the cause be credited with the sum of $1,000 paid by Jerry O. Wilson pursuant to the terms and provisions of the covenant not to sue. The motion was supported by an affidavit and copy of the covenant not to sue.

The trial judge refused to allow the credit on the judgment, and the defendants appeal, assigning error.

Childers & Fowler for plaintiff.

Mullen, Holland & Cooke; Craighill, Rendleman & Kennedy for defendants.

DENNY, J. It appears from the record that prior to the trial of this case the attorneys for the additional defendant Wilson informed the court that their client had procured from the plaintiff a covenant not to sue. Counsel further expressed the view that no further recovery could be had against Wilson. No formal motion, however, was made in respect thereto. The court refused to allow the motion made after verdict by the attorneys for the defendants Camp, to credit the sum of $1,000 on the judgment, which sum had been paid to plaintiff by the additional defendant Wilson pursuant to the terms of the covenant not to sue, because the existence of the "covenant not to sue in this case was not raised in the pleadings, and the jury was given no opportunity to consider the matter, as was done in the case of *Dr. R. F. Holland v. Southern Public Utilities Company*, reported in 208 N.C. at 289."

It is generally conceded that where there are joint tort-feasors there can be but one recovery, and a settlement with one is a release of the other. *Sircey v. Rees*, 155 N.C. 296, 71 S.E. 310; *Slade v. Sherrod*, 175 N.C. 346, 95 S.E. 557; *Scott v. Bryan*, 210 N.C. 478, 187 S.E. 756; *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659. But, where the injured party settles with one of the joint tort-feasors and does not give a release but, instead, merely a covenant not to sue, the remaining joint tort-feasors are not released. Even so, if the injured party proceeds against the remaining joint tort-feasors and obtains a

judgment against them, such remaining joint tort-feasors are entitled to have the amount paid for the covenant not to sue credited on said judgment. *Brown v. R.R.*, 208 N.C. 423, 181 S.E. 279; *Holland v. Utilities Co.*, 208 N.C. 289, 180 S.E. 592; *Slade v. Sherrod, supra; Mason v. Stephens,* 168 N.C. 370, 84 S.E. 527; G.S. 1-242; 76 C.J.S., Release, section 50 (c), page 691, *et seq.;* 45 Am. Jur., Release, section 4, page 676, *et seq.* See Anno. — Crediting Sum Received from Cotort-Feasor, 104 A.L.R. 932, where the authorities supporting the above view are collected from thirty jurisdictions, including North Carolina.

An examination of the authorities tend to show that it is permissible to plead a covenant not to sue, as was done in *Holland v. Utilities Co., supra.* But, such procedure is not the only way by which other joint tort-feasors may obtain credit for the amount paid for a covenant not to sue. Moreover, some courts hold that the introduction of a covenant not to sue is prejudicial to the plaintiff. In the case of *DeLude v. Rimek,* 351 Ill. App. 466, 115 N.E. 2d 561, the Court said: "It is well understood by lawyers and judges experienced in such matters that in a case where evidence is offered of the payment of a substantial sum for a covenant not to sue, the jury considers it evidence that the covenantee is the party responsible for the injury, and that defendant or defendants should be exculpated. Hence, there is always an effort on the part of the defense to put the covenant before the jury and to make the most of it during the course of the trial. In the instant case, time and again, and with far more repetition than was necessary to preserve their record, defendants stressed their objections to evidence of damages, on the ground that the covenantee had paid such damages." The Court then held: "While the amount paid under a covenant not to sue should be deducted from the total damages sustained, we hold it is the function of the jury to find the plaintiff's total damages, and the function of the judge, upon application of the defendant after verdict, to find the amount by which such verdict should be reduced by virtue of any covenant made by the plaintiff with another concerned in the commission of the tort."

Likewise, in *Schumacher v. Rosenthal* (U.S.C.A. 7th Cir.), 226 F 2d 946, the sum of $5,000 was paid by the insurance carrier of one of defendant's salesmen and a covenant not to sue was given to the salesman by the plaintiff. In the trial against the defendant, the existence of a covenant not to sue was not disclosed. A verdict of $12,000 was obtained against the defendant. After verdict, the defendant filed a motion to credit the judgment in the sum of

$5,000, the amount paid for the covenant not to sue. The motion was allowed and the Circuit Court held " * * * the district judge correctly allowed defendant's motion." *New York, C. & St. L.R. Co. v. American Transit Lines,* 408 Ill. 336, 97 N.E. 2d 264; *Aldridge v. Morris,* 337 Ill. App. 369, 86 N.E. 2d 143; *Brown v. R.R., supra.*

In the last cited case the plaintiffs instituted an action against D. B. Archbell, Norfolk Southern R. Co., C. F. Garner and C. C. Fry, alleging an unlawful conspiracy in restraint of trade. The action was nonsuited at the September Term 1929, Moore Superior Court, and reversed on appeal. *Lewis v. Archbell,* 199 N.C. 205, 154 S.E. 11.

Thereafter, on 15 September 1931, the plaintiffs came into court and took a voluntary nonsuit as to D. B. Archbell and Norfolk Southern R. Co., agreeing in open court not to sue said defendants "for any matter or thing growing out of or alleged in the complaint in this cause."

The cause came on for trial against the defendants C. C. Fry and C. F. Garner at the September Term 1933, Moore Superior Court, and resulted in a verdict and judgment for plaintiffs. The jury fixed the damages at $600.00 and judgment was rendered for treble this amount as provided in C.S. 2574, now G.S. 75-16. On appeal, the judgment was affirmed. *Lewis v. Frye,* 207 N.C. 852, 175 S.E. 717.

A motion to credit judgment with partial payment was filed by the defendants on 29 December 1934, while execution was in the hands of the sheriff. Motion denied, but reversed on appeal.

Stacy, C.J., speaking for the Court, said: "His Honor was evidently of the opinion that the failure to bring the matter to the attention of the court at the time of trial, as was done in *Holland v. Utilities Co., ante,* 289, deprived movants of their right to have the judgment * * * credited with the amount paid plaintiffs by their codefendants for the covenant not to sue. * * *

"It is provided by C.S. 620 (G.S. 1-242), that payments made upon docketed judgments and not entered of record, may be credited upon motion and hearing. True, the amount received by plaintiffs for the covenant not to sue some of the defendants was not strictly within the terms of this statute, nevertheless it would seem to be within its spirit. The payment inured to the benefit of the movants. * * *

"That movants are not entirely out by their laches — the execution being still in the hands of the sheriff — is supported, in tendency at least, by what was said, and the authorities cited, in *Williams v. Dunn,* 158 N.C. 399, 74 S.E. 99."

Furthermore, the fact that one who procures a covenant not to

sue is found by the jury not to be a joint tort-feasor, does not defeat the right of those who were found liable for injuries and damages upon which the covenant not to sue was bottomed, to have the amount paid for the covenant not to sue credited on the judgment against them. *Holland v. Utilities Co., supra; Gelsmine v. Vignale,* 11 N.J. Super. 481, 78 A 2d 602.

In light of the decisions and authorities cited herein, we hold that the defendants Camp are entitled to have the amount paid to the plaintiff by Jerry O. Wilson for the covenant not to sue credited on the judgment entered below in this cause. In our opinion, this view is not only supported by our decisions, but also upon the broad principle that no plaintiff should be permitted to recover twice for the same injury. *Holland v. Utilities Co., supra; Sircey v. Rees, supra.*

The ruling of the court below on defendants' motion for credit on the judgment of the amount paid for the covenant not to sue is reversed, and the cause remanded to the end that the credit requested may be entered on the judgment in this cause.

Error and remanded.

MURIEL H. HINES v. RUDOLPH EDWARD BROWN, ORIGINAL DEFENDANT, AND WILEY BOONE, ADDITIONAL DEFENDANT.

(Filed 12 April, 1961.)

1. Automobiles § 50—

Where an automobile is being driven by an employee under the direction and control of the owner-passenger, any negligence of the driver is imputed to the owner.

2. Negligence § 26—

Nonsuit on the ground of contributory negligence may be allowed only if the evidence establishes such contributory negligence as the sole reasonable inference that may be drawn from the evidence.

3. Automobiles § 42d— Evidence held to show contributory negligence as matter of law in colliding with rear of unlighted vehicle.

Evidence tending to show that defendant's vehicle was parked during the nighttime in plaintiff's lane of travel without lights, except for a flashlight by which a passenger was examining a road map, that the driver of the car in which plaintiff was riding saw this light when he was some fifty feet away, but did not apply his brakes until he was within fifteen or twenty feet away and too close to stop or turn either

to the right or left, that the road was straight and unobstructed with room to pass the parked vehicle on either side, and that plaintiff's vehicle was in good condition with good lights and brakes, *is held* to disclose contributory negligence as a matter of law on the part of plaintiff's driver.

4. Automobiles § 7—

The operator of a motor vehicle is under duty to exercise due care for his own safety and to keep a continuous lookout in the direction of travel, and to increase vigilance when darkness or other conditions increase the danger.

APPEAL by plaintiff from *Parker, J.*, September, 1960 Term, LENOIR Superior Court.

The plaintiff instituted this civil action to recover for her personal injuries resulting from a rear-end collision when the Cadillac in which she was riding ran into the defendant's Ford automobile, parked without lights on the highway. The pleadings raise issues of negligence, contributory negligence, and damages.

The plaintiff's evidence, omitting the details, disclosed the following: The Cadillac involved in the accident was registered in the name of the plaintiff's husband. However, she used it almost daily in operating a gift and antique shop in Kinston and a catering service throughout the surrounding territory.

On June 8, 1958, the plaintiff and a number of her employees, including the additional defendant, Wiley Boone, had served a dinner at a reception in Henderson. The plaintiff's party left Henderson shortly after midnight on their return to Kinston. The additional defendant Boone drove the Cadillac at the direction of the plaintiff who was riding in the back seat. About nine miles north of Kinston, at about three o'clock in the morning, Boone saw a light in front when he was approximately 50 feet away. "When I first recognized it I couldn't tell where it was until I got up on it. I recognized it was a car and it looked like it was inside the car. . . . About 15 or 20 feet of the car, that's when I applied my brakes." He tried to cut to his left but the right fender of the Cadillac struck the rear of the Ford automobile, causing plaintiff's injury. "It was a fair, clear night. No fog. I wasn't meeting any other car. Nothing blinding me." Other evidence indicated the night was dark, with no moonlight.

All the evidence indicated Brown's automobile, without lights, was parked on the hard surface in Boone's lane of traffic. The evidence indicated the light which Boone saw came from a flashlight by which one of the occupants in the station wagon was examining a road map. There was no other light about Brown's vehicle.

At the point of the accident the road was straight and level. The asphalt surface was 21 feet wide, and shoulders were ten feet wide on each side. The Ford automobile "was a bluish, maybe a greenish blue. The back of the car looked muddy or dirty, or wasn't very bright."

Upon the original defendant's motion, Boone, plaintiff's driver, was made an additional defendant for purposes of contribution. At the close of plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Wallace & Wallace, for plaintiff, appellant.
White & Aycock, for defendant Brown, appellee.

HIGGINS, J. The evidence in this case establishes the original defendant's negligence. Likewise it establishes the plaintiff's responsibility for any negligence on the part of the additional defendant Boone. As her agent, acting in her presence and under her control, his negligence is imputable to her.

The nonsuit must be sustained, if at all, upon the ground that Boone's negligence was one of the proximate causes of the accident, and that no reasonable inference to the contrary may be drawn from the facts in evidence. *Bradham v. Trucking Co.*, 243 N.C. 708, 91 S.E. 2d 891; *Badders v. Lassiter*, 240, N.C. 413, 82 S.E. 2d 357; *Hinshaw v. Pepper*, 210 N.C. 573, 187 S.E. 786.

The original defendant's automobile was parked in plaintiff's lane of traffic without lights, except for a flashlight by which a passenger was examining a road map. Boone saw this light when he was 50 feet away, yet he did not apply his brakes until he was 15 or 20 feet from the rear of the vehicle — too late to avoid the collision. The investigating officer testified that skid marks 12 feet in length stopped at the point of impact. This physical evidence emphasizes Boone's failure to apply brakes until he was too close to the Ford automobile to stop short or to turn either to the right or left, though ample unobstructed space permitted.

The operator of a motor vehicle in good condition, with good lights and good brakes, on a straight, level and unobstructed highway should have seen a vehicle parked in his driving lane in time to have avoided it by stopping or by driving to the one side or the other. The evidence discloses nothing by way of legal excuse for the failure. The darkness of the night should have increased the driver's vigilence. "The law charges a nocturnal motorist, as it does every other person, with the duty of exercising ordinary care for his own safety (citing cases) . . . 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." *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825.

In fixing driver responsibility, *Chief Justice Winborne*, in *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804, *Justice Parker, in Carrigan v. Dover, supra, Chief Justice Devin*, in *McClamrock v. Packing Co.*, 238 N.C. 648, 78 S.E. 2d 749, and *Chief Justice Stacy*, in *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251, have stated the ground rules. The evidence in the light most favorable to the plaintiff shows her driver, for whose conduct she is responsible, failed to exercise due care in the particulars hereinbefore indicated. The failure was one of the proximate causes of the accident and injury. Contributory negligence appears as a matter of law from the plaintiff's evidence. The judgment of nonsuit is

Affirmed.

STATE v. LEROY JONES.

(Filed 12 April, 1961.)

1. Criminal Law § 10: Indictment and Warrant § 18—

An indictment will support a conviction of the crime charged or a less degree of the same crime, and the crime of accessory before the fact is included in the charge of the principal crime, G.S. 15-170. The crime of accessory after the fact is not included in the charge of the principal crime.

2. Criminal Law § 109: Homicide § 28— Court should instruct jury on law of accessory before the fact arising on defendant's evidence.

Where, in a prosecution under a statutory indictment for murder, G.S. 15-144, the state's evidence tends to show that the offense was committed in the perpetration of a robbery and one defendant admits that he aided and abetted the others in obtaining a pistol and that he loaned his automobile to the others in order that they might commit a robbery, but that he got out of the car and waited beside the road while the other three committed the offense, and contends that he was not guilty of anything more than being an accessory before the fact, it is error for the court to fail to explain the legal meaning of accessory before the fact and instruct the jury that they might return such a verdict, and the mere statement of such defendant's contention in this regard is insufficient.

3. Criminal Law § 107—

The requirement that the trial court declare and explain the law

arising on the evidence is a substantial right, and the failure of the court to do so constitutes prejudicial error.

BOBBITT and HIGGINS, J.J., dissenting.

PARKER, J., joins in dissent of BOBBITT, J.

APPEAL by defendant from *Hooks, S. J.* at Special March Term 1960, of HARNETT, argued as No. 506 at Fall Term, 1960; now appearing on docket as No. 505 at Spring Term, 1961.

Criminal prosecution upon a bill of indictment charging defendant Leroy Jones with the offense of murder in the first degree of one Mildred Jones Dupree.

Defendant, upon arraignment, pleaded not guilty.

Upon trial in Superior Court both the State and the defendant offered evidence.

Defendant, in brief filed on this appeal makes this statement of facts: The defendant was charged with the murder of Mildred Jones Dupree on 10 December 1959. On that date Mrs. Mildred Jones Dupree was murdered while a robbery was being perpetrated on her. Each of three persons, Bailey, Thomas and Gibson, testified that they, in company with the defendant, went to the home of Mrs. Dupree at a time when they knew Mrs. Dupree was alone; that they went to her home in the defendant's automobile and that the defendant was driving; that they went for the purpose of robbing Mrs. Dupree; and that the defendant shot Mrs. Dupree with a pistol while in the process of robbing her. Mrs. Dupree died the next morning.

The defendant testified in his own behalf, and denied being present at the scene of the crime. He did admit that he aided and abetted the other three in obtaining a pistol, and he admitted that he loaned his automobile to the other three in order that they might commit a robbery. He testified that he himself got out of the car and waited beside the road while the other three went to the home of Mrs. Dupree for the purpose of robbing her.

After the deceased was shot, and after the three persons had picked up the defendant at the place where he had left them, they went together to the home of the defendant where they divided the money obtained in the robbery, and the four, together with a girl, went to Scotland County where they were arrested the next morning.

Verdict: Guilty of murder in the first degree.

Judgment: That the prisoner, Leroy Jones, suffer for his crime the penalty of death as provided by law by the inhalation of lethal gas of sufficient quantity to cause the death of the said prisoner, Leroy Jones, to continue until the prisoner, Leroy Jones, is dead.

Defendant excepts thereto, and appeals therefrom to Supreme Court and assigns error.

Attorney General Bruton, Assistant Attorney General Glenn L. Hooper, Jr., for the State.

Bryan & Bryan for defendant appellant.

WINBORNE, C.J. The indictment under which defendant is charged is framed in accord with the provisions of G.S. 15-144.

This form of bill of indictment includes the charge of murder committed in the perpetration of a robbery, without a specific allegation or count to that effect. See *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114.

The evidence offered upon trial of instant case tends to show that the homicide here involved was committed in the perpetration of robbery. And in stating the contentions of defendant the trial court told the jury, among other things, that "the defendant further argues and contends that he is not guilty of anything more than being an accessory to the crime of robbery, and, in fairness to him, that is all he is answerable to and all he is guilty of in this case." And in this respect the defendant requested the court to declare the law as to accessory before the fact of murder, and as to accessory after the fact of murder, and also as to accessory before the fact of robbery, and as to accessory after the fact of robbery. The record fails to show that the court complied with this request.

"Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or a less degree of the same crime * * * ." G.S. 15-170. The crime of accessory before the fact is included in the charge of the principal crime. *S. v. Bryson,* 173 N.C. 803; *S. v. Simons,* 179 N.C. 700. Not so, accessory after the fact. In the instant case Jones testified that he had assisted one Gibson in procuring a pistol for the avowed purpose of committing a robbery, and furnished his car for the use of Gibson, Thomas and Bailey in perpetrating the robbery, that he had an idea where they were going, and that he waited for them until they returned. Where murder was committed in perpetration of the robbery, Jones' evidence is sufficient, taken as a whole, to support a verdict against him for counselling and procuring the commission of the felony, that is, of accessory before the fact to murder. *People v. Peranio,* 225 Mich. 125, 195 N.W. 670. The court should have charged the jury on this phase of the evidence, explained the legal meaning of accessory before the fact to murder, and

instructed the jury that it might return such verdict as to the defendant Jones.

In this connection the statute, G.S. 1-180, requires that the judge shall declare and explain the law arising on the evidence given in the case. This is a substantial right of litigants. Failure to observe it is error for which the injured party is entitled to a new trial. Such is the applicable principle in the instant case. So, let there be a

New trial.

BOBBITT, J., dissenting. Whether a person, when indicted and tried for murder, may be found guilty as an accessory before the fact to the crime of murder, remains in doubt. *S. v. Dewer,* 65 N.C. 572, and *S. v. Green,* 119 N.C. 899, 26 S.E. 112, clearly say, "No." Under rather unusual factual situations, the decisions in *Dewer* and *Green* were overruled or the authority thereof somewhat impaired in *S. v. Bryson,* 173 N.C. 803, 92 S.E. 698, and in *S. v. Simons,* 179 N.C. 700, 103 S.E. 5. If and when an appropriate factual situation is presented, I think this Court should reconsider and clarify this subject.

G.S. 14-5 defines an accessory before the fact as a person who counsels, procures or commands another person to commit a felony. Here, according to the State's evidence, the defendant, in person, committed the robbery and murder. As I read the record, the defendant did not testify that he counseled, procured or commanded the robbery or murder; and the defendant's testimony is all the testimony tending to show he was not present at the time and place of the commission of the robbery-murder. Hence, whatever view is taken as to the legal question discussed in the preceding paragraph, I do not think the evidence in this case warranted an instruction as to defendant's guilt as an accessory before the fact.

PARKER, J., joins in this dissenting opinion.

HIGGINS, J., dissenting. Analysis of the evidence convinces me the question of accessory in any degree, either to murder or to robbery, does not arise upon this record. And regardless of contrary intimations in some of our cases, I am unable to agree that accessory is a lesser degree of the crime of murder. I vote no error.

J. C. JOHNSON, ADMINISTRATOR OF WILLIAM CLIFTON SCOTT, v. KENNETH FOX, ADMINISTRATOR OF WILLIE MANSFIELD DISHMAN.

(Filed 12 April, 1961.)

1. Automobiles § 41p—

The identity of the driver of a vehicle may be established by circumstantial evidence, either alone or in combination with direct evidence, but such facts and circumstances must establish identity as a logical and reasonable inference and not merely raise a conjecture, guess, or choice of possibilities.

2. Same: Automobiles § 54f—

G.S. 20-71.1 raises no presumption or inference that the owner of a vehicle was driving at the time of the accident in question.

3. Trial § 23a—

In order to be sufficient to be submitted to the jury, plaintiff's evidence must take the case out of the realm of conjecture and into the field of legitimate inference from established facts.

4. Automobiles § 41p— Evidence of identity of driver held insufficient to be submitted to the jury.

Evidence tending to show that when the vehicle was driven from the home of plaintiff's intestate it was driven by the owner with intestate as a passenger, that some ten hours thereafter the vehicle was found demolished off of the hard surface, that the body of intestate was found on the floor of the car next to the back seat, and that the body of the owner was found some fifty feet from where the car had stopped, and that the owner had a driver's license on his person but that intestate had none, *is held* insufficient to be submitted to the jury on the question of whether the owner was driving the vehicle at the time of the fatal accident.

APPEAL by plaintiff from *Phillips, J.*, November Term 1960 of IREDELL.

Civil action to recover damages for the death of plaintiff's intestate.

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

Ray Jennings and Land, Sowers & Avery for plaintiff, appellant.

R. A. Hedrick and Adams & Dearman by C. H. Dearman for defendant, appellee.

PARKER, J. This is a summary of plaintiff's evidence, except when we quote:

About 6:00 o'clock p.m. on 7 August 1959 William Clifton Scott, plaintiff's intestate, left his mother's home in a Pontiac automobile driven away by Willie Mansfield Dishman, defendant's intestate.

About 4:00 o'clock a.m. on 8 August 1959 Bob Cavin operator of a funeral home in the town of Mooresville, arrived at the scene of an accident on U.S. Highway No. 21 near Mooresville. There he saw a Pontiac automobile, whose top had been completely "sheared" off. He walked into the automobile and picked up the living body of William Clifton Scott, which was lying on the floor of the automobile next to the back seat. Near the scene he saw the dead body of Willie Mansfield Dishman. He carried Scott to a hospital, where he died. The automobile was completely demolished; the front seat had been completely knocked loose.

About 4:30 o'clock a.m. on 8 August 1959 R. L. Henry, a State highway patrolman, arrived at the scene. He testified as follows without objection: "He observed a 1955 Pontiac automobile that had run off the right-hand side of said highway traveling north; that the car had slid 46 feet on the road on a slight curve before leaving the road and then had skidded 166 feet when it clipped off a pine tree approximately 12 inches in diameter, peeling the top of the car off; that the car came to rest after skidding 94 feet more and striking two smaller trees. That the 1955 Pontiac automobile belonged to Willie Mansfield Dishman. That the body of Willie Mansfield Dishman was found 50 feet from where the car stopped; that Willie Mansfield Dishman had a North Carolina driver's license. That William Clifton Scott had already been removed from the scene of the accident to the hospital at Mooresville, N. C., when he arrived at the scene of the accident; that William Clifton Scott did not have any driver's license on his person."

The crucial question is whether the physical facts at the scene of the wreck, and the attendant facts and circumstances, which are circumstantial in nature, when considered in the light most favorable to the plaintiff, permit the legitimate and reasonable inference that defendant's intestate Dishman was driving his automobile at the time of the fatal wreck.

This crucial fact can be established by sufficient circumstantial evidence, either alone or in combination with direct evidence. *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492.

Upon the facts of the instant case no rebuttable presumption or inference arises that Willie Mansfield Dishman was driving his automobile at the time of the fatal wreck. G.S. 20-71.1 raises no such presumption. *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115.

What was said in the *Parker* case is controlling here: "When in a

case like this, the plaintiff must rely on the physical facts, and other evidence, which is circumstantial in nature, to show that Donald Wilson was driving the automobile at the time of the wreck, he must establish attendant facts and circumstances which reasonably warrant such inference. *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879; *Sowers v. Marley,* 235 N.C. 607, 70 S.E. 2d 670. Such inference cannot rest on conjecture or surmise. *Sowers v. Marley, supra.* 'The inferences contemplated by this rule are logical inferences reasonably sustained by the evidence, when considered in the light most favorable to the plaintiff.' *Whitson v. Frances, supra.* 'A cause of action must be something more than a guess.' *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411. A resort to a choice of possibilities is guesswork, not decision. *Hanrahan v. Walgreen Co.,* 243 N.C. 268, 90 S.E. 2d 392. To carry his case to the jury the plaintiff must offer evidence sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts."

It may be guessed or conjectured that Dishman was driving his automobile at the time of the fatal wreck, but a resort to a choice of possibilities is guesswork and speculation not judicial decision. Considering plaintiff's evidence in the light most favorable to him, and giving him the benefit of every reasonable inference to be drawn therefrom *(Pridgen v. Uzzell, supra,)* the plaintiff has not offered evidence as to the driving of the automobile at the time of the fatal wreck by Dishman sufficient to take his case out of the realm of conjecture and into the field of legitimate inference from established facts. Therefore, the trial court correctly entered a judgment of involuntary nonsuit at the close of plaintiff's evidence.

Plaintiff relies on *Stegall v. Sledge, supra.* The facts are easily distinguishable. In the *Stegall* case plaintiff offered evidence to the effect that she had never had an operator's license, and could not drive an automobile. The cases of *Bridges v. Graham, supra,* and *Pridgen v. Uzzell, supra,* are also factually distinguishable. In each of these cases defendant's intestate was seen driving the automobile on a public road a short time before the fatal wreck, which occurred in the *Bridges* case on the same road some 10 or 12 miles from where Graham's intestate was seen driving it, and which occurred in the *Pridgen* case on the same road some 1.9 miles from where Uzzell's intestate was seen driving it.

The judgment of involuntary nonsuit is

Affirmed.

STATE v. J. PAUL FRIZZELLE, JR.

(Filed 12 April, 1961.)

1. Criminal Law §§ 156, 161—

Where the court in the instructions to the jury charges that a certain person had made an incriminating statement in the presence of defendant, and it appears that the person referred to did not testify at the trial but that the instruction was based upon incompetent hearsay evidence as to what such person had stated, the inadvertence relates to a material fact not shown in evidence and must be held prejudicial notwithstanding the failure to bring it to the trial court's attention in apt time.

2. Criminal Law § 72—

In a trial upon indictment, the admission in evidence of the warrant for the purpose of showing that a certain officer was listed as a witness for the State, introduced by the solicitor for the purpose of showing that such officer, had he been a witness, would have denied making a certain exculpatory statement at the time of the accident in question, *is held* prejudicial, the warrant being at best a self-serving declaration on the part of the State and of no greater dignity than hearsay.

3. Criminal Law § 70—

Evidence, written or oral, is incompetent to prove the existence of a particular fact when its probative force is dependent upon the competency and credibility of a person not a witness.

4. Criminal Law §§ 91, 162—

Where incompetent evidence is highly prejudicial and it is apparent that its prejudicial effect could not be removed from the minds of the jurors, error in its admission is not corrected by a subsequent withdrawal of the incompetent evidence in the charge of the court.

APPEAL by defendant from *Hooks, S. J.*, October 1960 Criminal Term of GREENE.

This is a criminal action.

Indictment (two counts): (1) Operating a vehicle on a public highway while under the influence of intoxicating liquor and (2) reckless driving.

Plea: Not guilty.

There was evidence tending to show that defendant, about 10:00 P.M. on 29 October 1959 was driving a car on a public highway within the city limits of Snow Hill. His speed was approximately 35 miles per hour. It was raining and the road was wet. Defendant's car crossed the center line of the highway and collided with a large truck going in the opposite direction. ". . . (I)t looked like . . . the car pulled directly across the highway and hit the truck. The truck pulled off and almost ran in the ditch, on its right hand . . . . The

car struck the truck on the front fender. . . . The car got a right good ways to the left; it looked like over the center line, of course the truck was pulling away from him all the time. It happened fast." Defendant explained that he reached up to wipe his windshield and the accident happened while he was so engaged. There was testimony that he had the odor of intoxicants on his breath, he staggered and his eyes were red. There was further testimony that he was under the influence of intoxicating liquor.

Verdict: Guilty on both counts as charged.

Judgment: Prison term, suspended on conditions.

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

White & Aycock for the defendant.

MOORE, J. There are twenty-four assignments of error. We discuss only two.

(1) While Mr. Stevens, Chief of Police of Snow Hill, was testifying for the state on direct examination, the following transpired:

Witness: ". . . (T)he driver, which was a colored man, made the statement — that he saw the truck coming and he pulled clean off the road — now there might have been — I say clear off — his front wheels were clear off the road and the rear end could have been just on, maybe a foot.

"COURT: "He said what, Chief?

"WITNESS: He made the statement that he saw the truck coming, I mean the car coming, and he pulled off to keep from getting hit — pulled off the highway. Exception."

Later, while giving the State's contentions, the court instructed the jury: ". . . that the colored man who was driving the truck said there, in the presence of the defendant, that he saw the car coming and he pulled off the highway to keep from getting hit . . . ."

The driver of the truck did not testify at the trial. The record does not disclose that he made any statement in defendant's presence. The statement attributed to him gives a much worse impression of defendant's conduct in driving than that of the eyewitness who testified. The statement of the truck driver was pure hearsay. In causing it to be repeated by the witness and in charging the jury that it was made in the presence of defendant, the court erred to the prejudice of defendant. The question propounded by the judge eliciting a repetition of the hearsay evidence tended to emphasize it and impress it on the minds of the twelve. "Ordinarily an inadvertence in stating the facts

in evidence (in charging the jury) should . . . be brought to the attention of the trial court in apt time. But where the misstatement is of a material fact not shown in evidence, it is not required that the matter should have been brought to the trial court's attention." (Parentheses added) Strong. N.C. Index, Vol. 1, Appeal and Error, s. 24, p. 102; *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68.

(2). Mr. Pridgen, a State highway patrolman, who was an eyewitness to the collision and observed defendant on the occasion in question, was absent from the State and did not testify at the trial.

During the testimony of Mr. Letchworth, a police officer, on redirect examination the following took place:

"Q. Mr. Letchworth, the defendant testified that you were present at the time a statement was allegedly made by Officer Pridgen with respect to — that 'Mr. Frizzelle, I am glad you were not drinking.' Did you overhear any such statement by Mr. Pridgen?

"A. No, I didn't hear him make no statement.

"THE STATE OFFERED ORIGINAL WARRANT AS EVIDENCE.

"OBJECTION.

"COURT: For what purpose do you offer it?

"MR. ROUSE: I offer it to show, Your Honor, that Mr. Pridgen's name is on that Warrant as a witness for the State.

"COURT: Is this the Warrant that he is being tried under now?

"MR. ROUSE: He is being tried on a Bill of Indictment, Your Honor. It is a request for a Jury trial — that is, the original Warrant indicates it.

"MR. WHITE: That is the basis of my OBJECTION, Your Honor.

"OBJECTION OVERRULED. Exception.

"WARRANT ADMITTED AS EVIDENCE FOR THE STATE. Exception." In the charge the court withdrew the warrant from the jury's consideration.

It is obvious that the solicitor desired the jury to gain the impression that Pridgen, if present, would testify that he had not said to defendant: "Mr. Frizzelle, I am glad you were not drinking." Mr. Pridgen was listed on the warrant as a State's witness. The solicitor's statement was made in the presence of the jury. It is reasonable to assume that the able solicitor took full advantage of this item of evidence in his argument to the jury. At the very best this evidence was self-serving on the part of the State and was of no greater dignity than hearsay.

"Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credi-

bility of some person other than the witness by whom it is sought to produce it." Stansbury: North Carolina Evidence, s. 138, p. 274.

The evidence was designed both to impeach defendant's credibility and to show his guilt. It is true that the court sought to withdraw it, but it had already been impressed on the minds of the jury. Its predudicial effect was not subject to correction. *State v. Choate,* 228 N.C., 491, 500, 46 S.E. 2d 476.

We are of the opinion that the assignments of error herein discussed when considered with other assignments and the trial as a whole, were prejudicial and require that the case be retried.

New trial.

R. C. LYNN, ADMINISTRATOR OF THE ESTATE OF DAVID LEE LYNN, DECEASED v. MILDRED M. CLARK, AND WILLIAM L. CLARK, ADMINISTRATOR OF CHARLES CLARK, DECEASED.

(Filed 12 April, 1961.)

1. Parties § 1: Pleadings § 18—

Where the entire record discloses that the action was against the defendant in his representative and not his individual capacity, the caption denominating defendant the administrator for a named person and the complaint alleging that the named defendant's intestate died a resident of a specified county, the action is to be taken as one against the defendant in his representative capacity even though there is no expressed or specific averment thereof, and demurrer for defect of parties should be overruled.

2. Pleadings § 12—

A complaint should be liberally construed upon demurrer with a view to substantial justice between the parties, admitting for the purpose the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. G.S. 1-127, G.S. 1-151.

APPEAL by plaintiff from *Patton, J.,* at October 1960 Term of BURKE.

Civil action for alleged wrongful death of David Lee Lynn on 14 June 1958, allegedly caused by the negligence of Charles Clark in the operation of a motor vehicle. The case was first tried at the October 1959 Term of the Superior Court of Burke County. At the conclusion of the plaintiff's evidence, the defendant Mildred M. Clark demurred to the evidence and moved the court for judgment as of nonsuit. The motion was allowed, and the ruling was affirmed by this Court in *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427.

The jury at the trial at October 1959 Term was unable to agree upon a verdict as to the other defendant, and a mistrial was declared.

Thereafter on 22 September, 1960, the plaintiff filed a motion to amend his complaint. The cause again came on for trial at the October 1960 Term of Burke County Superior Court. The presiding judge then heard the motion, and denied same. And later, the defendant demurred *ore tenus* to the complaint on the ground that it failed to state a cause of action. The court sustained the demurrer and entered judgment in accordance therewith.

To the rulings of the court in denying the plaintiff's motion to amend, and in sustaining the defendant's demurrer *ore tenus*, the plaintiff objects and excepts, and appeals to the Supreme Court and assigns error.

W. Harold Mitchell, John H. McMurray for plaintiff appellant.
Patton & Ervin for defendant appellee.

WINBORNE, C.J. The determinative question on this appeal is whether or not the complaint states a cause of action against William L. Clark, as administrator of the estate of Charles Clark, deceased.

The defendant here contends that the complaint fails to allege either that William L. Clark was the administrator of Charles Clark, deceased, or that he had qualified and was acting as administrator of said estate, and that, therefore, the court properly sustained his demurrer. It is true that, except for the captions, William L. Clark is not referred to specifically in the pleadings as administrator. However paragraph 3 in pertinent part alleges "that William L. Clark's intestate, Charles Clark, died a resident of Burke County, North Carolina." Plaintiff moved to amend paragraph 2 by adding: "That William L. Clark was duly appointed Administrator of the Estate of Charles Clark, deceased, on the 26th day of July, 1958, by the Clerk of the Superior Court of Burke County, and that he is now the duly appointed, qualified and acting administrator of the estate of Charles Clark, deceased." As stated above this motion was denied.

Nevertheless, the language of the complaint, properly interpreted, shows a suit against William L. Clark, Administrator. The allegation in paragraph 3 shows that William L. Clark purported to act in some capacity for the estate of Charles Clark. It certainly indicates it was intended that he be sued in a capacity other than individually. While a complaint should specifically allege whether the action is brought against the defendant in his representative capacity, it is sufficient

if the complaint, taken as a whole, shows that the defendant is being sued in a representative capacity, though it is not expressly so alleged. In *Giguere v. Rosselot,* 110 Vt. 173, 3 A 2d 538, the Supreme Court of Vermont so holds.

Indeed, we think that the allegations of the complaint indicate with reasonable certainty that the defendant is being sued in a representative capacity, and that this is sufficient to fix the character of the action even though there is no express or specific averment thereof. See *Reddy v. Johnston,* 77 Ida. 402, 293 P 2d 945, citing 67 C.J.S. Parties, Sec. 100, p. 1096.

Furthermore, the answer filed by the defendant in answer to the allegations of the complaint admits the above mentioned allegation in paragraph 3. We think this further tends to show that the defendant recognized the fact that the action was brought against him in his representative capacity. An action should be treated as individual or as representative, as its true nature is disclosed by an inspection of the whole record. See *Massey v. Payne,* 109 W. Va. 529, 155 S.E. 658.

In fine, the office of the demurrer is to test the sufficiency of a pleading, admitting for the purpose the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. Moreover, a pleading challenged by a demurrer is to be construed liberally with a view to substantial justice between the parties. G.S. 1-127; G.S. 1-151; *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568; *Jacobs v. Highway Comm., ante,* 200.

Therefore the conclusion is that the complaint states a cause of action and the court erred in sustaining the defendant's demurrer *ore tenus.*

The case will be remanded to the court below to the end that further proceedings be had as to right and justice appertain and the law directs.

Error and remanded.

STATE v. WARNER GLENN BARNEY.

(Filed 12 April, 1961.)

1. Attorney and Client § 3—

An attorney has no right, in the absence of expressed authority, to waive or surrender by agreement or otherwise the substantial rights of his client.

2. Criminal Law § 22—

Where an attorney of record enters a plea of guilty and thereafter advises the court that he entered the plea in good faith but that the client says that he does not now and never intended to enter a plea of guilty, and had decided to employ other counsel, it is error for the court to refuse to allow such other counsel to withdraw the plea of guilty without findings of fact in regard to whether the first attorney was authorized to enter such plea.

APPEAL by defendant from *Armstrong, J.*, 12 September Term 1960 of FORSYTH.

This is a criminal action tried upon a warrant issued on 12 July 1959 by the Clerk of the Municipal Court of the City of Winston-Salem, charging the defendant with the operation of a motor vehicle upon a public highway of North Carolina while under the influence of intoxicating liquors.

Upon conviction in the Municipal Court judgment was entered and the defendant appealed therefrom to the Superior Court.

At the September Term 1960 of the Superior Court of Forsyth County the original counsel for defendant stated to the court: "When I entered this man's plea of guilty * * * at a former term of court, I did it in good faith. He was right here in the courtroom when I did it, but he says now that he does not and never intended to enter a plea of guilty. He says now he wants to employ other counsel."

The court granted the defendant permission to employ other counsel provided he do so by 2:00 o'clock that same day. That afternoon, 12 September 1960, present counsel for defendant requested the court for permission to withdraw the plea of guilty entered by former counsel at the 23 May Term 1960 of the Forsyth County Superior Court on the ground that the defendant had not authorized the entry of a plea of guilty.

The court refused to allow the plea to be withdrawn and proceeded to hear evidence and impose sentence. No evidence was heard or facts found bearing on the question as to whether or not the defendant had authorized or consented to the entry of the plea of guilty. Moreover,

the record does not show the minutes of the May Term 1960 setting forth that the plea of guilty was entered at that term.

The defendant appeals, assigning error.

Attorney General Bruton for the State.
Harold R. Wilson for defendant.

PER CURIAM. An attorney has no right, in the absence of express authority, to waive or surrender by agreement or otherwise the substantial rights of his client. *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860.

This Court said in *S. v. Barley,* 240 N.C. 253, 81 S.E. 2d 772: "The relation of attorney and client rests upon principles of agency, and not guardian and ward. While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld."

It will be noted that while former counsel for defendant stated in open court that he entered the plea of guilty in good faith, he did not say that he had been authorized to enter such plea.

The judgment entered below will be vacated and set aside and the cause remanded to the end that the court below may find the facts and determine whether or not the plea entered at the May Term 1960 was authorized.

Reversed and remanded.

WILLIAM E. MOORE v. PROPST CONSTRUCTION COMPANY.

(Filed 12 April, 1961.)

APPEAL by plaintiff from *Carr, J.,* November, 1960 Civil Term, VANCE Superior Court.

Civil action in which the plaintiff sought to recover for personal injury and property damages sustained when the 1957 model Pontiac sedan driven by plaintiff's brother ran into a mound of crushed stone placed by the defendant on the paved portion of U.S. Highway 1-A near Henderson, North Carolina. The pleadings raise issues of

negligence, contributory negligence, and damages. At the trial both parties introduced evidence. The jury found defendant guilty of negligence and the plaintiff guilty of contributory negligence. From the judgment dismissing the action, the plaintiff appealed.

Sterling G. Gilliam, B. H. Hicks, for plaintiff, appellant.

Teague, Johnson & Patterson, Bennett Perry, Jr., Ronald C. Dilthey, for defendant, appellee.

PER CURIAM. The plaintiff charged that the defendant on and prior to December 25, 1957, as principal contractor, was engaged in relocating a portion of U.S. Highway No. 1 in Vance County, North Carolina, and negligently permitted the barricades, warning devices, and detour signs to be removed from a section of the highway under construction, and negligently placed a large mound of gravel or crushed stone on the hard surface of that part of the highway which should have been closed; that plaintiff's brother ran into the mound of stone, causing the plaintiff serious personal injury and damage to the vehicle.

The defendant denied negligence and set up, as a plea in bar, the contributory negligence of plaintiff's brother, as plaintiff's agent and driver, alleging that he was negligent in ignoring the warning signs on the highway, was driving faster than was prudent under existing conditions, operated the vehicle carelessly and negligently, and failed to keep a lookout; that his negligence in these respects caused or contributed to the accident and resulting injury.

The plaintiff assigned as error the admission and exclusion of testimony relating to the defendant's authority and responsibility for permitting traffic on the part of the highway under construction. We need not consider this assignment for the reason that the jury answered the issue of defendant's negligence in favor of the plaintiff, and that any error with respect to evidence on the issue was cured by the verdict.

For a second assignment of error the plaintiff has challenged one clause lifted from a sentence in the court's charge. The challenged part of the sentence, if standing alone, would constitute error. However, when properly considered in context, the clause was a part of the court's statement of the defendant's contentions. The plaintiff made no objection until after verdict. The charge, considered in its entirety, is clear, concise, and presented the issues impartially. No reason appears why the verdict should be disturbed.

No error.

W. N. TIMBERLAKE, SR. v. LESLIE V. WILLIAMS.

(Filed 12 April, 1961.)

APPEAL by defendant from *Carr, J.*, November, 1960, Civil Term, FRANKLIN Superior Court.

The plaintiff instituted this civil action to recover the sum of $600 for property damages and $27.00 for personal injuries resulting from a road intersection collision between plaintiffs' Ford and defendant's Chevrolet. The defendant denied the plaintiff's allegations of negligence and counterclaimed for his own injury in the sum of $10,000.

Both parties presented evidence. The court submitted issues of negligence, contributory negligence, and damages. The jury found the defendant guilty of negligence and the plaintiff guilty of contributory negligence. From the judgment dismissing the action, the defendant appealed.

John F. Matthews, W. M. Jolly, for plaintiff, appellee.
Taylor & Ellis, for defendant, appellant.

PER CURIAM. The evidence discloses the accident occurred at the intersection of north-south Highway No. 401 and east-west Tarboro Road, Franklin County. In order to facilitate the movement of traffic from one of the above arterial highways to the other, the State Highway Commission built access roads from each side of each highway into the other. These accesses began 180 feet from the intersection and the four form a diamond-shape figure with the points of the diamond in the highway, one north and one south of the intersection on No. 401, and one east and one west of the intersection on the Tarboro Road. The traffic from either of the arterial roads into the other is routed over these accesses and no turns are permitted at the actual intersection.

As he approached the cutoff to the south of the actual intersection on 401, the plaintiff intended to switch over and go west on the Tarboro Road. To do so it was necessary for him to cross the lane for south-bound traffic on 401 and enter the access to his left. At the time the plaintiff was attempting to execute his intended movement, the defendant, having passed the actual intersection, was continuing south on 401. The two vehicles collided about the center of 401 at a point opposite the access plaintiff intended to enter. There was evidence that the plaintiff cut first to the left, then back to the right, and that defendant failed to reduce speed and to keep his

vehicle under proper control. The evidence as to signals, speed, proper lookout, right-of-way, etc., was conflicting.

The jury found both drivers negligent. The evidence was sufficient to support the findings. In such instances the applicable law to the facts has been the subject of much discussion by this Court, and useful purpose would not be served by further discussion. Suffice to say, reversible error does not appear.

No error.

CLAUDE L. RHYNE AND BETTIE TOLSON RHYNE v. PAUL L. BAILEY, PAUL L. BAILEY, JR., AND ALVIN E. WOODS.

(Filed 19 April, 1961.)

1. Statutes § 2: Constitutional Law § 24: Jury § 5—

The statutory provisions for the trial of actions for small claims in the Superior Court without a jury, unless jury trial is demanded pursuant to the procedure therein provided, is not a special act relating to the establishment of courts inferior to the Superior Court, and is valid. Constitution of North Carolina, Art. 2 § 29.

2. Trial § 22—

On a motion to nonsuit, the evidence is to be considered in the light most favorable to plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom.

3. Same—

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

4. Automobiles § 7—

A motorist is under duty to keep a continuing lookout in the direction of travel and is held to the duty of seeing what he ought to see.

5. Pleadings § 12—

Upon demurrer, a pleading is to be liberally construed with a view of substantial justice between the parties, G.S. 1-151.

6. Automobiles § 35: Pleadings § 28—

Allegations in regard to careless and reckless driving will not be held fatally defective in citing G.S. 20-140, even though the evidence discloses that the accident occurred within a campus of a university within the purview of G.S. 20-140.1, since a pleading will be liberally construed with a view to substantial justice between the parties.

7. Automobiles § 17—

Where two vehicles approach an intersection at which no stop sign

has been erected on either street, the vehicle on the right has the right-of-way when the vehicles approach the intersection at approximately the same time, while if one vehicle is already within the intersection when the other vehicle approaches, the vehicle first in the intersection has the right-of-way. G.S. 20-155 (a) (b). This rule does not apply to a vehicle making a turn in the intersection.

8. Automobiles § 41g—

Plaintiffs' evidence in this case is held sufficient to raise an issue of fact as to the negligence of the driver of each of the vehicles colliding at an intersection in failing to operate their respective vehicles with due caution and circumspection and in failing to maintain a proper lookout, and as to one driver failing to yield the right-of-way at the intersection to the vehicle on his right, and that, as a proximate result of the collision, one of the vehicles was knocked or pushed against plaintiffs' parked car causing the damage in suit.

9. Automobiles § 55—

If a son negligently operates an automobile owned and maintained by the father for the pleasure and convenience of the family, the father may be held liable for the resulting damage under the family purpose doctrine which obtains in North Carolina.

APPEAL by plaintiffs from *Williams, J.*, December 1960 Assigned Term of WAKE.

Civil action to recover compensation in the amount of $350.00 for damages to plaintiffs' automobile.

The case was heard by Judge Williams sitting without a jury, — no jury trial having been demanded by any party —, by virtue of Chapter 477, 1953 Session Laws of North Carolina, relating to the procedure in the adjudication of small claims in the Superior Court for Wake County.

From a judgment of nonsuit as to both defendants entered at the close of plaintiffs' evidence, plaintiffs appeal.

Lassiter, Leager & Walker By: Myron C. Banks for plaintiffs, appellants.

Joyner, Howison & Mitchell By: Walton K. Joyner for Alvin E. Woods, defendant, appellee.

Dupree, Weaver, Horton & Cockman By: G. Earl Weaver for Paul L. Bailey and Paul L. Bailey, Jr., defendants, appellees.

PARKER, J. About 5:15 o'clock p.m. on 14 December 1959 plaintiffs' Ford automobile, parked on the south side of Univeristy Drive on the campus of North Carolina State College, sustained damage in the amount of $321.49 (this was stipulated by the parties), as a result of

being struck in its left rear by a Ford automobile driven by Paul L. Bailey, Jr., son of Paul L. Bailey. Paul L. Bailey owned the automobile driven by his son, and purchased and maintained it for the use, pleasure and convenience of his family. Immediately prior to this collision there had occurred a collision in the intersection of University Drive and an unnamed street between an automobile driven by Paul L. Bailey, Jr., and a Pontiac automobile driven by Alvin E. Woods. University Drive runs east-west. The unnamed street enters University Drive on an upgrade from the north from a parking lot, but does not cross University Drive. The unnamed street was about as wide as the main travelled portion of University Drive, and was paved. There were no road signs or traffic signal at or near the intersection. At and near the intersection there were no obstructions to interfere with the view of traffic. Both streets carried heavy traffic.

Paul L. Bailey, Jr. was called as a witness by plaintiffs, and testified on direct examination in substance: He was driving the automobile east on University Drive about 25 miles an hour. When he was 15 to 20 yards from the intersection, he saw the Woods automobile standing still on the unnamed street to his left and north 10 or 15 feet back from its intersection with University Drive. Paul L. Bailey, Jr. drove into the intersection at a speed of about 20 miles an hour and after he had entered the intersection Woods put his automobile in motion, and drove it into the intersection between 5 and 10 miles an hour. He sounded his horn, applied his brakes, and attempted to turn his automobile slightly to his right in an attempt to get between the front end of the Woods automobile and a row of parked automobiles on his right. The Woods automobile ran into the left side of his automobile, and shoved his automobile into the rear of plaintiffs' automobile. The weather was fair. The sun set at 5:02 o'clock p.m., but he had no lights turned on, because it was not dark enough to require lights.

Paul L. Bailey, Jr. testified in substance on cross-examination by counsel for defendants Bailey: He could see down University Drive about 500 feet or more. As he approached the intersection, Woods did nothing to indicate that he would start forward into the intersection. As he got near the intersection, he saw Woods coming into the intersection. He turned to his right, applied his brakes, and blew his horn. His automobile was hit in the left side by the Woods automobile, and the impact of the collision forced him into the left rear of plaintiffs' automobile. Woods was attempting to make a left turn to go east. After the collision Woods told him he didn't see him. Woods told a policeman investigating the collision he did not see him until

after the impact. There was nothing wrong with his brakes. University Drive is a two-lane street. When his automobile was struck by Woods' automobile, it was more than half way past the center of the unnamed street.

Paul L. Bailey, Jr. testified in substance on cross-examination by Woods' counsel: The speed limit on the campus was 20 miles an hour. He sounded his horn after he entered the intersection. He had gone over half way into the intersection before the moment of impact, that is 15 to 20 feet into the intersection, if the unnamed street is of the same width as University Drive. Both automobiles had travelled approximately the same distance. He was travelling 25 miles an hour. He was travelling two and a half times as fast as the Woods automobile, if Woods was going 10 miles an hour. He hit his brakes and skidded about 10 feet. As he entered the intersection, he noticed that Woods was entering the intersection too.

Alvin E. Woods testified in substance on direct examination: He came to a complete stop at the intersection of the unnamed street and University Drive. He had his lights on, because he thought it was dark enough to require them. He observed both east and west up and down University Drive, and then proceeded to make a left turn onto University Drive, at which time he was struck by the Bailey automobile. His speed at the moment of collision was about 5 to 7 miles an hour. He has no opinion as to the speed of the Bailey automobile. He saw the Bailey automobile just at the impact point. He immediately slammed on his brakes. He did nothing to indicate he was entering the intersection other than having his lights on. It was a clear day, but it was dusk dark with very poor vision. After his automobile and the Bailey automobile collided, the Bailey automobile went over to the right and struck plaintiffs' automobile. There is no obstruction of view at the intersection. There was no obstruction to interfere with the view of traffic to the east for 300 or 400 feet at the intersection. The damage to the Bailey automobile was to the front left fender, and bumper, and the chrome strip on the side. His automobile was damaged on the extreme right front fender, the extreme front portion of the headlight, and corner of the bumper. The only thing he heard was the brakes of the Bailey automobile a split second just prior to the collision. The point of collision was about 3 to 4 feet over the center line of University Drive, the south side of the center line. His automobile was approximately over the center line of the intersection where the center line of the unnamed street intersects with the center line of University Drive. University Drive is about 30 feet from curb to curb.

Woods testified in substance on cross-examination by counsel for the Baileys: When he stopped before entering the intersection, the front of his automobile was 4 or 5 feet back from University Drive. He was aware of the fact that both University Drive and the unnamed street are heavily travelled He did not see the Bailey automobile at any time prior to the collision. The impact did not occur immediately after he drove into the intersection. He had moved across the north lane of University Drive and was on the south side of the center line of University Drive.

Woods testified in substance on cross-examination by his own counsel: There was no automobile in the intersection, when he entered it. After the collision he saw a single track skidmark extending 15 feet from the right rear wheel of the Bailey automobile behind the intersection on University Drive.

W. A. Lamm investigated the collision, and testified in substance: The point of impact was 18 feet from the west curb of the unnamed street, 21 feet south of the north curb of University Drive. Bailey said, "he was going about 25 miles an hour at the time that he first noticed the danger of collision 20 yards from the intersection and then was going about 20 miles an hour at the time they hit." Woods said, "he was going about 10 miles an hour, and did not see the other car until they hit."

In the joint answer of defendants Bailey and in the answer of defendant Woods there is no plea of contributory negligence nor of a counterclaim.

Chapter 477, § 4, 1953 Session Laws of North Carolina, relating to the procedure in the adjudication of small claims in the Superior Court for Wake County, reads: "No jury trial shall be had in such small claims actions, unless a party thereto shall demand a jury trial in the first pleading filed by him. Such small claims actions shall be tried before the judge presiding over the Superior Court of Wake County . . . ." In the instant case there was no demand for a jury trial by any party.

In respect to a somewhat similar statute for Forsyth County this Court said in *Furniture Co. v. Baron,* 243 N.C. 502, 91 S.E. 2d 236: "An examination of the foregoing Act reveals that its purpose is procedural in character and does not purport to relate to the establishment of a court inferior to the Superior Court within the purview of Article II, § 29, of the Constitution of North Carolina." See 35 N.C. Law Review 203.

The question presented is the sufficiency of plaintiffs' evidence to

withstand the motions of defendants for a judgment of compulsory nonsuit.

In considering such a motion, we are required to accept plaintiffs' evidence as true, and to consider it in the light most favorable to them, and to give them the benefit of every reasonable and legitimate inference to be drawn therefrom. *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205; *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184.

"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.

Plaintiffs' allegations as to the facts are contained in paragraphs 9 and 10 of their complaint as follows:

"9. On or about 14 December 1959, at or about 5:19 p.m. the defendant Alvin E. Woods was driving his car in a southerly direction on an unnamed street one block east of Dan Allen Drive, on the campus of North Carolina State College in the city of Raleigh, N.C., toward the intersection of said street with University Drive; at the same time the defendant Paul L. Bailey, Jr. was driving the car owned by his father, the defendant Paul L. Bailey, in an easterly direction on University Drive on the campus of North Carolina State College in the city of Raleigh, N.C., toward the intersection of University Drive with the aforementioned unnamed street; the defendant Alvin E. Woods failed to yield the right of way to defendant Paul L. Bailey, Jr., as it was his duty to do, and without maintaining a sufficient lookout and without maintaining sufficient control over the speed and direction of his car, drove it into the aforesaid intersection, colliding with the left side of the car driven by the defendant Paul L. Bailey, Jr., and owned by the defendant Paul L. Bailey; the defendant Paul L. Bailey, Jr. drove into the intersection without maintaining a proper lookout and without maintaining sufficient control over the direction and speed of the car driven by him.

"10. After the collision between the defendants Alvin E. Woods and Paul L. Bailey, Jr., the car operated by the defendant Paul L. Bailey, Jr. was shoved and propelled by the impact of the aforementioned collision into the rear end of the automobile owned by the plaintiffs."

Plaintiffs' allegations, in part, as to the negligence of defendant Woods are: One. He operated his automobile without keeping a proper and careful lookout for persons travelling upon the streets. Two. "11. . . . (b). He drove his car upon the streets carelessly and heedlessly, in wanton and wilful 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 to be likely to endanger persons and property upon said streets, in violation of G.S., § 20-140." Plaintiffs have similar allegations as to negligence on the part of defendant Bailey, Jr. Plaintiffs also have an allegation as to negligence on the part of defendant Woods as follows: "He violated G.S., § 20-155, in that he failed to yield the right of way to the defendant Paul L. Bailey, Jr., as it was his duty to do."

G.S. 1-151 provides that pleadings "shall be liberally construed with a view to substantial justice between the parties."

This Court said in *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330: "It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903.

G.S. 20-140(b) provides, "any person who drives any vehicle upon a highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

Plaintiffs' evidence shows that their automobile was parked on the south side of University Drive on the campus of North Carolina State College. G.S. 20-140 applies to reckless driving upon a highway. G.S. 20-140.1 is a similar statute as to reckless driving of a motor vehicle over any drive, driveway, road, roadway, street or alley upon the grounds and premises of any public or private hospital, college, university, school, etc.

It seems that the theory of the trial below was that University Drive and the unnamed street were highways within the purview of G.S. 20-140, and not roads, streets, etc., within the purview of G.S. 20-140.1 We are fortified in this assumption by the fact that the briefs of counsel do not raise this question or even mention G.S. 20-140.1 The complaint alleges the language of the statutes G.S. 20-140 and G.S. 20-140.1 in substance but not accurately as to reckless driving of an automobile, and we do not consider the fact that the complaint alleges a violation of G. S. 20-140, instead of a violation of G.S. 20-140.1, fatal to that allegation of negligence in the light of the provisions of G.S. 1-151, and the seeming theory of the trial below. If in fact G.S. 20-140.1 is applicable instead of G.S. 20-140, plaintiffs can request the court below to allow an amendment to their complaint to so allege.

The evidence of plaintiffs shows there were no road signs or traffic signal at or near the intersection, and that as the two automobiles

approached the intersection the Woods automobile was on the left. Therefore, what was said in *Mallette v. Cleaners, Inc.*, 245 N.C. 652, 97 S.E. 2d 245, is applicable here:

> "The evidence discloses no stop sign on the side of either street-approach to the intersection, nor any traffic control device over the center of the intersection. Therefore, upon the record as presented neither street was favored over the other, and the evidence is to be intrepreted in the light of G.S. 20-155, which provides in part:
>
> "'(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right . . .'
>
> "'(b) The driver of a vehicle approaching but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle already within such intersection and/or junction whether the vehicle in the junction is proceeding straight ahead or turning in either direction: . . .'"

G.S. 20-155(b) contains this proviso, which is not set forth in the *Mallette* case: "Provided, that this subsection shall not be interpreted as giving the right-of-way to a vehicle already in an intersection and/or junction when said vehicle is turning either to the right or left unless the driver of said vehicle has given a plainly visible signal of intention to turn as required in § 20-154."

It may be conceded that plaintiffs' evidence is not free of discrepancies and contradictions. Nevertheless, the portions on which plaintiffs rely, when weighed and considered and given every reasonable intendment and every legitimate inference to be drawn therefrom, as is the rule on a motion for judgment of compulsory nonsuit, are sufficient to justify but not compel an adjudication by the judge sitting here without a jury of actionable negligence on the part of defendant Woods and on the part of defendant Bailey, Jr. that caused their automobiles to collide in the intersection, and that the resulting collision of the Bailey automobile with the rear of plaintiffs' parked automobile followed so quickly and is so connected with the actionable negligence of Woods and Bailey, Jr., that it constituted a direct chain of events resulting from the actionable negligence of Woods and Bailey, Jr., and that such negligence on their part were the proximate causes of the damages to plaintiffs' automobile. The evidence in some respects is sufficient to justify

but not to compel a different adjudication by the judge as to negligence and proximate cause.

If defendant Bailey, Jr. is adjudicated guilty of actionable negligence that was one of the proximate causes of damage to plaintiffs' automobile, then, according to all the evidence in the record and the pleadings, Paul L. Bailey, the father of Paul L. Bailey, Jr., would be liable under the family purpose car doctrine, which obtains in North Carolina. *Elliott v. Killian,* 242 N.C. 471, 87 S.E. 2d 903; Strong's N.C. Index, Vol. I, Automobiles, § 55, pp. 314-316.

The trial judge should have overruled the motions for judgment of compusory nonsuit made by all the defendants. Plaintiffs' evidence is sufficient to require an adjudication by the judge sitting without a jury of the issues raised by the pleadings and plaintiffs' evidence. Of course, upon a re-hearing defendants, or any of them, may decide to offer evidence.

Reversed as to all defendants.

STATE v. CHARLOTTE MAZIE CARTER.

(Filed 19 April, 1961.)

1. Homicide § 10—

A person has the right to kill not only in his own self-defense but also in the defense of another who stands in a family relationship to him.

2. Homicide § 13—

While the intentional killing of another with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, the presumption that the killing was unlawful does not shift the burden of proof and cannot obtain when the State's evidence tends to show that defendant killed deceased in the lawful defense of her mother, and the State's evidence tending to establish such defense is not contradicted by other evidence.

3. Criminal Law § 85—

When the State introduces in evidence exculpatory statements of defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound thereby.

4. Criminal Law § 101—

When the State introduces in evidence exculpatory statements constituting a complete defense, and such statements are not contradicted by any other evidence, defendant may avail himself thereof on motion for judgment as of nonsuit.

5. Homicide § 20—

Where the State introduces testimony of statements tending to show that defendant killed her father in the lawful defense of her mother, and there is no evidence from which the jury could reasonably find that either defendant or her mother was at fault in starting the affray, and there is no evidence in the record tending to contradict or impeach the statements offered by the State, nonsuit should be granted.

APPEAL by defendant from *Johnston, J.*, at October 3, 1960 Term of ALLEGHANY.

Criminal prosecution upon a true bill of indictment returned by the Grand Jury at the August 29, 1960 Term of Alleghany County, North Carolina, charging: "That Charlotte Mazie Carter, late of Alleghany County, on the 9th day of July, 1960, with force and arms at and in the aforesaid county feloniously, willfully, and of her malice aforethought, did kill and murder Elijah Carter, contrary to the form and statute in such case made and provided, and against the peace and dignity of the State."

The solicitor announced that the State would not ask for a verdict of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter as the evidence may warrant.

Plea: Not guilty to the charge of second degree murder.

Upon trial in Superior Court the defendant is referred to as "Charlotte"; her father as "Elijah", sometimes "Lije"; and her mother as "Treva".

The case came on for trial at the October 3, 1960 Term of Superior Court, before judge and jury. The State offered as a witness Floyd O. Roupe, Sheriff of Alleghany County, who testified in pertinent part as follows:

" * * * On July 7th I went to the home of Elijah Carter after Charlotte Carter came to my house about 9 P.M. She knocked on the door and * * * said, 'I think I have killed my daddy.' I asked her what happened and she replied that they had gotten into a fight over at her house and she had hit him and they had taken him to the hospital. I went to the hospital with Charlotte and her mother, and Elijah was in the emergency room being sewed up. Later Charlotte related to me that about 7:30 P.M., her father, Elijah, came home from work and there was part of a screen door which had fallen off and he thought someone had torn it off and that he jumped on her 9 and ½-year-old brother Michael about it * * * That her mother told Elijah that the boy had not torn up the door, — that the piece came off when she * * * went out the door. Charlotte said her mother was in bed sick that day, and that her mother got up and went

into the kitchen and her mother and father started arguing — that they then started scuffling and that her father, Elijah, grabbed her mother, Treva, around the waist and was beating her with his fist and they scuffled around until they got in the living room. That there was a wine bottle nearby and that Elijah grabbed it and started to hit Treva, and that she, Charlotte, took it out of his hand and that Elijah and Treva fell in the floor, and that she, Charlotte, started to help her mother get up, and Elijah grabbed her, Charlotte's, arm and started twisting it and that her mother tried to talk him into stopping, but could not, and that her mother started hitting him in the back of the neck and head with her fists and that Elijah turned her loose and she told her mother she was leaving and went out into the yard. * * * Charlotte said she went around to get in the car which was sitting in front of the house. That her mother was in the yard also, and her father came out with a bottle in his hand and he hit her mother over the head with the bottle and he had the neck of the bottle in his hand. Charlotte said there was a bumper jack leaning up against the porch in front of the car. She said she saw her father start toward the bumper jack and that she jumped out of the car and ran around and both of them grabbed the jack about the same time, and that she twisted it out of his hand and began hitting him over the head with it. She said she hit him two or three times and knocked him to his knees, and then she ran around and got back in the car again. She said she looked back and saw Elijah going toward Treva again, and that she jumped out of the car and hit him in the head several times with the bumper jack, from behind, — she said she didn't remember how many but several times, and kept hitting him until he went down on the ground. That she got her mother in the car and brought her to the hospital. That she left her father lying on the ground and her brother went to get help * * * That (using a diagram sketched on blackboard) from what Charlotte said (to illustrate testimony) she and her mother were out in the yard, that she got in the car and told her mother to come on and get in, that she, Charlotte, got in on the driver's side, that Elijah came out of the house with the bottle in his hand and that Treva was trying to get in the car, and Elijah hit Treva over the head with the bottle and it broke, leaving only the neck of the bottle in his hand; and Lije started toward the jack with the neck of the bottle in one hand and grabbed the jack with the other, and she twisted it out of his hand and hit him over the head several times, and knocked him to his knees in this area in front of the house (indicating), and got back in the car and saw him going toward her mother, who was in this area in front

of the house (indicating) 15 or 20 feet from the house and about 20 feet from where Charlotte was in the car, and she grabbed up the jack and started hitting him over the head from behind * * * this was the second time, and that this happened in front of the house (indicating). She said she hit him two or three times — she was not sure how many the first time and she didn't remember the second time, but kept hitting him until he fell to the ground. She said he did not fall the first time — that he went to his knees."

And the Sheriff continuing said: "I knew Elijah Carter and he was six feet two inches, and weighed about 175 pounds, muscular and very strong. When I saw Elijah at the hospital he was not able to talk, and when I saw him on July 9th, he was dead."

Under cross-examination the testimony of the Sherriff did not materially vary from the story as detailed by the direct examination.

Also the State offered as witness Dr. G. J. Ashley who testified, among other things not pertinent to this appeal, that he examined Elijah and that in his opinion he died from a fractured skull and from inter-cranial hemorrhage, or bleeding inside the head, as a result of the injuries observed on his body.

The defendant and her mother testified substantially to the same facts as related by Sheriff Roupe.

And when the State rested its case, and again at the close of all the evidence, the defendant moved for judgment as of nonsuit. The motions were denied and defendant excepted.

The case was submitted to the jury upon the evidence so offered.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the Woman's Division of State's Prison for a term of not less than two nor more than five years.

Defendant objects and excepts thereto and appeals to the Supreme Court, and assigns error.

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

Worth B. Folger for defendant appellant.

WINBORNE, C.J. Under the law of self-defense a person may not only take life in his own defense, but he may also do so in defense of another who stands in a family relation to him. *S. v. Greer,* 162 N.C. 640, 78 S.E. 310; *S. v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271; *S. v. Church,* 229 N.C. 718, 51 S.E. 2d 345; *S. v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620.

While, ordinarily, as contended by the State, the intentional killing

of another with a deadly weapon raises two presumptions against the defendant, first, that the killing was unlawful, and second, that it was done with malice. *S. v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39. However this rule of law does not mean that the burden of showing an unlawful killing does not still rest with the State. *S. v. Howell,* 218 N.C. 280, 10 S.E. 2d 815.

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Ray,* 229 N.C. 40, 47 S.E. 2d 494.

And when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed. *S. v. Fulcher,* 184 N.C. 663, 113 S.E. 769.

As stated by *Stacy, J.,* later *C. J.,* in the last cited case, "Where a complete defense is established by the State's evidence, a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit."

In the case in hand the State introduced statements of the accused to the effect that the defendant was trying to stop the deceased from assaulting her mother with a broken bottle. Furthermore, there is no evidence from which a jury could reasonably find that either the defendant or her mother was at fault in starting the altercation described in the record.

This evidence plainly negatives the existence of an unlawful killing. The exculpatory statements of the defendant are not contradicted or shown to be false by any other fact or circumstance in evidence. While the State by offering this evidence was not precluded from showing that the facts were different, no such evidence was offered, and the State's case was made to rest entirely on the statements of the defendant, which the State presented as worthy of belief. *S. v. Todd, supra.* And it is patent that all she did was done in defense of her mother.

In the *Todd* case, *supra, Devin, J.,* later *C. J.,* said: "Here we think the defendant's statement fails to afford substantial evidence of his guilt of the offense charged * * * and rather tends to exculpate him, and hence his motion for judgment of nonsuit should have been sustained."

Consequently, we are constrained to hold upon the record of case on appeal in this case that these exculpatory statements are

binding upon the State, and that the motion of the defendant for judgment of nonsuit at the close of all the evidence ought to have been sustained in the court below. Put another way, when the entire evidence shows, and no other reasonable inference can be fairly drawn therefrom, that the killing was committed in defense of her mother, the trial judge should have granted the motion of nonsuit.

For reasons stated, the judgment entered in the trial court is reversed, and the defendant's motion for judgment of nonsuit is sustained in this Court pursuant to G.S. 15-173.

Reversed.

STEPHEN WARD MOSS, BY HIS NEXT FRIEND, THELMA W. MOSS v. THE CITY OF WINSTON-SALEM, ISRAEL MITCHELL, AND WOOD BROTHERS MANUFACTURING COMPANY.

(Filed 19 April, 1961.)

1. Appeal and Error § 22—

Where there is no exception or assignment of error to the findings of fact by the trial court, its findings are conclusive on appeal.

2. Constitutional Law § 24: Process § 13—

The mere fact that a foreign corporation was the manufacturer of an implement which caused injury to a resident of this State because of alleged defect or absence of safety device, is alone insufficient predicate for service of process upon such corporation under G.S. 55-145 (a) (3) (4), the implement having been purchased by a resident of this State from an independent contractor and distributor of another State.

APPEAL by plaintiff from *Crissman, J.*, 13 February Civil Term 1961 of FORSYTH.

This is an action for personal injuries instituted on behalf of the plaintiff, a child ten years of age, by his duly appointed next friend.

This matter was heard below upon defendant Wood Brothers Manufacturing Company's special appearance and motion to quash the summons and purported service of process and to dismiss the action as to Wood Brothers Manufacturing Company (hereinafter referred to as defendant).

From a judgment quashing the attempted service of summons and amended complaint upon the defendant and dismissing the action for want of jurisdiction of the person of defendant, the plaintiff appeals, assigning error.

Weston P. Hatfield, Clyde C. Randolph, Jr., for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton & Stockton, for defendant appellee.

DENNY, J. It is alleged in the complaint that the plaintiff was seriously injured on 4 September 1958 as a result of being struck by a piece of a bicycle handlebar, in Winston-Salem, Forsyth County, North Carolina, when a certain rotary mower, Model 80, manufactured by the defendant, owned by the defendant City of Winston-Salem, and operated by the defendant Israel Mitchell as agent and employee of the defendant City of Winston-Salem, encountered the piece of handlebar during the course of the operation of the mower and hurled it through the air with great force. It is alleged that the defendant was negligent in the manufacture and distribution of this power mower because the said defendant did not supply with or advise the need of a screen or safety guard to prevent the blades of the mower from picking up objects in its path and throwing them out through the rear of the machine.

Plaintiff purportedly obtained service of process upon the defendant under the provisions of section 55-145 of the General Statutes of North Carolina, relying upon paragraphs (3) and (4) of subsection (a), which provide as follows: "55-145: Jurisdiction over foreign corporations not transacting business in this State. — (a) Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, or any cause of action arising as follows: * * *

"(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or

"(4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance."

Summons was issued by the Clerk of the Superior Court of Forsyth County, North Carolina, directing the Sheriff of Wake County to summon the defendant by service on the Secretary of State of North Carolina, pursuant to the provisions of G.S. 55-146. It was

stated in the summons that "Wood Brothers Manufacturing Company is a corporation of the State of Illinois and maintaining its general office and place of business in the City of Oregon, Ogle County, Illinois, and is not registered to transact business in the State of North Carolina."

The return of the service dated 1 November 1960 shows service was made on the Secretary of State as provided by statute.

The defendant in apt time entered a special appearance and moved to quash the purported service of summons on said defendant and to dismiss the action as to said defendant on the ground that the purported service of process was ineffectual to subject it to the jurisdiction of the court, and in support of said motion the defendant introduced the affidavit of Keith S. Wood, President of said defendant, the affidavit of Dorothy Hines, Secretary-Treasurer of Farm Tractor Company, Winston-Salem, Forsyth County, North Carolina, and the affidavit of A. C. Shepherd, Purchasing Agent for the defendant City of Winston- Salem, Forsyth County, North Carolina.

In regard to the particular mower which allegedly caused the injury complained of, the trial court specifically found that: "On or about August 1, 1958, the Purchasing Agent of the City of Winston-Salem requested bids for a rotary 80-inch tractor-towed mower. (Six North Carolina firms were invited to submit bids.) The only firm to submit a bid on the mower was the Farm Tractor Company of Winston-Salem, North Carolina.

"On August 13, 1958, an order was placed by the City of Winston-Salem with Farm Tractor Company in Winston- Salem for the Model 80 Rotary Mower, which is the subject of this litigation.

"The entire transaction for purchasing the Rotary Mower was handled between the office of the Purchasing Agent of the City of Winston-Salem and Farm Tractor Company, Winston-Salem, North Carolina. No price quote was made by Wood Brothers Manufacturing Company to the City of Winston-Salem. No representative of Wood Brothers Manufacturing Company has ever called on the City of Winston-Salem with regard to any sale at any other time.

"Farm Tractor Company of Winston-Salem has never had any dealings with Wood Brothers Manufacturing Company, nor with any of its agents, employees or representatives. Farm Tractor Company purchased the mower from the Todd Company of Norfolk, Virginia. No representative or employee of Wood Brothers Manufacturing Company has ever called on Farm Tractor Company with regard to sales or service of equipment manufactured by Wood Brothers Manufacturing Company.

"Neither Wood Brothers Manufacturing Company nor any of its agents, officers, employees or representatives called on any person, firm or corporation in the State of North Carolina for the purpose of making the sale of the mower to the Farm Tractor Company, or to the City of Winston-Salem. Wood Brothers Manufacturing Company does not transact business in the State of North Carolina; defendant has not been present in the State of North Carolina."

The court further found that: "Defendant does not own, lease, operate or maintain any office or place of business in the State of North Carolina, and does not have any salesmen and did not have any salesmen at the time of this accident who called on customers in the State of North Carolina. Defendant does not have a listing in any telephone, public, city or other directory in the State of North Carolina. Defendant does not own, lease, possess or control any real property in the State of North Carolina.

"Defendant does not have any director, stockholder, managing or local agent performing any duties whatsoever in the State of North Carolina. Defendant does not have or authorize any person, firm or corporation to receive or collect payments of moneys for or on its behalf in the State of North Carolina. Defendant does not have any financial interest of any kind in any wholesale or retail dealer in the State of North Carolina, and does not own, lease, operate or maintain any office or place of business in the State of North Carolina. Such goods of defendant as are distributed in the State of North Carolina are sold by defendant to the Todd Company of Norfolk, Virginia. Todd Company is an independent contractor and distributor. Defendant does not own any interest or stock in the Todd Company."

The trial court concluded that the defendant had insufficient ties or connections with the State of North Carolina to be subjected to its jurisdiction in this case. The court also concluded that if section 55-145 of the General Statutes of North Carolina authorized service of process upon this defendant, it would subject the defendant to a judgment in *personam* in such a case and would deprive the defendant of its property without due process of law; deny it the equal protection of the law under the United States Constitution and the North Carolina Constitution; and would unreasonably obstruct and unduly burden interstate commerce.

The findings of fact by the court below are not challenged by any exception or assignment of error, hence they are binding on appeal. *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow*,

242 N.C. 102, 86 S.E. 2d 759; *Beaver v. Paint Company*, 240 N.C. 328, 82 S.E. 2d 113.

We have carefully considered the exceptions and assignments of error set out in the record and in our opinion they present no prejudicial error.

In *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E. 2d 445, in an exhaustive opinion by *Parker, J.*, we held the defendant had "no contacts, ties, or relations with the State of North Carolina, so as to make it amenable to service of process from the Courts of the State for the purpose of a judgment in *personam*." There, the defendant Triangle Publications, Inc., had sold certain magazines and newspapers to eighteen independant wholesale news dealers in North Carolina. The sales were made by delivering the publications to common carriers in States other than in North Carolina. Legal ownership and title to the publications passed from the defendant to these independant wholesalers upon their delivery by the defendant to the common carriers.

In the present case, the findings of the court below are to the effect that the defendant sold the mower in question to the Todd Company, an independant contractor and distributor of Norfolk, Virginia. The unchallenged findings of fact show that the defendant has not had any contacts in the State of North Carolina that could make it amenable to process from the courts of North Carolina for the purpose of a judgment in *personam*.

In our opinion, the facts revealed by the record herein are controlled by the decision in the *Putnam* case, and on authority thereof the ruling of the court below is

Affirmed.

BLOUNT-MIDYETTE & COMPANY v. AEROGLIDE CORPORATION.

(Filed 19 April, 1961.)

1. Contracts §§ 20, 25—

Where the contractor for the installation of machinery has exclusive possession of the realty during the progress of the work, and the building is destroyed by fire after the work had been begun, rendering the completion of the contract impossible, the burden is upon the contractor, in the owner's action to rescind the contract and recover the amount of consideration theretofore paid, to prove that the fire resulting in the

destruction of the property occurred without any fault on the part of the contractor.

2. Evidence § 5—

The burden of proof in any particular case depends upon the circumstances in which the claim arises.

DENNY, HIGGINS and RODMAN, JJ., concur in result.

APPEAL by defendant from *Bone, J.*, at October 1960 Special Term of BEAUFORT.

Civil action to rescind contract entered into on 2 July 1957, between plaintiff and defendant whereby the defendant Aeroglide Corporation agreed to make certain installations of machinery and equipment in, and alterations to, plaintiff's grain elevator for a price of $23,650.59.

According to the terms of the contract two-thirds of this sum was payable to the defendant on 1 August 1957. The balance was due upon completion of the work described in the contract. By the terms of the contract the defendant was to furnish all labor, materials and equipment. The contract also provided that the plaintiff close down the operations of the grain elevator and turn it over to the exclusive control of the defendant on 22 July 1957. The contract further provided that the work was to be completed on 27 August 1957, and control of the elevator returned to the plaintiff, Blount-Midyette & Company.

During the evening of 16 August, 1957, the grain elevator was completely destroyed by fire. The defendant had not completed the work specified in the contract, — the grain elevator still being in its exclusive control and possession.

Prior to the fire, and pursuant to the contract, the plaintiff had paid to the defendant $16,000.00. No payments were made thereafter.

The plaintiff, alleging failure of performance and the negligence of the defendant in causing the fire, instituted this action to have the contract rescinded and to recover of the defendant the sum of $16,000.00 had and received, less a credit of $1,200.00 for improvements not destroyed by the fire. Defendant's demurrer to the complaint was overruled and the defendant answered, pleading impossibility of performance, substantial performance, and set up a counterclaim for $7,497.03 for the value of its performance to the date of the fire.

Defendant's motions for nonsuit at the close of the plaintiff's evi-

dence and at the end of all the evidence were denied, and the presiding judge submitted three issues to the jury:

"1. Was the grain elevator referred to in the pleadings destroyed by fire without fault on the part of the defendant, as alleged in the answer?

"2. Is the plaintiff entitled to rescind the contract referred to in the pleadings and to recover of the defendant the $14,800.00 already paid thereon, as alleged in the complaint?

"3. What amount, if any, is defendant entitled to recover of the plaintiff on the counterclaim set up in the answer?"

The jury answered the first issue "No", the second "Yes", and the third "None". To judgment entered in accordance therewith, the defendant excepts and appeals to the Supreme Court, and assigns error.

Carter & Ross, Teague, Johnson & Patterson for plaintiff appellee.
Robert E. Long, Rodman & Rodman for defendant appellant.

WINBORNE, C.J. The determinative question on appeal in this case is whether or not the trial court correctly instructed the jury as to the burden of proof. The defendant appellant contends that once the frustrating event causing impossibility of performance is proved, the onus is upon the plaintiff to establish negligence on the part of the defendant as would deprive the latter of its right to rely upon the defense. The plaintiff appellee, on the other hand, contends that the plea of impossibility of performance does not suffice to excuse the defendant from having to pay damages for nonperformance unless it can establish affirmatively that the fire and resulting destruction of the grain elevator occurred without any fault on its part.

In this connection the court below instructed the jury in pertinent part as follows: "The court will submit to you three issues of fact in the case. The first one reads as follows: 'Was the grain elevator referred to in the pleadings destroyed by fire without fault on the part of the defendant, as alleged in the answer?'

"The burden of proof as to that issue is on the defendant Aeroglide Corporation to satisfy the jury by the greater weight of the evidence that the grain elevator referred to in the pleadings was destroyed by fire without fault on the part of the defendant as alleged in the answer * * *

"Now under the law the defendant is required to satisfy you by the greater weight of the evidence that that is true, that the destruction of the building and the removal of it from existence was accidental or at least without fault on the part of the defendant."

In contracts in which the performance depends upon the continued existence of a given thing, there is an implied condition that an impossibility of performance arising from the destruction of the thing shall excuse performance, and hence the destruction or loss of property which is the subject matter of the contract, if occurring without fault, discharges the contract or authorizes its rescission. This rule has been followed in a number of cases in both this country and England. *Taylor v. Caldwell,* 3 Best & S. 826 (1863); *Steamboat Co. v. Transportation Co.,* 166 N.C. 582, 82 S.E. 956; *Sale v. Highway Comm.,* 242 N.C. 612, 89 S.E. 2d 290.

In *Taylor v. Caldwell, supra,* a leading English case, it is said: "The authorities establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfillment of the contract arrived, some particular thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible for the perishing of the thing without the default of the contractor."

Steamboat Co. v. Transportation Co., supra, is a case where the plaintiff leased its steamboat to the defendant for use on Sundays and the plaintiff performed under the terms of the contract until the steamboat was destroyed by fire. Thereupon plaintiff sued defendant for use preceding the fire and the defendant counterclaimed for plaintiff's failure to provide the steamboat for the remaining period of the contract. The plaintiff pleaded impossibility of performance as a defense. *Hoke, J.,* speaking for the Court, said: "In reference to this counterclaim of defendant, it may be well to note that the obligations of an ordinary business contract are imperative in their nature. This principle, which relieves a party to such a contract by reason of the destruction of the property with which it deals, is sometimes treated as an exception; the general rule being the other way. 9 Cyc. pp 627-628-629. Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part. For this reason, and further because, by the terms of the present contract, the care and custody of the property was left with the plaintiff, if it is established that plaintiff has failed to further perform the executory features of this agreement, the burden would be on plaintiff to show that the steamer was de-

stroyed by fire and that the plaintiff and its agents were in the exercise of proper care at the time."

And in *Sale v. Highway Comm., supra, Parker, J.,* discusses the *Steamboat* case and adds: "In the absence of an express contract provision if the act to be performed is necessarily dependent on the continued existence of a specific thing, the destruction thereof before the performance of the act without the fault of the promisor, will excuse non-performance of the contract (citing cases). If the petitioners can allege, and prove, they have been damaged by the respondent's failure to perform any of the work it contracted to do as a part of the consideration for the right of way agreement, they can recover such damages, unless the respondent, the burden being upon it, can show that the buildings were destroyed by fire, or otherwise, and it, or its agents, were in the exercise of due care. After proof of the execution of the contract and breach by the promisor, the burden is on the promisor to show an excuse for the breach." See also *Crouse v. Vernon,* 232 N.C. 24, at 35, where it is said: "Non-performance of a valid contract is a breach thereof regardless of whether it occurs deliberately or through forgetfulness or neglect, unless the person charged (in this case the defendant) shows some valid reason which may excuse the non-performance; and the burden of doing so rests upon him."

The English rule is contra. See *Constantine Line v. Imperial Smelting Corp.* (1940) 2 All Eng. Rep. 165, where the House of Lords established the rule that the party relying on impossibility of performance does not have to prove affirmatively that the impossibility was not due to his own fault.

However, in view of the decisions of this Court we are constrained to follow, not disregard, the precedents therein laid down. Therefore, the instruction of the court below as to the burden of proof is affirmed. The burden of proof in any particular case depends upon the circumstances in which the claim arises. As pointed out hereinabove, the defendant was to have control of the building and premises from the time the performance of the contract began until it was completed. The evidence of both plaintiff and defendant is to the effect that the defendant did, in fact, have exclusive control from the time the work began until the fire.

For reasons stated in the judgment below there is

No error.

DENNY, HIGGINS & RODMAN, JJ., concur in result.

PEARL B. PEEDEN v. ALEXANDER HARDY TAIT.

(Filed 19 April, 1961.)

1. Trial § 22—

On motion to nonsuit, the evidence is to be viewed in the light most favorable to plaintiff, giving her the benefit of every reasonable inference to be drawn therefrom, and assuming to be true all the facts in evidence tending to support her cause of action.

2. Automobiles § 41f— Evidence of negligence in hitting stalled car held for jury.

Evidence tending to show that plaintiff, travelling north, in attempting to reverse her direction on a four-lane highway separated by a median, entered the cross-over at a slow speed, that her motor stalled causing her brakes to fail, that the car rolled onto the south bound lanes, that defendant's car, travelling south along the straight highway, was then some five hundred feet away with headlights burning, that it continued on and struck plaintiff's car, knocking it some ninety to one hundred feet, *is held* sufficient to be submitted to the jury on the question of whether defendant was negligent in travelling at excessive speed and in failing to keep a proper lookout.

3. Automobiles § 17—

Even though a motorist travelling along a dominant highway is not under duty to anticipate that another motorist will enter the highway from a cross-over or intersection without stopping and yielding the right-of-way, he is nevertheless under duty not to drive at a speed greater than that which is reasonable and prudent under the circumstances, to keep his vehicle under control, to keep a reasonably careful lookout, and to exercise ordinary care to avoid collision with persons or vehicles which he sees, or, in the exercise of due care should see, upon the highway.

4. Automobiles § 41b—

Whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger, is ordinarily an issue of fact for the determination of the jury.

5. Negligence § 26—

Even though plaintiff's own evidence raises an inference of contributory negligence in certain aspects, nonsuit for contributory negligence may not be allowed unless contributory negligence is established by plaintiff's evidence as the sole reasonable conclusion that may be drawn therefrom.

APPEAL by plaintiff from *Hooks, S. J.*, at September-October 1960 Civil Term of WILSON.

Civil action for personal injuries and property damage as a result of a collision between plaintiff's and defendant's automobiles. The collision occurred on U.S. Highway 301 about fifteen miles south of Wilson, North Carolina, at 7:30 P.M., the night of October 26, 1959. At the point of impact the highway has dual lanes with two lanes

for northbound traffic, and two lanes for southbound traffic. A grass median separates the north and south lanes of traffic. The highway was straight and level at the point where the collision took place, but about 500 to 600 feet north there is a small hill.

The plaintiff was driving a 1954 Oldsmobile north. The defendant was driving south. The plaintiff desired to reverse her direction to return to a restaurant which was located on the southbound side of the highway. The plaintiff approached a "cross-over", this being one of several which are placed at intervals along the highway to permit traffic to cross from one lane to another. The plaintiff proceeded into the "cross-over", and as she started to drive onto the southbound lane the motor of her automobile stalled, causing the hydraulic brakes to fail. Being unable to stop her vehicle, it rolled to a stop in the southbound lane. The defendant's automobile then collided with the plaintiff's, demolishing both vehicles, and injuring both parties.

The cause came on for trial and at the end of the plaintiff's evidence the defendant moved for judgment of nonsuit, and renewed his motion at the end of all the evidence, which motion was allowed. Plaintiff's motion for judgment of nonsuit as to the defendant's counterclaim was overruled. Thereupon, the court submitted the case to the jury upon the defendant's counterclaim. The jury answered the issues in favor of the defendant, and judgment was entered awarding him $10,000 for personal injuries and $754.00 for property damage.

To the signing of the judgment the plaintiff objects and excepts, and appeals to the Supreme Court and assigns error.

Finch, Narron, Holdford & Holdford for plaintiff appellant.

Battle, Winslow, Merrell, Scott & Wiley, Robert L. Spencer for defendant appellee.

WINBORNE, C.J. Plaintiff first stresses for error the allowance of the defendant's motion of nonsuit at the close of all the evidence. In such case the evidence is to be viewed in the light most favorable to the plaintiff, giving to her the benefit of every reasonable inference to be drawn therefrom, and assuming to be true all the facts in evidence tending to support her cause of action. *Ervin v. Mills Co.*, 233 N.C. 415, 64 S.E. 2d 431; *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804; *Mattingly v. RR*, 253 N.C. 746, 117 S.E. 2d 844.

In her complaint the plaintiff alleges in substance that the defendant was actionably negligent in that he (1) drove at an excessive rate of speed in violation of the speed statute (G.S. 20-141), (2) failed to maintain a proper lookout, and (3) did not have his car

under proper control. As tending to support the foregoing allegations the plaintiff testified as follows: "U.S. 301 is a four-lane highway at this point. There are two lanes for northbound traffic and two lanes for southbound traffic separated by a grass island in between. There are cross-overs so that you may get across from the northbound lane to the southbound lane. As we approached the cross-over we were going back to the Dixianna to have supper, and my 1954 Oldsmobile had power brakes and they would not hold if the motor was not running. So as I attempted to make my turn the motor stalled and I was driving very slow and I wasn't exactly on the southbound lane. I couldn't possibly have been for him to have hit me in the side, and the motor stalled and he was, I'll say, a good 500 feet from where I saw it, as I was attempting to cut across to go back South I saw the lights. I couldn't see the car. I just saw the lights and I knew I had plenty of time and would have had because I was driving very slow. I was giving a turn signal. I had my signal lights on for a left turn. My car stalled as I attempted to make the turn and it just rolled right on into the highway. I discovered my car stalled when I applied my brakes. I knew then the motor was off. I didn't do anything. I just stopped and this man hit me. I tried to get my car started. I tried twice and before I had time to crank it he had hit me, I'll say five or six seconds. * * * After the impact my car was knocked I'll say from 90 to 100 feet in the direction south * * * It is a straight highway. It is straight and level for several miles north and south from the point of the collision. I could see a car coming from the north for quite a distance. I would say this man was 500 feet from me as I attempted to make the turn. It is a straight highway but it was a small hill and as Mr. Tait started up, I saw the lights * * *."

This evidence when viewed in the light most favorable to the plaintiff is sufficient to justify, though not necessarily to impel, the inference of negligence on the part of the defendant. Hence, an issue arises for the determination of the jury. *Newman v. Coach Co.*, 205 N.C. 26, 169 S.E. 808; *Cooley v. Baker*, 231 N.C. 533, 58 S.E. 2d 115; *Jernigan v. Jernigan*, 236 N.C. 430, 72 S.E. 2d 912.

This testimony would support the inference that the plaintiff had determined that it was safe for her to make the turn and that the defendant was driving at an excessive speed or failed to keep a proper lookout in the direction of travel, thereby proximately causing the collision.

The rule in this State is that the operator of an automobile traveling upon a main or through highway and approaching a cross-over or intersection is under no duty to anticipate that the operator of an

automobile approaching such intersection will fail to stop or yield to traffic on the main or through highway and, in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last minute, that the operator of the automobile on the intersecting highways or cross-over will stop before entering such highway. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 17; *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373. However, the driver on a dominant highway does not have an absolute right of way in the sense that he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. "It is his duty, notwithstanding his favored position, to observe ordinary care, that is that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Hawes v. Refining Co.*, 236 N.C. 643, 74 S.E. 2d 16; *Reeves v. Staley*, 220 N.C. 573, 18 S.E. 2d 239; *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658." *Blalock v. Hart, supra.*

Whether or not a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact, and hence the determination of such fact is for a jury. *Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197.

Moreover, it is true that plaintiff's evidence raises an inference of contributory negligence. In this connection, this Court in *Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377, opinion by *Ervin, J.*, declared that there "the stopping of the engine and the resulting stalling of the tractor-trailer combination arose from a want of due care." But the rule is that the plaintiff can only be nonsuited on ground of contributory negligence when she proves herself out of court. The facts necessary to show such negligence must be established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360, and numerous cases there cited.

Therefore, the conclusion is that the trial court erred in sustaining defendant's motion of nonsuit.

For reasons stated the judgment rendered below should be reversed, and a new trial had.

New trial.

CECIL H. JARRETT v. SOUTHERN RAILWAY COMPANY.

(Filed 19 April, 1961.)

1. Trial § 22a—

On motion to nonsuit, plaintiff's evidence must be accepted as true and plaintiff is entitled to the benefit of all reasonable inferences that may be drawn from it, resolving all conflicts in his favor.

2. Railroads § 4—

At a crossing of four railroad tracks with a much travelled street in a populous city both the railroad company and the motorists using the crossing are required to use that degree of vigilance which is in proportion to the known danger of the hazardous crossing.

3. Same— Evidence held for jury on issues of negligence and contributory negligence in this action to recover for crossing accident.

Plaintiff's evidence was to the effect that, in attempting to traverse a grade crossing of a municipal street and four railroad tracks, he stopped approximately twelve feet from the track upon which defendant ordinarily operated its trains and upon which the train in question approached, that plaintiff could not see in the direction of the approaching train more than 80 or 100 feet because of weeds, etc., that he looked and listened and neither heard nor saw an approaching train, entered upon the crossing and was struck before his car cleared the crossing. Plaintiff estimated the speed of the train at 25 to 35 miles per hour and introduced a city ordinance limiting the speed of trains at the locus to 15 miles per hour. Held: The evidence is sufficient to be submitted to the jury on the issue of the negligence of the railroad company, and does not disclose contributory negligence as a matter of law on the part of plaintiff.

APPEAL by plaintiff from *Patton, J.*, September, 1960 Regular Term, CATAWBA Superior Court.

The plaintiff instituted this civil action to recover for personal injuries and property damages resulting from an automobile-train collision at a grade crossing in the city of Newton, North Carolina. The collision occurred at about 9:50 on the morning of July 11, 1959, at the intersection of 19th Street and the Southern Railway's main line track. The plaintiff approached the intersection, driving west on 19th Street. The Southern Railway's freight train, going south, struck the

rear end of plaintiff's Lincoln Capri before it cleared the track, causing the plaintiff's personal injury and damage to the vehicle.

The paved portion of 19th Street, approximately 22 feet wide, crossed four railroad tracks. As the plaintiff attempted to cross from the east to west he first encountered a Southern sidetrack to a business establishment operated by Goodnight Brothers. The second track was the main line of the Southern on which the train was running. The third track was the main line of Carolina-Northwestern Railway Company, and the fourth was a sidetrack into Knitmode Manufacturing Company. A distance of about 12 feet separated the Southern main line from the Goodnight sidetrack.

The plaintiff's place of business was near the crossing. He was thoroughly familiar with it. It was a busy crossing over which perhaps 2,000 vehicles passed each 24-hour period. There was a stop sign on the 19th Street approach to the crossing.

The plaintiff's witness Hinson testified: ". . . about five minutes before the accident . . . I came down to the sidetrack going into Goodnight Brothers . . . I stopped the front of my car on the sidetrack . . . You had to pull out in the sidetrack approximately three feet between the sidetrack and the main line to be able to see 100 feet up the track. . . . This is on account of the weeds and grass grown up along the track and in between."

The plaintiff testified: "When I got down to the siding that goes into Goodnight Brothers, I stopped and looked up to the right, which is north, and I couldn't hear anything. . . . As to noise or any other thing that would indicate a train was coming, . . . there absolutely was not any whistles blowing; there was no noise at all; no bells ringing. . . . After I stopped there and did not see any train to the right and didn't hear any noise, I proceeded — took my foot off the brake pedal and rolled right down. . . . When I got my car up on the main line of the railroad, I saw a train coming. At that time the train was about—I'd say between 80 and 100 feet away . . . The train engine was not making any noise—I'd say it was coasting; . . . I mashed on the accelerator. . . . The train struck the back end of my car. . . . My car was almost two-thirds across the track when it was struck."

The plaintiff introduced evidence of his personal injury and property damage. He also introduced a city ordinance which provided: "It shall be unlawful for any railroad engine, car, or train to be run through the city at a speed in excess of 15 miles per hour, . . . or to approach any street crossing without giving sufficient warning signals."

At the close of the plaintiff's evidence the court withheld ruling on defendant's motion for nonsuit. The defendant then offered evidence that a train approaching the crossing from the north can be

seen a distance of 1,000 or 1,500 feet; that on the occasion involved the train was making 12 to 15 miles per hour; that the whistle was blowing and the bell was ringing. At the close of all the evidence the court entered judgment of nonsuit, from which the plaintiff appealed.

Corne and Warlick, Richard A. Williams, for plaintiff, appellant.
Patrick, Harper & Dixon, for defendant, appellee.

HIGGINS, J. The question presented is the sufficiency of the evidence to withstand defendant's motion for nonsuit. On this question the rules require us to accept the plaintiff's evidence as true. We must give him the benefit of all reasonable inferences that may be drawn from it, resolving all conflicts in his favor. *Heuay v. Construction Co.*, 254 N.C. 252; *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560; *Lake v. Express Co.*, 249 N.C. 410, 106 S.E. 2d 518; *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406. The record does not disclose whether the nonsuit was entered because the plaintiff failed to offer evidence of defendant's negligence or because plaintiff's own evidence established his contributory negligence as a matter of law. *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184; *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804; *Leonard v. Garner*, 253 N.C. 278, 116 S.E. 2d 731; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

Each case involving a highway-railway crossing accident must be decided upon its facts. Nevertheless, certain rules have been recognized by this Court as tending to assist in fixing responsibility. Here we are dealing with a hazardous crossing, known to be such by both parties. Two thousand vehicles traverse four railroad tracks each day. The degree of vigilance required of both parties is in proportion to the known danger. One of the leading cases is *Johnson v. R.R.*, 163 N.C. 431, 79 S.E. 690. Others are *Sherrill v. R.R.*, 140 N.C. 252, 52 S.E. 940; *Coleman v. R.R.*, 153 N.C. 322, 69 S.E. 251; *Moseley v. R.R.*, 197 N.C. 628, 150 S.E. 184; *Lincoln v. R.R.*, 207 N.C. 787, 178 S.E. 601; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637; *White v. R.R.*, 216 N.C. 79, 3 S.E. 2d 310; *Godwin v. R.R.*, 220 N.C. 281, 17 S.E. 2d 137; *Beaman v. R.R.*, 238 N.C. 418, 78 S.E. 2d 182; *Irby v. R.R.*, 246 N.C. 384, 98 S.E. 2d 349; *Faircloth v. R.R.*, 247 N.C. 190, 100 S.E. 2d 328; *High v. R.R.*, 248 N.C. 414, 103 SE. 2d 498; *Arvin v. McClintock*, 253 N.C. 679, 118 S.E. 2d 129.

This is a close case. We have encountered difficulty in finding for it a comfortable resting place among our decisions. However, disregarding all evidence favorable to the defendant, we conclude the plaintiff has offered evidence (only a part of which is quoted) from which defendant's negligence may be inferred. Likewise, we conclude the

evidence in the light most favorable to the plaintiff does not show his contributory negligence as a matter of law. Construing the evidence in the light most favorable to him, as we are required to do, the plaintiff stopped approximately 12 feet from the track upon which the defendant ordinarily operated its trains. The plaintiff could see not more than 80 or 100 feet because of weeds, hedges, grass, etc. As he released his brake and attempted to cross the main track the train was neither in sight nor in hearing. Before he could complete the crossing, however, the train, without whistle or bell, and probably coasting, came in sight at an estimated speed of 25 to 35 miles per hour and struck the rear of his vehicle before he had time to clear the track. A city ordinance permitted speed not in excess of 15 miles per hour.

Giving due heed to the reciprocal duties which the parties owed to each other as outlined in *Johnson v. R.R., supra.*, and subsequent cases, we conclude the pleadings and the evidence presented issues of fact both as to negligence and contributory negligence. Whether one party, or both, or neither, failed to exercise due care are issues to be resolved by the jury.

New trial.

ANTHONY F. BYRNES v. JOHN FRANCIS RYCK.

(Filed 19 April, 1961.)

Automobiles § 46: Trial 31b— Charge held for error in failing to explain law arising upon defendant's evidence.

Plaintiff's evidence was to the effect that he was riding as a passenger in a demonstration car, that defendant driver was unfamiliar with power steering, that as they were travelling along a street defendant negligently hit a concrete safety island at a "Y" intersection, losing control, and resulting in the accident in suit. Defendant's evidence was to the effect that as he approached the intersection plaintiff grabbed the steering wheel, thus depriving defendant of control of the car and turned the car right, into the traffic island. Held: The charge of the court defining the abstract principles of law applicable, and stating the respective contentions of the parties, but failing to state any part of the defendant's evidence in regard to the seizure of control of the car by plaintiff and the law applicable if the jury should find the facts from the evidence to be as contended by defendant, must be held prejudicial for failing to declare and explain the law arising on the evidence as to all substantial features of the case. G.S. 1-180.

APPEAL by defendant from *Sink, Emergency Judge,* October Special Civil Term 1960 of MECKLENBURG.

BYRNES *v.* RYCK.

This is a civil action to recover for personal injuries alleged to have been the result of the negligence of the defendant.

On 9 May 1959 the defendant John Francis Ryck was driving a sales demonstration automobile of Andy Foppe, Inc., an automobile sales company, at the request of its automobile salesman, the plaintiff Anthony F. Byrnes. The automobile was in the possession of Byrnes as a demonstration car; it was a late model car, equipped with power brakes and power steering. The defendant Ryck was not accustomed to driving a car with power steering. Plaintiff Byrnes explained the operation of the car to the defendant and was sitting close to him on the right side of the front seat. There was no evidence of speeding.

The car proceeded south on Dilworth Road, in the City of Charlotte, until it reached the base of a "Y" in the road just beyond where Romany Road intersected. At the base of the "Y" on Dilworth Road there is a concrete safety island about six inches above the pavement level and beyond that a substantially large island grassed over. Defendant Ryck testified that he had known plaintiff Byrnes several years; that he saw Byrnes at a filling station and Byrnes asked him why he did not buy that automobile. "I started to drive, he gave me instructions * * *. As I approached the intersection ("Y"), Mr. Brynes was sitting on the passenger's side of the front seat buddying (sic) me, he had his arm around me and asked me where I was going, and tapped me on the shoulder and grabbed the wheel with his right hand * * * when he (Mr. Brynes) reached forward, grabbed the wheel and he turned with that completely out of my hands, the next thing I knew there was an extra burst of speed, his foot was on the gas feed and the next thing I knew we were up against the telephone pole * * *."

On cross-examination Mr. Ryck testified that he told the investigating officer that power steering was a factor in causing the accident. Before the accident when Mr. Byrnes was demonstrating the car to him, he told him to be very careful with the power steering, that he attributed the power steering as a factor in causing the accident because it was "so loose and free alongside of what I drive."

It is not in dispute that the left front wheel of the automobile struck the concrete traffic island, ran across it; that the car moved on into the west prong of the "Y" and hit a telephone pole near the west curb, something over 100 feet beyond the traffic island. The car turned over and plaintiff was injured.

The plaintiff denied interfering with the driving of the car in any way; denied grabbing the steering wheel or giving any instructions

whatever to Ryck as to the driving of the car. All Byrnes admitted as to the course the car took was as follows: "I asked Mr. Ryck, 'Which way are you going?' and about the time I got the words out of my mouth, Mr. Ryck turned down this way and we came down this way (indicating direction on map marked Plaintiff's Exhibit #1), the left front wheel hit the point of this island which threw us up on the island. * * * Prior to that time the vehicle was traveling about 30 to 35 miles per hour."

There was a complete contradiction between the testimony of the plaintiff and that of the defendant as to how the accident happened. The defendant contended that the plaintiff, knowing that he was unaccustomed to power steering, grabbed the steering wheel attempted to turn the car to the right and apply the brakes with the result that the car struck the traffic island causing control to be lost and the car to hit the telephone pole. On the other hand, the plaintiff contended that he gave no instructions to the defendant whatever as to the method and manner of driving the car; he did not grab the steering wheel or apply his foot to the accelerator or brake.

The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant appeals, assigning error.

Bailey & Booe for plaintiff appellee.
Jones & Small; Deal, Hutchins & Minor for defendant appellant.

DENNY, J. The appellant assigns as error the failure of the court below in its charge to the jury to state the evidence necessary to explain the application of the law, in that the court failed to state any part of the evidence to the effect that the defendant testified he was driving the automobile in a lawful manner when the plaintiff reached over and grabbed the steering wheel, turned the car sharply to the right into and over a traffic island and in making said movement deprived the defendant of the control of said automobile; and did not instruct the jury how the respective issues should be answered if the jury should find the facts from the evidence to be as contended by the defendant.

A careful examination of the court's charge to the jury reveals that the court gave the contentions of the plaintiff and the defendant, defined negligence, proximate cause, greater weight of the evidence, and instructed the jury with respect to damages; but, completely omitted to declare and explain the law arising on the evidence in the case. Such omission constitutes a failure to comply with the express requirements of G.S. 1-180. The statute requires the trial

judge to "declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto."

In 53 Am. Jur., Trial, section 509, page 411, it is said: "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into the view the relations of the particular evidence adduced to the particular issues involved." This statement was cited with approval in *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484.

Likewise, in the case of *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913, *Parker, J.,* speaking for the Court, said: "The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G.S. 1-180 imposed upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties, as here, is not sufficient to meet the statutory requirement."

Among the numerous decisions of this Court interpreting and applying the provisions of G.S. 1-180, see *Ammons v. Insurance Co.,* 245 N.C. 655, 97 S.E. 2d 251; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331; *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212; *Lewis v. Watson, supra.*

The defendant is entitled to a new trial and it is so ordered.

New trial.

STATE v. NORMAN GILES.

(Filed 19 April, 1961.)

1. Arrest and Bail § 3—

Where officers follow and "clock" a motorist travelling in excess of 55 miles per hour in a 30 mile per hour zone, the officers have a right to pursue and arrest the motorist without a warrant.

2. Criminal Law § 79: Searches and Seizures § 1—

Where officers, pursuing a speeding defendant, continue to pursue on foot after defendant had abandoned his car, apprehend defendant and

return him to his car, where an officer smells some intoxicating beverage, and upon shining his light into the car, sees cases of liquor between the back seat, which had been pulled forward, and the "boot" of the car, the officers have a right to seize the liquor without a warrant, and the evidence obtained thereby is competent.

APPEAL by defendant from *McKinnon, J.*, September Regular Criminal Term 1960 of WAKE.

This is a criminal action in which the defendant pleaded not guilty to two counts in a bill of indictment charging him with (1) possession of nontaxpaid liquor, and (2) possession of nontaxpaid liquor for the purpose of sale, and to two warrants charging him with (1) the transportation of nontaxpaid liquor, and (2) driving at a speed of 55 miles an hour in a 35 miles per hour zone. By consent the cases were consolidated for trial.

The defendant was observed by Raleigh Police Officers Gilbert and Massey on 31 January 1960, at about 10:30 p.m., driving a 1953 Chevrolet automobile on New Bern Avenue in the City of Raleigh. The attention of the officers was attracted by the speed of the defendant's car. They followed him in their police car, clocking him at a speed of a little over 55 miles per hour. The officers turned on the red light and sounded the siren on their car and gave chase to the defendant, who pulled off New Bern Avenue into Pettigrew Street, then to Davie Street where it intersects with Rock Quarry Road, slid his car to a stop and jumped therefrom and ran. Officer Massey gave chase and caught the defendant about a block from his automobile. The defendant was handcuffed, returned to the place where the car was stopped and the officers examined his car. Officer Gilbert testified that he could smell the odor of some type of intoxicating beverage and, upon shining his light into the defendant's car, could see, between the back seat, which had been pulled forward, and the "boot," five cases, three of which contained jars with a liquid substance inside, and two of which were empty. The three cases were found to contain jars of nontaxpaid or "white" liquor, without tax stamps affixed.

The jury returned a verdict of guilty as charged, and from the judgments imposed the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General G. A. Jones, Jr., for the State.

W. H. Yarborough, Jr., Thomas W. Ruffin for defendant appellant.

DENNY, J. The defendant assigns as error the admission of the

officers' testimony upon the premise that the evidence of the defendant's possession and transportation of nontaxpaid liquor was inadmissable. The defendant insists that the officers made an illegal and unlawful search of his car without a search warrant.

It is provided in G.S. 15-27 that, " * * * no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action."

It is also provided in G.S. 18-6 that no search warrant is required " * * * where the officer sees or has absolute personal knowledge that there is intoxicating liquor in such vehicle or baggage."

The defendant in operating his automobile in excess of 55 miles an hour in a 35 mile zone on the public streets in the City of Raleigh, committed a misdemeanor in the presence of the Raleigh Police Officers and they had a right to pursue him and arrest him without a warrant. Consequently, after the defendant was taken into custody, it was the duty of the officers to return to defendant's car and to see that it was taken care of and not abandoned. If, upon approaching the automobile, the officers detected the smell of liquor or other intoxicating beverages therein, it was their duty to take possession of the car and seize the liquor without first obtaining a search warrant. *S. v. Ferguson,* 238 N.C. 656, 78 S.E. 2d 911.

In the case of *S. v. Harper,* 236 N.C. 371, 72 S.E. 2d 871, this Court said: "Officers may acquire absolute personal knowledge of the presence of liquor in an automobile through the sense of seeing, smelling, or tasting. *S. v. Godette,* 188 N.C. 497, 125 S.E. 24; *S. v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *S. v. Simmons,* 192 N.C. 692, 135 S.E. 866.

"Upon approaching the car, the officers smelled liquor. They looked into the car and saw and recognized two jars of contraband liquor uncovered and clearly visible on the back seat. It then became their duty under G.S. 18-6 to arrest the defendant, take his automobile in possession, and seize the liquor. (Citations omitted.) The officers, upon smelling and seeing the liquor, were in possession of sufficient personal knowledge that a crime was being committed in their presence to justify them in arresting the defendant without a warrant. (Citations omitted.)"

It is said in 79 C.J.S., Searches and Seizures, Section 68, subsection (a), page 845, *et seq.*: "Where an officer is where he has a right to be and becomes a witness to an offense which necessitates his acting as such officer, he may make the incidental search and seizure, but where he observes the offense after he has made an unlawful entry

a subsequent search and seizure without a warrant may be illegal." *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912; *In re Phoenix Cereal Beverage Co.,* C.C.A. 2d N.Y., 58 F 2d 953; *Matthews v. Correa,* C.C.A. 2d N.Y., 135 F 2d 534; *Elder v. Camp,* 193 Ga. 320, 18 S.E. 2d 622; *Lee v. State,* 140 Tex. Cr. 155, 143 S.W. 2d 389; *S. v. Hoffman,* 245 Wisc. 367, 14 N.W. 2d 146. See also *Hart v. Commonwealth,* 198 Ky. 844, 250 S.W. 108; *Traylor v. State,* 111 Tex. Cr. 58, 11 S.W. 2d 318; *S. v. Vandetta,* 108 W. Va. 277, 150 S.E. 736.

In subsection (e) of the above cited Section of C.J.S., it is further said: "No search warrant is necessary in order to search the vehicle in which a person is riding at the time of his arrest for an offense committed in the presence of the officer, including a felony or a misdemeanor, and such a search is not unreasonable under the constitutional guaranty."

Likewise, it is said in 47 Am. Jur., Searches and Seizures, section 20, page 516: "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand."

This assignment of error is overruled.

The defendant's additional exceptions present no prejudicial error, and in the trial below we find

No error.

BARNETT OLIVER ADLER, BY HIS NEXT FRIEND, SAM R. ADLER v. WILLIAM EDWARD CURLE, (ORIGINAL DEFENDANT), AND SAM R. ADLER, (ADDITIONAL DEFENDANT).

(Filed 19 April, 1961.)

Master and Servant § 32: Parties § 4: Appeal and Error § 46—

In an action against an employer for a negligent injury inflicted by the employee, the employee is a proper but not a necessary party, and when the employee is not made a party originally, later motion to make him a party is addressed to the discretion of the trial court, and the refusal of the motion will not be disturbed on appeal in the absence of abuse of discretion.

APPEAL by defendant Curle from *Sharpe,* S. J. February 1961 Special Civil Term of WAKE.

Emanuel & Emanuel and Ruark, Young, Moore & Henderson for appellees.

Jones, Reed & Griffin and Thomas A. Banks for appellant.

PER CURIAM. This action was begun 18 September 1959 to recover damages for personal injuries inflicted in the collision of automobiles at the intersection of Elm Street and U.S. Highway 264 in Greenville on the night of 25 March 1959. Plaintiff was an occupant of an automobile owned by his father, Sam R. Adler, driven at the time of the collision by D. T. Calhoun. The complaint was filed 2 October 1959. Original defendant answered 13 November 1959. He denied negligent operation of his vehicle. He alleged Sam R. Adler, father of plaintiff and owner of the vehicle in which plaintiff was riding, furnished it to his son as a family purpose car; the collision resulted from the negligent operation by Calhoun, acting as operator or chauffeur for plaintiff; the negligence of Calhoun barred plaintiff's right to recover and entitled defendant to substantial damages for personal injuries sustained by him, which he prayed for in his counterclaim.

On 29 December 1959 a reply was filed denying the allegations on which the counterclaim was asserted. On 12 January 1960 plaintiff amended his complaint to allege the Curle car was owned by Mrs. Curle, mother of defendant, who kept it for a family purpose car and at the time of the collision it was being operated for the purpose so provided. 3 February 1960 defendants moved to make Sam R. Adler a party defendant. The motion was allowed. Defendant was, on 10 February 1960, permitted to amend his answer. Sam R. Adler was served with process 15 February 1960. 20 March 1960 he answered the counterclaim asserted by the original defendant. He denied liability and asserted a cross action against the original defendant for damages to his automobile. 28 March 1960 plaintiff filed an amended reply to the answer and counterclaim of the original defendant. 29 March 1960 the original defendant filed answer to the amended complaint. 20 May 1960 the original defendant filed a rejoinder to the reply of the additional defendant Sam R. Adler. At the September Term 1960 motions were made to strike designated portions of the pleadings. The motions were heard in October 1960 by Judge McKinnon. He made an order on that date. 26 October 1960 there was an amendment to the complaint and an amendment to the amended reply. 8 November 1960 there was an answer to the amended complaint. 17 February 1961 the original defendant filed a motion to make Calhoun, the operator of the Adler car, a party. The motion was heard by Judge Sharp at the February Term 1961. The court, in the exercise of its discretion, declined to allow the motion. De-

fendant excepted and appealed. The record now before us, consisting only of pleadings and orders relating thereto, comprises more than forty-nine printed pages. The action was begun more than sixteen months before the motion to make Calhoun a party. Defendant's answer shows Calhoun's relationship to the litigation. That answer was filed more than a year prior to the motion to make Calhoun a party.

Adler's liability to the original defendant for Calhoun's negligence as asserted in the counterclaim is bottomed on the allegation that Calhoun was Adler's servant or agent. The servant in an action for damages against his master is a proper but not a necessary party. Defendant, by his counterclaim having elected to sue Adler, the master, alone, did not have a right thereafter to insist that the agent be made a party. Since Calhoun was not a necessary party, it was a matter in the discretion of the court whether to allow or deny the motion. As such it was not appealable. *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165. It is not suggested that there was an abuse of discretion. The foregoing statement of the time taken to put the case at issue would refute any suggestion of abuse if made.

Affirmed.

J. E. DANIEL v. BUTLER LUMBER COMPANY, INC.

(Filed 19 April, 1961.)

Brokers and Factors § 6—

Plaintiff's evidence is held insufficient to show that defendant or any authorized agent of defendant contracted with plaintiff to pay him a commission on the purchase price of any timber suitable to the needs of defendant which plaintiff should locate. Failure of plaintiff to comply with Rule 19(3) and Rule 27½ of the Rules of Practice in the Supreme Court is pointed out.

APPEAL by plaintiff from *Carr, J.,* October Civil Term, 1960, of WARREN.

Plaintiff, a resident of Warren County, alleged he entered into a contract with defendant, Butler Lumber Company, Inc., a Virginia corporation, whereby defendant agreed to pay plaintiff a commission of 5% of the purchase price of any timber or land "which the plaintiff could locate suitable to the needs of the defendant which the defendant subsequently purchased"; that plaintiff "located" several

such tracts, two of which, the "Ball" tract in Franklin County and the "Hall" tract in Warren County, were subsequently purchased by defendant for more than $212,000.00; and that plaintiff, under the alleged contract, was entitled to recover commission in an amount in excess of $10,600.00

Answering, defendant denied the alleged contract and indebtedness. Defendant admitted it purchased the "Ball" and "Hall" tracts.

At the close of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

James D. Gilliland for plaintiff, appellant.
Banzet & Banzet for defendant, appellee.

PER CURIAM. The only evidence by which plaintiff undertook to establish the alleged contract consisted of his testimony as to statements made to him by one John P. Forneau, defendant's former employee. The court, sustaining defendant's objections thereto, excluded this testimony.

It is well established that the nature and extent of an agent's authority may not be shown by extra-judicial declarations of such agent. Forneau did not testify. His employment by defendant had terminated, upon his resignation, on or about April 7, 1956. He was not present at the trial.

J. T. Butler, President, and Clyde R. Butler, Secretary and Treasurer, of defendant, were examined adversely by plaintiff. Their positive testimony is that Forneau had no authority to purchase and had not purchased land or timber for defendant and that Forneau had no authority to make a contract (in behalf of defendant) such as that alleged. Moreover, the evidence offered by plaintiff is insufficient to support a finding that Forneau, in making the statements attributed to him by plaintiff, was acting within the apparent scope of his authority as defendant's employee.

It is noted that all negotiations incident to the purchase by defendant of the "Ball" and "Hall" tracts were conducted by its said executive officers. Neither plaintiff nor Forneau participated in such negotiations. Indeed, it appears from plaintiff's testimony that he had had no conversation or contact with either of defendant's said executive officers at any time, that he did not know said negotiations were in progress, and that he just happened to learn that defendant had made such purchases a considerable length of time after such purchases had been consummated.

All of appellant's exceptions relate to the competency of excluded testimony and to his exception to the judgment of involuntary nonsuit. Upon consideration of all the evidence, that excluded as well as that admitted, we have reached the conclusion stated above.

Appellant's so-called "ASSIGNMENTS OF ERROR" do not comply with Rule 19(3), and appellant's so-called statement in his brief of "QUESTIONS INVOLVED" does not comply with Rule 27½. Rules of Practice in the Supreme Court, 221 N.C. 546, *et seq.* In each instance, appellant merely listed, *seriatim,* each of his seventy-two exceptions. Having considered the appeal fully on its merits, further discussion as to appellant's failure to comply with our rules is unnecessary.

The court's judgment of involuntary nonsuit is affirmed.

Affirmed.

LYDE LASSITER BAKER, MARY ALICE NORVILLE AND WILLIAM EARL LASSITER v. TRAVIS D. MURPHREY.

(Filed 19 April, 1961.)

Deeds § 6—

It will be presumed that a person undertaking over a period of years to take acknowledgments in the capacity of a deputy clerk is a duly appointed and qualified deputy clerk, nothing else appearing.

APPEAL by defendant from *Parker, Joseph W., J.,* at December 1960 "A" Term of GREENE.

Civil action to have the plaintiffs declared the owners of an undivided one-sixth interest in certain lands in Greene County.

The case was before this Court on former appeal, as is reported in *Baker v. Murphrey,* 250 N.C. 346, 108 S.E. 2d 644. The judgment from which appeal was then taken was reversed.

And the case came on for rehearing at the December 1960 Mixed Term of Superior Court of Greene County, — when and where, as shown by record of case on appeal, counsel for the parties stated to the court that they had agreed upon the facts as the same appear in the record; that there were no questions of fact to be submitted to the jury, and stipulated that the matter should be heard by the court upon the agreed statement of facts; and that the court should make conclusions of law and enter judgment thereon pursuant to the provisions of G.S. 1-185.

Counsel for defendant further stated to the court that the defendant was relying upon the three-year statute of limitations as a bar to plaintiffs' action, and the further defense that the deed under which plaintiffs claim title to the land in controversy was void for the reason that no record of the appointment of H. J. Brown, who took the acknowledgment of the grantor in said deed, that is, the deed from Eliza J. Murphrey to John J. Murphrey, described in the record, as a deputy clerk and cross-indexing of the same, could be found in the office of the clerk or register of deeds of Greene County, nor could there be found any record of the filing of his oath as a deputy clerk.

Whereupon the court made the following conclusions of law:

"(1) As owners of the equity of redemption, the plaintiffs were necessary parties to the foreclosure action. The decree of confirmation and deed in the foreclosure action are void as to the plaintiffs in this action and the Commissioner's Deed to defendant did not convey title.

"(2) The three-year statute of limitations does not apply and is therefore not a bar to plaintiffs' action.

"(3) H. J. Brown having professed to act and having acted as a Deputy Clerk by taking the acknowledgment of the execution of the deed in question, and probating same, the deed having been duly registered, it will be assumed that he was rightfully appointed to that office, and that he acted rightfully in taking the acknowledgment and probating the deed until the contrary is made to appear.

"(4) The failure to find of record the appointment of H. J. Brown as Deputy Clerk, the cross-indexing of same, and the oath of the said H. J. Brown does not deprive his acts as a Deputy Clerk of their validity; the requirements of G.S. 2-14 being directory and not a prerequisite to a valid appointment.

"(5) H. J. Brown, having acknowledged and probated deeds and other instruments such as mortgages and bonds over a period of six years; thereby performing and exercising the duties of the office of Deputy Clerk, which said instruments were duly registered, and which affect serious property rights of third persons; and having thereby been recognized and accepted by the general public as a Deputy Clerk and his official capacity not having been challenged for more than thirty years, would in any event be a *de facto* Deputy Clerk.

"(6) As a *de facto* officer performing the duties of a *de jure* office his acts as a Deputy Clerk would be valid.

"(7) The deed from Eliza J. Murphy to John J. Murphy dated January 7, 1928, of record in Book 157 at page 305 is in all respects valid.

"It is therefore, ordered, adjudged and decreed that the plaintiffs are the owners of an undivided one-sixth interest in the 22½ acre tract of land as described in the complaint, subject to the judgment of foreclosure and such liens as may be outstanding thereon, and entitled to the immediate possession thereof.

"It is further ordered, adjudged and decreed that the defendant shall pay the costs of this action to be taxed by the Clerk," etc.

To the foregoing conclusions of law and the judgment entered thereupon, the defendant excepts and appeals to the Supreme Court, and assigns error.

Lewis & Rouse for plaintiff appellees.
K. A. Pittman, I. Joseph Horton for defendant appellant.

PER CURIAM. In the light of the stipulated facts encompassed in the conclusions of law in respect to the acts of H. J. Brown, as Deputy Clerk, the principle is well settled in this State that there is a *prima facie* presumption that a deputy clerk, authorized by statute to take acknowledgments, is duly appointed and qualified, nothing else appearing. *Piland v. Taylor,* 113 N.C. 1, 18 S.E. 70. 1 Am. Jur. 333, Sec. 50 See also G.S. 52-12 and G.S. 47-1.

Applying this principle to the case in hand, the challenge to the conclusions of law are without merit. Hence the judgment from which appeal is taken is

Affirmed.

EFFIE ELLIOTT, ED ELLIOTT AND PARTHENIA ELLIOTT v. JULIA ANN McCALL GOSS, ADMINISTRATRIX OF SAM McCALL, DECEASED, AND INDIVIDUALLY; MAGGIE McCALL BALDWIN, GEORGIANNA McCALL ALLSBROOK AND HENRY McCALL AND R. S. BOGER AND WIFE, LOUANNA BOGER.

(Filed 19 April, 1961.)

1. Pleadings § 15—

A demurrer based upon matters *dehors* the pleadings is a "speaking" demurrer and will not be considered.

2. Appeal and Error § 34—

An instrument which does not appear in the record on appeal will not be considered.

ELLIOTT v. GOSS.

3. Appeal and Error § 41—

Where only evidence objected to appears in the record, and the charge of the court is not included in the record, admission of the evidence will not be held prejudicial, it being impossible to determine from the record whether the admission of the evidence was error, or, if so, whether its admission was harmful.

APPEAL by defendants from *Crissman, J.*, September 1960 Term of MOORE.

This is an action for land.

There was verdict for plaintiffs. Judgment was entered declaring plaintiffs the owners and entitled to the possession of the land in controversy.

Defendants (other than R. S. Boger and wife) appealed.

Barrett and Wilson and Johnson and Johnson for plaintiffs.
E. J. Burns for defendant appellants.

PER CURIAM. This case was here at a prior term. *Elliott v. Goss*, 250 N.C. 185, 108 S.E. 2d 475. The decision of this Court on the former appeal sustained a demurrer to the complaint but permitted plaintiffs to amend.

Plaintiffs filed an amended complaint. Defendants demurred on the ground that the amended complaint does not state a cause of action. The trial court overruled the demurrer. In this we find no error. The complaint states facts sufficient to constitute a cause of action in ejectment and to quiet title. Furthermore, the argument of defendants in support of demurrer has no validity unless matters *dehors* the complaint are considered. In reality defendants convert their pleading into a speaking demurrer. In this aspect, the demurrer may not be sustained in any event — a speaking demurrer may not be considered. *Lamm v. Crumpler*, 240 N.C. 35, 43, 81 S.E. 2d 138.

After this case had been argued here, counsel mailed a copy of the instrument defendants desire the Court to consider. It is not a part of the record and this Court will not go outside the record. Even so, we find nothing therein which would, if considered, change the results.

Defendants assign as error the admission in evidence of certain testimony and a purported deed. The evidence adduced at the trial, other than that referred to in the assignment of error, and the charge of the court are not a part of the record. It is therefore impossible for this Court to determine whether or not the particular evidence excepted to was prejudicial to defendants. Considering it out of context, it appears to have been properly admitted. The assignment of error is not sustained.

The issues submitted to the jury are sufficient to determine the issues of fact raised by the pleadings.

The costs will be paid by defendants (other than R. S. Boger and wife).

In the trial of the case we find

No error.

WILLIAM C. McINTYRE, A RESIDENT CITIZEN AND TAXPAYER OF CHARLOTTE, MECKLENBURG COUNTY, NORTH CAROLINA, ON HIS OWN BEHALF AND ON BEHALF OF THE OTHER TAXPAYERS OF SAID COUNTY, v. HONORABLE F. O. CLARKSON, SENIOR RESIDENT JUDGE OF THE 26TH JUDICIAL DISTRICT OF NORTH CAROLINA, AND JESSIE CALDWELL SMITH, TREASURER OF MECKLENBURG COUNTY, NORTH CAROLINA, AND WALKER H. BUSBY, MECKLENBURG COUNTY AUDITOR AND ACCOUNTANT.

(Filed 3 May, 1961.)

1. Constitutional Law § 4: Statutes § 4—

A taxpayer may test by injunction the constitutionality of a statute relating to the appointment of and payment of compensation to justices of the peace in the county, since such statute involves the expenditure of public funds and also relates to an office which affects the business and social life of each citizen of the county.

2. Constitutional Law § 6—

All legislative powers of the State are vested in the General Assembly and it may exercise all such powers unless specifically prohibited or limited by some provision of the Constitution, the wisdom and expediency of legislation being exclusively within its province.

3. Constitutional Law § 10—

While all doubt as to the constitutionality of a statute will be resolved in favor of the lawful exercise of their powers by the representatives of the people, it is the duty of the courts to declare a statute unconstitutional in proper cases when the statute clearly transgresses constitutional limitations.

4. Statutes § 1—

In regard to the limitations prescribed by Art. II, Sec. 29 of the Constitution of North Carolina, all statutes dealing with the subjects specified must be classified either as local, private, or special acts, which are void, or general laws, which the General Assembly has power to pass.

5. Same—

The test of whether a statute is local or general is not the amount of

territory to which it applies, but whether it is of general state-wide application as to all persons and localities coming within prescribed classifications, since the Constitution does not prohibit the Legislature from prescribing classifications provided such classifications are based upon rational differences of need, population, situation, or condition, and the statute operates uniformly as to all persons, things, or localities coming within each particular classification.

6. Same—

A statute applicable only to a specified locality or localities will not be held to contravene Art. II, Sec. 29 of the State Constitution if the statute merely supplements general laws on the subject, or offers aid in administering or financing policies established by general law, especially when the administrative unit is local in nature.

7. Same: Courts § 17—

G.S. 7, Art. 14A authorizing certain counties to adopt its machinery for the appointment, tenure, and payment of justices of the peace is indivisible, since all of its provisions depend upon the exclusive power of appointment therein provided.

8. Same—

G.S. 7, Art. 14A, is a local statute relating to the appointment of justices of the peace proscribed by Art. II, Sec. 29 of the Constitution, since the statute exempts from its coverage a large number of counties without any real or logical basis of classification either as to need, population, topography or otherwise.

8. Same—

G.S. 7, Art. 14A may not be upheld as being supplementary to the 1955 Act granting the resident judges of the Superior Court authority to appoint justices of the peace, since the statute is not supplementary to the 1955 Act but is in direct conflict therewith in providing exclusive authority to appoint justices of the peace.

HIGGINS, J., concurs.

BOBBITT, J. dissenting.

APPEAL by plaintiff from *Campbell, J.*, at Chambers 18 November 1960 in MECKLENBURG.

Civil action to restrain the appointment of, and payment of salaries to, justices of the peace for Mecklenburg County under the provisions of Article 14A, Chapter 7, of the General Statutes of North Carolina.

Defendants admit the factual allegations of the complaint. The facts thus stipulated and judicially admitted are (numbering ours):

1. Plaintiff is a resident, citizen and taxpayer of Mecklenburg County and sues on "his own behalf as a taxpayer, and for the benefit of the other taxpayers of Mecklenburg County."

2. Defendants are: F. O. Clarkson, senior Resident Superior Court

Judge of the 26th District (Mecklenburg County); and Jessie Caldwell Smith and Walker H. Busby, Treasurer and Auditor of Mecklenburg County, respectively.

3. On 7 March 1960 the Board of County Commissioners of Mecklenburg County adopted a resolution accepting for Mecklenburg County "all of the provisions of Article 14A of the General Statutes of North Carolina providing for the appointment of Justices of the Peace by the Resident Judge and the abolition of the fee system." The resolution provided for 41 justices of the peace: 2 for service in the County Recorder's Court, 12 for service in the county rural police force, 13 for service in the Charlotte City police force, 3 for service in the City Recorder's Court, 3 for service in the Domestic Relations Court, and 8 for general trial service in Mecklenburg County. The terms of office were fixed at 2 years, to begin in December 1960.

4. On 11 July 1960 a budget resolution was adopted by the Board of Commissioners appropriating $33,995.00 from the County's general fund for payment of salaries and expenses of justices of the peace for 7 months, December 1960 to June 1961, inclusive. The authorized number of trial justices of the peace was reduced from 8 to 5, with recommendation that the number be held to 3 unless it appear that a greater number is needed. Salaries for trial justices were fixed at $6,000 each.

5. Judge Clarkson has announced that he will make the appointments in conformity with the resolutions.

The complaint alleges that Article 14A, Chapter 7, of the General Statutes of North Carolina (G.S. 7-120.1 to G.S. 7-120.11, inclusive) is unconstitutional, the appointment of justices of the peace pursuant to this article would be unlawful, payment of their salaries from the general fund would constitute an unauthorized and unlawful expenditure of public funds and would irreparably injure plaintiff and the other taxpayers of Mecklenburg County. Plaintiff prays for injunctive relief.

On 28 September 1960 Craven, S. J., denied plaintiff's motion for a temporary restraining order.

At the hearing before Campbell, J., 18 November 1960, defendants' demurrer *ore tenus* was overruled. Defendants excepted. Then, after hearing arguments of counsel, the judge made an order denying plaintiff's motion for injunction.

Plaintiff appealed.

Plaintiff filed motion in Supreme Court for restraining order pending appeal. The motion was granted 14 December 1960.

J. F. Flowers and Mercer J. Blankenship for plaintiff.

E. McA. Currie for defendant F. O. Clarkson.

Dockery, Ruff, Perry, Bond & Cobb for defendants Busby and Smith.

Whiteford S. Blakeney for the District Bar of the Twenty-Sixth Judicial District, as Amicus Curiae.

MOORE, J. In this Court defendants demur *ore tenus* to plaintiff's complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and does not show that the plaintiff has sufficient legal interest to maintain the action.

Defendants contend that a resident, citizen and taxpayer, as such, does not have sufficient interest in the controversy to maintain an action, for himself and on behalf of others similarly situated, to challenge the constitutionality of a statute providing for the appointment of justices of the peace for the county in which he resides and for payment of their salaries from the general fund of the county.

" 'Courts will not declare void an Act of the Legislature unless the question of its constitutionality is presently presented and it is found to be necessary to do so in order to protect rights guaranteed by the Constitution.' *Fox v. Commissioners,* 244 N.C. 497, 94 S.E. 2d 482. Only an injured party may assail the validity of a statute. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563." *Carringer v. Alverson, ante,* 204, 208.

But this Court has in numerous cases determined the constitutionality of statutes upon suit for injunctive relief by taxpayers where the expenditure of public funds is involved. *Dennis v. Raleigh,* 253 N.C. 400, 116 S.E. 2d 923; *Freeman v. Comrs. of Madison,* 217 N.C. 209, 7 S.E. 2d 354.

Here, the Commissioners of Mecklenburg County have made an appropriation from the general fund of the county for payment of salaries of justices of the peace under the purported authority of Article 14A, Chapter 7, of the General Statutes of North Carolina. When the case was argued in this Court it was admitted that the resident judge had appointed justices of the peace for Mecklenburg County in conformity with the resolution of the Commissioners putting Article 14A into effect. The appointments were made before the interlocutory injunction was issued by this Court. The present suit calls into question the legality of the appointments and the resolutions of the Commissioners adopting the provisions of Article 14A and appropriating funds for salaries and other expenses of justices of the peace. These matters are of serious concern to the citizens and taxpayers of Mecklenburg County and of the State at large. It is es-

sential to the effective and orderly government of Mecklenburg County that an immediate determination of the case be had on the merits. In addition to the issuance of warrants and the adjudication of certain civil and criminal actions, justices of the peace have many official duties and powers, including the performing of marriage ceremonies and the taking of acknowledgments of deeds and deeds of trust. Their activities vitally affect the business and social life of the State. It would be stretching a procedural rule to the breaking point to hold that a citizen and taxpayer must violate a criminal law, breach a contract, commit a tort, contract a questionable marriage or make a doubtful acknowledgment of a deed before he may, on his own part and on behalf of other citizens and taxpayers of his county, invoke the equitable jurisdiction of the courts to have determined the validity of a statute which so vitally affects the public welfare and public funds.

The demurrer *ore tenus* is overruled.

Prior to the enactment of Article 14A, Chapter 7, of the General Statutes of North Carolina (G.S. 7-120.1 to G.S. 7-120.11), there were four methods of selecting justices of the peace: (1) popular elections in the township (G.S. 7-113); (2) appointments by the Governor (G.S. 7-114 and 7-115); (3) appointments by the General Assembly (*In re "Omnibus Bill,"* 227 N.C. 717); and (4) filling of vacancies by the clerks of superior court (G.S. 7-114). These methods were all statewide in application.

In 1949 the General Assembly passed the law in question on this appeal — Article 14A, Chapter 7, hereinafter referred to as the 1949 Act. It is permissive only, and becomes effective in a particular county if and when adopted by resolution of the county commissioners of that county. It impowers the commissioners to fix the number of justices of the peace to be appointed and authorizes the resident judge of the superior court to make the appointments and to remove from office for cause, after hearing. The appointees serve two-year terms and are paid salaries from the general county fund in lieu of fees. They are required to give bond and make daily deposits of all fees, fines and forfeitures collected. The commissioners are required to provide offices and to designate the place or places where each justice of the peace shall sit regularly. The Act purports to repeal G.S. 7-113 and the last two sentences of G. S. 7-114 and G.S. 7-115, and thereby to abrogate all other methods of election or appointment of justices of the peace in the particular adopting county, except that vacancies are filled by the clerk of superior court. The Act exempted 73 counties from its operation. In 1957 Hoke County was added. There are presently 72 exempted counties.

In 1955 the General Assembly rewrote G.S. 7-115, hereinafter referred to as the 1955 Act. It now provides that in case of need resident judges in their discretion may, from time to time, appoint one or more fit persons as justice of the peace in the county or counties within their respective districts. The term of office is two years and the appointees may be removed by the resident judge for cause, after hearing. This Act is "In addition to other methods provided by law for appointment or election of a justice of the peace." This Act is a statewide law and no counties are exempted.

". . . (A) doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." *Lassiter v. Board of Elections,* 248 N.C. 102, 112, 102 S.E. 2d 853.

The members of the General Assembly are representatives of the people. The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits. The courts will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition. *Finance Co. v. Pittman,* 253 N.C. 550, 553, 117 S.E. 2d 423; *State v. Warren,* 252 N.C. 690, 696, 114 S.E. 2d 660; *Lilly & Co. v. Saunders,* 216 N.C. 163, 170, 4 S.E. 2d 528.

"It is well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional — but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *Glenn v. Board of Education,* 210 N.C. 525, 529-30, 187 S.E. 781. See also *State v. Moore,* 104 N.C. 714, 717, 10 S.E. 143.

Plaintiff contends that the 1949 Act contravenes Article II, section 29, of the Constitution of North Carolina, in that it is a special and local Act and is not a general Act applicable to the entire State.

In 1916 three constitutional amendments were ratified — Article II, sec. 29; Article VIII, ss. 1, 4. They became effective 10 January 1917. They were designed to remove some sixteen or more subjects from the field of local, private and special legislation.

It was argued by the proponents of the amendments that they were necessary and essential for that the membership of the General Assembly as a whole had little knowledge of local, private and special needs and conditions, the General Assembly should be permitted to devote more time and attention to general legislation of statewide interest and concern, local self-government should be strengthened by

delegating local matters by general laws to local officials, and legislation should relate to the State "as a single united commonwealth rather than as a conglomeration of innumerable discordant communities." Prior to the adoption of the amendments a large percentage of the laws enacted by the Legislature was "local, private and special": 1911 — 85%; 1913 — 87%; 1913 (Special Session) — 84%; 1915 — 81%. During the period 1868 to 1917, there were 225 local, private and special Acts relating to the appointment of justices of the peace. Popular Government, issue of February-March, 1949. *Idol v. Street,* 233 N.C. 730, 732, 65 S.E. 2d 313.

Article II, section 29, of the Constitution of North Carolina, as it relates to this appeal, is as follows: "The General Assembly shall not pass any local, private or special act or resolution relating to . . . the appointment of justices of the peace . . . nor shall the General Assembly enact any such local, private or special act by partial repeal of a general law . . . Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

Article II, section 29, of the Constitution will be hereinafter referred to as the 1917 Amendment.

The 1949 Act directly relates to the appointment of justices of the peace in the adopting counties. It excludes all other methods of appointment or election. Appointments are made by the resident judge. It provides for two-year terms, salaries and places of sitting. It is indivisible legislation; its several parts are inter-dependent. Prior to its enactment there had been no provision for appointment of justices of the peace by superior court judges.

The question clearly presented is whether or not the 1949 Act is "local, private or special" legislation rather than "general." If it is "local, private or special," it contravenes the 1917 Amendment and is void. If "general," it is valid. There is no middle ground. ". . . (A)s to the particular types of legislation described in Art. II, sec. 29, of our Constitution, all legislative enactments are to be classified in one of two classes: (1) 'local, private or special' acts which are 'void,' or (2) 'general laws' which the General Assembly has 'power to pass.' " *State v. Dixon,* 215 N.C. 161, 165, 1 S.E. 2d 521.

The substance of plaintiff's contention is that the 1949 Act is local and special in that it applies to less than a majority of the counties of the State. He reasons that a law is general if it affects a majority of the counties, local if it applies to less than a majority. In support of this proposition he cites *In re Harris,* 183 N.C. 633, 112 S.E. 425, and *State v. Dixon, supra.*

Defendants contend that the 1917 Amendment "prohibits direct, explicit and mandatory action by the General Assembly; that it does not prohibit the General Assembly's setting up machinery by which local groups may undertake certain action." They also rely on *Harris* and particularly cite the following cases: *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187; *Huneycutt v. Commissioners,* 182 N.C. 319, 109 S.E. 4; *Hill v. Commissioners,* 190 N.C. 123, 129 S.E. 154; *Reed v. Engineering Company,* 188 N.C. 39, 123 S.E. 479; *Fletcher v. Comrs. of Buncombe,* 218 N.C. 1, 9 S.E. 606.

The parties find comfort in their respective contentions from language found in the cases relied on by them. However, the clauses of the Constitution limiting, restricting or prohibiting local, private and special legislation vary in purpose, scope and application. In determining the effect of one of these constitutional provisions in a particular case regard must be had to the terms and purpose of the statute in question and to the object and scope of the constitutional prohibition. The factors are so variable that no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general. This fact has led to the comment in some quarters that the decisions of this Court in this line of cases lack consistency and uniformity and are "in a state of flux." That there are apparent inconsistencies we do not dispute, but a careful analysis of the cases with due regard to the factors involved will disclose a generally harmonious application of principles.

" 'It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case.' " *In re Harris, supra,* 635.

General definitions are inadequate to determine, in a given situation, the distinction between local and general legislation, as witness the following. Special laws are those made for individual cases, local laws are special as to place. *Mills v. Commissioners,* 175 N.C. 215, 218, 95 S.E. 481. A local act is one operating only in a limited territory or specified locality. *Idol v. Street, supra.* A private law is one which is confined to particular individuals, associations or corporations. *Yarborough v. N.C. Park Commission, supra.* General laws embrace the whole of a subject and are of common interest to the whole State. Sutherland on Statutory Construction, 3d Ed., Vol. 2, s. 2102, p. 9.

The following summation of the matter, however, seems to clearly state the principles which must be applied in the instant case: "The

phrase 'local law' means, primarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole state, or applies to any political subdivision or subdivisions of the state less than the whole, or to the property and persons of a limited portion of the state, or to a comparatively small portion of the state, or is directed to a specific locality or spot, as distinguished from a law which operates generally throughout the state. Such a law, enacted by a state legislature, touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens. Within the meaning of constitutional prohibitions against local laws, a law is local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded. In other words, a local law discriminates between different localities without any real, proper, or reasonable basis or necessity — a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others. However, mere classification does not render a law local in the constitutional sense. Where a law is broad enough to reach every portion of the state, and to embrace within its provisions all localities of a class distinguished by characteristics sufficiently marked and important to make them clearly a class by themselves, or to reach the whole of a legislative class of localities legitimately created for purposes of general legislation, or all places affected by the conditions to be remedied, so that the statute operates uniformly throughout the state under like circumstances, and its classification is reasonable and based upon a rational difference of situation or condition, it is not a local law, even though it does not actually apply to all parts of the state, or indeed, even though there are only a few places, or one place, on which the statute operates." 50 Am. Jur., Statutes, s. 8, pp. 24-26.

"For a law to be general it is only required that the objects of its operation be reasonably classified. . . . when the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special." 24 Kentucky Law Journal (1935-1936), p. 364. "Universality is immaterial so long as those affected are reasonably different from those excluded and for the purpose of the act there is a logical basis for treating them in a different manner. When the

operation of the law is limited by the presence or absence of features which are inconsequential to the object of the statute — which creates an artificial class of those affected — it is special or local." *ibid,* p. 375. ". . . (T)he legislature has broad discretion in establishing a class . . . ." *ibid,* p. 376. ". . . (U)ltimately the problem is resolved into the question of what facts in each case are sufficiently important to justify the exclusions and inclusions." *ibid,* p. 379. In making classifications, differences in population of municipalities, geographical differences, and relative business activities of certain types in different localities have been held as valid bases. *ibid. pp.* 380, 381.

A law is general "if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious. While substantial distinctions which are inherent are essential in classification, the distinctions need not be scientific or exact. The Legislature has wide discretion in making classifications. Crawford: Statutory Construction, ss. 81, 82, pp. 115-119.

A law is general, not because it operates on every person in the State, but because every person brought within the relations and circumstances provided for by the Act is affected. Statutes relating to persons or things as a class are general laws. The test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications must be general within the limits of the subject matter. They must be reasonable and the statute must affect all within the class uniformly. Classifications must not be arbitrary or capricious, but must be natural and intrinsic and based on substantial differences. Classifications have been sustained on the ground of need. Sutherland on Statutory Construction, 3d Ed., Vol. 2, ss. 2102-2106, pp. 6-22.

Whether or not the 1949 Act is based on a proper classification of the subject matter dealt with is the question that must be answered in determining its validity.

The instant case is the first which has reached this Court involving the clause of the 1917 Amendment "relating to the appointment of justices of the peace." The case most nearly akin to the one *sub judice* is *In re Harris, supra.* As already indicated, it is cited and discussed in the brief both of plaintiff and defendants. The General Assembly in 1919 passed "An Act to establish a uniform system of recorders' courts for municipalities and counties in this State." Forty-

four counties were exempted from its provisions. Harris was tried and convicted in a court organized pursuant to this Act. Our Court held that the Act did not violate the 1917 Amendment prohibiting local, private or special legislation "relating to the establishment of courts inferior to the Superior Court." In short, the Act was held to be "general." The opinion discusses at considerable length, and quotes from, an 1881 New York opinion, *People ex rel. Clauson v. Newburgh and Shawangunk Plank Road Co.*, 86 N.Y. 1 (the page citation in the state report of *Harris* is in error). Apparently our Court took the view that the number of counties involved took it from the category of local law, and explained: ". . . (T)he statute is designed and intended to provide for as many as 56 out of the 100 counties of the State, and could in no sense be regarded as a local or special law within any usual or ordinary meaning of these terms." However, the Court took cognizance of the classification test and brought the case clearly within that principle, which, it seems to us, was the sound basis for the decision. The opinion continues: "It is well known that at the time this law was enacted there were 20 or 25 of these recorders' courts already established and doing satisfactory work, and in the remaining excepted counties it was estimated that the regular courts were then so fixed in time and number as to afford adequate facilities for the administration of public justice in those counties. It is always presumed that a Legislature acts rightly and from proper motives, and a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid." Based on a classification of "need" the Act was general and the correct result was reached.

In *State v. Dixon, supra,* the majority opinion was delivered by *Clarkson, J. Barnhill, J.* (later *C.J.*), concurred; *Devin, J.* (later *C.J.*), dissented, and *Schenck and Seawell, JJ.*, joined in the dissent. In 1937 the General Assembly passed an act purporting to regulate real estate brokers and salesmen in thirty-six counties. The act was declared to be local. The following quotations from the concurring opinion seem extremely pertinent:

> ". . . (A) general law as distinguished from a special or local law is that it is a law that embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class. A law is general in the constitutional sense when it applies to and operates uniformly on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law. . . .
>
> "On the other hand, a special statute is one which does not include all of the persons within a given class, but relates to less

than all the class, or one which relates and applies to particular members or a particular section of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might but for such limitation be applicable. . . .

"The legislation under consideration is general in its terms and applies to real estate brokers and salesmen as a class. . . . Thus, it appears that the purpose of the act is to regulate the trade of real estate brokers and salesmen, and that the legislature grouped the real estate brokers of the State as a whole into a class sufficiently distinguished by characteristics to make it the subject of legislation. However, notwithstanding the declared intent of the Legislature to deal with real estate brokers and salesmen as a class throughout the State, the act . . . exempts from the operation thereof 64 counties. It appears, therefore, that the act does not apply to real estate brokers and salesmen throughout the State as a class, notwithstanding the declared purpose of the Legislature. The lawmaking body made a reasonable classification of citizens and then, by the express terms of the act, excluded from its operation a large portion of the class. To my mind, this alone stamps the legislation as special, brings it within the prohibitive provisions of Art. II, sec. 29, of the Constitution, and makes it invalid."

The majority opinion does not discuss classification, but the general tenor of the opinion is consistent with that principle stated in the concurring opinion.

For a few of the cases in this jurisdiction clearly applying the classification principle see: *Finance Co. v. Currie, Comr., ante,* 129, 118 S.E. 2d 543; *Lilly & Co. v. Saunders, supra; Roach v. Durham,* 204 N.C. 587, 169 S.E. 149; *State v. Lockey,* 198 N.C. 551, 152 S.E. 693; *State v. Call,* 121 N.C. 643, 28 S.E. 517.

The other cases particularly cited and relied on by the defendants are not pertinent to the instant controversy. But a brief reference to a few of them may serve to show the distinguishing features.

Of *Kornegay v. Goldsboro, supra,* it was said: "A battle royal split the court." Popular Government, issue of February-March, 1949, p. 11. In 1920 an Act was passed authorizing the cities, towns, townships and school districts of Wayne County to sell bonds at less than par for payment of debts theretofore incurred and due or soon to be due. Here the provisions of Article VIII, ss. 1 & 4, of the Constitution were involved. The Court held that section 1 has no application to municipal corporations and relates only to private corporations, and

that section 4 does not prohibit local, private and special legislation but imposes on the Legislature a "moral obligation" to provide for the matters therein listed by general laws.

In those situations in which the county is the established and designated unit for the administration of a general, statewide law or policy, a statute, having application to one or more counties, which merely supplements the general law or policy, or aids in the administration according to local needs, or is primarily designed to finance the operation, is not unconstitutional if it does not directly or specifically violate a constitutional prohibition against local, private or special legislation; and this is true even if the statute incidentally or indirectly relates to the prohibited subject. A few examples follow.

Most of the cases relating to roads and bridges arose during the period when roads and bridges were, for the most part, the responsibility of the counties and the counties were the units for administration purposes. In *Brown v. Commissioners,* 173 N.C. 598, 92 S.E. 502 (1917), plaintiffs sought to enjoin the Commissioners of McDowell County from issuing bonds and levying special taxes for road purposes pursuant to an Act applying to North Cove Township. The 1917 Amendment prohibits local acts authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys. The Court held that the 1917 Amendment was not violated, that the Act only provided the means for constructing and maintaining roads. Accordant: *Commissioners v. Bank,* 181 N.C. 347, 107 S.E. 245 (1921); *Commissioners v. Pruden,* 178 N.C. 394, 100 S.E. 695 (1919); *Martin County v. Trust Co.,* 178 N.C. 26, 100 S.E. 134 (1919); *Mills v. Commissioners, supra. Huneycutt v. Commissioners, supra,* involves an Act "creating the board of road commissioners of Stanly County, and giving to them the entire control and management of the public roads and bridges in said County." In sustaining the Act the Court explained that the 1917 Amendment had not been violated, for the purpose of the legislation was "to provide ways and means by which the general road work of the entire County might be successfully carried on and maintained." In a similar case the Court took the position that the authority conferred by the Act in question was supplemental to the general law and valid. *Hill v. Commissioners, supra.*

On the other hand, a statute which directed the building of a bridge at a specified place across a stream between two counties and authorized the issuance of bonds and levying of a tax for that purpose was held to contravene the 1917 Amendment. *Day v. Commissioners,* 191 N.C. 780, 133 S.E. 164 (1926). After the State took over the

responsibility of constructing and maintaining the roads of the State, a statute limiting the territory to five counties for the construction of toll bridges by a private corporation was declared a local law and void as violative of the 1917 Amendment. *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310 (1953).

An Act applicable to a single city, which authorized the municipality to make street improvements and assess the cost thereof against abutting property owners without a petition therefor, was held to be constitutional since the Act was merely declaratory of the powers given the municipality under the general law and did not purport to authorize the laying out of a particular street or streets. *In re Assessments,* 243 N.C. 494, 91 S.E. 2d 171 (1956). See also *Goldsboro v. R.R.,* 241 N.C. 216, 85 S.E. 2d 125 (1954).

The 1917 Amendment prohibits local, private and special legislation undertaking to establish or change the boundaries of any school district. But this provision does not proscribe the General Assembly from setting up machinery under which a county, as the administrative unit charged in a general law with making provision for necessary capital outlay, may create school districts or special bond tax districts within the county to provide the capital outlay. *Fletcher v. Commissioners of Buncombe, supra.*

The General Assembly is prohibited, by the 1917 Amendment, from passing any local, private or special act relating to health, sanitation and the abatement of nuisance. An Act, applicable to one county, authorizing the formation of sanitary sewerage districts throughout the county, the boundaries to be fixed by certain designated local authorities in a specified manner, does not violate the constitutional provision. The purpose of the Act is not to regulate health or sanitary matters or to abate nuisances. *Reed v. Engineering Co., supra.* But a statute authorizing the City of Wilmington and New Hanover County to make provision for the hospitalization and medical care of the indigent sick without a vote of the people was void. *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749 (1953). Also, an ordinance adopted by a City-County board of health regulating the production for sale and sale of milk within the county, and the statute purporting to confer authority therefor, are unconstitutional. *Idol v. Street, supra.*

The preceding references suffice to illustrate the holdings that statutes which do not directly contravene the 1917 Amendment but supplement general laws and policy, or aid in administering or financing policy established by general law, are not unconstitutional, especially when the administrative unit is local in nature. They also

contain examples of statutes which are unconstitutional because they directly offend the 1917 Amendment.

The office of justice of the peace is constitutional in origin and existence. Provision is made for justices of the peace in each township of the State — whether this provision is mandatory does not arise here. Their jurisdiction, limitations, duties and obligations are uniform throughout the State. It is a judicial office and as such is not in a true sense subject to local supervision as are many executive agencies. The Constitution prohibits and renders void all local, private or special legislation relating to their appointment.

The 1949 Act relates directly to the appointment of justices of the peace. The Act is indivisible. Without *exclusive* appointive power, the provisions relating to salaries, the limitation of the number to be appointed, the designation of places for sitting, the giving of bonds, and other requirements would be impracticable and would also be discriminatory. The *exclusive authority to appoint* is the essential, primary and controlling feature of the Act.

The Act is applicable to only 28 counties. Do the justices of the peace, or the essential method of their appointment, in the 28 counties constitute an inherent and reasonable class or classification as distinct from the justices of the peace and appointive methods in the other 72 counties? We think not. The 28 counties are scattered from Currituck to Graham. Three are mountain counties, sixteen are eastern and coastal counties, and nine are in the piedmont. They have among them some of the smallest in population and property valuation, and some of the largest in these categories. Some of the counties are almost completely rural, others are largely urban. To illustrate, the following are some of the included counties: Mecklenburg, Buncombe, Columbus, Orange, Dare, Camden. There is no perceivable circumstance related to the office of justice of the peace which serves as a basis for classification of these officials and their activities in the 28 counties, distinguishing them from the justices of the peace of the excluded 72 counties. As a matter of fact there are, among the included 28 counties, vast differences in geography, business, industry, wealth and population. In the same proportions, differences exist between the included countries with respect to the volume of work done by justices of the peace. As to each of the counties included in the Act, there are comparable counties, in all aspects relating to the office of justice of the peace, among those excluded. For instance, we can conceive of no circumstance that makes the 1949 Act more practical or necessary for Mecklenburg County than for Guilford or Forsyth County — certainly the record discloses none. Nor does it appear that other methods of appointment are less desirable for the

28 than for the 72 counties. The conclusion is inescapable that there is no reasonable, inherent and distinctive feature which makes the 28 counties a group apart from the 72 excluded counties so that it can be said that the 1949 Act applies alike to all justices of the peace of the State similarly situated.

Application of the principles of reasonable classification as hereinbefore discussed is essential in proper cases. It is particularly applicable to the instant case. If the 1949 Act is a "general" law in the constitutional sense, it follows that North Carolina could have an indefinite number of permissive statutes relating to the appointment of justices of the peace, each subject to adoption in a limited number of counties, each providing the exclusive method of appointment in adopting county or counties, all conflicting as to method of appointment, and many or all overlapping as to applicable territory. As a result there could be a different method of appointment in nearly every locality of the State without regard to need or other rational basis for classification. This is what the 1917 Amendment was designed to prohibit.

We do not now decide whether a classification of justices of the peace based on population, business, or other factors in selected counties would be reasonable and valid in a given situation. In the instant case, the crux of the matter is that nothing is "well known" or even "estimated" which makes any real distinction between the 28 and 72 counties with reference to the office of justice of the peace. Herein lies the difference between this and the *Harris* case.

The 1949 Act (Article 14A, Chapter 7, General Statutes of North Carolina) is local and special and contravenes the clause of the 1917 Amendment (N.C. Constitution, Art. II, s. 29) relating to the appointment of justices of the peace.

The 1955 Act authorized resident judges to make justice of the peace appointments throughout the State. It is suggested that the 1949 Act might be sustained on the ground that it is merely supplemental to and not contradictory of the 1955 Act. We do not agree. The 1955 Act does not purport to repeal and abrogate the other general methods of electing and appointing justices of the peace. It specifically provides that it is in addition to all other methods of appointment. On the other hand, the 1949 Act purports to exclude all other provisions for election and appointment in the territory of its application (except, of course, the filling of vacancies by clerks of superior court). The two Acts are in direct conflict. It is the 1955 Act that is supplemental; the 1949 Act purports to be exclusive and to abrogate all other enactments.

Having decided that the 1949 Act is unconstitutional, we do not

reach the question as to whether or not it was repealed by the 1955 Act. May two general laws which are in direct conflict and deal with identical subject matter subsist unimpaired?

The 1917 Amendment provides also that the General Assembly may not enact a local, private or special statute relating to the appointment of justices of the peace "by the partial repeal of a general law." Quaere: If the 1949 Act was "general," would it not be unconstitutional by reason of the partial repeal of G.S. 7-113, G.S. 7-114 and G.S. 7-115, rendering them operative only in limited territory? But we do not reach this question.

Article 14A, Chapter 7, of the General Statutes of North Carolina is unconstitutional and void. Therefore, the purported appointments of justices of the peace for Mecklenburg County by Judge Clarkson pursuant thereto are void. All acts done and proposed pursuant to the resolutions of the Board of County Commissioners of Mecklenburg County, adopting the said statute and appropriating funds for the payment of salaries and expenses of justices of the peace, are unlawful and a nullity.

The judgment below is

Reversed.

HIGGINS, J., Concurs in result.

BOBBITT, J., dissenting. The challenged 1949 Act provides that salaried justices of the peace appointed pursuant to its terms "shall continue to collect such fees as are provided by law with respect to criminal or civil cases and pay them into the general fund of the county." G.S. 7-120.4. There is no allegation that the fees to be collected and paid into the general fund of the county by the three salaried justices of the peace for the seven months period, December, 1960, through June, 1961, will be less than the $33,995.00 appropriated from the general fund of the county for the payment of their salaries and expenses. Hence plaintiff, having failed to allege facts sufficient to show irreparable injury to him as a taxpayer, is not entitled to maintain an action for injunctive relief.

The constitutional question plaintiff attempts to present casts a cloud upon the validity of every act of each of the three salaried justices of the peace. This creates a situation of such urgency and public importance that this Court should, in the exercise of its power "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts" (N.C. Constitution, Art. IV, Sec. 8), proceed now to pass upon the constitutional question.

Is the 1949 Act, now codified as G.S. Chapter 7, Article 14A (G.S. 7-120.1 — G.S. 7-120.11, inclusive), unconstitutional on the ground it is a *local* act relating to the appointment of justices of the peace and therefore violative of Article II, Section 29, of the Constitution of North Carolina?

Plaintiff contends the 1949 Act is a local act because the county commissioners in only twenty-eight named counties are authorized to invoke its provisions. Citing *State v. Dixon*, 215 N.C. 161, 1 S.E. 2d 521, he contends an act applicable to less than half of the counties of North Carolina is a local act.

The Court does not accept plaintiff's said contention. The basis of decision, as I understand it, is that the 1949 Act cannot be sustained as a general law because there is no substantial basis for placing the twenty-eight covered counties in one category and the seventy-two excepted counties in another category.

In the light of our prior decisions, and mindful that "(i)n considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity," *State v. Lueders*, 214 N.C. 558, 561, 200 S.E. 22, the 1949 Act, in my opinion, should not be declared unconstitutional on either ground.

Admittedly, the realization that the membership of the General Assembly as a whole had little knowledge of local, private or special needs and conditions, influenced the advocacy and adoption of Article II, Section 29. The 1949 Act, being *an enabling act*, vests in the county commissioners of each covered county the authority, after *their* appraisal of its local needs and conditions, to determine whether its provisions should be invoked. The 1949 Act is not self-operative. In the twenty-eight covered counties, the county commissioners *may*, but are not required, to invoke its provisions. Hence, the governing body of a covered county, which has knowledge of its local needs and conditions, is to determine whether the justices of the peace in such county are to be appointed and compensated as provided by the 1949 Act.

A contention that the 1949 Act unlawfully discriminates as between covered counties and excepted counties is unrealistic. In the first place, the constitutional doctrine prohibiting discrimination refers to discrimination as between citizens and not as between counties. Moreover, it is common knowledge that each county excepted from the provisions of the 1949 Act was so excepted because its own representatives in the General Assembly so requested. Any county now excepted would be readily made a covered county if its

representatives in the General Assembly should see fit to introduce a bill to accomplish this purpose.

It is noted, *with emphasis*, that, in respect of jurisdiction, procedure, etc., justices of the peace appointed by the resident superior court judge and compensated by salary as provided in the 1949 Act, have exactly the same status as justices of the peace in excepted counties. The 1949 Act in no way affects the legal rights or liabilities of any party to a civil or criminal action before a justice of the peace appointed and compensated in accordance with its provisions, whether such party be a resident of a covered county or a resident of an excepted county. Moreover, unlike the statute considered in *State v. Dixon, supra,* discussed below, the 1949 Act has no bearing upon the lawfulness of the conduct of persons either in a covered county or in an excepted county.

In Article II, Section 29, it is provided that "(t)he General Assembly shall not pass any local, private, or special act or resolution . . . relating to the appointment of justices of the peace," but "shall have power to pass general laws regulating matters set out in this section."

The power of the General Assembly to enact general laws relating to the appointment of justices of the peace *is not derived from* Article II, Section 29. Unless an act contravenes some prohibition or mandate of the Constitution of North Carolina or is in conflict with powers granted the Federal Government by the Constitution of the United States, the General Assembly has plenary legislative power. *Lassiter v. Board of Elections,* 248 N.C. 102, 102 S.E. 2d 853. See dissenting opinion of *Devin, J.* (later *C.J.*), in *State v. Dixon, supra,* p. 173. The question for decision is whether the 1949 Act is a *local* act, not whether it is a general law. Obviously, it is not a general law in the sense that it provides that justices of the peace in every county of the State shall be selected in exactly the same manner. Nor would it be a general law in this sense if no county were excepted. Even if no county were excepted, its provisions might be invoked by the county commissioners of only one county.

The question is whether an enabling act, the provisions of which may be invoked by the county commissioners of any one or all of twenty-eight counties, is a *local* act. It is noted: Of the State's total population of 4,556,155, 1,366,352 reside in these twenty-eight counties. (1960 census)

The 1916 constitutional amendments, including Article II, Section 29, became effective January 10, 1917.

In 1919, the General Assembly enacted "An Act to Appoint Justices

of the Peace for the Several Counties of North Carolina." Public Laws of 1919, Chapter 99. A similar statute, referred to as the Omnibus Justice of the Peace Act, has been enacted at each succeeding session of the General Assembly. To illustrate: The 1919 Act, in respect of Alleghany County, appoints as justices of the peace in the designated townships the individuals whose names are set forth below.

"ALLEGHANY COUNTY.

"*Cherry Lane Township* — A. J. Bryan, Coy McCann.
Whitehead Township — T. A. Edwards, Joseph Wagoner.
Glade Creek Township — J. W. Belvins.
Cranberry Township — C. L. Upchurch."

In like manner, the 1919 Act appoints individuals as justices of the peace in designated townships in eighty-eight other counties.

To my mind, an act *appointing* a named individual as a justice of the peace for a designated township in a particular county is a local act relating to the appointment of a justice of the peace. Apparently, it was suggested that Article II, Section 29, might be circumvented by the inclusion of all such local acts in one (omnibus) statute.

No case has been presented to this Court for judicial determination as to the constitutionality of such Omnibus Justice of the Peace Act. However, prior to the enactment of said 1919 Act, the General Assembly, by resolution, requested this Court for advice as to whether "there is any provision in Article II, section 29, which would prohibit the General Assembly from enacting an omnibus justice of the peace bill." It appears further that this Court, in a "MESSAGE" addressed to the General Assembly and signed (apparently for the Court) by *Chief Justice Clark,* advised the General Assembly that this Court was "of the opinion that the bill is constitutional and not in contravention of the recent amendment, Article II, section 29, which prohibits the enactment of any local, private or special act relating to the appointment of justices of the peace, etc., but authorizes general laws regulating this and other matters contained in the section referred to." Advisory Opinions, 227 N.C. 717.

It is difficult for me to comprehend the (unstated) legal basis of said Advisory Opinion. It seems to me each such appointment is in fact and in law a local act and that its essential nature is not changed by the device of bracketing multiple local acts in a single statute. Indeed, with due deference, it is my opinion that the appointment by the General Assembly of designated individuals to serve as justices of the peace is precisely what Article II, Section 29, was intended to

prohibit. For present purposes, this comment is sufficient: If such Omnibus Justice of the Peace Act is not violative of Article II, Section 29, certainly there is no substantial basis for holding *an enabling act* such as that here challenged, which does not appoint any person as justice of the peace in any township or county, unconstitutional as violative of Article II, Section 29.

A 1919 Act (Public Laws of 1919, c. 277) entitled "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF RECORDERS' COURTS FOR MUNICIPALITIES AND COUNTIES IN THE STATE OF NORTH CAROLINA," conferred authority for the establishment of such courts. Section 64 thereof provided that the 1919 Act "shall not apply" to forty-seven designated counties. Section 64 of the 1919 Act was codified as C.S. 1608. A 1921 Act (Public Laws of 1921, c. 110, s. 16) amended C.S. 1608 by striking Granville, Iredell and Cherokee from the list of *excepted counties,* thereby increasing the number of counties under the 1919 Act from fifty-three to fifty-six. Thereafter, the Iredell County Recorder's Court was established in the manner prescribed by the 1919 Act.

One Sherrill Harris, in *habeas corpus* proceedings, asserted he was unlawfully imprisoned pursuant to a purported judgment of said Iredell County Recorder's Court, and that the judgment was invalid because the statutes purporting to authorize its establishment were unconstitutional as violative of the provision of Art. II, Sec. 29, Constitution of North Carolina, that "(t)he General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court."

This Court in *In re Harris* (1922), 183 N.C. 633, 112 S.E. 425, held that neither the 1919 Act nor the 1921 Act violated said provision of Art. II, Sec. 29. Primary consideration was devoted to the constitutionality of the 1919 Act. *Hoke, J.,* (later *C. J.*), *for a unanimous Court,* stressed the fact that the term "local act" had no fixed or generally accepted meaning. Hence, he reasoned, whether a particular act should be considered "local" must be determined, to a considerable extent, with reference to its nature and purpose and with reference to the nature and extent of the locality to which it applies.

The 1919 Act, as amended, is now codified as G.S. Ch. 7, Subchapter VI, "RECORDERS' COURTS," comprising Articles 24-29, inclusive. G.S. 7-264, as amended, provides that "(t)his subchapter shall not apply" to twenty-two designated counties. It is applicable to seventy-eight counties.

A 1953 Act (S.L. 1953, c. 998) amended G.S. 7-264 by striking

Johnston County from the list of excepted counties and by providing specifically that G.S. Ch. 7, Art. 24 should be applicable to municipalities in Johnston County. Thereafter, the Recorder's Court of Benson was established in the manner provided in said G.S. Ch. 7, Subchapter VI.

In *State v. Ballenger* (1957), 247 N.C. 216, 100 S.E. 2d 351, Ballenger asserted that the Recorder's Court of Benson was not a legally constituted court, that it lacked the power to issue the warrant on which he was tried in said court and in the superior court, and that the superior court had no jurisdiction to try him on such warrant. He attacked the Recorder's Court of Benson on the ground that the statutes authorizing its establishment were unconstitutional as violative of Art. II, Sec. 29.

This Court, in *S. v. Ballenger, supra,* basing its decision directly on *In re Harris, supra,* upheld the validity of the Recorder's Court of Benson and held constitutional the statutes under which it was established. *Denny, J.,* for a unanimous Court, said: "Consequently, we hold that Chapter 998 of the Session Laws of 1953, eliminating Johnston County from the list of counties excepted in G.S. 7-264 and making the provisions of Article 24 of Subchapter VI of Chapter 7 of the General Statutes, as amended, applicable to the municipalities in Johnston County, was tantamount to a re-enactment of *the general law* making it applicable to Johnston County." (My italics) Obviously, this Court did not consider the authority of *In re Harris, supra,* had been impaired by *State v. Dixon, supra,* or by any other decision of this Court.

While not directly involved, it seems appropriate to advert to the following statutory provisions.

1. G.S. Ch. 7, Subchapter VIII, consisting of Articles 33, 34 and 35, *confers authority* for the establishment of "CIVIL COUNTY COURTS." Art. 33, G.S. 7-308 *et seq.,* is not applicable to thirty-seven designated counties. G.S. 7-331. Art. 34, G.S. 7-332 *et seq.,* is not applicable to nine designated counties. G.S. 7-350.

2. G.S. Ch. 7, Subchapter IX, consisting of Art. 36, G.S. 7-384 *et seq.,* which *confers authority* for the establishment of "COUNTY CRIMINAL COURTS," is not applicable to sixty-two designated counties. G.S. 7-404.

3. G.S. Ch. 7, Subchapter X, consisting of Art. 37, G.S. 7-405 *et seq.,* which *confers authority* for the establishment of "SPECIAL COUNTY COURTS," is not applicable to sixty designated counties. G.S. 7-446.

Presumably, all of these enabling acts were adopted by the

General Assembly in reliance upon the decision of this Court in *In re Harris, supra.*

Emphasis is placed upon the diversity, in respect of geography, business, industry, wealth and population, as between the twenty-eight counties covered by the 1949 Act. Suffice to say, such diversity exists as between the counties covered by each of the enabling acts now codified as G.S. Ch. 7, Subchapters VI, VIII, IX and X. These facts are noted:

1. The seventy-eight counties to which Articles 24-29, inclusive, now applies include Mecklenburg (272,111), the most populous, and Tyrrell (4,520), the least populous. G.S. 7-264. Moreover, when the 1919 Act was held constitutional in *In re Harris, supra,* it applied to Mecklenburg and Tyrrell. Articles 24-29, inclusive, constitute a codification of said 1919 Act, as amended. When *In re Harris, supra,* was decided, fifty-six counties were covered. Now, seventy-eight counties are covered.

2. The sixty-three counties to which Article 33 applies include Mecklenburg and Tyrrell. G.S. 7-331.

3. The ninety-one counties to which Article 34 applies include Mecklenburg and Tyrrell. G.S. 7-350.

4. The thirty-eight counties to which Article 36 applies include Mecklenburg and Tyrrell. G.S. 7-404.

5. The forty counties to which Article 37 applies include Guilford (246,520) and Tyrrell. G.S. 7-446.

If the 1949 Act is vulnerable for the reason assigned, it would seem that each of the enabling acts now codified as G.S. Ch. 7, Subchapters VI, VIII, IX and X, is equally vulnerable on the same ground. In view of our decision in *In re Harris, supra,* followed by our decision in *State v. Ballenger, supra,* I am unwilling to cast a cloud upon the validity of past and future acts of inferior courts established pursuant to these enabling acts.

I am advertent to *State v. Williams,* 209 N.C. 57, 182 S.E. 711, where this Court held unconstitutional, as violative of Article II, Section 29, a 1925 Act (Public-Local Laws of 1925, c. 286) purporting to authorize the Board of County Commissioners of Cabarrus County to establish township recorders' courts. I agree that such an (enabling) act, applicable to a single county, must be considered a *local* act. Indeed, as indicated above, it was so considered by the General Assembly.

It is noted: The provision in Article II, Section 29, is against the *establishment* of courts inferior to the superior court by local, private or special act. Article II, Section 29, did not uproot or dis-

turb inferior courts *theretofore established* under local acts. Moreover, it was held that Article II, Section 29, did not prohibit the amendment (by local act) of local acts under which such pre-existing inferior courts had been established. *Provision Company v. Daves,* 190 N.C. 7, 128 S.E. 593; *State v. Horne,* 191 N.C. 375, 131 S.E. 753; *Williams v. Cooper,* 222 N.C. 589, 24 S.E. 2d 484; *Board of Managers v. Wilmington,* 237 N.C. 179, 188, 74 S.E. 2d 749; *In re Wingler,* 231 N.C. 560, 565, 58 S.E. 2d 372; *State v. Norman,* 237 N.C. 205, 210, 74 S.E. 2d 602; *State v. Furmage,* 250 N.C. 616, 619, 109 S.E. 2d 563. Hence, since the adoption of Article II, Section 29, our inferior courts have consisted of (1) *pre-existing* inferior courts established by local acts, a considerable number, and (2) inferior courts established under one of the enabling acts now codified in G.S. Chapter 7. As to local acts purporting to modify, in respect of a particular county, the provisions of such an enabling act, it is sufficient to say that the validity of such local acts has not been determined by this Court.

In *State v. Dixon, supra,* this Court, by a majority of four to three, held invalid "AN ACT TO DEFINE REAL ESTATE BROKERS AND SALESMEN; TO PROVIDE FOR THE REGULATION, SUPERVISION AND LICENSING THEREOF; TO CREATE A REAL ESTATE COMMISSION, AND PRESCRIBING THE POWERS AND DUTIES THEREOF; TO PROVIDE FOR THE ENFORCEMENT OF SAID ACT AND PENALTIES FOR THE VIOLATION THEREOF." Public Laws of 1937, Chapter 292.

In summary, this 1937 Act provided: To engage in the business of real estate broker or salesman in violation of its provisions was declared a misdemeanor, punishable as therein provided. It created the "North Carolina Real Estate Commission." Only persons licensed by the Commission could engage in such business. Applications, fees and qualifications for such license were prescribed. No license would be issued unless and until the applicant had passed an examination conducted by the Commission. While all other provisions purported to vest statewide authority in the "North Carolina Real Estate Commission," a final section (section 17½) provided that "this Act shall not apply" to sixty-four named counties.

The 1937 Act was held invalid on two separate grounds, *viz.:*

1. It was held unconstitutional as a local act regulating trade in violation of Article II, Section 29.

2. It was held invalid because in conflict with the provision of the Revenue Act providing that real estate brokers and salesmen "shall apply for and obtain from the Commissioner of Revenue a *State-wide license* for the privilege of engaging in such business or profession."

This excerpt from the opinion of the Court, by *Clarkson, J.*, indicates the emphasis placed upon the second ground of decision: "All real estate brokers in the State are required to pay the State privilege tax and all are subject to the same general laws in the conduct of their trade; yet, if the provisions of the instant act be upheld, a real estate broker who had paid his State tax would be deprived of the privilege of carrying on his trade in more than one-third of the counties in the State. For example, a broker seeking to sell a farm lying in two counties would be merely an honest business man conducting a legitimate business if the transaction were completed on one corner of the farm, but would be criminal if it were completed at another point on the same farm. The fatal shortcoming of the 1927 Real Estate Brokers' Act was not so much that it was a local act as it was that the act discriminated *within* a class, to wit: the real estate brokers licensed to do business throughout the State."

With reference to the first ground of decision, the Court in *State v. Dixon, supra,* does not purport to overrule *In re Harris, supra.* Indeed, the opinion quotes with approval from *In re Harris, supra.* The only ground on which the *Harris* case is distinguished in this: In *Harris* fifty-six counties were covered and forty-four were excepted. In *Dixon,* thirty-six counties were covered and sixty-four counties were excepted.

Two further observations in relation to *State v. Dixon, supra*: The second ground of decision, standing alone, was sufficient to uphold the lower court's allowance of Dixon's motion for arrest of judgment. In my view, whether an (enabling) act applies to more or less than half of the total number of North Carolina counties is not a proper test for determining whether a particular statute is a local act within the meaning of Article II, Section 29.

The converse of the factual situation in *State v. Dixon, supra,* was considered in *State v. Felton,* 239 N.C. 575, 80 S.E. 2d 625, where it was held that an act purporting to legalize gambling in Currituck County in contravention of the general criminal laws of the State was invalid.

It is noted that statutory provisions, rather than the provisions of Article VII, Section 5, of the Constitution of North Carolina, now govern the manner in which justices of the peace are to be selected. G.S. 7-112.

In summary:

1. This Court has not passed upon any statute challenged as unconstitutional under Article II, Section 29, on the ground it was a local act relating to the appointment of justices of the peace. (Apparently,

the Court recognizes as authoritative the said 1919 Advisory Opinion relating to the 1919 Omnibus Justice of the Peace Act.)

2. This Court has upheld the constitutionality of the statute now codified as G.S. Chapter 7, Articles 24-29, inclusive, in *In re Harris, supra,* and *State v. Ballenger, supra,* notwithstanding extreme diversity as between covered counties and as between excepted counties. It has declared unconstitutional an enabling act providing for the creation of township recorders' courts in Carbarrus County. *State v. Williams, supra.*

3. In *State v. Dixon, supra,* the challenged statute undertook to declare criminal in certain counties conduct that was authorized and lawful under the general laws of the State.

4. This Court has declared unconstitutional statutes relating to or regulating matters other than courts as local acts violative of Article II, Section 29. These statutes, principally, relate to a single county, *e.g., Idol v. Street,* 233 N.C. 730, 65 S.E. 2d 313, and cases cited.

In *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310, five counties were involved. In that case, a 1949 Statute purported to authorize the Municipal Board of Control to "enter an order creating a municipal corporation." This 1949 Statute was held invalid as an attempt to delegate legislative power and authority contrary to the provisions of Article II, Section 1, of the Constitution of North Carolina. Since the alleged corporate status of Coastal Highway was based on an order of said Municipal Board of Control, this Court held plaintiff had no legal corporate status. Thereafter, the Court proceeded to declare unconstitutional on the ground it violated Article II, Section 29, an amendatory 1951 Act under which Coastal Highway's authority as therein defined was "(t)o construct, maintain, repair and operate the toll road, toll bridge or turnpike at such location within the North Carolina Counties of Currituck, Dare, Tyrrell, Hyde, and Carteret as shall be adopted by the municipal corporation." It is noted that the *Coastal Highway* case involved a particular project.

In *In re Harris, supra, Hoke, J.* (later *C.J.*), fully advertent to conflicting definitions by text writers and by courts of other jurisdictions, reached the conclusion the term "local act" as used in Article II, Section 29, had no fixed or generally accepted meaning. If it had no fixed or generally accepted meaning when Article II, Section 29, was adopted, I am unwilling to attempt now to define the term with exactitude. In short, now as then, whether a particular act should be considered local must be determined, to a considerable extent, with reference to its nature and purpose and with reference

to the nature and extent of the locality to which it applies. In the light of our prior decisions, I cannot say the 1949 Act, an enabling act applicable to twenty-eight counties with a population of 1,356,352, is a local act within the meaning of Article II, Section 29.

The Court recognizes the well established rule that all reasonable doubt is to be resolved in favor of the validity of an act of the General Assembly and that such act will not be declared unconstitutional unless it is clearly so. In my opinion, application of this principle requires that the constitutionality of the 1949 Act be upheld. Hence, I vote to affirm Judge Campbell's judgment.

STATE OF NORTH CAROLINA, EX REL NORTH CAROLINA UTILITIES COMMISSION v. PIEDMONT NATURAL GAS COMPANY, INC.

(Filed 3 May, 1961.)

1. Utilities Commission § 1—

The purpose of regulation of public utilities is to protect the interest of the public to the end that adequate service is provided at reasonable rates, and in fixing such rates the Utilities Commission must be fair to both the producer and to the consumer.

2. Utilities Commission § 3: Gas § 3—

In fixing the rate for a public utility, the Utilities Commission must first ascertain the value of the property used in providing the service, and it may then calculate the rate which will produce a fair return upon such rate base.

3. Same—

In determining the value of the investment of a utility used in providing its services, the Utilities Commission must take into consideration replacement costs in order to determine the present value of the utility's facilities, and evidence of such trended costs deserves weight in proportion to the accuracy of the tests and their intelligent application.

4. Same: Utilities Commission § 5—

Where a utility introduces expert testimony as to replacement costs of its facilities based upon charts and indexes of other utilities of like classification in the same territory, the Utilities Commission must weigh such testimony in the light of the accuracy of the tests and their intelligent application, and it is error of law for the Commission to disregard such evidence or give it only a minimal consideration.

5. Same—

It is error for the Utilities Commission to apply the national average

of promotional costs as conclusive in determining the reasonableness or excessiveness of promotional expenditures by a gas company when the evidence discloses that the company had recently changed over from manufactured to natural gas and was in the process of expanding its facilities into new territory in competition with electricity and oil.

6. Same—

Where a utility is currently investing large amounts of capital in expansion, the Utility Commission should determine the capital invested as of the time the rates fixed by it are to be effective, rather than the average net investment of the utility for the entire test year, since the rates fixed are prospective.

7. Same—

Where the Utilities Commission fixes the rate base of a utility on the basis of original acquisition cost alone, without taking into consideration replacement costs or capital invested in new construction, the findings of the Commission as to the value of the property used in providing the service is not supported by competent, material and substantial evidence.

8. Utilities Commission § 3: Gas § 3—

In fixing the rate of a public utility, the Utilities Commission should find the fair value of the utility's facilities, its operating expenditures, including capital consumed, and should fix such rate of return on the investment as will enable the utility by sound management to pay a fair profit to its stockholders and to maintain and expand the facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise.

APPEAL by the North Carolina Utilities Commission and North Carolina Association of Launderers and Cleaners, Inc., from *Campbell,* J., MECKLENBURG Superior Court in Chambers, January 16, 1961.

Piedmont Natural Gas Company, Inc., (hereafter called Piedmont) is a New York corporation domesticated and doing business in North Carolina. It originated this proceeding on October 16, 1959, by filing with the North Carolina Utilities Commission (hereafter called the Commission) for its approval, a revised rate schedule showing a general increase in its charges for natural gas service in North Carolina. Piedmont alleged its proposed increased rate was made necessary by the fact that its supplier, Transcontinental Pipe Line Corporation, (hereafter called Transco) had increased its charges for gas by more than $543,000 per year effective November 18, 1959. On November 3, 1959, the Commission, by order, refused to approve the rate increase and initiated this investigation to determine the lawfulness of the proposed rate schedule. Piedmont applied for and was granted permission to put into effect the increased rates under a bond which required a refund of any charges found to be excessive. On December 30, 1959, by order of the Commission, the North Carolina Associ-

ation of Launderers and Cleaners, Incorporated, (hereafter called the Association) a customer of Piedmont, was permitted to intervene and participate in the hearings.

The Commission began its hearings on January 12, 1960. Buell G. Duncan, President of Piedmont, John F. Watlington, Jr., President of Wachovia Bank & Trust Company, E. T. Anderson, Vice President and Treasurer of Piedmont, Edward H. Gannon, Manager of the Utilities Accounting Department of Stone & Webster Service Corporation, Frank B. Muhlfeld, Vice President of Stone & Webster, testified as witnesses for Piedmont. W. H. Cleveland, Senior Accountant on its staff, testified for the Commission.

The evidence disclosed that in May, 1951, Piedmont acquired from Duke Power Company its gas manufacturing, storage and distribution systems located in Charlotte, Salisbury, Spencer, East Spencer, High Point, Greensboro, Winston-Salem, Burlington, and Graham, North Carolina. Likewise Piedmont acquired similar properties located in a number of cities in South Carolina. The discussions hereafter will relate entirely to that part of Piedmont's business in the State of North Carolina.

Immediately after acquiring the properties from Duke, Piedmont began to change over from manufactured to natural gas which it purchased from Transco. The deliveries to Piedmont were made at Transco's appropriate terminal on its pipe line. The conversion over to natural gas was complete in 1952. Piedmont acquired additional facilities for distribution and sale of natural gas to customers in Huntersville, Thomasville, Randleman, and Asheboro. Plans exist for extension of this service to other communities. In order to distribute natural gas, Piedmont has laid approximately 160 miles of lateral pipe line through which it delivers gas from Transco's trunk line.

Prior to October 16, 1959, (effective date of proposed rate increase) Piedmont had operated under a rate schedule which became effective with the Commission's approval in June, 1959. Piedmont's proposed rate increase was triggered by and designed to meet the additional cost of natural gas resulting from Transco's increased rate effective November 18, 1959, with Federal Power Commission's approval. Under Transco's new rate the increased cost to Piedmont for the 12 months test period would have been more than $543,000. In addition, Piedmont would have been due the State of North Carolina more than $24,000 as a gross receipts tax. Piedmont's new rate did nothing more than absorb the increased cost resulting from Transco's rate increase.

For the purposes of the investigation the Commission chose the 12 months ending October 31, 1959, as the test period from which to determine the fair value of Piedmont's property, its operating

revenue, its working capital, its allowable deductions, and the rate required to produce a fair return.

Mr. Duncan, for Piedmont, testified before the Commission:

"On May 18, 1959, Transco filed with the Federal Power Commission, which regulated the rates charged by Transco to its customers including Piedmont, revised tariffs which were made effective November 18, 1959, subject to refund to Transco's customers to the extent not subsequently approved by the Federal Power Commission. Piedmont is presently paying these increased rates and must continue to pay such rates for the natural gas it receives from Transco until the rates are finally determined by the Federal Power Commission. Piedmont has intervened in the proceedings instituted by Transco before the Federal Power Commission and plans to oppose the requested increase in the rates charged by Transco. However, in the meantime we must pay the full amount of the increase in the demand charge and commodity charge proposed by Transco. At this time it is not known what the final decision of the Federal Power Commission will be. In order to protect Piedmont from losses by having to absorb such increase in the charges by Transco, as may be approved by the Federal Power Commission, we must now begin collecting from our customers that increase in operating expenses. . . . If such increase had been in effect throughout the twelve months ending October 31, 1959, the increase in Transco's rates for the twelve months period would have been $647,457; of this amount $535,113 would have been applicable to North Carolina. Due to the six per cent gross receipts tax charged by the State of North Carolina, an additional $32,581 would have to be collected by Piedmont in order to offset the tax payment. Therefore, Piedmont would have to increase its rates $680,038, $567,694 of which is applicable to North Carolina operations, to recover the entire increase in its cost. However, the new rates will produce an increase in revenue of $543,022 in North Carolina, so the company will not recoup all of the increased cost, falling short by $24,672 in North Carolina. . . . It is my opinion that it will be difficult and probably impossible to attract new capital required, even at extremely high interest rates, if we have to absorb any part of the increased payments to Transco . . ."

Mr. Watlington testified: "Piedmont Natural Gas Company, because of the fact that its rate of growth has been high, has tended to make proportionately a larger usage of bank financing than is generally customary in the utility field. . . Today there

exists a substantial demand for funds in relation to the available money in the market. This is caused by the need for funds by new companies and also by the substantial need of old, well-established companies due to expansion and inflation. Therefore, dollars in the securities markets are being actively competed for by many users and this is affected by the rate of earnings of the company. The company with an unfavorable rate of earnings is at a substantial disadvantage in this market. In my opinion, the long term effect would be to increase substantially the financing cost of the company. Obviously the sound and intelligent investor is going to choose the company with an attractive earnings picture and is going to ignore the one with a poor record. This is a more important factor today than it has been at any other time in my experience in banking. I have an opinion as an experienced banker, business man and director of the company as to whether the rate increases requested are necessary. In my opinion, this is of tremendous importance if the company is to continue to be in a position to serve its customers and to contribute materially to the economic expansion of our area. . . ."

Mr. Anderson testified: " . . . I am responsible for the direction of all accounting and financial activities including the keeping of reports to this Commission and other financial and statistical reports of the company. In addition, I have the primary responsibility in the company for the design of gas rates . . . Based on the sales of gas for the Test Year, the New Rates will produce increased revenues of $659,783 for the Total Company and $543,022 for North Carolina only. However, this increased revenue does not completely recover the increased costs to the Company resulting from the Transco rate increase, falling short by $24,672 for North Carolina. . . . In my opinion, the new rates are definitely fair and reasonable. . . . Our gross revenues in 1959 exceed the gross revenues of 1958 by about one million dollars. It would be safe to say the last three years our revenues have increased by at least one million dollars each year. We anticipate that growth right on. We hope for it. But our balance available for common is not going to increase proportionately, 1959 compared to 1958, and after all, that is what we need to attract capital."

Mr. Gannon testified: "I am Assistant Treasurer and also Manager of the Utility Accounting Department and the Special Accounting Department of Stone & Webster Service Corporation. No, sir, I am not qualified and do not propose to testify regard-

ing engineering matters. It is my feeling that I am merely taking the original costs as shown by the books of the company and translating that to prices at the present day. . . . By use of the Handy-Whitman Index, Sir, and I have tested the costs experienced by the company against the Handy-Whitman Index to determine the difference that would exist in the two methods. . . . The Handy-Whitman Index is in common use in the utility field. The purpose of Exhibit 10 is to translate the dollars of original cost of utility property in October 31, 1959, to prices as of the same date based on the Handy-Whitman Index of Public Utility Construction Costs, . . . The term original cost as used herein is the cost of utility plant when first devoted to public service. The Handy-Whitman Index contains public utility costs segregated as to geographical divisions of the United States and the index numbers used in my exhibit are those that pertain to the South Atlantic Division. The State of North Carolina is included in this division of the Index. I used the Handy-Whitman Index in this valuation study because it has been compiled especially for gas and electric utilities and is used not only by the industry but also by a number of public service commissions and many valuation engineers. . . . The original cost of the utilities property applicable to the operation of Piedmont in the State of North Carolina at October 31, 1959, amounted to $24,730,234 and on the basis of this study had an undepreciated trended original cost of $36,881,452. This is exclusive of any amount for going value and working capital. . . . . In my judgment the net trended valuation of $32,570,428 is representative of the present value of the property of the Company in its present physical condition. In other words, the valuation procedure which I have employed translates the original cost of the property to prices as of the present day. That is a method of arriving at a replacement cost depreciated. This constitutes a determination of the current cost valuation of the company's investment used in rendering gas service based on the use of the Handy-Whitman Index."

Mr. Gannon has testified as an expert in respect to the value of utility properties before commissions and courts in many of the states and in three Canadian provinces.

Mr. Muhlfeld testified: "As a Vice President (of Stone & Webster Service Corporation) . . . In connection with my work for clients I have testified before various state public utility commissions regarding the advisability and feasibility of issuing cer-

tain types of securities and also the earnings pattern necessary to attract capital. . . . Basically a gas public utility or, for that matter, any public utility should be allowed a return sufficient to maintain investor confidence in its financial soundness and enable it to finance a necessary expansion program. The crux of the problem in determining the proper rate of return for any utility is the determination of what earnings are required to enable it to compete successfully with other companies for capital. . . . I have made studies to show how Piedmont compares in relation to other companies from the standpoint of earnings coverage of its securities. Piedmont is a straight natural gas distribution company that purchases all of its gas requirements from a pipeline and has annual operating revenues in the range of 10.5 million dollars. Therefore, I have chosen nine companies which in my opinion are comparable with Piedmont. . . . I have prepared Exhibit 11, Sheets 1 to 10, showing the relative position of Piedmont with these nine companies. . . . I must further conclude that the full amount of the rate increase requested by Piedmont is necessary if Piedmont is to compete in the money market on even a reasonably satisfactory basis with other companies . . . When compared with the 8% earnings of the nine selected companies, Piedmont shows actual earnings of 5.4% actual, after giving effect to sale of convertible preferred stock, for the twelve months ending October 31, 1959, and for the pro forma test year before and after the rate increase, earnings of 3.70% and 4.61%, respectively. . . . Inasmuch as this comparison is inclusive of all segments of the capital structure, the earnings shown for Piedmont simply bear out my conclusions that the rate increase being requested in these proceedings is an absolute minimum to permit the company to compete in the money market on any kind of a reasonable basis."

Mr. Cleveland testified for the Commission: "The capital structure of $20,825,399 (Exhibit 1) is result of allocating to North Carolina on a net average investment ratio the capital structure of the total company. The total company capital structure includes capital for merchandising and jobbing, conversion costs, acquisition costs for the property purchased in excess of net original cost, and, of course, construction work in progress on which interest during construction was taken and which has been excluded from the rate base. This construction work in progress for North Carolina alone amounts to $2,104,681. . . . The figure of capitalization referred to (Exhibit 2) is $17,456,014 . . . (the difference is accounted for by) the large amount of construction

> work in progress. . . . It is in the capital requirement, but it hasn't produced anything to cover the requirement. It is eliminated out of the capital requirement in Exhibit No. 2. . . . The net operating income adjusted doesn't include earnings to cover that capital. . . . These examinations cover formal matters resulting in rate hearings as well as routine matters. Such examinations are made in the field utilizing company books and records and the reports are prepared in this (Commission's) office."

The intervenor did not offer evidence.

The foregoing is the essence of the evidence which each party illustrated by tables and charts. At the conclusion of the hearing the Commission made detailed findings of fact designed, as it states, to answer two questions: (1) What is the fair value of the properties used and useful in rendering the intrastate service for which the rates and charges are being established? (2) What is a fair rate of return both to the company and to the public based on the established fair value rate base?

The Commission found: "Mr. Gannon was permitted to testify over objections that the undepreciated trended original cost of Piedmont's North Carolina properties, exclusive of any allowance for working capital, was $36,881,452 as of October 31, 1959. After allowances for depreciation reserves based on 'per cent condition' tables, the net trended valuation, according to Witness Gannon, was $32,570,428 as of October 31, 1959.

"Even when performed by qualified engineers and based on actual inspections of the physical properties of the utility, trended original cost studies have been accorded very little weight by the regulatory commissions throughout the country."

With respect to the trended original cost as testified to by Piedmont's witnesses, the Commission said: "The probative force of the evidence of trended original cost which was admitted in the case is minimal, but we have not excluded it from consideration."

During the test period Piedmont actually expended $386,000 on sales promotion. The Commission allowed $200,000 of the amount, eliminating $186,000 on the ground the amount exceeded the national average. The Commission concluded the fair value in its present condition of Piedmont's properties was $18,400,000 and a fair rate of return is six per cent. Based upon the findings, the Commission ordered the proposed new rate canceled, the old rate reinstated, and a refund with interest of all payments in excess of the old rate.

Commissioner Worthington filed a concurring opinion in which he stated:

". . . I concur in the ultimate result reached. It may well be that the assumptions, suggestions and the departure from customary and uniform procedure used and followed in this case will not occur in the future; however, it should be fully understood that my concurrence here does not carry my approval of the drastic departure from customary procedure heretofore followed by the Commission. . . . Of course, if the rates allowed are properly colored within the reasonable predictable future to the extent that there is a tremendous growth in revenue and income of the Company, earnings may be such as to produce a more favorable situation than the present outlook is the case; however, we must always take into consideration the fact that while the rates should be considered in the light of the 'colored by the reasonably predictable future' the same consideration must be given to additional expense in operations and expansion. These things have prime importance but in the light of the upcoming investigation of the company's operations, the actual experience under the increased rates will be available and the effect will be much more readily ascertainable. It does not appear that the rates here allowed will necessarily be confiscatory."

Here are two paragraphs from Commissioner Long's concurring opinion:

"I am well aware that this company has a high debt ratio which tends to minimize the company's requirements for servicing its capital and that the use of debt capital provides the company with a large tax deduction.

"I think is is necessary for a company with so high a debt ratio which faces so much expansion to earn a larger return on its invested capital than the 9 per cent average earned by the Nation's fifty largest and best-established utilities. I am not willing, without evidence, to assume the company's new plant will not produce earnings which, when added to those calculable from the company's old plant, will be entirely adequate, and I do not think the company should expect us to do so."

Chairman Westcott dissented in part, saying:

"It appears to me that the record in this case is deficient for the purpose of rendering a decision at this time, for that it fails to place before us the company's operating experience resulting from the increased cost of gas, on the one hand, and the effect of revenues from a heavy program of construction work in progress

not fully devoted to public use during the test period, on the other hand.

". . . It is my opinion that we should have more conclusive evidence before us before rendering this important decision, particularly in light of the fact that the Commission has directed its Accounting Staff to make an examination of the current operations of the subject company and report to us its findings for the twelve months' test period ending May 31, 1960."

From the Commission's order, Piedmont appealed to the Superior Court of Mecklenburg County upon exceptions to certain findings of fact, to the conclusions of law, to the order cancelling the new and reinstating of the old rate, and requiring refund. After hearing upon the record, Judge Campbell entered judgment reversing the Commission. The part of the judgment requiring review here is quoted:

"NOW, THEREFORE, IT IS CONCLUDED, ORDERED, ADJUDGED, AND DECREED: That the Decision and Order of the Utilities Commission should be, and is hereby, reversed and remanded, for that in said Decision and Order the Commission committed reversible error and the substantial rights of the Appellant have been prejudiced because the findings, inferences, conclusions and decisions of the Order of the Commission fail to comply with the requirements of the General Statutes of North Carolina governing such determinations, are affected by errors of law, are unsupported by competent, material, and substantial evidence in view of the entire record as submitted, and are arbitrary and capricious; in the following respects:

"1. The Order of the Commission erred in fixing the rate base at $18,400,000, and in failing to make a proper and true determination of the fair value of the utility property of Appellant based upon evidence and in compliance with the General Statutes as construed by the Supreme Court of North Carolina. The rate base of $18,400,000 fixed by Order of the Commission represents only a nominal addition to the original cost less depreciation, or book value, of the property, and its determination fails to give effective consideration and weight to the present or replacement cost of the property and other factors, as required by law, the Commission being free to take additional evidence on fair value if deemed necessary.

"2. The Commission failed to give effective consideration and weight to the testimony of witness E. H. Gannon concerning the

present or replacement cost of Appellant's property and the evidence of trended cost developed from the Handy-Whitman Index which translated the original cost of the property into prices as of the present, and failed both in its ruling and finding on said evidence and in its determination of the amount of the rate base to attribute true and effective probative value or force to such evidence.

"3. Inasmuch as the Order in this case does not expressly state how the determination of rate base was made, the Court deems it appropriate to state that in connection with its reconsideration of this cause upon remand, it would not be proper for the Commission to arrive at the fair value rate base by capitalizing earnings under the existing rates at the determined rate of return, or by any such arbitrary calculation whereby rate base is a mathematical product or quotient from other determinations, instead of making, as the law requires, a true finding of the fair value of the property based upon evidence of value independent of other determinations necessary in the proceeding.

"4. Whereas the Commission has the power and right upon a proper showing of excessive and unreasonableness to disallow or reduce a utility's operating expenditures for rate-making purposes, and although Appellant's expenditures for sales promotion during the test year does seem somewhat high to the Court, the competent evidence in this record is not sufficient to clearly establish the excessiveness of the actual expenditure of $386,483.73 for sales promotion by Appellant and an abuse of management's discretion on this matter which the Order held to be 'strongly and peculiarly affected by managerial discretion.' Nor is there sufficient evidence in the record on which to base the finding in the Order that $200,483.73 is a reasonable expenditure for this purpose; the unspecified national average of per customer expenditure for sales promotion purposes relied upon in the Order, without evidence as to the comparability to Appellant of the companies used in the average, or the similarity of the items included under the heading of sales promotion, does not rise to the level of the evidence required as a basis for finding the expenditure of this particular utility excessive and unreasonable, or for fixing the maximum expenditure for rate-making purposes which is determined to be reasonable.

"7. The Order disapproving the new rates and requiring Appellant to absorb the entire increase in the cost of gas erred in that it appears from the record that the old rates, with the addition of the large increase in cost of gas, will not produce suf-

ficient earnings to permit the utility to meet its existing capital requirements and permit proper financing for future expansion, permitting the utility to compete in the market for capital funds, as established by the competent, material, and substantial evidence in the record.

"9. The substantial reliance and weight placed by the Commission on assumption and speculation concerning anticipated future increases in revenues and potential earnings 'which do not appear in the test period or anywhere in the record' in determining the reasonableness of the rate of return fixed and the need for the increased rates, is unsupported by the record and is improper, especially since the Order does not give similar weight and consideration to potential and anticipated increase in costs and expenses. . . . While consideration of the probable earning capacity of the property under the rates proposed and the income to be produced by the greater amount of property in service at the end of the test period is permitted by the law, rates must essentially be regulated on the basis of fixed and known operations and earnings rather than predicted and speculative future operations and earnings without support in the record, inasmuch as the Utilities Commission has the continuing authority to initiate proceedings and order rate reductions at any time actual earnings do in fact increase above a just and reasonable level.

"In view of the disposition made in this Judgment of the major grounds of appeal urged by Appellant and the necessity of remanding the case to the Commission, a ruling upon the other Exceptions of Appellant in this Judgment is not necessary.

"Accordingly the Order of the Utilities Commission is reversed, and this cause is remanded to the Commission for a modification of its Order and a determination of just and reasonable rates, in accordance with the conclusions set forth in this Judgment.

"This the 25th day of January, 1961."

From this judgment the Commission and the Intervenor appealed, assigning errors.

Winborne, Winborne, & Winborne, for the North Carolina Association of Launderers and Cleaners, Inc., appellants.

Thomas Wade Bruton, Attorney General, F. Kent Burns, Assistant Attorney General, for the North Carolina Utilities Commission, appellant.

McLendon, Brim, Holderness & Brooks, for defendant, appellee.

HIGGINS, J. The right of the State to regulate utility rates springs from the monopolistic character of the business authorized by its franchise. However, the management, operation, and control of the utility are primarily its own business. The purpose of regulation is to protect the public interest and see to it that adequate service is provided at reasonable rates. In return for the franchise, the utility gives up its right to make private rate contracts with its customers, and submits to the regulation of its rates. In exercising regulatory power, the Commission, acting for the State, must be fair both to the producer and to the consumer.

In fixing a rate the Commission must ascertain the value of the property used in providing service. "Necessarily, what is a 'just and reasonable' rate which will produce a fair return on the investment depends on (1) the value of the investment—usually referred to . . . as the Rate Base—which earns the return; (2) the gross income . . . from authorized operations; (3) . . . operating expenses . . . must include amount of capital . . . currently consumed in rendering the service; and (4) what rate constitutes a just and reasonable rate of return on the predetermined Rate Base." *Utilities Com. v. State,* 239 N.C. 333, 80 S.E. 2d 133; *Utilities Com. v. Greensboro,* 244 N.C. 247, 93 S.E. 2d 151; *Smyth v. Ames,* 169 U.S. 466, 42 L. Ed. 819; G.S. 62-124. "When these essential ultimate facts are established by findings of the Commission, the amount of additional gross revenue required to produce the desired net return becomes a mere matter of calculation." *Utilities Com. v. State, supra.*

The Commission found $18,400,000 to be the fair value of Piedmont's property in carrying on its business in North Carolina. Piedmont contends the finding is not supported by competent, material and substantial evidence. It argues the Commission set out to have Piedmont absorb Transco's rate increase. To accomplish this result the Commission accepted $1,104,000 (shown by the test period) as the net return. Likewise, it fixed six per cent as the proper rate of return. To justify both figures required a rate base of $18,400,000. As so fixed, the base is a quotient or a forced figure and is not supported by evidence. Piedmont further argues not only the figures but the concurring opinion of Commissioner Worthington and the dissenting opinion of Chairman Wescott support this view. Judge Campbell, in his order of remand, stated: "It would not be proper for the Commission to arrive at the fair value rate base by capitalizing earnings under the existing rates at the determined rate of return or by any such arbitrary calculations whereby rate base is a mathematical product or quotient from other determinations, instead of making, as the law requires, a true finding of the fair value of the property based

upon evidence of value independent of other determinations necessary in the proceeding."

Piedmont claims, and Judge Campbell found, that the rate base of $18,400,000 was the result of calculation, using the company's net profit for the test period, and six per cent as a fair return. These calculations fixed the base rate as stated above. If we disregard the foregoing claims, nevertheless errors of law appear in the Commission's determination. These errors are sufficient to require that the proceeding go back for further consideration and findings. The order reveals the Commission disregarded altogether the evidence of replacement cost in arriving at fair value. Mr. Gannon, specialist in the field of utility accounting since 1937, using authoritative studies by which original cost may be translated into present value, actually fixed the value of Piedmont's property at 32 million dollars. His calculations were based on studies of Piedmont's cost record, as compared with nine other utility companies engaged in like activity in the Southeastern United States. In evaluating this testimony, the Commission said: "Even when performed by qualified engineers and based on actual inspection of the physical properties of the utility trended original cost studies have been accorded very little weight by the regulatory Commissions throughout the country." (Quoting Southwestern Bell Telephone Co., 77 PUR. 33 (Mo.); *Re New Jersey Bell Telephone Co.*, 72 PUR. 49; *Re Narragansett Electric Co.*, 21 PUR. 3rd 113 (R.I.); *Re Montana-Dakota Utilities Co.*, 28 PUR. 3rd 355 (Montana); *Re Central Illinois Elec. & Gas Co.*, 6 PUR. 3rd 108).

"In this case Mr. Gannon freely admitted that he was not a qualified engineer, . . . In short, his was a mere mathematical computation which he could have prepared in his office in New York. . . . Under these circumstances the probative force of the evidence of trended original cost which was admitted in this case is minimal, but we have not excluded it from consideration."

In the case last cited by the Commission in support of its ruling, *Central Illinois Electric and Gas Co.*, 6 PUR. 3rd 108 (Ill. 1954) the Illinois Commission stated: "Evidence of current or reproduction costs and of the observed condition or depreciation of the company's electric, gas and water utility plants was presented by E. H. Gannon (here Piedmont's witness) and L. N. Boisen of Stone & Webster Service Corporation . . . Gannon testified that the current or reproduction cost was determined by trending original costs by accounts and year of installation by the application of the Handy-Whitman Index. . . . While the evidence concerning trended original cost and also concerning the observed depreciation may be open to challenge *in some minor respects* (emphasis added) such evidence does reflect a decrease

in the purchasing power of the dollar and the change in economic conditions and is pertinent to a determination of reproduction cost. Such trended cost must be considered and given appropriate weight in arriving at the fair value of the company's utility plants."

The Commission also cited *In Re Montana-Dakota Utilities Co.*, 28 PUR. 3rd 355 (Mont. 1959) as authority for rejecting the trended original cost as evidence of present value. The case actually held: "While this certainly is a recognized method, we would hesitate to place entire reliance on the trended rate base." These cases are far from holding the evidence is worth no more than "minimal" consideration.

In these times of increased construction costs and decreased dollar value, trended cost evidence deserves weight in proportion to the accuracy of the tests and their intelligent application. The objections to such evidence apparently came from jurisdictions where the base rate is fixed at "book value" or "original cost" rather than present value. Of course, the book value or original cost can be ascertained with exactness from the books and records. Trended cost is useful only when it becomes necessary to fix the present value of facilities constructed when the cost was low and replacement has become expensive — our case. The trended cost takes into account the type of facility, its age, its original and replacement cost, terrain, location, its probable useful life, and other factors. Such evidence is not conclusive but it does appear to be a useful guide in determining value of facilities, most of which are underground and not open to visual inspection. Engineers and accountants have, through examination, investigation and experience in the field, devised tables, studies, and indices designed and intended as guides in translating original cost into present value. A better method, without minute underground examination, is not suggested.

Mr. Gannon's evidence was competent and should have been considered by the Commission on its merits. The Commission, influenced no doubt by other commission holdings in original cost states, gave it only "minimal" consideration and further discredited it by saying it was not altogether ignored. Obviously the Commission brushed the evidence aside as of little or no consequence. We do not undertake to say what weight the Commission should have given Gannon's and Muhlfeld's evidence. What we do say is that it should have been weighed fairly in balanced scales. To give it minimal consideration only constituted error of law. *City of Richmond v. Henrico Co.*, 185 Va. 176, 37 S.E. 2d 873, modified 185 Va. 859, 41 S.E. 2d 35; *Duquesne Light Co. v. Penn Public Utilities Comm.* 176 Pa. Super. 568, 107 A.

2d 745 (1954); *Railroad Commission v. Houston Natural Gas Corporation,* 289 SW 2d 559, 155 Tex. 502.

Piedmont's witnesses, especially Mr. Watlington and Mr. Anderson, testified that six per cent on a rate base of $18,400,000 would not enable Piedmont to compete in the money market for the capital necessary to meet its expanding needs and to enable it to borrow money at a rate appealing to the sound investor rather than at a higher rate demanded by the speculator. In fixing the rate base the Commission appears to have used either its mathematical formula or its imagination instead of evidence to support the findings. The rate base fixed by the Commission is unsupported by competent, material and substantial evidence.

The trial judge also found error of law in the Commission's refusal to allow Piedmont's promotional expenditures as operational costs. Throughout its order the Commission recognizes the high quality of Piedmont's management. The record shows the expenditure was actually made in its promotional activity. The Commission ordered the amount reduced by $186,000, this upon the basis of Cleveland's evidence the percentage expenditure was in excess of the national average for companies retailing natural gas. No effort was made to ascertain the expenditures by companies in Piedmont's class or in its territory. In this connection it must be remembered that Piedmont in 1952 changed over from manufactured to natural gas. All customers had to be sold on natural gas. New customers had to be won. Competition with electricity and oil had to be met. Piedmont is rapidly expanding its facilities by a heavy promotional program. Twenty per cent of its facilities were installed in the last year. Promotional expenditures throughout the nation included many old companies in the field for years with a well known product and an established market. Promotion in a new field faced Piedmont. It is doubtful for that reason whether evidence of the national average should be admitted at all. The average of companies in Piedmont's classification, yes, but the national average, doubtful. The trended original cost evidence which we hold competent was based on the indices and studies of nine companies in Piedmont's classification and in its territory. So Gannon's and Muhlfeld's evidence is not open to the national average objection.

For the purpose of establishing Piedmont's proper rate base the Commission took the average net investment for the test year. Since rates are prospective, the base should have been determined as of the date the rates became effective. Piedmont is a rapidly growing company. Its investment was greatest at the end of the test year. Hence

the investment at that time should be accepted rather than the average for the year.

The Commission has found that six per cent on the investment is a fair net return. But six per cent is meaningless until it is translated into dollars and cents on the basis of a fixed amount of money — in this case capital structure or rate base. The evidence of Piedmont's witnesses fixes the value as high as $32,000,000.00 and at all events greatly in excess of $18,400,000.00.

The Commission's only witness, Mr. Cleveland, does not express any opinion as to the fair value of Piedmont's capital investment. He does not qualify himself to give such opinion. He is an accountant who did nothing more than examine the books, make notes, go back to his office and prepare the charts used in his testimony. The books show only acquisition cost, and even the new construction is not included for the reason that "it is not yet producing income." Neither does Mr. Cleveland ascertain the amount of capital consumed in operating the business.

On the record, we must agree with Judge Campbell's finding that a rate base of $18,400,000 is not supported by competent, material and substantial evidence. We, therefore, agree with the Judge and Chairman Westcott that the proceeding should be remanded for such further study and up-to-date findings as will enable the Commission (1) to find the fair value of Piedmont's facilities; (2) to ascertain its operating expenses, including capital consumed; (3) to fix such rate of return on the investment as will enable Piedmont by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise. *Utilities Com. v. State, supra; Corporation Com. v. Mfg. Co.*, 185 N.C. 17, 116 S.E. 178.

We have pointed out some of the particulars wherein we think the Commission has failed to follow the statutory rules as interpreted in our decided cases. In doing so we do not promulgate any new rules. Neither is it our intention to enlarge or restrict the application of old ones.

For the reasons indicated, the order of remand entered in the superior court is

Affirmed.

R. D. JENKINS v. LEFTWICH ELECTRIC COMPANY.

(Filed 3 May, 1961.)

1. Appeal and Error § 41—

The burden is upon appellant not only to show error but also that the alleged error was prejudicial.

2. Negligence § 7—

Negligence must be the proximate cause of injury or damage in order to constitute the basis for a cause of action.

3. Electricity § 4—

The rule that the highest degree of care commensurate with the practical operation of the business must be exercised by those who manufacture and distribute electrical current applies also to those who install electric wiring and equipment, and the rule is applicable not only in actions to recover for death or injury to persons but also to actions to recover for damage to property.

4. Electricity § 1—

The National Electrical Code, as approved by the American Standards Association on 5 August 1959, and filed in the office of the Secretary of the State of North Carolina, has the force and effect of law in this State. G.S. 143-138.

5. Trial § 22—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence which is favorable to plaintiff or which tends to clarify and explain plaintiff's evidence must also be considered, but defendant's evidence which is in conflict with that of plaintiff or which tends to contradict or impeach plaintiff's evidence is not to be considered.

6. Negligence § 7—

Proximate cause 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 of the facts then existing.

7. Negligence § 24a—

The existence of negligence and proximate cause may be proved by circumstantial evidence which establishes these factors as a more reasonable probability and not as a mere possibility or conjecture.

8. Electricity § 7— Questions of negligence and proximate cause held for jury in this action to recover for fire from defective wiring.

Evidence tending to show that defendant installed electrical wiring, switch boxes, junction boxes, and receptacles in defendant's home pursuant to contract, that one of the workers was inexperienced, that wires in a switch box installed behind the refrigerator in the kitchen were installed in violation of the National Electrical Code, that immediately after the

electricity to the house was turned on the lights in one room showed only a dark red glow while the lights in another room burned excessively bright and exploded after three or four minutes, and that within two hours thereafter fire broke out, which originated in the area of the kitchen, *is held* sufficient to be submitted to the jury upon the question of negligence in the installation of the wiring, and whether such negligence was the proximate cause of the fire and consequent damage.

APPEAL by defendant from *Pless, J.*, January 1961 Term of CALDWELL.

Civil action to recover damages for the destruction by fire of plaintiff's new home and of his household and kitchen furniture and other personal property therein allegedly caused by the negligent installation of electric wiring, switch boxes, junction boxes and receptacles in his home by defendant.

The following issues were submitted to the jury, and answered as appears.

"1. Was plaintiff damaged in his property as a result of the negligence of the defendant as alleged?

"Answer — Yes.

"2. What amount, if any, is plaintiff entitled to recover of this defendant?

"Answer — $4200.00."

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

Townsend and Todd By: James R. Todd, Jr., for plaintiff, appellee.
L. H. Wall and Hal B. Adams for defendant, appellant.

PARKER, J. Plaintiff's evidence tends to show the following facts:

In the autumn of 1959 plaintiff was the owner of a new home, which he had recently constructed. It had a fair market value of $4,500.00. He had in it household and kitchen furniture and other articles of personal property with a fair market value of $5,125.00. He had fire insurance on his home in the amount of $3,000.00, and no insurance on his personal property therein. In November 1959 he had moved in this home.

Defendant Electric Company contracted with plaintiff to install the electric wiring, switch boxes, junction boxes and receptacles in his home for a price of $130.00. Defendant sent Sanford Bowers, who had been an electrician for a number of years, and a helper Clyde Craig, known as Pete, to do the work. Pete Craig wired the refrigerator receptacle in the kitchen, and all the wiring and installing in

the kitchen. Pete Craig asked Bowers did the black wire go with the black, and the red with the red. Bowers replied they did. Pete put on the meter box upside down, and Bowers called his attention to it, and changed it. On 9 November 1959 Bowers told plaintiff he was through with the work, he would have the work inspected, and the Duke Power Company would turn on the electricity.

On 10 November 1959 plaintiff was in his home, and the Duke Power Company turned on the electricity between 4:00 or 5:00 o'clock p.m. Within 30 or 40 minutes thereafter he turned on the lights in his living room. He had an upright lamp there with two 100-watt bulbs in it, and the lights showed only a dark red glow. He went in the kitchen, and switched on the overhead light fixture which had two 100-watt bulbs in it. These bulbs came on tremendously bright, and after three or four minutes exploded, and the lights went out. When these bulbs exploded, the refrigerator stopped. The refrigerator was in the kitchen, and back of it was a receptacle in which the refrigerator connection was inserted. He cooked his supper on the electric range, and left his home about 6:45 o'clock p.m.

D. W. Gragg, who lived about 500 yards from plaintiff's home, came out of his house, and saw the windows in plaintiff's house, and they looked a light blue color. He saw flames break through "on the eve of the house on the upper side, right where the kitchen was." He went to his telephone to call Archie Davis' service station because plaintiff went there occasionally in the evenings, but the telephone was busy. He got in his truck to go to Archie Davis' service station, and met plaintiff on the way. Davis told him plaintiff had received the news, and he went to the fire. He saw plaintiff there upon arrival.

About one hour after plaintiff left his home, he received the news that his home was on fire by telephone at Archie Davis' service station. He left for his home, and when he reached there flames were all over the interior. "I could tell that the kitchen had fallen in, and it appeared that the fire originated in that area. I am certain that I switched the electric range off at the time I left home, because I checked the range twice." His home and its contents were destroyed by the fire.

The next morning Jack Huffman, general manager for City Electric Company of Hickory, one of the largest contractors there, at plaintiff's request went with him to the scene of the fire. Huffman is familiar with all types of wiring, switches, junction boxes, etc. He supervises the installation for his company. He is familiar with the National Electrical Code. The court, without objection by defendant, held that he was an expert witness as an electrician. When Huffman

with plaintiff reached the scene, he saw nothing much, only ashes; a few boards may have been standing; it was still smoking. While digging around through the ashes with his hands he found a switch box, which plaintiff said was where it was behind his refrigerator. In the electric business a switch box is used for all switches, outlets, or receptacles. This switch box fitted in the classification of switch boxes 2 inches by 1 3/4 inches by 2 3/4 inches in Table 370-6(a-1) of the National Electrical Code. This table specifies how many wires should be put in a box depending on its size, and this is set out for the protection of property owners. This switch box had 8 wires in it, twice as many as the maximum permitted by the National Electrical Code. (It would seem from the record that the wires were number 12-2). This was a violation of the National Electrical Code. The wires in the switch box were clamped awfully tight. The metal of the clamp could cut into the copper of the wires, and cause a short circuit, which would blow a fuse. Huffman testified, "even if there had been the number of wires in the box allowed in the Code, in the manner they were clamped, it was done in a manner which was not safe. They were too tight." The negative and hot wires were not placed in the switch box in the ordinary and customary way of wiring. In Huffman's opinion, it was possible that the wiring in the installation as he found it could have caused 220 volts to go into the appliance. It was also his opinion that the installation as he found it could have caused a leaking circuit, not enough to show on a bell ringing circuit, or a test set, and not enough to blow a fuse. When the refrigerator was plugged in it, it could have started the heating, but he would not say it did. Huffman testified without objection: "The place where I found this receptacle, which was behind the refrigerator, in the kitchen, the floor had been burned through at those locations, in front and behind the refrigerator and in looking through the remains, there is where I found that receptacle."

On recross-examination Mr. L. H. Wall, one of defendant's counsel, asked Huffman if he had signed a written statement. Huffman replied Yes. Whereupon Mr. Wall read the statement, and asked that it be marked for identification as defendant's Exhibit A, which statement is as follows:

> "I, Jack Norman Huffman, age 31, reside at Conover, N. C. I am manager of the City Electric Company in Hickory, N. C.
>
> "On 11-11-59 I was called by R. D. Jenkins to Collettsville Road, Lenoir, N. C. He told me his new home had burned down and he wanted me to come over and see if I could find any fault in the wiring that was left after the fire. I went over that day,

and the only thing I could find in the ruins that would indicate a violation of the National Electric Code was a receptacle that had nine wires connected to it, and this was too much wiring for the size of the receptacle and is against regulations of the National Electric Code. Also the clamps that hold the wires together in the rear of the box were so tight that possibly the insulation on the wiring could have been broken and this would have caused heat, but not enough to blow a fuse. This is not actually faulty wiring, that is, having nine wires connected to one receptacle, but it is a violation of the National Code. Other than this I could find nothing that would indicate faulty wiring, or violation of the National Electric Code."

On cross-examination Jack Huffman testified: "I found two ground wires in the receptacle and three neutral wires. Neither the neutral or ground wires are conductors."

Immediately thereafter he testified on redirect-examination: "There are a total of 8 wires through the box. And there was a total of 8 wires there at the time I found it. I told Mr. Jenkins it was a violation of the Code."

When plaintiff rested his case, defendant introduced evidence as follows:

Sanford Bowers testified in substance: He is an employee of defendant. He and a helper, Clyde Craig, did for defendant the wiring of plaintiff's home. He is, to a certain extent, familiar with the National Electrical Code, and he installed the wires in accordance with that Code, as he understood it. On cross-examination he was shown the switch box which Jack Huffman found in the ashes of plaintiff's home, and was asked whether it was in compliance with the National Electrical Code. He replied, "No, sir; I don't think it is."

T. W. Younts is the county and city wiring inspector. He is familiar with the National Electrical Code. He inspected the wiring in plaintiff's home on 9 November 1959, and made out a certificate. He went to the scene after the fire. Jack Huffman and plaintiff were there. He went over with Huffman the portions of the receptacles that had been found there and introduced in evidence, to see how they had been wired. He found one violation of the National Electrical Code. "There was one too many wires in the box." He could not tell anything about the clamp in the box having been too tight: the insulation was gone, and there was no way for him to tell. He testified on cross-examination: "There is a violation of the Code because there were 2 cables under one clamp. . . . There were 6 wires in the box. The Code limitation is 4 No. 12 wire. There are not 4 wires too many."

He testified further on cross-examination in substance as follows: Looking at the clamp and the manner it is placed over the wires, it is possible it could have cut through a portion of the insulation on one or more of the wires. If the insulation were cut through, actually, that would be a short circuit. It is possible a partial short circuit will not necessarily blow a fuse. It is possible for such a condition to generate heat as an act of ground leakage. When he made his inspection he did not inspect this particular installation and check it. He testified on redirect-examination: "If there is a short circuit your fuse is going to kick out, and that circuit is dead."

Ned Leftwich, secretary and treasurer of defendant, has been doing electrical work for 20 years. One cannot tighten a clamp tight enough to damage the wires. He testified on cross-examination: "There are more wires in the box than we normally put in one."

E. L. Leftwich, president of defendant, is a licensed electrician. He testified on direct-examination:

> "I have examined the box (Plaintiff's Exhibit 'A') and find three neutral wires, and three conductors. Your neutral wire is a conductor, but where they come into a box and tap out they are counted as one terminal, one conductor. The Code does not say anything about wires. They say conductors. So there are six conductors in this box and three of them are tapped out and count as one. Tapped out means just tapped out to an appliance. My interpretation of the Code is that where a wire comes into a box and goes on to an appliance of some kind that the wire that comes in and the one that goes out are counted as one. Based upon this interpretation of the Code there are four conductors in the box."

He testified on cross-examination:

> "I do not think the installation was a violation of the Code even if Mr. Huffman and Mr. Younts so stated. There were more wires in the box than we usually put in, there were more than I would have put in, but it absolutely is not against the Code. The reason I only put two wires in a receptacle is that I never do nothing but feed into it and if I am feeding another receptacle I will feed that out, and that takes just two wires. That for me is the generally accepted practice but I have seen twice as many wires in a box as was supposed to have been in this one."

Defendant introduced in evidence Jack Huffman's written statement which it read, and had marked for identification.

Defendant has ten assignments of error to the overruling of its

objections to questions asked the witness Jack Huffman. It has favored us with no citation of authority at all in respect to these ten assignments of error. If there was error in the admission of Huffman's testimony over defendant's objections, which we do not concede, it seems to have been cured in large part by defendant's introducing in evidence the written statement of Huffman. Suffice it to say that prejudicial error in respect to these ten assignments of error has not been shown, and all are overruled.

The assignment of error to the testimony of D. W. Gragg is clearly without merit.

There is no assignment of error to the charge of the court. Defendant's principal contention is that the court erred in failing to allow its motion for judgment of involuntary nonsuit made at the close of all the evidence. Its chief argument is that even if there is some evidence of a slight deviation from the National Electrical Code in the installation of the electric wiring and switch box by it, there is no evidence that this deviation was a proximate cause of the fire that destroyed plaintiff's home and its contents.

"It is a fundamental principle that the only negligence of legal importance is negligence which proximately causes or contributes to the injury under judicial investigation." *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459.

The duty and care to be exercised by electric companies generating and selling electricity is clearly set forth in *Kiser v. Power Co.,* 216 N.C. 698, 6 S.E. 2d 713: "A high degree of foresight is required of the defendant because of the character and behavior of electricity which it generates and sells. *Shaw v. Public-Service Corp.,* 168 N.C., 611, 84 S.E. 1010. The defendant's knowledge of its service is supposedly superior to that of its customer's. It is not unreasonable, therefore, in view of the dangerous character of the product, to require the 'utmost diligence and foresight in the construction, maintenance, and inspection of its plant, wires, and appliances, consistent with the practical operation of the business.' *Turner v. Power Co.,* 167 N.C., 630, 83 S.E., 744. The care required must be commensurate with the dangers incident to the business. And so the law is written. *Haynes v. Gas Co.,* 114 N.C., 203, 19 S.E., 344."

In *Small v. Utilities Co.,* 200 N.C. 719, 158 S.E. 385, is set forth some of the various expressions found in the decisions in respect to the degree of care required by electric companies in such cases, and then the Court says: "In approving these formulae as to the degree of care required in such cases, it is not to be supposed that there is a varying standard of duty by which responsibility for negligence is to be determined. *Helms v. Power Co.,* supra. The standard is always

the rule of the prudent man, or the care which a prudent man ought to use under like circumstances. What reasonable care is, of course, varies in different cases and in the presence of different conditions. *Fitzgerald v. R.R.*, 141 N.C., 530, 54 S.E., 391. The standard is due care, and due care means commensurate care under the circumstances. *Hanes v. Shapiro*, 168 N.C., 24, 84 S.E., 33; 9 R.C.L., 1200." It seems from reading the decisions that the rule was adopted primarily for the protection of human life, but the fact that property alone is injured or destroyed does not abrogate the rule.

In *Conn v. Lexington Utilities Co.*, 233 Ky. 230, 25 S.W. 2d 370, the ultimate problem presented by the appeal was to determine the degree of care owed by a contractor who installs electric wires in a dwelling house. What the Court said in this case seems to us to be sound law: "One who installs an instrumentality for a known use, which involves a great danger to life and limb, must exercise a degree of care commensurate with the danger for the protection of those who rightfully may be subject to the peril. The duty rests upon those who make and distribute the dangerous current, and upon those who provide the appliance and facilities as well. . . . One who engages in the business of installing electric wires must be held to the same degree of care as those who make and distribute the current, because the danger to be guarded against is the same. Electricity is not only dangerous, even deadly, but it is invisible, noiseless, and odorless, rendering it impossible to detect the presence of the peril until the fatal work is finished. It is for this reason that the high duty is imposed, and being imposed, a breach of it fixes liability for the resulting injury to those to whom the duty is owed. The duty is not different because the injury from its violation happens to property instead of to persons. It follows from the consideration suggested, and the authorities adduced, that those who install wires for the carriage of dangerous currents of electricity are under the same duty respecting it as those who manufacture and distribute that current."

This is said in 18 Am. Jur., Electricity, § 49, p. 446: "AS TO INSTALLING ELECTRICAL EQUIPMENT — One engaged in the business of generating and distributing electricity and who sells and engages to install electric equipment and supply current therefor must exercise the care of a reasonably prudent man skilled in the practice and art of installing such equipment, according to the state of the art or method generally used by persons engaged in a like business at the time the work is done."

Plaintiff has based his case squarely upon the alleged negligence of defendant in the installation of electric wiring, switch boxes, junction boxes, and receptacles in his home, in that in making the in-

stallation defendant did not exercise commensurate care with the danger under the circumstances in respect to bringing currents of electricity into his home, and in that defendant in making such installation violated the National Electrical Code, which was a part of the North Carolina State Building Code in effect at the time of the fire, and is now in effect. The case was tried upon that theory.

North Carolina has been a pioneer in the field of statewide building and fire prevention regulations which have been enacted for the protection of the public. The Building Laws passed in 1905 — Public Laws 1905, Chapter 506 — and earlier and later Acts codified in C.S., 1919, Vol. I, Municipal Corporations, Article 11, provided regulations for materials and methods of construction in use at that time.

A meeting was held in Raleigh on 28 November 1931 at North Carolina State College to discuss the formulation of a modern State Building Code. The General Assembly of 1933, Public Laws 1933, Chapter 392, created a Building Code Council and authorized it to, in co-operation with the Commissioner of Insurance, prepare and adopt a Building Code. The first North Carolina Building Code received the approval of the Official Building Code Council and the Commissioner of Insurance in 1935, and was printed the same year. This was known as the 1936 Edition.

The North Carolina Building Code adopted, promulgated and published in 1936 was ratified and adopted by Chapter 280, Public Laws of North Carolina 1941, by clear and specific reference, and that Act provides that such provisions "shall continue in full force and effect unless and until they may be modified as hereinafter authorized." "The National Electrical Code referred to in the North Carolina Building Code published in 1936, by virtue of the Act of 1941, has the force and effect of law." *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333.

A few modifications of this 1936 Building Code were made from time to time by the Building Code Council, and accepted by the Commissioner of Insurance. A general revision to bring this Code up to date was considered in order at a meeting by the Building Code Council on 12 November 1952, attended by representatives from several State organizations interested in the construction industry. At the suggestion of the Chairman of the Building Code Council, a preliminary draft was prepared by the staff of the Department of Insurance, and copies were mailed to various organizations interested in the construction industry. Comments and criticisms were received from several of these organizations and open meetings were held in the office of the Commissioner of Insurance together with represent-

atives of these organizations. By a unanimous vote on 19 June 1953, the Building Code Council adopted the draft as revised and recommended its acceptance by the Commissioner of Insurance. On the same date the Commissioner of Insurance accepted the recommendations of the Council, and ordered the final draft printed. In respect to the history of our building and fire prevention regulations above stated, see foreword to North Carolina State Building Code, 1958 Edition.

This is said in *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560, which was an action to recover damages resulting from a fire allegedly caused by defendant's negligence in installing a fan over the roof of the kitchen of plaintiff's restaurant: "The North Carolina Building Code of 1953, Article XVI, in pertinent part, provides: 'Except as may be otherwise provided by rules promulgated by the Building Code Council, the electrical systems of a building or structure shall be installed in conformity with the "National Electrical Code," as approved by the American Standards Association and as filed in the office of the Secretary of State. The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters.' "

The 1957 General Assembly in Chapter 1138, 1957 Session Laws, rewrote the 1933 Act, and reorganized and expanded the Building Code Council. This Act became effective 1 July 1957. This Act is codified in G.S., Vol. 3B, Chapter 143, Article 9, Building Code Council and Building Code, Sections 143-136-143-143, both inclusive.

G.S. 143-138(a) empowered the Building Code Council to prepare and adopt a North Carolina State Building Code. G.S. 143-138(b) provides in pertinent part: "The North Carolina State Building Code, as adopted by the Building Code Council may include . . . regulations governing . . . electrical systems (regulations for which electric systems may be the National Electric Code, as approved by the American Standards Association and filed with the Secretary of State); and such other reasonable rules and regulations pertaining to the construction of buildings and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building, its neighbors, and members of the public at large." G.S. 143-138(c) sets forth in detail the standards to be followed in adopting the North Carolina State Building Code, and provides in relevant parts: "All regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed liberally to those ends. Re-

quirements of the Code shall conform to good engineering practice, as evidenced generally by the requirements of . . . the National Electric Code, ... , and similar national agencies engaged in research concerning strength of materials, safe design, and other factors bearing upon health and safety." G.S. 143-138(f) provides: "Until such time as the North Carolina State Building Code has been legally adopted by the Building Code Council pursuant to this article, the North Carolina Building Code adopted by the Council and the Commissioner of Insurance in 1953 shall remain in full force and effect. Such Code is hereby ratified and adopted." G.S. 143-138(h) provides that "any person who shall be adjudged to have violated this article or the North Carolina State Building Code shall be guilty of a misdemeanor. . . ."

The 1958 Edition of the North Carolina State Building Code is a reprint of the 1953 Edition together with all amendments to date. The North Carolina State Building Code, 1958 Edition, in Article XVI, page 216, in pertinent part, provides: "ELECTRICAL INSTALLATIONS. Except as may be otherwise provided by rules promulgated by the Building Code Council, the electrical systems of a building or structure shall be installed in conformity with the 'National Electrical Code,' as approved by the American Standards Association and as filed in the office of Secretary of State. The electric wiring of houses or buildings for lighting or for other purposes shall conform to the regulations prescribed by the organization known as National Board of Fire Underwriters."

Therefore, on 10 November 1959, the date of the fire here, the National Electrical Code, as approved by the American Standards Association on 5 August 1959, and which Code is filed in the office of the Secretary of State of North Carolina, by virtue of G.S. 143-138, had the force and effect of law in North Carolina. *Lutz Industries, Inc. v. Dixie Home Stores, supra; In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189; *Drum v. Bisaner, supra.*

The 1959 National Electrical Code — Standard of the National Board of Fire Underwriters for Electric Wiring and Apparatus as recommended by the National Fire Protection Association — American Standard Approved 5 August 1959 by American Standards Association, and on file in the office of the Secretary of State, provides on page 149: "370-6. Number of Conductors in a Box. Boxes shall be of sufficient size to provide free space for all conductors enclosed in the box." On the same page, 370-6(a) "The maximum number of conductors, not counting fixture wires, permitted in outlet and junction boxes shall be as in Tables 370-6 (a-1 and -2) with the exceptions noted." Table 370-6(a-2) applies to shallow boxes of less than 1½

inches depth. The maximum number of conductors Number 12 for a box with dimensions 2 inches by 1 3/4 inches by 2 3/4 inches is 4, as set forth in Table 370-6(a-1). Then 370-6 provides in relevant part on page 150: "Tables 370-6 (a-1 and-2) apply where no fittings or devices, such as fixture studs, cable clamps, hickeys, switches or receptacles are contained in the box. Where one or more fixture studs, cable clamps, or hickeys are contained in the box, the number of conductors shall be one less than shown in the Tables. . . . A conductor running through the box is counted as one conductor and each conductor originating outside the box and terminating inside the box is counted as one conductor. Conductors of which no part leaves the box are not to be counted in the above computation."

The term "conductor" has been construed to include only those media the purpose of which is the transmission of electricity. 29 C.J.S., Electricity, p. 475.

In passing on a motion for a judgment of involuntary nonsuit, we are required to take plaintiff's evidence as true, and to consider it in the light most favorable to him, and to give him the benefit of every reasonable inference to be drawn therefrom. *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755.

The law is well established in this State that in ruling upon a motion for an involuntary judgment of nonsuit, after the plaintiff and the defendant have introduced evidence, the court may consider the evidence of defendant favorable to plaintiff or which tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore the evidence of defendant which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1, and cases there cited. Otherwise, consideration would not be in the light most favorable to plaintiff. *Singletary v. Nixon,* 239 N.C. 634, 80 S.E. 2d 676; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209.

Plaintiff's evidence tends to show that the switch box or receptacle installed by defendant behind his refrigerator in his kitchen fitted in the classification of boxes 2 inches by 1 3/4 inches by 2 3/4 inches in Table 370-6(a-1) of the 1959 National Electrical Code, that this switch box had in it 8 wires, and that his refrigerator was connected with it. That this switch box had 8 wires in it, twice as many as the maximum permitted by the National Electrical Code.

Defendant's witness Sanford Bowers testified in substance that he and a helper, Clyde Craig, did for defendant the wiring of plaintiff's home. On cross-examination he was shown this switch box, and was asked whether it was in compliance with the National Electrical

Code. He replied, "No, Sir; I don't think it is." Defendant's witness T. W. Younts, county and city wiring inspector, testified he was familiar with the National Electrical Code. He testified on direct examination, he found one violation of the National Electrical Code. "There was one too many wires in the box." He testified on cross-examination: "There is a violation of the Code because there were 2 cables under the clamp. . . . There were 6 wires in the box. The Code limitation is 4 No. 12 wire. There are not 4 wires too many." Ned Leftwich, secretary and treasurer of the defendant, testifying for defendant said on cross-examination: "There are more wires in the box than we normally put in one."

Considering plaintiff's evidence and defendant's evidence favorable to him, there is plenary evidence to show that the switch box installed by defendant back of plaintiff's refrigerator in his kitchen had more conductors or wires in it than permitted by the National Electrical Code, and that there were 2 cables under the clamp in violation of the Code, according to defendant's witness Younts, and that these violations of this Code, authorized by G.S. 143-138, were negligence *per se*. *Lutz Industries, Inc., v. Dixie Home Stores, supra; Drum v. Bisaner, supra.*

Plaintiff's evidence further tends to show that the installation in plaintiff's kitchen, including this switch box, was done by defendant's employee, Clyde Craig, an incompetent worker. Defendant's evidence is that Clyde Craig was working for defendant at the time of the trial, but was not called as a witness. This use of an incompetent employee under the circumstances here for the installation of wiring, etc., for the use of electricity is negligence, because the law imposes upon every person who enters upon an active course of conduct the positive duty to exercise due care, which means commensurate care under the circumstances, and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551; *Small v. Utilities Co., supra.*

We now come to the question as to whether plaintiff's evidence and the evidence of defendant favorable to him, considered in the light most favorable to plaintiff, and giving him the benefit of every reasonable and legitimate inference to be drawn therefrom, is sufficient to carry the case to the jury that defendant's negligence was a proximate cause of the fire which destroyed plaintiff's home and his personal property therein.

A proximate cause of an injury is "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." *Mattingly v. R. R.*, 253 N.C. 746, 117 S.E. 2d 844.

It is said in *Patton v. Dail*, 252 N.C. 425, 114 S.E. 2d 87: "It is well settled law in this jurisdiction that the fact in controversy here, as to the origin of the fire, may be established by circumstantial evidence." Citing authorities.

This Court said in *Frazier v. Gas Company*, 247 N.C. 256, 100 S.E. 2d 501: "' . . . Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and . . . if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence.' *Fitzgerald v. R. R.*, 141 N.C. 530, 54 S.E. 391; *Peterson v. Tidewater Power Co.*, 183 N.C. 243, 111 S.E. 8. 'The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to himself.' *Henderson v. R. R.*, 159 N.C. 581, 75 S.E. 1092."

Plaintiff's evidence and defendant's evidence favorable to him, considered in the light most favorable to plaintiff, tends to show the following: Defendant finished the electric wiring of plaintiff's new home on 9 November 1959. The Duke Power Company turned on the electricity between 4:00 or 5:00 o'clock p.m. the next day. 30 or 40 minutes later plaintiff turned on the lights in his living room, the lights showed only a dark red glow. He then went into his kitchen and switched on the lights, which came on tremendously bright, and after three or four minutes exploded, and the lights went out. When these light bulbs exploded, his refrigerator in the kitchen stopped running. Back of this refrigerator was the switch box or receptacle, which did not comply with the requirements of the National Electrical Code, installed by an incompetent employee of defendant, and in which the refrigerator connection was inserted. He cooked his supper on the electric range, switched it off, and left his home about 6:45 o'clock p.m. Within an hour or less after he left his home, D. W. Gragg, who lived about 500 yards from his home, saw flames break through "on the eve of the house on the upper side, right where the kitchen was." Plaintiff returned to his home soon after Gragg saw the fire, and when he reached there flames were all over the interior. He testified: "I could tell that the kitchen had fallen in, and it appeared that the fire originated in that area."

Plaintiff's witness Huffman testified in substance that in his opinion the installation back of the refrigerator as he found it could have caused a leaking circuit, not enough to show on a bell ringing circuit, or a test set, and not enough to blow a fuse. When the refrigerator

was plugged in it, it could have started the heating, but he would not say it did. Huffman made a written statement, which defendant introduced in evidence. This statement, *inter alia*, contains these words: "Also the clamps that hold the wires together in the rear of the box were so tight that possibly the insulation on the wiring could have been broken, and this would have caused heat, but not enough to blow a fuse."

T. W. Younts, defendant's witness, testified in substance on cross-examination: Looking at the clamp in the receptacle and the manner it is placed over the wires, it is possible it could have cut through a portion of the insulation on one or more of the wires. If the insulation were cut through, actually, that would be a short circuit. It is possible a partial short circuit will not necessarily blow a fuse. It is possible for such a condition to generate heat as an act of ground leakage.

It seems to be a legitimate inference from the evidence that when defendant permitted an incompetent employee to install the electric wiring and receptacle in plaintiff's kitchen, it could have in the exercise of ordinary prudence foreseen that an injury from fire was probable under all the facts.

This Court said in *Henderson v. R. R.*, 159 N.C. 581, 75 S.E. 1092: If "the evidence does no more than 'raise a possibility or conjecture of a fact,' a judgment of nonsuit ought to be sustained (citing authority), but if the 'more reasonable probability' is in favor of the plaintiff's contention the question ought to be submitted to the jury. *Fitzgerald v. R. R.*, 141 N.C. 535."

After careful consideration of plaintiff's evidence and of defendant's evidence favorable to him, considered in the light most favorable to plaintiff and giving him all legitimate inferences to be drawn therefrom, it is our opinion that plaintiff was entitled to have the evidence considered by a jury to determine whether the fire was proximately caused by defendant's negligence.

In the trial below, we find

No error.

CHARLES GRINDSTAFF v. JOHN E. WATTS AND MANNING WATTS, A MINOR.

(Filed 3 May, 1961.)

1. Parent and Child § 7—

Ordinarily a parent may not be held liable for a tort committed by his child solely by reason of the relationship.

2. Boating—

The Family Purpose Doctrine will not be extended by the courts to cover motor-boats, and the owner of such boat will not be held liable for an injury inflicted by negligent operation of the boat by his son, even though the son was operating the boat with the owner's consent, in the absence of evidence of any structural or mechanical defect in the boat or that the son was inexperienced or had theretofore been guilty of recklessness or irresponsibility in the operation of the boat, or was engaged at the time in a mission for the owner.

3. Same—

In a suit to recover for injuries inflicted through the negligent operation of a boat by the son of the owner, evidence as to the number of motor-boats registered in the State is irrelevant and immaterial, the Family Purpose Doctrine not being applicable.

4. Constitutional Law § 6—

The General Assembly is the policy making division of the State government, and whether the public safety and welfare demand the extension of the Family Purpose Doctrine to cover motorboats lies within its province.

APPEAL by plaintiff from Huskins, J., September 12, 1960 Civil "A" Term of MECKLENBURG.

Civil action, instituted 4 September 1959, to recover for personal injuries suffered by reason of defendants' alleged negligent operation of a motor-boat.

The complaint alleges:

About 2:30 P.M. on 14 June 1958 plaintiff was riding in a small boat propelled by an outboard motor on the Catawba River in North Carolina, when a large cruiser type outboard motor-boat, owned by defendant John E. Watts and being operated by his son, Manning Watts, defendant, ran into the right rear of the craft in which plaintiff was riding, threw plaintiff into the water, struck and injured him. There were many boats in the river. Manning Watts was operating the cruiser in a reckless manner, at a high and unreasonable speed of approximately 30 miles per hour, without keeping a proper lookout, without giving warning of his approach, and with the helm unattended. Manning Watts was a minor, 19 years old, and resided in his father's

house as a member of the family. John E. Watts owned and maintained the cruiser for the use, pleasure, comfort and convenience of himself and family, including Manning Watts, and the cruiser was a family purpose vehicle. At the time of the accident in question Manning Watts was operating the boat "with the permission, consent and at the instruction and direction," and as agent, of his father. John E. Watts was additionally negligent in that he permitted Manning Watts to operate the boat, a dangerous instrumentality, knowing that he was inexperienced, reckless and irresponsible. Plaintiff's injuries were proximately caused by the alleged negligence of defendants.

Defendants answered as follows:

Defendants were not negligent in any of the respects alleged. Plaintiff was contributorily negligent in that he ran the boat he was operating at a high rate of speed across the course of the Watts boat. Manning Watts lives in the home of his father, but he is an emancipated minor, is gainfully employed, pays his father and mother for room and board, and has complete freedom in the use and expenditure of his wages. At the time of the collision he was on a mission of his own and was not acting as agent or servant of his father.

Plaintiff offered evidence, including the adverse examinations of John E. and Manning Watts. The evidence tends to show negligence on the part of Manning Watts resulting in serious injury to plaintiff, as alleged. The evidence also shows the following undisputed facts: John E. Watts had purchased the cruiser in March 1958. It had been in use one to three times each week. He and Manning had operated it, one as much as the other. Manning had operated it on occasions when his father was not present. Prior to March 1958 John E. Watts owned other boats over a period of 5 or 6 years. Manning had operated these boats more or less regularly. Manning had a key to the cruiser and had permission to use it for his own purposes whenever he desired. He had been employed by Douglas Aircraft for about 14 months. He lived with his father and mother and paid them for room and board. He used the remainder of his wages as he saw fit and provided his own necessaries. John E. Watts and his family, including Manning, used the boat for fishing and pleasure. "It was a family project."

Defendants did not offer evidence. At the close of plaintiff's evidence both defendants moved for nonsuit. The motion of John E. Watts was sustained. The motion of Manning Watts was denied.

The jury returned a verdict against Manning Watts and assessed damages. Judgment was entered accordingly. Manning Watts did not appeal.

From judgment of involuntary nonsuit in the action against John E. Watts, plaintiff appeals.

Hedrick, McKnight and Parham for plaintiff, appellant.
McDougle, Ervin, Horack & Snepp and C. Eugene McCartha for defendant appellee.

MOORE, J. The sole question on this appeal is whether or not the "family purpose doctrine," as applied in tort cases involving the operation of automobiles, is applicable to negligence cases arising out of the operation of motor-boats on the waters of the State.

For the purposes of this appeal we assume, but do not decide, that Manning Watts was a member of the family of John E. Watts according to the rules laid down in *McGee v. Crawford,* 205 N.C. 318, 321, 171 S.E. 326.

In any event, the plaintiff has failed to make out a *prima facie* case of actionable negligence against the defendant John E. Watts unless plaintiff is permitted to call to his aid the family purpose doctrine.

"At common law it is well established that the mere relation of parent and child imposes on the parent no liability for the torts of the child. . . ." 67 C.J.S., Parent and Child, s. 66, p. 795. "Relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he approved such acts, or that the child was his servant or agent." *Brittingham v. Stadiem,* 151 N.C. 299, 300, 66 S.E. 128. "To impose liability upon the parent for the wrongful act of his child (absent evidence of agency or of the parent's participation in the child's wrongful act), for which the child, if *sui juris,* would be liable, it must be shown that the parent was guilty of a breach of legal duty, which concurred with the wrongful act of the child in causing the injury. 'A parent is liable if his negilgence combines with the negligence of the child and the two contribute to injury by the child.' 67 C.J.S., Parent and Child, s. 68." *Lane v. Chatham,* 251 N.C. 400, 402, 111 S.E. 2d 598.

In the case at bar there is no showing that the boat was structurally or mechanically defective, that the son was inexperienced in the operation of the craft or was on any prior occasion reckless or irresponsible in its operation, or that the son was on any mission or engaged in any business for his father at the time of the accident. Therefore, the evidence is insufficient to impose liability on the father under the common law rule.

While the family purpose doctrine sometimes deals with relationships other than that of parent and child, it constitutes an exception to the common law rule with respect to the liability of a parent for the torts of his minor child, in automobile cases. The doctrine is not bottomed on the theory that automobiles are inherently dangerous instrumentalities, for it is uniformly held that they are not. *Robertson v. Aldridge,* 185 N.C. 292, 296, 116 S.E. 742.

The family purpose doctrine is an anomaly in the law. When the facts essential to invoke the doctrine are established by the verdict or admitted, an irrebutable presumption arises that the family member operator was the agent of the family member owner and acted pursuant to and within the scope of the agency. "The doctrine is an extension of the principle of *respondeat superior.* . . ." 38 N.C. Law Review 249, 250. In this State it is not the result of legislative action, but is a rule of law adopted by the Court. "The doctrine undoubtedly involves a novel application of the rule of *respondeat superior* and may, perhaps, be regarded as straining that rule unduly." 5 Am. Jur., Automobiles, s. 365, p. 705. It is a deviation from the ordinary principles of *respondeat superior* and has been severely criticized in some quarters. Shearman and Redfield on Negligence, Rev. Ed., Vol. 4, s. 690, p. 1628. It has been rejected by at least 27 States. 60 C.J.S., Motor Vehicles, note 72, pp. 1067-8; 21 Kentucky Law Journal, pp. 483-485.

This Court first began to consider and discuss the doctrine about 1913. *Linville v. Nissen,* 162 N.C. 95, 77 S.E. 1096. From time to time the subject was given further attention and comment. *Clark v. Sweaney,* 176 N.C. 529, 97 S.E. 474 (1918); *Taylor v. Stewart,* 172 N.C. 203, 90 S.E. 134 (1916). The first clear approval appears in *Robertson v. Aldridge, supra* (1923), and even here the Court seemed reluctant to fully accept the doctrine. The opinion states: ". . . (I)t is . . . held in our opinions by the great weight of authority that where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect." However, it further declares: ". . . (I)t is the rule approved by well considered authority and recognized in this jurisdiction that when an owner, parent or other, entrusts his car to one whom he knows or has every reason to believe is incompetent, or reckless and irresponsible, to an extent that makes a negligent injury probable, such owner may

be held liable, though the doctrine of *respondeat superior* is not presented."

In 1927 a commentator, discussing *Robertson* and other cases in this jurisdiction, concluded: "The North Carolina Court has not accepted the 'family purpose' doctrine, but rather bases its decisions strictly on the principles of agency, holding the parent liable for injuries caused by the negligent driving of his children only when it appears that the driver was acting within the authority, express or implied, of the owner. And refusing to hold the parent liable where it appears that there was no authority or an express prohibition. Any law changing such liability should come from legislative action and not by drastic decisions of the courts." 5 N.C. Law Review, 253-4.

The doctrine is now firmly imbedded in the law of this jurisdiction. *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427; *Thompson v. Lassiter,* 246 N.C. 34, 97 S.E. 2d 492; *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Vaughn v. Booker,* 217 N.C. 479, 8 S.E. 2d 603; 132 A.L.R. 981; *Grier v. Woodside,* 200 N.C. 759, 158 S.E. 491.

Our latest definition of the doctrine may be deduced from the following statement: "Ordinarily, a cause of action based solely on the family purpose doctrine is stated by allegations to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge, and approval of the owner of the car." *Lynn v. Clark, supra.*

The family purpose doctrine "came into being as an instrument of social policy to afford greater protection for the rapidly growing number of motorists in the United States." 38 N.C. Law Review 252-3. Perhaps nothing has had so great an impact on the business and social life of this country during the past half century as the advent and ever increasing use of automobiles and trucks. It was probably inevitable that there should be an alarming number of collisions and accidents resulting in injuries, suffering and economic loss. This possibly justified the search of the courts for some device to impose a greater degree of financial responsibility. On the other hand, the fact can not be ignored that a majority of the jurisdictions have managed somehow without the family purpose doctrine. It is certain that the courts in the adopting States have been exceedingly reluctant to broaden its scope or to extend it to other instrumentalities.

The Tennessee Court in 1929 applied it to motorcycles. *Meinhardt v. Vaughn,* 17 S.W. 2d 5. But there the Court was at great pains to

point out the similarities between motorcycles and automobiles. The Washington Court refused in 1949 to extend the doctrine to include bicycles. *Pflugmacher v. Thomas,* 209 P. 2d 443. The Court explained that the rule in automobile cases was adopted because the courts were "confronted with an alarming situation and an increasing social problem demanding solution." It found no such situation in the use of bicycles.

In our rather extensive examination of the authorities we do not find a single instance in which the doctrine has been applied to motorboats or boats of any kind. We find only one case involving boats in which the doctrine has been considered and discussed — *Felcyn v. Gamble,* 241 N.W. 37 (Minn. 1932). There, plaintiff sustained injuries caused by the alleged negligence of defendant's son in the operation of defendant's boat which, it was alleged, was "located and used . . . by his family for family purposes." It was further alleged that the son was a member of the family and plaintiff was a guest passenger in the boat. The court refused to apply the family purpose doctrine. It found no "necessity" for it and found that "the situation as regards motorboats is in no way comparable to that of the automobile."

The *Felcyn* case is cited in *Florenzie v. Fey,* 205 N.Y.S. 2d 91 (1960). This was an action by the owner-operator of a motor-boat to recover damages arising from a collision between his boat and defendant's motor-boat which was being operated at the time of the accident by a gratuitous bailee while defendant was not in the boat. The facts do not involve a family situation, but some of the comments of the court are pertinent. After declaring that defendant is not an insurer and that liability must rest on negligence and not mere ownership, the court referred to a report of the Joint Legislative Committee on Motor Boats recommending the adoption of a bill imposing responsibility on boat owners for the negligence of the operators. It pointed out that such a bill was introduced in 1958 and failed of passage. The rejection of the measure by the Legislature was undoubtedly given much weight by the court, for it concluded: "Until the passage of the bill recommended by the Joint Legislative Committee on Motor Boats or its equivalent, the plaintiff, on the facts such as here exist, is relegated to an action against the operator and may not recover against the owner. This may appear bizarre in a state where the age established for the operation of a motor boat is fourteen and, under certain conditions set out in the Navigation Law, s. 70, operators may be between the ages of ten to fourteen. However, until the intervention of statutory authority explicitly making the

owner liable, no cause of action exists against the owner for the negligent act of a gratuitous bailee operating a motorboat."

In the absence of legislative action, this Court is not disposed to extend the family purpose doctrine in North Carolina to instrumentalities other than motor vehicles operating on public highways. Should the principles of *respondeat superior* be further relaxed, great uncertainty will exist in the field of agency and there will be an immediate clamor to extend the doctrine to still other instrumentalities to meet the exigencies of particular cases. *Hays v. Hogan,* 273 Mo. 1, 200 S.W. 286.

That there has been a marked increase in the use of motor-boats in recent years is common knowledge. Likewise the danger to life, limb and property from their use has proportionately increased. The General Assembly is not unaware of these facts. A chapter (75A), entitled "Motorboats," was added to the General Statutes in 1959, effective 1 January 1960 (G.S. 75A-1 to G.S. 75A-19). The declaration of policy is: "It is the policy of this State to promote safety for persons and property in and connected with the use, operation and equipment of vessels, and to promote uniformity of laws relating thereto." G.S. 75A-1. The chapter contains many regulations and provisions. It provides, among other things, that it shall be unlawful for any person to operate a motor-boat or manipulate water skis, surfboard or other similar device in a reckless or negligent manner or while intoxicated. G.S. 75A-10.

Plaintiff excepts to the exclusion of evidence tending to show that there were, as of 7 September 1960, the following categories of motorboats propelled by machinery greater than ten horse power, registered in North Carolina: Regular, 36,231; dealers, 230; public, 202; total, 36,663. This evidence is irrelevant and immaterial to the issues in the case at bar.

The General Assembly is the policy-making division of government. If the public safety and welfare demand that the family purpose doctrine be extended to tort cases arising from the operation of motorboats, the legislative department is quite capable of understanding and providing for that need without assistance from the judicial branch of government. The decision lies with the Legislature.

The ruling of the trial court in sustaining the motion of defendant John E. Watts for nonsuit is

Affirmed.

BRAXTON ROUSE v. PRESTON E. JONES, ESQUI R. JONES AND WALTER T. SHIVAR, A MINOR, BY HIS GUARDIAN AD LITEM, WILLIE T. SHIVAR, AND WILLIE T. SHIVAR.

(Filed 3 May, 1961.)

1. Trial § 22—

On motion to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to him.

2. Automobiles § 14—

A motorist is forbidden by statute to attempt to pass another vehicle travelling in the same direction unless the left side of the highway is clearly visible and is free of oncoming traffic for a sufficient distance to permit him to pass the other vehicle in safety, and the violation of this statutory provision is negligence. G.S. 20-150(a).

3. Automobiles 41d— Evidence held for jury on issue of negligence in attempting to pass before ascertaining the movement could be made in safety.

Evidence tending to show that a motorist, at nighttime, overtook and attempted to pass another vehicle which was travelling at the maximum legal speed, that he pulled to the left from a position close to the rear of the preceding vehicle, which thus partially obstructed his vision, that the attempt to pass was made while travelling upgrade, approaching a slight curve, that upon seeing an approaching vehicle he speeded-up in an attempt to regain the right side of the highway, and collided with the vehicle travelling in the same direction, resulting in injuries to his passenger, *is held* sufficient to be submitted to the jury on the question of such motorist's negligence and that such negligence was a proximate cause of the injury.

4. Automobiles § 39—

Evidence that a motorist, after sideswipping a car travelling in the same direction, ran off the pavement, down an enbankment, and through a swampy area 375 feet, struck a tree which knocked off one of the doors of the vehicle, *is held* to warrant a finding of excessive speed.

5. Automobiles § 25—

It is negligence to drive a motor vehicle upon a public highway at a speed that is greater than is reasonable and prudent under the existing circumstances. G.S. 20-141 (a) (c).

6. Negligence § 7—

Proximate cause is an inference of fact drawn from other facts and circumstances, and is ordinarily a question for the jury.

7. Automobiles § 14—

It is negligence *per se* for a motorist to increase the speed of his vehicle while another motorist, travelling in the same direction, is attempting to pass. G.S. 20-151.

8. Automobiles § 41d—

Evidence that one motorist, while another motorist travelling in the same direction was abreast in attempting to pass, increased his speed, even though he saw, or in the exercise of due care should have seen, a third vehicle approaching from the opposite direction, *is held* sufficient to be submitted to the jury on the issue of negligence, even though the attempt by the second motorist to pass was, under the circumstances, in violation of statute and negligent.

9. Negligence § 1—

Even though a person is not under duty to anticipate negligence on the part of another, when such other has created a perilous condition by his negligence, the first is under duty to take such action as an ordinarily prudent person would take in order to avoid injury after he discovers, or should discover in the exercise of ordinary care, the impending danger.

10. Negligence § 7—

There may be more than one proximate cause of an injury, and if the negligent acts of two persons join and concur in producing an injury, they are jointly and severally liable therefor, even though they act independently of each other.

11. Negligence § 8—

The doctrine of intervening negligence relates to proximate cause, and the negligence of one party cannot insulate that of another when the injury from the perilous condition created by the acts of the first is reasonably forseeable and the negligence of the second remains active to the very moment of the injury.

12. Negligence § 28—

Where the court fully charges upon proximate cause, it is not ordinarily required that the court elaborate its definition thereof by charging in regard to insulating negligence unless there is an apt request therefor supported by evidence.

13. Negligence § 3—

The question of whether defendant used due care in an emergency is ordinarily for the jury.

14. Same—

A defendant may not invoke the doctrine of sudden emergency if his own negligence brings on such emergency.

APPEAL by defendants from *Parker, J.*, October 1960 Civil Term of LENOIR.

This is a civil action, instituted 3 February 1959, to recover damages for personal injuries resulting from a collision of automobiles.

The collision occurred about 10:30 P.M. on 21 November 1957 on the Jones Road, a rural paved highway, in Lenoir County. Plaintiff was a gratuitous guest passenger in an automobile owned by defendant

Esqui R. Jones and operated by defendant Preston E. Jones, son of the owner. The Jones car was proceeding southwardly along the Jones Road and was following and overtaking an automobile operated by defendant Walter T. Shivar and owned by his father, Willie T. Shivar. Jones, while on a slight upgrade and approaching a slight curve, blinked his lights and sounded his horn as indications of his intention to pass Shivar, and pulled to his left in an attempt to do so. At this moment, and while the Jones and Shivar cars were about abreast, the lights of a meeting car appeared. The meeting car was approaching at a distance of from 100 to 200 feet away. Jones "stepped on the accelerator" and pulled to the right. His car collided with the Shivar car. Both vehicles went off the highway to the right. Plaintiff was seriously injured.

It is admitted that the negligence, if any, of the drivers is imputed to their respective fathers, the car owners, under the family purpose doctrine. Hereinafter when Jones and Shivar are named the reference is to the operators of the vehicles.

Plaintiff alleges that defendant Jones was negligent in that he was driving at a speed greater than was reasonable and prudent under the circumstances, attempted to pass without first ascertaining that the movement could be made in safety, failed to maintain a proper look-out, attempted to pass the Shivar car while it was meeting another vehicle and while the Shivar car was travelling at an unreasonable and excessive rate of speed, failed to pass at least two feet to the left of the Shivar car, drove again to the right side of the highway before he was safely clear of the Shivar car, and operated an automobile improperly equipped with lights.

Plaintiff alleges that defendant Shivar was negligent in that he operated an automobile at a speed greater than was reasonable and prudent under the circumstances, increased speed while the Jones car was passing, failed to give way to the right, and continued at an excessive speed when he saw the meeting car and realized that Jones would immediately attempt to turn into the right traffic lane.

Plaintiff further alleges that the negligence of Jones and Shivar concurred to cause the collision and that the negligence of each was a proximate cause of the collision and the resulting injury to plaintiff:

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

"1. Was the plaintiff injured by the negligence of the defendants, Preston E. Jones and Esqui R. Jones, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff injured by the negligence of the defendants, Walter T. Shivar, by his Guardian Ad Litem, Willie T. Shivar, and Willie T. Shivar, as alleged in the complaint? Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover for personal injuries? Answer: $14,229.00."

The court entered judgment in conformity with the verdict.

Defendants appeal.

White & Aycock for plaintiff.

Taylor, Allen & Warren for defendants Preston E. Jones and Esqui R. Jones.

Jones, Reed & Griffin for defendants Shivar.

MOORE, J. Defendants Jones and defendants Shivar severally assign as error the refusal of the court to allow their respective motions for nonsuit.

With respect to negligence and proximate cause the evidence is sharply conflicting. On the motions to nonsuit, plaintiff is entitled to have the evidence considered in the light most favorable to him. *King v. Powell*, 252 N.C. 506, 509, 114 S.E. 2d 265. When so considered, plaintiff's version of the occurrence is as follows:

About ten minutes before the accident Jones and Shivar met at the river bridge and talked a minute or two. Jones turned his car around and proceeded in the same direction Shivar was going. About two miles south of the river there is a slight curve and the highway is slightly upgrade. As the cars approached the curve Jones pulled out to pass Shivar and the lights of a meeting car flashed up. As Jones pulled out beside Shivar, plaintiff said to Jones: "Watch it Preston, yonder comes a car." All of them saw it about the same time. When Jones saw the car approaching he had pulled out and was alongside Shivar. Jones "shoved it to the bottom to get in front of" Shivar. Jones was close behind Shivar when he pulled out to pass. Plaintiff didn't know whether the lights of the meeting car, when he first saw them, had been on before or someone turned them on at the moment. At the scene of the accident Jones and Shivar told the highway patrolman that their speed at the time of the collision was fifty to fifty-five miles per hour. The next afternoon Shivar told investigating officers that they were not exceeding seventy. Later in the presence of Jones and the officers he said to Jones: "Preston you might as well tell the truth about it, I have." Jones then said they were not going over seventy miles per hour. Defendants explained that they had not exceeded seventy miles per hour, but at the time of the collision had slowed down to about fifty-five — they had slowed to fifty or fifty-five at the time they ran together. Jones said the meeting car was 100 to 150 feet away when its lights came on. Shivar said it was about 200 feet away. Jones said he didn't know

whether his lights were good enough to enable him to see a man or unlighted vehicle 200 feet down the highway or not. Shivar did not slow down when Jones attempted to pass, but accelerated his speed. In the attempt to get around Shivar, Jones pulled to the right and his car collided with Shivar's car. Both ran off the highway and down an embankment into a swampy area. The Shivar car came to rest 150 feet from the point of collision. The Jones car went 375 feet from the point of collision and struck a tree. One of its doors was torn off and plaintiff fell out. The meeting car did not collide with either of defendants' cars and did not stop.

From this evidence the inference is reasonable that defendant Jones attempted to pass defendant Shivar at night while driving slightly upgrade and approaching a slight curve, he began the movement from a position close to the rear of the Shivar car which partially obstructed his vision, he attempted to pass at a time when the Shivar car was travelling at the maximum posted speed of fifty-five miles per hour, the movement was made at a speed that would not permit him, when he discovered the peril of the meeting automible, to control his vehicle so as to resume his position at the rear of the Shivar car or otherwise avoid a collision, and as a result he collided with Shivar's vehicle in trying to avoid the meeting automobile and caused injury to plaintiff, his passenger. In short, Jones' conduct permits the reasonable conclusion that he attempted to pass when the left side of the highway was not clearly visible and before he ascertained that it was free of oncoming traffic for a sufficient distance ahead to allow him to pass in safety and, that he was operating his vehicle at a speed greater than was reasonable and prudent under conditions then existing.

The driver of a motor vehicle is by statute forbidden to drive "to the left side of the center of a highway, in overtaking and passing another vehicle proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety." G.S. 20-150(a). One who violates this section is negligent, and if such negligence proximately causes injury it is actionable. *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539; *Joyner v. Dail,* 210 N.C. 663, 188 S.E. 209.

There was testimony, albeit not positive, that the lights of the meeting automobile were not turned on until it was within 200 feet of the Jones car. Nevertheless, before overtaking and passing a vehicle going in the same direction, a motorist has positive duties. "One who operates a motor vehicle must be reasonably vigilant and anticipate the use of the highway by others." *Clark v. Emerson,* 245

N.C. 387, 390, 95 S.E. 2d 880. Jones had the duty to give attention to those circumstances which tended to obscure his vision and determine his decision as to whether or not he could pass in safety, such as his nearness to the car he was following, the effectiveness of his lights, the curve ahead, the obscuring effect of the night itself. *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251. From the evidence in the case the jury might reasonably have concluded that Jones attempted to overtake and pass without having made a reasonable determination that he could do so in safety.

In any event, it appears from plaintiff's evidence that he attempted to pass a vehicle going in the same direction which was already travelling at the maximum lawful speed, knowing that his own speed in passing would have to be much greater, that he pulled out from a position close to the rear of the Shivar car and when he got into the left lane and discovered the oncoming car, he was in such position and travelling at such speed that he was unable to control his vehicle and avoid collision.

Though overruled in some aspects, *Groome v. Davis,* 215 N.C. 510, 514, 2 S.E. 2d 771, has a pertinent statement: ". . . (T)here is more involved in speed than the mere chance of being at a particular spot at a given instant. The event may not be left in the lap of the gods, when it should have been kept in the hands of the driver." Excessive speed is negligence. *Riggs v. Motor Lines,* 233 N.C. 160, 165, 63 S.E. 2d 197. That Jones' speed was highly excessive is borne out by the physical facts. After the collision with the Shivar car, the Jones automobile ran off the pavement, down the embankment and through a swampy area 375 feet, struck a tree and had one of its doors knocked off. It is unlawful for a person to operate a vehicle upon a public highway at a speed that is greater than is reasonable and prudent under existing circumstances. G.S. 20-141(a), (c). One who violates this statute is guilty of negligence.

There was sufficient evidence to warrant the jury in finding that Jones was negligent in the respects indicated, and in others perhaps. Proximate cause is an inference of fact to be drawn from other facts and circumstances, hence what is proximate cause is ordinarily for the jury. "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 214, 29 S.E. 2d 740. Here it was a question for the jury.

Shivar was not responsible for the lights of the meeting car, nor for the attempt of Jones to pass. He was driving in the proper lane at approximately the maximum lawful speed. But there is evidence

that when Jones drew abreast his car and it was apparent that Jones was in a position of peril by reason of the near approach of the meeting vehicle, Shivar did not reduce speed but accelerated his speed and raced the passing car.

Under the circumstances thus presented it was Shivar's duty not to increase the speed of his car until Jones had completely passed. G.S. 20-151. A violation of this section is negligence *per se*. A driver is under no duty to anticipate disobedience of law or negligence on the part of others, but he has the duty to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Caughron v. Walker,* 243 N.C. 153, 157, 90 S.E. 2d 305.

In the instant case, Shivar saw, or in the exercise of reasonable care should have seen, that Jones was in a position of peril, and that if he, Shivar, increased speed or took no action to avoid collision, injury was likely to result. Yet he increased speed and there was a collision between his vehicle and the Jones car resulting in injury to plaintiff. Proximate cause was for the jury.

The jury found that the negligence of Jones and Shivar concurred to cause the injury suffered by plaintiff. "It is elemental that there may be two or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other; yet if they join and concur in producing the result complained of, the author of each cause may be held liable for the injuries inflicted, and an action may be maintained against any one of the wrongdoers or against all of them as joint tortfeasors." *Riddle v. Artis,* 243 N.C. 668, 670, 671, 91 S.E. 2d 894. "This principle is applicable when the facts are such as to justify the view that the several acts of negligence on the part of two different persons concurred in contributing proximately to the injury complained of." *Tillman v. Bellamy,* 242 N.C. 201, 204, 87 S.E. 2d 253.

Each of the defendants insists that the action should have been nonsuited as to him for that the evidence shows as a matter of law that the negligence of his co-defendant or that of the meeting car intervened and insulated the negligence, if any, on his own part.

The doctrine of insulating the negligence of one by the subsequent intervening active negligence of another belongs to the definition of proximate cause. *Butner v. Spease,* 217 N.C. 82, 87, 6 S.E. 2d 808. Intervening negligence which insulates the negligence of a prior actor is carefully defined and explained in *Riddle v. Artis, supra.* It would serve no useful purpose to repeat the explanation here. Suffice it to say, it appears from the evidence hereinbefore recited that the in-

jurious result was not reasonably unforeseeable (as that term is defined in the *Riddle* case) to either of appellants, and that the negligence of each remained active to the very moment of impact. The doctrine of insulating negligence is a guide in proper cases for determining whether or not certain negligence is the proximate cause of injury as a matter of law. Since it is an elaboration of a phase of proximate cause, the court was under no duty to instruct the jury specifically with respect thereto in the instant case, in the absence of proper request for instructions based on an applicable contention supported by evidence.

The court properly overruled the motions for nonsuit.

Much is said in defendants' briefs relative to the emergent nature of the occurrence. The question as to whether or not an actor used due care in emergency is ordinarily for the jury. Furthermore, an actor may not invoke the sudden emergency doctrine in exculpation of his own conduct if his negligence brings on the emergency. *Powell v. Lloyd,* 234 N.C. 481, 487, 67 S.E. 2d 664. The jury was adequately instructed on the emergency phase of the case.

There are many exceptions to the admission and exclusion of evidence and to the charge. In a few instances there are, perhaps, technical errors, but from a careful consideration of each exception relied on and the trial as a whole it is our opinion that no prejudicial error appears

No error.

JOHN GODWIN, JR. v. WALTER E. VINSON.

(Filed 3 May, 1961.)

1. Attachment § 10—

Where plaintiff in attachment fails to recover judgment, defendant may proceed against plaintiff's bond by motion in the cause, G.S. 1-440.45(c).

2. Same—

Where plaintiff's attachment is wrongful, defendant is entitled to recover on plaintiff's bond the actual damages sustained by him by reason of the attachment.

3. Damages § 2—

Actual damages means compensation for injury and losses which are the direct and proximate result of the wrong.

4. Attachment § 10—

Where it is determined that plaintiff's attachment of defendant's property was unlawful, plaintiff is a wrongdoer *ab initio*, and if such attachment results in defendant's loss of his equity of redemption in the chattel, defendant is entitled to recover as actual damages the cash value of his equity at the time and place of the seizure of the chattel, with lawful interest on such value from the time of the seizure to the time of the rendition of the judgment.

5. Same: Damages § 15—

Where, upon defendant's motion in the cause to assess damages resulting from wrongful attachment, defendant contends that his equity of redemption, which he lost by reason of such wrongful attachment, was in a certain sum, an instruction of the court that the jury might answer the issue of such damages in any amount from one dollar up to the amount claimed by defendant, must be held for prejudicial error, since it is the duty of the court to instruct the jury as to the rule for the admeasurement of damages upon the issue.

6. Appeal and Error § 54—

Where error in proceedings in the lower court relates solely to the issue of damages, the Supreme Court, in the exercise of its discretion, may award a partial new trial limited to the issue of damages.

RODMAN, J. concurs in result.

APPEAL by plaintiff from a judgment by *Preyer, J.*, September 1960 Term of ROWAN.

Motion in the original cause by defendant, by virtue of G.S. 1-440.45, to recover on bonds taken for his benefit therein, when defendant prevailed in the principal action, and the order of attachment of his automobile obtained by plaintiff was dissolved.

On 13 February 1959 plaintiff obtained a writ of attachment from the Superior Court of Rowan County directing the sheriff of the county to seize and safely keep defendant's new automobile. The writ of attachment was based upon plaintiff's affidavit alleging an indebtedness of defendant to him in the sum of $1,065.80, and alleging as grounds for attachment of the automobile that defendant was a nonresident, or a resident of the state, who, with intent to defraud his creditors or to avoid service of summons, has departed or is about to depart from the state or keeps himself concealed therein, or is a person who, with intent to defraud his creditors, has removed or is about to remove property from the state. Plaintiff gave an undertaking with surety in the amount of $4,000.00 binding themselves, if the attachment was dissolved or dismissed to pay defendant all costs that may be awarded to defendant in the same and all damages defendant may sustain by reason of such attachment. On 13 February 1959 the sheriff, pursuant to the writ of attachment seized and stored de-

fendant's automobile. It seems plaintiff's complaint was filed on 21 February 1959, though summons was issued on 9 February 1959, and served on defendant on 13 February 1959.

On 3 March 1959 defendant made a motion before the clerk of Rowan Superior Court, pursuant to G.S. 1-440.36, to dissolve the attachment on the ground that none of the allegations in plaintiff's affidavit to obtain the writ of attachment was true. On the same day the clerk heard the motion, and entered an order finding the facts in detail, and dissolving the writ of attachment, and ordering the sheriff to release defendant's automobile. From this order plaintiff appealed to the Superior Court in term.

The appeal was heard by Phillips, J., at the March Term 1959 of Rowan County, who entered a judgment as follows: "IT IS ORDERED, ADJUDGED AND DECREED that this action be dismissed in that it was not brought by the Real Parties in Interest; that the Writ of Attachment issued herein was unlawful and is hereby dissolved; that the property heretofore attached by the Sheriff of Rowan County, under authority of said writ, be released to the defendant; and that the plaintiff be taxed with the costs of this action by the Clerk." On the day the judgment was entered the automobile was released to defendant. On the following day, 24 March 1959, plaintiff appealed from the judgment of Phillips, J., to the Supreme Court, caused the sheriff to retake the automobile, and gave an additional undertaking with a corporate surety in the sum of $2,000.00, binding themselves to defendant in the same manner as in the first undertaking, if the judgment of Phillips, J., was affirmed on appeal.

On 24 April 1959 the Wachovia Bank and Trust Company filed an intervening petition asserting its lien upon the automobile under a chattel mortgage executed by defendant, and asking for delivery of the automobile to it. The clerk of the Superior Court of Rowan County entered an order directing the sheriff to deliver the automobile to the bank free and clear of any lien of attachment.

The appeal from the judgment of Phillips, J., was affirmed in the Supreme Court on 25 November 1959. 251 N.C. 326, 111 S.E. 2d 180. Upon certification of the Supreme Court's opinion to the Superior Court, Crissman, J., on 29 February 1960, on motion of defendant's counsel, entered judgment affirming the prior judgment dismissing the action.

Defendant on 21 March 1960 filed a motion in the cause to recover on the bonds taken for his benefit therein, alleging that he was entitled to recover for the loss of the use of his automobile, and for the loss of his equity therein. Plaintiff filed no answer to the motion.

Defendant's evidence tends to show the following: He is a travel-

ling salesman, who has lived in Salisbury 3½ years. He has no kinsmen or real estate in Rowan County. It was stipulated by the parties that by the terms of G.S. 1-440.39 the amount of bond required for discharging the attachment was $2,131.60. Because of his meager means he could not give security to obtain a bond or put up cash to repossess his automobile. He called his employer, employed a lawyer, and moved before the court to dismiss the writ of attachment. He then testified in detail as to the court procedure that followed, which is set forth above. He offered the evidence of four agents in the bonding business to show that an applicant for a bond to discharge an attachment must put up collateral. The fair rental value of his automobile was $150.00 a month. He purchased this automobile new on 10 November 1958 for $3,854.97. The Wachovia Bank and Trust Company had a chattel mortgage on it for $3,000.00. He had made two installment payments on it of $83.53 a month, when the sheriff seized it. He talked to the Wachovia Bank and Trust Company the last of April or the first part of May 1959 after it had taken possession of his automobile. It wanted him to take the automobile back, and to make the installment payments which were three behind. He didn't have the money to do so. He had made arrangements for another automobile, and could not handle both accounts. The bank told him it would go against his credit to have a public sale. To avoid this he released the automobile to the bank, which cleared his credit rating with the bank. The bank sold the automobile privately, and did not lose any money on its mortgage. As a result of the attachment of his automobile he lost his equity in it.

Plaintiff offered no evidence.

The following issues, without objection, were submitted to the jury, and answered as appears:

"1. Did the defendant Vinson make a reasonable effort to give a bond to discharge the attachment of the station wagon?
Answer: Yes.

"2. What is Mr. Vinson entitled to for loss of the use of his station wagon from February 13, 1959, through April 24, 1959?
Answer: $200.00.

"3. Did Mr. Vinson do what he could in the exercise of reasonable care and diligence to avoid loss or lessen the consequences of the wrongful attachment of his station wagon when he released his equity in the station wagon to avoid foreclosure by Wachovia Bank & Trust Company?
Answer: Yes.

"4. What is Mr. Vinson entitled to for the loss of his equity in his station wagon?
Answer: $800.00."

From a judgment in accord with the verdict, plaintiff appeals.

Graham M. Carlton for plaintiff, appellant.
George L. Burke, Jr., for defendant, appellee.

PARKER, J. The procedure of defendant by motion in the cause to recover on the bonds taken for his benefit therein is authorized by the express language of G.S. 1-440.45(c). *Brown v. Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645.

On the second issue submitted to the jury, the trial court restricted any recovery for the loss of the use of his automobile by defendant to the time when it was in possession of the sheriff by virtue of the writ of attachment caused to be issued by plaintiff up to the time the Wachovia Bank and Trust Company received possession of it.

A careful examination of the assignments of error in respect to the trial as to the first, second and third issues fails to show prejudicial error in respect to the trial as to the first three issues. However, prejudicial error is shown by the assignment of error as to the charge on the fourth issue, which is as follows: "Now the last issue which the court will submit is: 4. What is Mr. Vinson entitled to for the loss of his equity to his station wagon? Answer. . . . Now, as the court instructed you, he contends he is entitled to $1,637.00, and Mr. Godwin contends he is entitled to nothing. Now, if you answer the third issue No, and find Mr. Vinson did not do what a man in the exercise of reasonable care and diligence would have done to protect his equity, then you would not answer the fourth issue, it would not have been Mr. Godwin's fault that he lost the equity if he did not act like a reasonable man about it, but if you answer that third issue, Yes, then you would award on the fourth issue any amount from one dollar to $1,637.00 that you find by the greater weight of the evidence Mr. Vinson would be entitled to for the loss of his equity." The court gave the jury on the fourth issue no rule as to the measure of damages, so that the jury could arrive at a correct verdict.

Plaintiff's two bonds for attachment of defendant's automobile conform to the provisions of G.S. 1-440.10, the relevant part of which reads: "(2) The condition of the bond shall be that a. If the order of attachment is dissolved, dismissed or set aside by the court, or b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attach-

ment, the surety's liability, however, to be limited to the amount of the bond."

When the attachment defendant proceeded on the bonds in the principal case here, he "is entitled to recover the actual damages sustained by him by reason of the levy of the order of attachment on his property. Citing authority. The liability of the surety, however, is limited to the amount of the attachment bond. Citing authority." *Brown v. Esates Corp., supra.*

Actual damages means "compensation for injuries and losses which are the direct and proximate result of the wrongful suing out of the writ and the seizure and detention of his property thereunder. Actual loss or injury must have been sustained or no compensatory damages are recoverable." 7 C.J.S., Attachment, § 556, p. 680. To the same effect: 5 Am. Jur., Attachment and Garnishment, § 1005; Sutherland on Damages, 4th Ed., Vol. II, § 512, p. 1689.

It has been judicially determined in the principal action that the attachment of defendant's automobile was unlawful, therefore, plaintiff is a wrongdoer *ab initio. Stanley v. Carey,* 89 Wis. 410, 62 N.W. 188; Sutherland on Damages, 4th Ed., Vol. II, § 512, p. 1691. Therefore, if attachment defendant had any equity in his automobile at the time of its seizure by virtue of the writ of attachment procured by plaintiff, which he lost as a direct and proximate result of the wrongful suing out of the writ of attachment by plaintiff and the seizure and detention of his automobile thereunder, he is entitled to recover as actual damages the fair cash value of the equity in his automobile at the time and place of its seizure by the sheriff by virtue of the wrongful writ of attachment, with lawful interest on such value from the time of the seizure to the time of the rendition of the judgment. 7 C.J.S., Attachment, § 559, pp. 681-2; 5 Am. Jur., Attachment and Garnishment, § 1005, p. 205; Sutherland on Damages, Vol. II, 4th Ed., p. 1691.

Plaintiff was entitled to have the trial judge instruct the jury on the fourth issue on the measure of damages as set forth in this opinion.

The statement of *Walker, J.*, for the Court in *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164, has been quoted many times with approval: "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication."

This case comes within the rule stated by *Justice Walker* as to when a partial new trial will be ordered. We perceive no good reason

why attachment defendant should again be put to trial on the first, second and third issues. In awarding a partial new trial upon the fourth issue alone, we find precedents in our following decisions: *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Journigan v. Ice Co.,* 233 N.C. 180, 63 S.E. 2d 183; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Jackson v. Parks,* 220 N.C. 680, 18 S.E. 2d 138; *Messick v. Hickory,* 211 N.C. 531, 191 S.E. 43; *Gossett v. Metropolitan Life Ins. Co.,* 208 N.C. 152, 179 S.E. 438; *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690, Ann. Cas. 1915 B 598; *Rushing v. R. R.,* 149 N.C. 158, 62 S.E. 890.

In the trial of the first three issues we find no error. A new trial is ordered in this case, limited, however to the fourth issue.

Partial new trial.

RODMAN, J., concurs in result.

JIMMIE D. SMITH v. PEOPLES BANK & TRUST COMPANY.

(Filed 3 May, 1961.)

1. Deeds § 21—

Recitations by the grantor as to its source of title are, considered in the light most favorable to the grantee, a covenant of seizin and not a covenant of warranty.

2. Same: Deeds § 22—

A covenant of seizin does not run with the land and is breached immediately when the deed is delivered if the grantor is not then seized of title according to his covenant; a covenant of warranty is prospective and is not breached until the grantee or his successors are ousted or evicted by the owner of a paramount title.

3. Deeds § 21—

Allegations that some thirteen years after the delivery of the deed and the taking of possession by the grantee thereunder, judgment was entered that a stranger owned a fee simple title to an undivided interest in the land, without allegation that the grantor was a party to the action, is insufficient to state a cause of action for breach of covenant of seizin, since such decree is not determinative that the grantor was not seized in fee as to the entire interest in the land at the time the deed was executed.

4. Pleadings § 28—

Plaintiff may not recover except upon the theory of the complaint.

5. Pleadings § 19—

Where the complaint is insufficient to state a cause of action upon the theory advanced therein, but does not make it affirmatively appear that plaintiff has no cause of action against defendant upon the predicate facts alleged, the action should not be dismissed upon demurrer prior to the expiration of time for motion for leave to amend.

MOORE, J., concurs in result.

APPEAL by plaintiff from *Mintz, J.*, November Term, 1960, of EDGECOMBE.

The hearing below was on demurrer to the amended complaint.

The amended complaint, summarized, alleges these facts:

By deed dated November 27, 1946, L. L. Raynor (unmarried), Lula Shearin Raynor (unmarried), and "Peoples Bank & Trust Company, a banking corporation organized under the laws of the State of North Carolina, with its principal office in Rocky Mount, North Carolina, as trustee (under the last Will and Testament of C. G. Shearin, deceased, which is duly probated in the office of the Clerk of the Superior Court of Nash County), for the estates created in said will, for Charles Brantley Lee Shearin and his children and, Cora Mae Shearin and her children," purported to convey to Jimmie D. Smith (plaintiff herein), his heirs and assigns, for the recited consideration of $12,950.00, a described tract of 44.5 acres in Stoney Creek Township, Nash County, North Carolina. The deed, in accordance with the recitals therein, was executed by said individual grantors and in the name of "PEOPLES BANK & TRUST COMPANY, TRUSTEE of the Estates of Charles Brantley Lee Shearin and Cora Mae Shearin," by the bank's president, attested by its assistant cashier, and its corporate seal was affixed.

Each of the individual grantors, L. L. Raynor and Lula Shearin Raynor, owned an undivided one-sixth interest in said land; and each, by the terms of said deed, fully warranted the title in respect of his (her) undivided one-sixth interest.

The deed contains this provision: "Grantor, Peoples Bank & Trust Company, Trustee, the owner of four-sixths undivided interest of the property hereby conveyed, acquired its title under the terms of the last will and testament of C. G. Shearin, deceased, which is duly probated in Nash County Registry, the said C. G. Shearin, deceased, having acquired a one-sixth interest under the Will of G. T. Shearin, a one-sixth interest from R. L. Shearin, by deed registered in Book 350, page 511, Nash County Registry (see also quit-claim deed from

R. L. Shearin to Peoples Bank & Trust Company, dated November 19, 1946, duly registered in Nash County Registry); a one-sixth interest from C. H. Shearin by deed registered in Book 446, page 315, and a one-sixth interest from S. H. Shearin, by deed registered in Book 477, page 244, Nash County Registry."

The deed, in the warranty clause, contains this provision: "The Peoples Bank & Trust Company, Trustee as aforesaid, covenants with the party of the second part, his heirs and assigns, that said premises are free and clear of any encumbrances made or suffered by it and that it will forever warrant and defend the title to the same against the lawful claims of all persons arising out of any act or deed by it in its capacity as trustee."

Upon delivery of said deed, plaintiff paid the purchase price of $12,950.00 to the grantors and entered into possession of the land.

On August 24, 1959, Charles Lee Shearin and Cora Mae Shearin instituted in Nash County Superior Court a special proceeding for actual partition of said land. They asserted ownership of an undivided one-sixth interest. Plaintiff, upon service of summons upon him in said special proceeding, called on defendant "to defend said title pursuant to its warranty and representations in said deed and made to him at the time of sale." Although given an opportunity to do so, defendant "wholly failed and refused to assist in said proceeding, to provide the plaintiff with counsel, or to offer any assistance in the settlement of the controversy."

At December Term, 1959, judgment was entered in said special proceeding. It was adjudged that Charles Lee Shearin and Cora Mae Shearin were the owners of the undivided one-sixth interest in controversy, and were entitled to actual partition. Thereafter, plaintiff purchased said undivided one-sixth interest from the Shearins.

Plaintiff alleges "the warranties and representations contained in said deed were breached on the 10th day of December 1959, at the time a decree was entered in the Superior Court of Nash County, adjudging the plaintiff not to be the owner of said one-sixth (1/6) interest in said tract of land," and that "the said mistake of the defendant combined with the mistake of the plaintiff in relying upon the warranties and representations of the defendant in said deed" was a "mutual mistake" resulting in loss and expense by plaintiff.

Plaintiff's action is to recover (1) the sum of $2,158.33, one-sixth of said purchase price of $12,950.00, together with interest at 6% per annum from November 27, 1946, and (2) the sum of $800.00 expended by plaintiff as attorneys' fees in connection with his unsuccessful defense of said special proceeding, and (3) the sum of $2.50, the fee paid by plaintiff for recording the deed from the Shearins to plaintiff.

Defendant demurred, setting forth with particularity these grounds of objection: (1) The amended complaint does not state facts sufficient to constitute a cause of action and (2) the action is against defendant in its individual or corporate capacity and not in its capacity as trustee under the will of C. G. Shearin, deceased.

Judgment was entered sustaining the demurrer and dismissing plaintiff's action. Plaintiff appealed. "The ONLY EXCEPTION is to the signing of the Judgment."

Fountain, Fountain, Bridgers & Horton for plaintiff, appellant.
Thorp, Spruill, Thorp, Trotter & Biggs for defendant, appellee.

BOBBITT, J. The deed of November 27, 1946, contains a representation that defendant in its capacity as trustee under the will of C. G. Shearin owns and conveys four undivided one-sixth interests in the land described therein. The source of C. G. Shearin's title to each undivided one-sixth interest is stated. The ownership of the undivided one-sixth interest referred to in the deed as having been acquired by C. G. Shearin "under the Will of G. T. Shearin," was in controversy in the Nash County special proceeding.

Presumably, the judgment in the Nash County special proceeding is based upon an interpretation of the will of G. T. Shearin. Plaintiff alleges he paid $800.00 in attorneys' fees in defense of his title. It may be fairly inferred that plaintiff then contended the deed of November 27, 1946, conveyed to him the undivided one-sixth interest in controversy. Plaintiff did not appeal from the adverse judgment. The complaint contains no allegations as to the provisions of the will of G. T. Shearin.

Plaintiff does not allege a breach of the special warranty in the deed. It is not alleged that defendant, either in its capacity as trustee or in its corporate capacity, encumbered the undivided one-sixth interest or committed any act or deed adversely affecting such interest. Moreover, the facts alleged are insufficient to state a cause of action in tort. According to plaintiff's allegations, both plaintiff and defendant acted in the belief that C. G. Shearin acquired an undivided one-sixth interest under the will of G. T. Shearin.

The gist of the cause of action alleged by plaintiff is that the representation as to ownership in said deed was breached "on the 10th day of December 1959," by the entry of the decree in the Nash County special proceeding.

Considered in the light most favorable to plaintiff, the representation as to ownership in said deed constitutes a covenant of seizin.

When so considered, plaintiff's cause of action, if any, for breach thereof, arose immediately upon delivery of said deed.

In *Cover v. McAden,* 183 N.C. 641, 112 S.E. 817, *Adams, J.,* explains clearly the distinction between a covenant of seizin and a covenant of warranty: "The former is a covenant *in praesenti,* or a covenant that a particular state of things exists when the dead is delivered—*juris et seisinae conjunctio*—and if it does not exist the delivery of the deed containing such a covenant causes an instant breach. A covenant of warranty is prospective. It is an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, or that they shall not by force of a paramount title be evicted from the land or deprived of its possession. (Citations) This distinction is further observable in the conditions or circumstances that usually characterize the breach of each covenant. If the grantor is not seized, or if an encumbrance exists, the covenant of seizin is broken immediately upon the execution of the deed; but generally speaking, a covenant of warranty, being prospective in its nature, is broken only by eviction, actual or constructive, under a paramount title existing at the time the conveyance is made. (Citations)"

"The covenant of seizin does not run with the land, and is broken when the deed is delivered, if the grantor does not own the lands according to his covenant, the right of action accrues at once to him, and to him alone. (Citations)" *Varser, J.,* in *New Bern v. Hinton,* 190 N.C. 108, 129 S.E. 181.

"The covenant of warranty and the covenant of quiet enjoyment are not strictly personal, like the covenant of seizin, which is broken when the deed is delivered if the title is defective, but they are prospective in their operation, and an ouster or eviction is necessary to constitute a breach. These covenants are, therefore, in the nature of real covenants and run with the land conveyed, and descend to the heirs and vest in assignees or purchasers. 4 Kent (13 Ed.), p. 471 (538) *et seq.*" *Walker, J.,* in *Wiggins v. Pender,* 132 N.C. 628, 636, 44 S.E. 362. Hence, as stated by *Denny, J.,* in *Shimer v. Traub,* 244 N.C. 466, 94 S.E. 2d 363: "It is the law in this State that a cause of action for breach of warranty of title to real estate does not arise until there has been an ouster or eviction of the grantee or grantees under a superior title. (Citations)"

Plaintiff bases his right to recover on the decree entered December 10, 1959, in the Nash County special proceeding. He relies on *Shuford v. Phillips,* 235 N.C. 387, 70 S.E. 2d 193, and decisions of like import. See *Culbreth v. Britt Corp.,* 231 N.C. 76, 56 S.E. 2d 15; *Cover v. McAden, supra; Jones v. Balsley,* 154 N.C. 61, 69 S.E. 827. In these

cases, the action was to recover for breach of *a covenant of warranty.* In such case, an adjudication that there was an outstanding paramount or superior title is binding on the covenantor, although not a party to the action, if the covenantor is given notice of the action and an opportunity to defend his title. But such prior adjudication is not prerequisite to or determinative of a covenantee's right to maintain an action for breach of a covenant of seizin.

As stated in his brief, "(p)laintiff entered into possession in 1946 and enjoyed possession until December 10, 1959, the date on which the Superior Court of Nash County ruled that Charles Lee Shearin and Cora Mae Shearin were the owners of a one-sixth (1/6) undivided interest in the land." When considered as a cause of action for breach of a covenant of seizin, plaintiff's cause of action, if any, arose when the deed was delivered, that is, on or about November 27, 1946. Plaintiff has failed to allege facts sufficient to show such covenant was then breached. He relies solely on the decree entered December 10, 1959, in the Nash County special proceeding. There is no allegation that defendant was a party to the Nash County special proceeding, either in its corporate capacity or in its capacity as trustee. The decree therein is not determinative of plaintiff's right to maintain a cause of acton for breach of the covenant of seizin.

On this appeal, whether plaintiff has a cause of action against defendant, either in its corporate capacity or in its capacity as trustee, for money had and received, or on other grounds, is not presented. "Plaintiff's recovery is to be had, if at all, on the theory of the complaint and not otherwise." *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470; *Manley v. News Co.,* 241 N.C. 455, 460, 85 S.E. 2d 672.

Since, in our view, the gist of the cause of action presently alleged is that the representation in said deed as to ownership was breached "on the 10th day of December 1959," by the entry of the decree in the Nash County special proceeding, the portion of the judgment sustaining the demurrer to the amended complaint is affirmed. However, the allegations of the amended complaint do not affirmatively disclose a defective cause of action, that is, that plaintiff has no cause of action against defendant. The demurrer should have been sustained without prejudice to plaintiff's right to move for leave to amend. *Skipper v. Cheatham,* 249 N.C. 706, 711, 107 S.E. 2d 625, and cases cited. Hence, the portion of the judgment dismissing the action is erroneous and should be stricken. It is so ordered. As so modified, the judgment is affirmed.

Modified and affirmed.

MOORE, J. concurs in result.

LEWIS C. WAGNER AND BESSIE M. WAGNER v. FRED C. BAUMAN AND ELIZABETH S. BAUMAN.

(Filed 3 May, 1961.)

1. Adverse Possession § 23—

Evidence tending to show that plaintiffs' predecessor in title purchased the land more than seven years prior to the institution of the action, that upon controversy then arising with the adjoining land owners, the parties went upon the land and agreed to certain natural objects as marking the true boundary, that plaintiffs' predecessor in title built a fence along this boundary, and that plaintiffs and plaintiffs' predecessor in title had been in possession up to this boundary continuously thereafter, *is held* sufficient to be submitted to the jury upon claim of title up to such boundary by seven years possession under color.

2. Boundaries 4—

Evidence that at the time plaintiffs purchased the property from defendants, the *feme* defendant pointed out the natural objects constituting the boundary, is sufficient to be submitted to the jury as to the estoppel of defendants from denying that the lines thus pointed out at the time of the purchase and relied on by the purchaser were not the true dividing lines.

3. Same: Boundaries § 11—

Where, after the purchase of property and the execution of deed therefor, a dispute arises with the owners of the adjoining land as to the location of the true dividing line, and the *feme* adjoining owner goes upon the land and points out the natural objects which she agrees determines the true boundary line, her declarations are competent as an admission against interest, but cannot change the boundaries called for in the deed, and an instruction giving her declarations the effect of establishing the boundary line between the contiguous tracts must be held for prejudicial error.

APPEAL by defendants from *Pless, J.*, November 1960 Term of WATAUGA.

This is an action in trespass to try title. Plaintiffs alleged ownership of two tracts described in the complaint as containing 7 acres and 13 acres respectively.

Defendants denied plaintiffs were the owners of the lands as described in the complaint, alleging they were the owners of a portion, which portion they did not describe.

Plaintiffs contend the two tracts adjoin, the southern boundary of the 7-acre tract being the northern boundary of the 13-acre tract. This line is shown on the court map by the red line and letters CBA. Plaintiffs contend point red C is the center of a branch, point red B is a spring at the head of the branch, and red A is a stump, formerly

a chestnut tree, Marie Spann's corner on the west edge of the Boone Road.

Defendants contend the southern line of the 7-acre tract is shown by the green line and letters C, the center of a branch, green B, a spring, and green A, Marie Spann's corner on the edge of the Boone Road.

The area in dispute is a rectangle containing approximately one acre. The court submitted an issue to the jury to determine ownership of the rectangular area. The jury answered as contended by plaintiffs. Judgment was entered on the verdict and defendants appealed.

Louis H. Smith and Alfred R. Crisp for plaintiff appellees.
Wade H. Brown and Hal B. Adams for defendant appellants.

RODMAN, J. The 7-acre tract was conveyed to plaintiffs by C. R. Spann and wife by deed dated 11 October 1955. The description conforms to a survey made by I. A. Bumgarner on the day the deed is dated. The description as here pertinent is: "to a stake in the branch, Greene and Spann corner; thence up with the branch as follows: (courses and distances) to a point in the middle spring; thence North 85 West 26 poles to an iron stake by the road . . ."

Four days after plaintiffs purchased the 7-acre tract they purchased the 13-acre tract from defendants. The description in that deed as here pertinent is: ". . . thence north 40 deg. west 14 poles to a stake corner to Wagner and Green; thence with Wagner's line as follows: (then follows the identical courses and distances given in the deed from C. R. Spann to plaintiffs for the 7-acre tract) to a stake at a spring; thence north 85 deg. west 29 poles to a stake in the margin of Old Flat Top Road . . ."

The 7-acre tract conveyed by C. R. Spann to plaintiffs was acquired by Spann from his mother, Dora Spann, by two deeds, one dated in 1940 for 2 acres not material to this controversy, the other for 5 acres, dated 17 November 1945. The part of the description in that deed material to this controversy is: ". . . southward with C. R. Spann's line 14 poles to the center of the branch; thence up and with the branch a westward course 17 poles to the spring at the head of the branch; thence continuing a westward course with Bauman's line 24 poles to Marie Spann's corner on the West side of the Old Boone Road . . ."

There was evidence for plaintiffs that red C was in the center of the branch and that the line from red C to red B followed the branch, red B being a spring; that the line from B to A ran north 85 west to an iron pipe on the east edge of the road. On the west edge of the

road was a chestnut stump, formerly a chestnut tree, Marie Spann's corner. There was evidence for defendants that green C was in the center of a branch and the line from C to green B followed the branch. Green B was a spring. The line from green B to green A ran from the spring past an apple tree to a chestnut tree on the west side of the road, Marie Spann's corner. There was evidence for plaintiffs that shortly after C. R. Spann purchased the 5-acre tract from his mother, a controversy arose between him and his sister, the feme defendant, then the owner of the 13-acre tract, with respect to the line dividing their properties. I. A. Bumgarner, who surveyed when plaintiffs purchased in 1955, was employed to survey the line. This survey was made late in 1945 or early in 1946. Present on the survey were Mrs. Spann, grantor of C. R. Spann, feme defendant, and C. R. Spann. The feme defendant at that time pointed out the corner in the branch indicated by red C, the spring, and the chestnut, red A, as the correct line. This line was then surveyed by Bumgarner. It was the identical line which he surveyed when plaintiffs purchased from C. R. Spann in 1955. Immediately following Bumgarner's survey in 1945 or 1946 Spann built a fence along the line pointed out by feme defendant. C. R. Spann had possession up to that line until he sold to plaintiffs. The testimony with respect to the survey in 1945 or 1946 and what was then said was admitted over the objection of defendants. Defendants denied that they pointed out or recognized the line as the evidence of Bumgarner and Spann tended to show. They denied that Spann had adverse possession. They asserted that his possession was sporadic and permissive. They asserted that they then claimed that the green line was the true line.

There was testimony for plaintiffs that prior to the purchase from defendants feme defendant showed L. C. Wagner the red line as the line dividing her property from the C. R. Spann property purchased by plaintiffs. Wagner testified defendants made no claim to the land in controversy for three or four years after the execution of their deed; that the Wagner line called for in the deed from defendants to plaintiffs is the red line; that plaintiffs relied upon the declarations of feme defendant when they purchased.

The motion to nonsuit was properly overruled. There was evidence sufficient to take the case to the jury on the theory that plaintiff and his ancestor in title had acquired title to the land to the red line by possession under color for the statutory period. There was evidence sufficient to go to the jury to estop defendants from denying that the red line pointed out by feme defendant was in fact the line of the property plaintiffs purchased from C. R. Spann, because plain-

tiffs relied upon the declarations of defendants when they purchased the 13 acres.

The court charged the jury: "The Court further instructing you, gentlemen of the jury, that if you find and find by the greater weight of the evidence, without regard to the question of the fence, that in the year 1945 or 1946, that a survey of this property was made by Mr. Bumgarner, and that at that time Mrs. Bauman agreed upon the spring at Red letter B, and that the line from there to the Red letter A was thereupon fenced in in accordance with that agreement, then that would constitute an agreement as to the line, and that the parties, adjoining landowners, have a right to agree as to where the line is, and that, if the agreement was made, that would inure to the benefit of the plaintiff Mr. Wagner, and that if you should find that the line was agreed upon there, from the spring to the Red letter B to A, and that the branch from B back to C constituted the remainder of the line, then, upon that showing by the greater weight of the evidence, if you should find that to be true, the plaintiffs would be entitled to a favorable answer to this issue, that is YES."

The court further charged: "In other words, gentlemen, if the plaintiff has maintained his position, and has satisfied you by the greater weight of the evidence, either of the seven years' possession, under fence, which I have gone into fully for you, and which you will remember, or that the line was agreed upon back in 1946 as being contended for by the plaintiff at a time when it was surveyed by Mr. Bumgarner and that Mrs. Bauman and Mr. Spann agreed upon that as being the line, or if the plaintiff has satisfied you by the greater weight of the evidence that Mrs. Bauman stated to him, in contemplation of the sale of the property, that the fence was the line, and that the deed was drawn for the purpose of letting the fence be the line, then in either of those events, if shown by the greater weight of the evidence, the plaintiff would be entitled to prevail and you would answer the issue YES."

Defendants' exceptions nos. 68 and 70 are directed to those portions of the charge.

Testimony that the feme defendant in 1946 showed the surveyor the branch, spring, and other objects called for in the deed from Dora Spann to C. R. Spann, which objects then pointed out are the objects now claimed by plaintiffs as marking their southern boundary, was competent. They were admissions adverse to the claim now asserted. The fact, if it is a fact, that defendants did not challenge C. R. Spann's assertion of ownership and possession of the land in controversy could likewise be considered by the jury as an admission that the line claimed was in fact the line dividing her land from the land of C. R. Spann.

But neither admissions nor a parol agreement made in 1946 could in fact change the boundaries of the deed made in 1945 from Dora Spann and vest title in her grantee to land not conveyed by that deed.

The distinction between competence of evidence as an admission and the effect of such admission to establish the boundary has been recognized and consistently applied by this Court. As early as 1830, *Henderson, C.J.*, in *Reed v. Schenck*, 13 N.C. 415, said: "Suppose the well was not on the line, would the party saying that the line was there change its location? It is true, such acknowledgments are evidence of the place where the marks or *termini* once were, but it is only evidence when it has been shown or appears there were some marks to which such acknowledgements pointed." *Webb v. Hall*, 18 N.C. 278; *Gilchrist v. McLaughlin*, 29 N.C. 310; *Carroway v. Chancery*, 47 N.C. 170, s. c. 51 N.C. 361; Davidson v. Arledge, 97 N.C. 172; *Shaffer v. Hahn*, 111 N.C. 1; *Shaffer v. Gaynor*, 117 N.C. 15; *Buckner v. Anderson*, 111 N.C. 572; *Haddock v. Leary*, 148 N.C. 378; *Kirkpatrick v. McCracken*, 161 N.C. 198, 76 S.E. 821; *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677; *Wiggins v. Rogers*, 175 N.C. 67, 94 S.E. 685; *Taylor v. Meadows*, 175 N.C. 373, 95 S.E. 662; *Woodard v. Harrell*, 191 N.C. 194, 132 S.E. 12.

Tested by the rule announced in these cases, it is apparent that the portion of the charge constituting defendants' exception no. 68 and that portion of the charge constituting defendants' exception no. 70, reading: "In other words, gentlemen, if plaintiff has maintained his position and has satisfied you by the greater weight of the evidence . . . or that the line was agreed upon back in 1946 as being contended for by the plaintiff at a time when it was surveyed by Mr. Bumgarner and that Mrs. Bauman and Mr. Spann agreed upon that as being the line . . . the plaintiff would be entitled to prevail and you would answer the issue YES," are erroneous and manifestly prejudicial.

The distinction between the conduct of feme defendant, owner of the land, in 1946 and her conduct in 1955 prior to her sale to plaintiffs is apparent. No one purchased relying upon her conduct in 1946.

For the reasons given, there must be a

New trial.

BERT DARDEN v. W. C. BONE AND BRYAN OIL COMPANY.

(Filed 3 May, 1961.)

1. Appeal and Error § 19—

An assignment of error to the denial of motion to nonsuit will not be considered when the record fails to show that defendant took exception to the ruling of the court, since an assignment of error must be supported by an exception duly noted. Rule of Practice in the Supreme Court 19 (3).

2. Appeal and Error § 23—

An assignment of error to the admission or exclusion of evidence must set forth so much of the testimony or record as to enable the Court to understand what questions are sought to be presented without a voyage of discovery through the record. Rule of Practice in the Supreme Court 19 (3).

3. Appeal and Error § 24—

An assignment of error to the charge must point out specifically the asserted error so that the question sought to be presented can be ascertained without the necessity of going beyond the assignment itself.

4. Appeal and Error § 44—

Appellant may not object that the court prejudiced his case by allowing another party to remain in the action when appellant himself had agreed to the consolidation of the action against such additional party.

5. Automobiles § 41a—

Where the conflicting evidence is such that reasonable men may draw different conclusions as to the existence of actionable negligence, the issue must be submitted to the jury.

6. Automobiles § 54f—

Where an additional defendant, joined upon the original defendant's cross-action, is not served with summons until more than two years after the accident in suit, the original defendant is not entitled to the presumption created by G.S. 20-71.1, and when there is no evidence that the driver was operating the vehicle of the additional defendant in the course of his employment as an agent or employee of the additional defendant, nonsuit of the cross-action based upon the doctrine of *respondeat superior* is proper.

APPEAL by defendant W. C. Bone from *Hooks, S.J.*, at December 1960 Term of WAYNE.

Civil action to recover for personal injuries resulting from a collision between a vehicle owned by Bryan Oil Company, driven by John Ashley Johnson, and upon which the plaintiff Bert Darden was riding, and a vehicle owned by the defendant, W. C. Bone, which was driven by Charlie Weston (Westers) King.

The case on appeal discloses these uncontroverted facts:

On the 5th day of October, 1957, at about 4:30 P.M., the plaintiff Bert Darden was a passenger in a 1947 Willys Jeep automobile, owned by Bryan Oil Company and operated by John Ashley Johnson. They were proceeding in a westwardly direction on Golf Course Road which intersected South John Street extension, forming a "T" intersection. On the Golf Course Road there is a STOP sign facing traffic approaching the intersection. At approximately the same time the defendant's driver, Charlie Weston (Westers) King, was proceeding southwardly on South John Street extension toward said "T" intersection in a loaded lime-spreader truck.

The Willys Jeep automobile entered into the intersection, turned left to proceed southwardly on South John Street extension. At a point about 59 feet from the intersection, the truck, owned by the defendant and operated by Charlie Weston King, collided with the Willys Jeep automobile. Both vehicles traveled something over 100 feet before coming to rest off the highway. As a result of the collision, John Ashley Johnson was killed and the plaintiff, Bert Darden, received personal injuries.

The plaintiff instituted this action against the defendant, W. C. Bone, who answered and set up a cross-action against Bryan Oil Company pursuant to G.S. 1-240. Thereupon, the court ordered that Bryan Oil Company be made a party defendant.

The cross-action against Bryan Oil Company was nonsuited at the close of all the evidence and the case was submitted to the jury under the charge of the court on these two issues, which the jury answered as indicated:

"1. Was the plaintiff, Bert Darden, injured by the negligence of the defendant, his agent and servant, as alleged in the complaint? Answer: Yes.

"2. What damages, if any, is the plaintiff entitled to recover? Answer: $10,000.00."

To the entry of judgment in accordance therewith, the defendant, W. C. Bone, excepts and appeals to the Supreme Court, and assigns error.

Albion Dunn, J. Faison Thomson, Jr., Scott B. Berkeley for plaintiff appellee.

Braswell & Strickland, James & Speight, W. H. Watson for W. C. Bone, defendant appellant.

Taylor, Allen & Warren for Bryan Oil Company, defendant appellee.

WINBORNE, C.J. Careful consideration of the nineteen groupings

of assignments of error and purported assignments of error set out in the instant case on appeal fails to reveal error for which the judgment of Superior Court should be disturbed. Those properly presented will be expressly considered.

Assignment of Error No. 4 relates to denial by the court of motion of defendant for judgment as of nonsuit at the close of the plaintiff's evidence. In this connection the record and case on appeal fail to show that an exception was taken to the ruling of the court.

"Exceptions which appear nowhere in the record except under the assignments of error are ineffectual, since an assignment of error must be supported by exception duly noted." *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Indeed, defendant waived such motion when he put on his evidence. G.S. 1-183. *Nichols v. McFarland,* 249 N.C. 125, 105 S.E. 2d 294.

Assignments of error Nos. 1, 2, 3, and 6 relate to the court's admission and exclusion of certain testimony. These assignments of error are not sufficiently definite to enable the Court to understand what questions are sought to be presented, without a voyage of discovery through the record. See Rules of Practice in the Supreme Court, 221 N.C. 544; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Nichols v. McFarland, supra.*

As stated by *Hoke, J.,* in *Thompson v. RR,* 147 N.C. 412, 61 S.E. 286: "If the exception be to a ruling of the Court on a question of evidence, the testimony should be to (so?) set out that its relevancy can be seen. And if the exception is to some other ruling of the court or some other matter occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that its bearing on the controversy could be perceived to some extent in reading the assignment itself."

Assignments of Error 9, 10, 11, 12, 13, 14, 15 and 16 relate to the court's charge and are insufficient in that they do not present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is and the particular portion of the charge to which the defendant objects is not specifically pointed out. "The assignment must particularize and point out specifically wherein the court failed to charge the law arising on the evidence." *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85. *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.

It is clear that the Rules of the Court have not been complied with in the assignments of error as hereinabove enumerated. Rule 21 requires an appellant to state briefly and clearly his exceptions. Rule 19 (3) requires that the exceptions taken be grouped and the error complained of concisely but definitely set out as a part of the assign-

ment. "The Court will not consider assignments not based on specific exceptions and which do not comply with its rules." *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94. What the Court requires is that exceptions which are presented to the Court for decision shall be stated clearly and intelligibly by the assignment of error, and not by referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of.

Therefore, the failure of the defendant to comply with the Rules of Practice limits consideration of assignments of error to Nos. 5, 7, 8, 17, 18, and 19. Of these assignments of error, Nos. 5, 8, 17, 18, and 19, are concerned with the *Darden-Bone* case, and will be considered first. Defendant's assignment of error No. 5, in substance, is to the effect that the court prejudiced his cause by allowing the Administratrix of the Johnson estate to continue in the trial. In this connection, it must be noted that that defendant agreed to the consolidation of the cases for trial and it is now too late to complain. Indeed, the defendant won the *Johnson* case. Therefore, prejudicial error is not here made to appear.

Assignment of error No. 8 relates to the refusal of the court to nonsuit the plaintiff at the end of all the evidence. Upon a thorough reading of the record the conclusion is that the court did not commit error in this respect. There is sufficient evidence from which the jury could find that Charlie Weston King, the defendant's agent, was operating the truck in a negligent manner under the conditions existing at that time. True, the evidence is conflicting in many respects. For example, the plaintiff contends that the Willys Jeep in which he was riding came to a stop at the intersection, and then proceeded into the intersection, while the defendant Bone contends that the Willys Jeep did not stop. However, we cannot say as a matter of law that the evidence was insufficient to go to the jury. "If reasonable men draw different conclusions from the evidence, the issue must be submitted to the jury." *Newbern v. Leary,* 215 N.C. 134, 1 S.E. 2d 384.

For reasons stated in connection with assignments of error Nos. 5 and 8, assignments of error Nos. 17 and 18 (motions to set aside the verdict), and 19 (signing and entering the judgment), are untenable.

Assignment of error No. 7 pertains to the court's action in nonsuiting the defendant Bone's cross-action against Bryan Oil Company at the conclusion of his evidence. The question to be decided is whether or not the defendant can invoke G.S. 20-71.1 so as to make out a *prima*

facie case of agency between John Ashley Johnson and Bryan Oil Company. There is not any evidence in the record that Johnson was operating the vehicle in the course of his employment as an agent or employee of Bryan Oil Company at the time of the collision. Bryan Oil Company does admit, however, that it owned the Willys Jeep. In short, unless the defendant is able to bring his case within the provisions of G.S. 20-71.1 his action must fail.

The application of G.S. 20-71.1 is expressly limited to actions commenced within one year after the cause of action accrues. Otherwise it is not applicable. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Floyd v. Dickey,* 245 N.C. 589, 96 S.E. 2d 731.

The record in this case shows that the collision occurred on 5 October, 1957. The plaintiff instituted this action on 8 April, 1958, and not until 30 August 1959, did the defendant obtain an order making Bryan Oil Company an additional party defendant. Summons was served on Bryan Oil Company on 31 August 1959. This is some two years after the date the cause of action accrued. Applying the law, G.S. 20-71.1, to the facts in this case, we are constrained to hold that the defendant was too late with his cross-action to be entitled to the benefit of the *prima facie* presumption of agency.

For reasons stated, in the judgment below there is

No error.

ERIC GREEN AND CORNIE G. GREEN, WIDOW v. LUCIOUS BARKER AND WIFE, MARIE T. BARKER.

(Filed 3 May, 1961.)

1. Boundaries § 7—

In a processioning proceeding the line dividing the property should be located, and nonsuit is inapposite.

2. Boundaries § 2—

Marked trees are sufficient natural objects to control course and distance.

3. Same—

The boundary between fixed corners will ordinarily be run as a straight line, but when the description calls for the line along natural objects, such as a stream or a line of marked trees, the line must be run in accordance with the natural objects.

4. Same—

Where the description calls for natural objects as the boundary be-

tween fixed corners, such as a line of blazed trees, such line must follow the natural objects, and thus may be a straight line or a deviation from a straight line, depending upon the facts.

5. Same—

Where the description of the boundary between fixed corners calls for a line of blazed trees, the party claiming a deviation from a straight line to follow the natural objects must locate the trees and show that the blazes appearing thereon were in existence at the time the description was drawn, and when he fails to do so, he may not claim a deviation from a straight line between the fixed corners.

6. Trial § 31f—

It is error for the court to submit a contention of a party to the jury and permit a finding favorable to the party upon such contention when there is no evidence in the record to support the contention.

APPEAL by respondents from *Carr, J.*, November 1960 Term of GRANVILLE.

This is a processioning proceeding to establish the eastern boundary of petitioners' land, the western boundary of respondents' land. The parties agree on the location of the northeast and southeast corners of petitioners' land. Respondents' land does not extend as far south as the lands of petitioners. A straight line from petitioners' southeast corner to their northeast corner is north 17½ east. Respondents assert this is the true dividing line. Petitioners recognize this as the true line where adjacent to their northeast and southeast corners but insist that the division line departs to the east of the straight line so as to go by what are now pine stumps, but which, when they purchased in 1933, were blazed or marked pine trees.

Petitioners trace title to Roberta Clay Allen, a daughter and devisee of Chastine Allen. Respondents trace title to Martha H. Barker, a daughter and devisee of Chastine Allen. The will of Chastine Allen, dated 23 January 1874, fixes the dividing line between the lands of his daughters Martha and Roberta in this language: "I commenced at Butler's land, black oak sapling, run north by a blazed pine chopped line through the old field across the creek to Ellis' line." The parties agree that the black oak sapling at Butler's land is now indicated by a stone in Mrs. Fisher's line, and the northern terminus of the line is an iron post in Macon Bonner's line.

The jury fixed the line as contended by petitioners. Judgment was entered on the verdict and respondents appealed.

Hugh M. Currin for petitioner appellees.

Gaither M. Beam, Royster & Royster, and Gholson & Gholson for respondent appellants.

RODMAN, J. Respondents moved for judgment of nonsuit, contending petitioners had offered no evidence to establish the line claimed by them. The motion was properly overruled. In a processioning proceeding title is not involved. The line dividing the properties should be located. *Welborn v. Lumber Co.*, 238 N.C. 238, 77 S.E. 2d 612.

Gaston, J., said in *Shultz v. Young*, 25 N.C. 385: "*Prima facie* a call in a grant for one *terminus* to another is understood to mean a direct line from the former to the latter point. But assuredly there may be accompanying words of description, which will indicate that the line is not to be a direct line. Thus it is of ordinary occurrence that, when the call is with a river or creek from one *terminus* to another, the river or creek, however crooked its direction or numerous its courses, if it will carry you to the proposed *terminus*, must be followed throughout." Marked trees are sufficiently permanent in character to fall in the category referred to by Judge Gaston. *Brown v. Hodges*, 233 N.C. 617, 65 S.E. 2d 144; *Lumber Co. v. Lumber Co.*, 169 N.C. 80, 85 S.E. 438. The natural object referred to in the description merely locates the route to be traveled. *Bowen v. Lumber Co.*, 153 N.C. 366, 69 S.E. 258; *Long v. Long*, 73 N.C. 370. The line of another tract known and established is sufficient to require deviation from a straight course. *Batson v. Bell*, 249 N.C. 718, 107 S.E. 2d 562.

The phrase in the description "north by a blazed pine chopped line" suffices to point to the route to be followed to reach the corner, but the language does not say that the blazed pine chopped line is not in fact a straight line and that one must deviate from a straight line to reach the corner. When *the* blazed pine chopped line called for in the description has been located, that fixes the location of the route which must be followed in going from one corner to the other. Deviation is not justified merely by showing *a* blazed pine chopped line. If the blazed pine chopped line is not in fact the one referred to in the description, it can have no effect. *Batson v. Bell, supra; Seawell v. Fishing Club*, 249 N.C. 402, 106 S.E. 2d 486; *Hoge v. Lee*, 184 N.C. 44, 113 S.E. 776; *Carter v. Vann*, 189 N.C. 252, 127 S.E. 244; *Sherrod v. Battle*, 154 N.C. 345, 70 S.E. 834; *Rodman v. Gaylord*, 52 N.C. 262.

Trees chopped and blazed long after Chastine Allen made his will fixing the dividing line between his daughters could not change the line then made. Such blazing would be comparable to the attempt to fix the lines of a senior deed or grant by the lines of a junior instrument. Both are prohibited. *Harris v. Raleigh*, 251 N.C. 313, 111 S.E. 2d 329; *Coffey v. Greer*, 241 N.C. 744, 86 S.E. 2d 441; *Belhaven v. Hodges*, 226 N.C. 485, 39 S.E. 2d 366.

The parties were in disagreement as to whether or not there had ever been a blazed or chopped line at the points claimed by petitioners.

Respondents and a surveyor, who surveyed the property shortly after petitioner purchased, testified in the negative. Petitioners first became familiar with the property in 1933. They purchased shortly after they first saw the property. They testified that when they purchased, the line dividing the two properties was indicated by a hedgerow with blazed pines. They testified that the trees were large and old, but nowhere did they testify as to the probable age of the blazes or chops. No evidence was offered tending to relate the age of the blazes or chops claimed by petitioners to the date of the will made by the common ancestor. No evidence was offered tending to show that the line claimed by them had the reputation of being the dividing line between the properties. No evidence was offered tending to show any admissions made by the owners prior to respondents that the line asserted by petitioners was the true line. An expert forester, who saw one of the blazed trees claimed by petitioners, expressed the opinion the tree had been blazed about ten years.

Respondents assign as error the following portion of the Court's charge: "The petitioners contend that you should locate it from A to C, contending that the black line is the true line on the map calling attention to the fact that they have offered evidence of the existence of chopped trees on that line, and that in accordance with the Court's instructions, that the line would not run north, due north, but would run, if there were chopped trees at the time that Allen made his will; that the line would run by those chopped trees and they contend that they have offered evidence of the presence of chopped trees in fairly recent times, at least in the 1930's and early forties, I believe; that they saw them there and that they were large trees and contend that you should find that they were trees that were in existence at the time that Allen made his will and that those chops were on there at that time and that you should so find and conclude that the line ran in accordance with their contention following a course running by some chopped pines, a pine chopped line."

Respondents properly say there is no evidence on which a jury could find that the chops described by petitioners were made as early as 1874, the date of the Allen will; and because of the absence of evidence to support the contention, the court was in error in permitting the jury to find in favor of petitioners based on that contention. The exception is well taken. *Lookabill v. Regan,* 245 N.C. 500, 96 S.E. 2d 421; *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68; *Supply Co. v. Rozzell,* 235 N.C. 631, 70 S.E. 2d 677; *Blanton v. Dairy,* 238 N.C. 382, 77 S.E. 2d 922.

New trial.

HENRY GRADY HONEYCUTT, PETITIONER v. EDWARD SCHEIDT, COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA, RESPONDENT.

(Filed 3 May, 1961.)

1. Automobiles § 1—

The General Assembly has authority under the police power to prescribe the conditions upon which licenses to operate motor vehicles shall be issued, suspended, or revoked, and it has designated the State Department of Motor Vehicles as the agency for the administration of its rules in regard thereto. G.S. 20, Art. 2.

2. Automobiles § 2—

The right to operate a motor vehicle upon the highways of this State is a conditional privilege and not a contractual or constitutional right, and the revocation or suspension of a license is an exercise of the police power in the interest of public safety and the safety of the licensee, and while such revocation or suspension has as one of its purposes to impress upon the licensee the duty and necessity of obeying the traffic laws, it is not punishment for violation of such laws.

3. Same—

The Department of Motor Vehicles properly suspends a motor vehicle operator's license upon proof that the licensee had been convicted of speeding 60 miles per hour in a 50 mile per hour zone on two separate occasions within a twelve month period even though one of the occasions had theretofore been used as the basis for a prior suspension of the license. G.S. 20-16 (a) (9) and G.S. 20-19.

APPEAL by petitioner from *Preyer, J.*, 17 October Civil Term 1960 of CABARRUS.

This case was heard upon stipulated facts, the substance of which is as follows:

On 15 December 1958 the petitioner, a truck driver, was convicted in the Municipal Court of the City of Greensboro, North Carolina, of the offense of speeding 60 miles per hour in a 50 miles per hour zone, the date of this offense being 1 December 1958.

On 26 March 1959 the petitioner was convicted in the Recorder's Court of Mecklenburg County, North Carolina, of the offense of speeding 60 miles per hour in a 50 miles per hour zone, the date of this offense being 3 March 1959.

Thereafter, on or about 3 April 1959, the respondent, acting under the provisions of G.S. 20-16 (a) (9), suspended petitioner's driver's license for a period of three months beginning 11 April 1959 for the two offenses of speeding above set out. This suspension was voluntarily removed by the respondent on 11 June 1959.

On 8 February 1960 the petitioner was convicted in the Superior Court of Guilford County (Greensboro Division), North Carolina, of

the offense of speeding 60 miles per hour in a 50 miles per hour zone, the date of this offense being 6 November 1959.

On 21 March 1960, the respondent, again purporting to act under the provisions of G.S. 20-16 (a) (9), issued an order suspending petitioner's operator's license for a period of four months beginning 24 March 1960, based upon the two offenses of speeding in excess of 55 miles per hour which occurred on 3 March 1959 and 6 November 1959.

This proceeding was instituted on 31 March 1960. In his petition the petitioner asked the court to overrule and reverse the order entered by the respondent on 21 March 1960, the petitioner contending that the conviction on 26 March 1959 for the offense of speeding which occurred on 3 March 1959, could not be twice used by the respondent as a basis for suspending petitioner's operator's license. Petitioner also asked the court to restrain respondent from enforcing the order entered on 21 March 1960. On 4 April 1960 an order was entered by the Honorable Walter E. Crissman, Judge Presiding over the courts of the Nineteenth Judicial District, enjoining and restraining the respondent until further order of the court from enforcing the order of suspension of petitioner's license. On 4 May 1960, counsel for respondent and petitioner agreed to the continuation of the restraining order until final determination of this proceeding.

This matter was heard at the 17 October 1960 Civil Term of the Superior Court of Cabarrus County upon the agreed statement of facts. Judgment was entered affirming the order of the respondent issued on 21 March 1960, suspending petitioner's operator's license, dissolving the temporary restraining order, and dismissing the proceeding. From this judgment the petitioner appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Thomas L. Young for the Commissioner.

W. M. Nicholson, Ledford & Ledford for petitioner.

DENNY, J. G.S. 20-16 provides: "(a) The Department shall have authority to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee: (9) Has, within a period of twelve (12) months, been convicted of two or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour, or of one or more charges of reckless driving and one or more charges of speeding in excess of fifty-five (55) and not more than seventy-five (75) miles per hour."

It is provided in subsection (c) of G.S. 20-16, as amended by Chap-

ter 1242 of the Session Laws of 1959, that, " * * * Upon the restoration of the license or driving privilege of such person whose license or driving privilege has been suspended or revoked because of conviction for a traffic offense, any points that might previously have been accumulated in the driver's record shall be cancelled." However, in cancelling the points accumulated over the period stipulated in the statute upon which a suspension may be ordered, such cancellation does not cancel or change the number of convictions upon which a license may be suspended under the provisions of G.S. 20-16 (a) (9). Moreover, Chapter 1242 of the Session Laws of 1959, amending our Uniform Drivers' License Act and establishing our present point system, in section 3 thereof, provides: "This Act is in addition to all other laws relating to the suspension or revocation of operators' and chauffeurs' licenses." Therefore, the provisions of the 1959 Act, establishing the point system now in effect in this State, does not purport to repeal, modify or change in any manner the provisions of G.S. 20-16 (a) (9). Furthermore, it is provided in G.S. 20-16, subsection (c): "The Department shall maintain a record of convictions of every person licensed or required to be licensed under the provisions of this article as an operator or chauffeur and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this State and shall assign to the record of such person, as of the date of commission for the offense, a number of points for every such conviction in accordance with the following schedule of convictions and points, except *that points shall not be assessed for convictions resulting in suspensions or revocations under other provisions of laws:* * * *." (Emphasis added.)

In the case of *Fox v. Scheidt, Comr. of Motor Vehicles,* 241 N.C. 31, 84 S.E. 2d 259, this Court said: "The General Assembly has full authority to prescribe the conditions upon which licenses to operate automobiles are issued, and to designate the agency through which, and the conditions upon which licenses, when issued shall be suspended or revoked. *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793. G.S.N.C. 20 — Art. 2 vests exclusively in the State Department of Motor Vehicles the issuance, suspension and revocation of licenses to operate motor vehicles. *S. v. Warren,* 230 N.C. 299, 52 S.E. 2d 879.

" 'The right of a citizen to travel upon the public highways is a common right, but the exercise of that right may be regulated or controlled in the interest of public safety under the police power of the State. The operation of a motor vehicle on such highways is not a natural right. It is a conditional privilege, which may be suspended or revoked under the police power. The license or permit to so operate

is not a contract or property right in a constitutional sense.' *Commonwealth v. Ellett,* 174 Va. 403, 4 S.E. 2d 762."

It was pointed out in *Harvell v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 699, 107 S.E. 2d 549, that, it is well to keep in mind that the suspension or revocation of a driver's license is no part of the punishment for the violation or violations of traffic laws. It will be deemed that the court or courts in which the licensee was convicted, meted out the appropriate punishment under the facts and circumstances of each case. The purpose of the suspension or revocation of a driver's license is to protect the public and not to punish the licensee. However, the suspension or revocation of a driver's license should serve to impress such offender with the necessity for obedience to the traffic laws and regulations, not only for the safety of the public but for his own safety as well. *Harrell v. Scheidt, Comr. of Motor Vehicles,* 243 N.C. 735, 92 S.E. 2d 182.

Likewise, in the case of *Lamb v. Clark,* 199 Va. 374, 99 S.E. 2d 597, *Eggleston, J.* (now *C.J.*), in speaking for the Court, said: "One of the purposes of these provisions authorizing the revocation or suspension of a driver's license is to impress upon the licensee the duty and necessity of obeying the traffic laws of this State which the General Assembly has enacted for the safety of the public. *Commonwealth ex rel. Joyner v. Butler,* 191 Va. 193, 201, 61 S.E. 2d 12, 16. Another, and even more important purpose, is to remove from the streets and highways a driver who is likely to cause injury and damage before a tragedy occurs. *Commonwealth ex rel. Lamb v. Hill,* 196 Va. 18, 24, 82 S.E. 2d 473, 476."

It is not unusual for a statute to prescribe a higher penalty in case of repeated convictions for similar offenses. But a warrant or indictment for "a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty." *S. v. Miller,* 237 N.C. 427, 75 S.E. 2d 242; G.S. 15-147; G.S. 90-111; G.S. 20-179; *S. v. Mumford,* 252 N.C. 227, 113 S.E. 2d 363; *S. v. Wood,* 247 N.C. 125, 100 S.E. 2d 207; *S v. White,* 246 N.C. 587, 99 S.E. 2d 772; *S. v. Stone,* 245 N.C. 42, 95 S.E. 2d 77.

The proceeding now under consideration is civil and not criminal in its nature. *Commonwealth v. Ellett, supra.* Therefore, in our opinion, the respondent was duly authorized by the provisions of G.S. 20-16 (a) (9) and G.S. 20-19 to suspend the petitioner's operator's license for a period of four months, beginning with 24 March 1960, based on the two convictions for speeding in excess of 55 miles per hour in a 50 miles per hour zone, which occurred on 3 March 1959 and 6 November 1959.

The record on appeal does not expressly state that the petitioner was driving a truck each time he was arrested for speeding 60 miles per hour in a 50 miles per hour zone, but we so construe the record.

The judgment of the court below is

Affirmed.

L. L. FURR v. JAMES A. OVERCASH.

(Filed 3 May, 1961.)

1. Negligence § 26—

Nonsuit for contributory negligence is proper only when the evidence in the light most favorable to plaintiff establishes contributory negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom.

2. Automobiles § 42f—

Evidence tending to show that plaintiff was driving a tractor pulling a grain combine along the highway after sundown but before dark, that headlights were burning on the tractor and its tail light shining on the combine, that plaintiff, upon seeing defendant's car approaching down the center of the highway, pulled his machine to the right as far as possible with the right wheels of the tractor in the ditch, but leaving the left side of the combine some six inches to the left of the center of the 25 foot highway, *is held* insufficient to show contributory negligence as a matter of law on the part of plaintiff in causing a collision of the car with the combine.

3. Automobiles § 24—

Defendant's evidence that the width of the combine pulled by plaintiff's tractor along the highway exceeded 10 feet does not bring the vehicle within the purview of G.S. 20-116 (j) when plaintiff's uncontradicted evidence tends to show that the combine, as adjusted by him for travel upon the highway, had a width of only 9 feet 11 inches.

APPEAL by defendant from *Gwyn, J.*, at January 1961 Term of CABARRUS.

Civil action to recover damages to a grain combine.

On 9 September 1959, the plaintiff, L. L. Furr, was driving an Allis-Chalmers tractor which was pulling a grain combine. He was traveling in a westerly direction on Roberta Church Road which is a country dirt road and approximately 25 feet wide. The defendant, James A. Overcash, was traveling along said Roberta Church Road in an easterly direction. As the two vehicles met there was a collision between

the plaintiff's combine and the defendant's automobile,— the automobile striking the left side of the combine.

Plaintiff instituted this action alleging negligence on defendant's part in that (a) he operated his automobile at a high and reckless rate of speed; (b) failed to keep a proper lookout; (c) failed to keep automobile under proper control, and (d) failed to keep on his right-hand side of the road.

Defendant denies these allegations and alleges that the plaintiff was contributorily negligent in that (a) he violated G.S. 20-116 (j); (b) failed to keep a proper lookout, and (c) failed to properly light the combine.

Evidence was introduced by both parties and the case was submitted to the jury, and the jury returned a verdict in favor of the plaintiff, awarding him $400.00.

To judgment entered in accordance therewith the plaintiff excepts and appeals to the Supreme Court, and assigns error.

W. S. Bogle for plaintiff appellee.
Hartsell, Hartsell & Mills, J. Maxton Elliott for defendant appellant.

WINBORNE, C.J. The determinative question in case on appeal is predicated upon exceptions to the trial court's denial of defendant's 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. Indeed, the defendant states in his brief that: "The only question involved on this appeal is whether the plaintiff was guilty of contributory negligence as a matter of law."

Nonsuit for contributory negligence is proper only when plaintiff proves himself out of court considering the evidence in the light most favorable to the plaintiff and giving to him the benefit of every reasonable intendment thereon and inference therefrom. *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804; *Arvin v. McClintock,* 253 N.C. 679, 118 S.E. 2d 129.

"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; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

Upon trial the plaintiff, as shown by the record, testified in pertinent part substantially as follows: "We pulled out into the road and started home between sundown and dusk dark. Just as I got into the road and got straightened out I seen this car coming up the road between three and four hundred yards, and I seen that he was driving in the middle of the road, and I said to myself I be-

lieve that fellow is going to hit me. I pulled into the ditch against the bank with my tractor, and just as I stopped he plowed into me. His car turned around crossways of the road and slid back in behind me 50 or 75 feet— tore the machine up. The whole bar and the frame was all warped, no satisfaction of being fixed where it would work. At the time of the impact the machine was sitting six inches on the right side of the road— over half of the road to pass. I saw Mr. Nichols measure the road. The road was straight for a quarter of a mile each way. * * * It was light enough to see anybody in the road. I had the lights on my tractor. The tail light on the tractor was shining on the machine. The automobile was coming up the road around 30 or 40 miles an hour and when I seen the automobile it was in the middle of the road. It didn't move over. I kept my eye right on it * * * The tractor was in the ditch on the right-hand side and one wheel of the combine was in the ditch on my right. The left-hand portion of the combine lacked six inches of being to the center of the road. I saw it measured."

And on re-direct examination the plaintiff said: "The machine is not the same width in the field as on the highway, we always move it over about two feet to hitch. It is not as wide on the highway as in the field."

Harold Furr, who was an eye witness to the collision, testified for the plaintiff: "I got in my truck sitting in the driveway fixing to pull out. I could see all the way. He hit right in the middle. He was driving right down the middle of the road. I said to myself, 'He'll run over that combine.' I saw Overcash coming two or three hundred yards down the road. In my opinion he was making about 45 at the time of the impact. He had done and stopped. I seen him. He pulled plumb over to the right as far as he could get and stopped. I ran down and asked if anybody hurt. I asked him what was his trouble, if he didn't see the combine. He said one of the kids was crying and he was trying to show the tractor to keep him from crying and he didn't see the combine. It was a little bit after sundown. It wasn't dark. With the tail piece on the combine I will say it is maybe ten feet wide."

Plaintiff in rebuttal testified: "I went to measure the combine at dinner time and the combine with the hood turned up is 9 feet and 11 inches. I measured it with a tape measure."

Looking at this evidence in the light most favorable to the plaintiff, it tends to raise these inferences:

First, that the plaintiff, L. L. Furr, was driving his tractor on the right-hand side of the road between sundown and dusk, but it

was not dark. That the road was straight for a quarter of a mile each way.

Second, that the headlights were burning on the tractor and there was a light shining on the combine.

Third, that the plaintiff saw the defendant's automobile approaching him down the center of the road, and he, the plaintiff, pulled his machine to the right side of the road as far as possible to avoid the collision.

Fourth, that the left side of the combine lacked six inches of being to the center of the road, and that the combine had a width of 9 feet 11 inches.

It would seem, therefore, that when the evidence of plaintiff is considered in the light of the well established rules of this Court, that the lower court did not err in refusing the defendant's motions for nonsuit. The record in the present case fails to reveal evidence which would require a finding that the plaintiff failed to perform his duty in any of the particulars alleged and from which this Court can hold, as a matter of law that the plaintiff was contributorily negligent. As stated by *Bobbitt, J.*, in *Leonard v. Garner*, 253 N.C. 278, 116 S.E. 2d 731: "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 * * *."

The defendant further contends that the plaintiff violated G.S. 20-116 (j), which constitutes negligence *per se*. This statute regulates the movement of certain farm equipment (including combines) along the highways which exceed 10 feet in width. However, this contention is untenable because there is no evidence in the record that the plaintiff's combine exceeded 10 feet in width so as to bring this case within the purview of G.S. 20-116 (j). The plaintiff's evidence taken in the light most favorable to him shows that the combine was 9 feet 11 inches in width while being moved upon the road. The defendant's evidence tends only to show the width of the combine when in actual operation and not when being moved along the highway.

Therefore, the conclusion is that the case was one to be resolved by a jury, and not one of law to be decided by the court. For reasons stated, in the judgment below there is

No error.

MRS. DELLA MAE BREWER, ADMINISTRATRIX OF THE ESTATE OF NORMA CAROLINE BREWER, DECEASED, v. ELMER E. GREEN AND MARY WATSON.

(Filed 3 May, 1961.)

1. Trial § 23a—

While the evidence must be considered in the light most favorable to plaintiff on defendant's motion to nonsuit, when the evidence, so considered, is insufficient to support the cause of action alleged in the complaint, judgment of nonsuit will be upheld.

2. Automobiles § 41m— Evidence held insufficient to be submitted to jury on issue of negligence in striking child on highway.

Evidence tending to show that children were standing on the eastern side of the highway, that, as plaintiff's vehicle approached from the south, one of the children ran into the highway at about the time the car was even with where they were standing, and that the right front of defendant's car struck this child, inflicting fatal injuries, when the child was about the center of the highway, without evidence that the vehicle was travelling at excessive speed, *is held* insufficient to show actionable negligence on the part of defendant even though the vehicle was over the center line of the highway to the driver's left at the moment of impact, there being evidence supporting the inference that the driver pulled the car to the left in an effort to avoid hitting the child.

3. Automobiles § 36: Negligence § 21—

There is no presumption of negligence from the mere fact of an accident and injury.

PARKER, J. Dissents.

APPEAL by plaintiff from *Pless, J.*, January Term 1961 of CALDWELL.

This is a civil action instituted to recover for the alleged wrongful death of the plaintiff's intestate.

Plaintiff's evidence shows that the accident in question happened on Highway No. 268 in Caldwell County, North Carolina, on 15 January 1960, about 3:30 p.m. The weather was clear and the sun was shining. Plaintiff's intestate, Norma Caroline Brewer, was six and one-half years of age. She and her brother, Roger, nine years of age, her sister, Shirley, eleven years of age, and Patricia Austin, thirteen years of age, had started to a neighbor's home, Mrs. Bolick's, to get some milk. Mrs. Bolick's house is located on the west side of Highway No. 268, north of where Hollywood Ridge Road intersects with Highway No. 268, about one-fourth of a mile from the Brewer home.

The Brewer family lived on the Hollywood Ridge Road a very

short distance from where it intersects with Highway No. 268. Highway No. 268 runs approximately north and south; the highway is paved and is approximately twenty feet wide, with shoulders on either side approximately two feet wide.

The 1960 Chevrolet sedan involved in the accident was owned by the defendant Elmer E. Green and was being driven by the minor defendant Mary Watson, nineteen years of age, and for whom a guardian *ad litem* was duly appointed to represent her in this litigation.

In approaching the intersection of the Hollywood Ridge Road from the south, the direction from which the defendant Mary Watson was traveling, there is a curve in the road, and as one travels north from the apex of the curve on Highway No. 268 it is approximately 250 feet to the intersection of Hollywood Ridge Road. As one rounds the curve in Highway No. 268 there is a clear view to the north of approximately three-quarters of a mile.

The evidence further tends to show that these children arrived at the northeastern intersection of the above roads and stopped on the shoulder or near the eastern edge of Highway No. 268. Patricia Austin testified: "Norma, Roger, Shirley and I were standing there waiting to cross. I was the first one to the south. I had a clear view of the road. This car was coming and Norma stepped out into the road just about the center line — approximately the center line when it hit her. I looked for a car before Norma went into the road. There was one going south, it went on. There was a car to the left when Norma entered the road * * *.I saw the right front of the car hit her. It went on over into Mrs. Taylor's driveway. I did not hear the sound of a horn. I did not see the car slow down and did not hear the sound of brakes. I don't have any idea how fast the car was going. I am 14 years old."

On cross-examination, this witness testified: "Norma ran into the road. The car was coming from the south. I grabbed Roger to keep him from going into the road. He made a movement as to step into the road. I put my hand on his shoulder. * * * Yes, she (Norma) ran into the front right-hand side. * * * I saw the car coming from the south to our left. * * * The car was on the right-hand side of the road." On redirect examination this witness further said: "When I saw it here (indicating on a diagram of the road which had been drawn on a blackboard by the Highway Patrolman) it was on the right-hand side of the road. The front of the car hit the child."

Roger Brewer testified on cross-examination: "We went out to the shoulder of the road. We didn't get out on the pavement. We were waiting to cross to the other side of the highway. I didn't start

to run across the highway. I started to * * * walk — not in front of the car. The car had already started and I started and Pat pulled me back. No, Norma didn't get across — she started to run across. She didn't make it. Yes, the car was about even with us when we all started to cross." This witness further testified on redirect examination that as the car approached them "the line was * * * under it." Then he said: "There was no center line or yellow line when it happened."

Shirley Brewer testified: "I was on the road with the other children. * * * I started to look to see if anything was coming, and I saw the car coming and I was going to take hold of Norma's hand, but I did nothing, and the car hit her and went on into Mrs. Taylor's driveway, and she (Norma) was lying right across the center line."

The evidence also tends to show that the body of the plaintiff's intestate, after being struck by the right front of the automobile, came to rest in the middle of the road approximately 96 feet from the intersection of the roads. The speed limit on Highway No. 268, where the accident occurred, was 55 miles per hour. There was no evidence of excessive speed or of skid marks on the road. The driver of the car turned into Mrs. Taylor's driveway and properly parked the car. This driveway was approximately fifty feet from where the injured child was lying in the middle of the highway. The Highway Patrolman testified: "It is approximately 100 feet from the mail boxes where the girls were standing to Mrs. Taylor's driveway." Plaintiff's intestate died as a result of her injuries about 11:00 p.m. on the same day she was injured.

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

Fate J. Beal for plaintiff appellant.
Townsend & Todd for defendants appellee.

DENNY, J. The plaintiff assigns as error the ruling of the court below sustaining the defendants' motion for judgment as of nonsuit at the close of the plaintiff's evidence.

We must consider the evidence in the light most favorable to the plaintiff in passing on a motion for judgment as of nonsuit. *Brinson v. Mabry,* 251 N.C. 435, 111 S.E. 2d 540. But when such evidence is so considered, and in the opinion of the Court it is insufficient to support the plaintiff's allegations of actionable negligence, a judgment as of nonsuit should be upheld.

According to the evidence, the four minor children were standing

on the east side of the highway, apparently waiting for traffic to clear; a car passed them going south. All three of the children who remained on the side of the road testified that they saw the car operated by the minor defendant coming from the south. Plaintiff's intestate, according to the evidence, ran into the road about the time the car was even with where the children were standing. The evidence further tends to show that as the car approached the point where the children were standing by the road in a place of safety, the little six and one-half year old child ran into the highway and was hit by the right front of the car. There is no evidence of excessive speed; neither is there any evidence that would tend to show that the child ran into the highway a sufficient length of time ahead of the approaching car for the driver thereof to have taken any effective measures to avoid the accident.

The plaintiff contends that the minor defendant was operating the car on the left side of the highway and that plaintiff's intestate was struck about the center of the road by the right front of the car with such force that she was carried some distance along the highway. The evidence revealed by the record supports the view that the child had reached about the center of the road when she was struck by the right front of the car just inside the right front headlight and that she was carried some distance along the highway on the bumper of the car.

However, in light of all the evidence in this case, in our opinion the fact that the driver of the automobile was driving the car at the time of the impact near the center of the highway rather than on the extreme right thereof, is not sufficient in itself to establish actionable negligence. The driver of the car may have instinctively pulled the car to the left in an effort to avoid hitting the child when she ran into the highway from the right-hand side of the road. There is evidence tending to support such an inference.

The appellant cites the case of *Carter v. Shelton,* 253 N.C. 558, 117 S.E. 2d 391, in support of her contention that the plaintiff's evidence was sufficient to take the case to the jury. The facts in that case are clearly distinguishable from those in the present case.

The case of *Brinson v. Mabry, supra,* would seem to be controlling on the facts in this case. In the *Brinson* case, as here, there was no evidence of excessive speed. *Higgins, J.,* in speaking for the Court, said: "In this case the children were not on the traveled portion of the highway. They were apparently waiting for vehicular traffic to clear before attempting to cross. The defendant saw nothing to give notice to the contrary until the little girl darted out from behind another vehicle in front of him, leaving insufficient time to take evasive

action." *Cf. Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561. There is no presumption of negligence from the mere fact that there has been an accident and an injury. *Grant v. Royal,* 250 N.C. 366, 108 S.E. 2d 627; *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821; *Merrell v. Kindley,* 244 N.C. 118, 92 S.E. 2d 671.

In our opinion, the evidence adduced in the trial below is insufficient to establish actionable negligence on the part of the driver of the automobile involved in this accident. Therefore, the judgment as of nonsuit entered below is

Affirmed.

PARKER, J. dissents.

J. W. MASON v. MAURICE BREVOORT AND WIFE, OTA S. BREVOORT.

(Filed 3 May, 1961.)

1. Reformation of Instruments § 10—

Where plaintiff grantor's evidence tends to show that the reservation to himself of the timber upon the land conveyed was inserted by the draftsman in conformity with his instructions and that he read the reservation and approved it before he executed the deed, the evidence fails to establish a cause of action in grantor's behalf to reform the reservation either as to the extent of the boundary or the size of the timber reserved.

2. Same—

A deed may be reformed only for the mutual mistake of the parties or the mistake of one party induced by the fraud of the other, and the instrument may not be reformed merely because the language knowingly employed fails to express the intent of one of the parties when the mistake as to the purport of the language is not induced by the fraud of the other party.

3. Pleadings § 28—

The fact that a cause of action is stated in the complaint does not warrant the submission of the case to the jury when plaintiff's evidence is insufficient to support recovery upon the theory alleged in the complaint.

APPEAL by plaintiff from *McKinnon, J.,* October Civil Term 1960 of WAKE.

The plaintiff and his wife executed a deed dated 5 May 1950 to Howard E. Brevoort and wife, Hazel Brevoort, conveying a tract of land containing 114.8 acres, which deed contained a purported reser-

vation as follows: "The parties of the first part reserve the right for a period of ten years to the largest timber in a 25-40 acre tract of the above land, said tract of 25-40 acres having been designated by the parties hereto by blazing the trees along the boundary in the said 25-40 acre tract."

The plaintiff alleges in sum and substance in his complaint that the above reservation was included in the deed by mutual mistake of the plaintiff and the defendants, or by fraud on the part of the defendants and by mistake of the draftsman, and that the timber was not sufficiently described by mutual mistake of the parties, fraud on the part of the defendants and mutual mistake on the part of the draftsman; that the plaintiff is entitled to have the deed reformed "to express the intention, the purpose, the agreement, the understanding between the plaintiff and the defendants in the execution of said deed by adding the words 'that the plaintiff reserves the right for a period of ten years to cut all the commercial timber located upon the lands described in this deed (114.8 acres) measuring 6" in diameter at ground level, and particularly all such timber of such description located to the North of the blazed line.' "

It is further alleged in the complaint that the defendants here, as agents and representatives of Howard E. Brevoort and wife, negotiated the purchase of the land described in the complaint from the plaintiff. Defendants denied these allegations. It is also alleged that Howard E. Brevoort and wife by deed dated 25 March 1953 conveyed the 114.8 acre tract of land to Maurice Brevoort and wife, Ota S. Brevoort, the defendants herein, which deed also contained the same reservation set out in the deed executed by the plaintiff and his wife to Howard E. Brevoort and wife. These allegations were admitted in the defendants' answer.

In the trial below the plaintiff testified: "I told Mr. Paschal (plaintiff's attorney) I would not sign the deed he had drawn; I told him I wanted to reserve the timber in that 25 to 40 acres. Mr. Paschal inserted in the deed the reservation that is in there, and that was what I had told him to put in the deed.

"It was agreed I was to reserve the timber in the 25 to 40 acres and told him then I would put a blazed line. Neither of the Brevoorts were there when the line was marked; they were in the field."

Plaintiff's attorney testified: "I put the exemption in as designated by Mr. Mason. * * * Acting upon the instructions from Mr. Mason, who paid me for preparing the deed, I went ahead and prepared the deed with the reservation of the 25 to 40 acres of timber and they did not tell me to put any exemption about the pulp wood, and Mr. Mason executed the second deed which I prepared with the reservation, and

he was satisfied as I prepared it, and the Brevoorts knew of the exception."

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

Morris & Hinsdale for plaintiff appellant.
Ellis Nassif for defendants appellee.

DENNY, J. The plaintiff's sole assignment of error is to the action of the court below in sustaining the defendants' motion for judgment as of nonsuit.

In the trial below no evidence was introduced tending to show that the defendants, representing themselves or as agents for their predecessors in title, had anything to do with the preparation of the deed executed as of 5 May 1950 by the plaintiff and his wife, or that they, or any one of them, were consulted about the form or contents of the reservation inserted in the deed. The evidence is to the effect that Maurice Brevoort was present when the deed was executed and the reservation was read; that he agreed to the terms and turned a check over to Mr. Mason. The deed was duly executed, notarized, and recorded.

The plaintiff offered no evidence in support of the allegation in his complaint to the effect that the grantors and the grantees had agreed prior to the execution of said deed "that the plaintiff reserves the right for a period of ten years to cut all the commercial timber located upon the lands described in this deed measuring 6" in diameter at ground level, and particularly all such timber of such description located to the North of the blazed line." To the contrary, the plaintiff testified that the reservation inserted in the deed was what he told his attorney "to put in the deed."

In the case of *Cox v. Freight Lines*, 236 N.C. 72, 72 S.E. 2d 25, this Court said: "The court cannot submit a case to the jury on a particular theory unless such theory is supported by both the pleadings and the evidence."

In an article in the North Carolina Law Review, Volume 15, at page 155, *et seq.*, it is said: "After the contractors believe they have definitely prescribed the terms and limits of their bargain they undertake to reduce it to written form. This may be attempted by one of the parties or some third person such as an attorney. Through forgetfulness, lack of understanding, misinformation, or even fraud, the draftsman may produce a document which does not conform to the bargain. When this has happened the instrument will be reformed by

the court. If, however, the document is in accord with the original understanding of the parties the court cannot correct it, irrespective of how unfortunate may be the bargain it represents * * *."

In the case of *Crawford v. Willoughby,* 192 N.C. 269, 134 S.E. 494, this Court said: "The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or intrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation." *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530.

There is no evidence of mutual mistake of the parties, or of fraud on the part of the defendants. While it is now obvious that the plaintiff is not satisfied with the language used in the reservation inserted in his deed, his own testimony tends to show that the language used was in conformity with his instructions to his attorney and that he read the reservation and approved it before he executed the deed.

We express no opinion as to the validity or invalidity of the reservation in plaintiff's deed as written, nor are we now called upon to interpret the same. In our opinion, however, the evidence adduced in the trial below is insufficient to support a verdict for reformation of the deed. Hence, the judgment of nonsuit will be upheld.

Affirmed.

MARVIN GAY v. WAKE COUNTY BOARD OF EDUCATION.

(Filed 3 May, 1961.)

APPEAL by plaintiff from *Williams, J.,* at December 1960 Special Civil Term of WAKE.

Proceeding before North Carolina Industrial Commission under Tort Claims Act, G.S. 143-291, *et seq,* heard before J. W. Bean, Chairman, and hearing commissioner, on claim of Marvin Gay for compensation for injury allegedly sustained in a collision of a school

bus owned by Wake County Board of Education, operated by Jimmy Marcom, and a Ford sedan driven by plaintiff at the intersection of the Apex and Cary roads.

The record on this appeal reveals that at hearing on 21 October 1958, upon stipulations and all the competent evidence, Chairman Bean, the hearing commissioner, made findings of fact and, thereon, conclusions of law, that the driver of the school bus, Jimmy Marcom, was negligent at the time complained of, and that the plaintiff was contributorily negligent.

And based thereupon, Chairman Bean, as such hearing commissioner aforesaid, ruled that an order issue denying the plaintiff damages, since the plaintiff was contributorily negligent at the time his automobile collided with the school bus at the Apex and Cary road intersection in Wake County, North Carolina, on 28 January, 1958.

And the record of case on appeal shows that thereafter the plaintiff, in apt time, appealed to the Full Commission. And following review by the Full Commission on 11 December 1958, the case was remanded for the taking of additional evidence, and the opinion of the hearing commissioner was vacated and set aside.

The case again came on for hearing before Chairman Bean at Raleigh on 24 February, 1959, and in a decision and order filed 4 March 1959, he denied the claim for the reasons therein stated. The plaintiff in apt time appealed to the Full Commission. The case came on for review before the Full Commission at Raleigh on 22 June 1959. Counsel for plaintiff filed specific allegations of error with the Full Commission. And the record of case on appeal shows that having carefully reviewed the record, together with plaintiff's exceptions and argument of counsel, the Commission was of opinion that the assignments of error are without substantial merit and should be overruled. The record shows that the Commission having reached the conclusion that the findings of fact of Chairman Bean are supported by competent evidence, and that his conclusions of law are without prejudicial error, adopted as its own the findings of fact, conclusions of law, and order of Chairman Bean, and affirmed in all respects the result reached.

Thereafter on 25 August 1959, plaintiff filed exceptions to the order of the Full Commission and appealed to Superior Court of Wake County.

The cause coming on to be heard and being heard upon such appeal, the court, being of opinion "after reviewing and carefully considering the certified copy of the record in the case and particularly the evidence produced at the hearing, and after argument of counsel for both plaintiff and defendant, that the findings of fact made by

the Industrial Commission are based upon competent evidence, and, therefore, should not be disturbed," ordered, adjudged and decreed that the decision and order of the Industrial Commission in said case be, and the same is hereby in all respects approved and confirmed, and the plaintiff is taxed with the cost in this court.

Plaintiff objects and excepts to the foregoing judgment, and the signing thereof and, in open court, gives notice of appeal to the Supreme Court, and assigns error.

Bailey & Dixon for plaintiff appellant.
Mordecai, Mills & Parker for defendant appellee.

PER CURIAM. Among the provisions of the statute pertaining to appeals in cases under the Tort Claims Act, G.S. 143-292, it is provided that either party may appeal from the decision of the Full Commission to the Superior Court of the county in which the claim arose; that such appeal shall be for errors of law only, and under the same terms and conditions as govern appeals in ordinary civil cases; and that the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.

Moreover, the statute further provides that either party may appeal from the decision of the Superior Court to Supreme Court as in ordinary civil actions.

In the light of these provisions of the statute the judgment from which appeal is taken is in accord with law and, hence, it is

Affirmed.

JOE W. TOOMES AND WIFE, CONNIE MARIE TOOMES, PETITIONERS, v. ROBERT F. TOOMES (SINGLE), RALPH V. TOOMES AND WIFE, RUTH TOOMES, DEFENDANTS.

(Filed 3 May, 1961.)

1. Pleadings § 12—

The office of a demurrer is to test the sufficiency of a pleading, admitting for its purpose the truth of the facts alleged in the pleading.

2. Pleadings § 15—

Where intervenors in partition proceedings alleged that they owned an undivided interest in the land and that such interest had not been divested, demurrer to their pleading should be overruled, even though the assertion of intervenors' title is based upon the invalidity of the former decree

entered in the proceedings because of the want of proper confirmation and want of service of summons on intervenors, since whether the validity of the prior decree could be thus attacked is not presented by the demurrer, the judgment roll being referred to but not made a part of the pleading.

3. Same—

A demurrer based upon facts not appearing upon the face of the pleading is a speaking demurrer, and if the matter *dehors* conflicts with the facts alleged the demurrer must be resolved on the basis of the pleading, without considering the extraneous matters.

4. Judgments § 18—

If a pleading attacks the validity of a judgment on grounds available only upon motion in the cause, the court has the discretionary power to treat the pleading as a motion in the cause and thus avoid delay.

APPEAL by intervenors from *Preyer, J.,* November 7, 1960 Civil Term of RANDOLPH.

This is a special proceeding, instituted 4 February 1960, for sale of land for partition. The petition alleges that Joe W. Toomes, Robert F. Toomes and Ralph V. Toomes are tenants in common and own the land in the proportions one-fifth, three-fifths and one-fifth, respectively. The answer admits all the material allegations of the petition. The Clerk of Superior Court entered an order of sale 26 February 1960.

On 25 May 1960 Claudia Rose Vestal, Betty J. Lewis, Blease Toomes, Bernard Toomes and Louise T. Rayle petitioned the court to be permitted to intervene, and the Clerk ordered that they be made parties respondent (together with their spouses), that summons be served on them and that they be permitted to answer.

The intervenors filed answer and alleged in substance: The land should be sold for partition. Intervenors, together, own a one-tenth undivided interest in the land in question and their title "has never been divested." A purported sale of their interest was made pursuant to an order, dated 23 March 1937, in a former special proceeding, but the order and purported sale were void and did not divest their title. The former special proceeding and the sale made pursuant thereto are invalid for several specified reasons, among them, the lack of proper confirmation and approval of the sale by the court and want of service of summons on these respondents who were then minors. Intervenors pray that they be permitted to share in the proceeds of the sale to be made in the present special proceeding.

The original petitioners and respondents demurred to intervenors' answer on the grounds that it shows that intervenors have no interest

in the land, and the purported attack on the former special proceeding may not be pleaded in the present proceeding.

Pending the hearings on the demurrer the land was sold and the sale confirmed. The controversy relates only to the proceeds of the sale.

The Clerk of Superior Court sustained the demurrer. On appeal, the Judge examined the judgment in the former proceeding and sustained the demurrer and dismissed the claim of intervenors.

Intervenors appeal and assign error.

John R. Hughes and Harry Rockwell for intervenors, appellants.
H. Wade Yates for petitioners, appellees.
Ottway Burton for defendants, appellees.

PER CURIAM. The office of demurrer is to test the sufficiency of a pleading, and for that purpose it admits the truth of the facts contained in the pleading. *Buchanan v. Smawley,* 246 N.C. 592, 595, 99 S.E. 2d 787. Applying this rule, the original parties admit, for the purpose of the demurrer, the following facts alleged: Intervenors were not served with summons in the former proceeding; the 1937 sale was not properly confirmed and approved; and intervenors have not been divested of title to their one-tenth interest in the land or its proceeds. Whether these allegations can be sustained by proof is a different matter. They are sufficient to withstand the demurrer.

The ruling of the court below was undoubtedly based on his examination and consideration of the judgment in the former proceeding. While this judgment and the judgment roll in the former proceeding were referred to and attacked by intervenors' pleading, they were not attached to or incorporated in the pleading. "A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked. (Citing authorities) A demurrer which requires reference to facts not appearing on the face of the pleading attacked is a 'speaking demurrer,' and is bad." *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 488-9, 98 S.E. 2d 852. The instant case illustrates the soundness of the rule that a "speaking demurrer" is bad. If the matter *dehors* the pleading conflicts with the facts alleged, the court has no choice but to resolve the matter on the basis of the pleading. Extraneous matters may be considered only when the cause is heard on the merits.

Demurrants insist that the allegations attacking the 1937 judgment and sale may only be asserted by motion in the former proceeding, and must be disregarded in the pleading to the proceeding

at bar. Even so, if all reference to the former proceeding be stricken from intervenors' answer, the pleading still alleges ownership of a one-tenth interest in the land and that it has never been divested. This, we think, is sufficient to withstand demurrer. Assuming, but not deciding, that all or a portion of intervenors' allegations with reference to the former proceeding may only be made by motion in that cause, the court may, in its discretion, treat the answer in the present proceeding as a motion in the prior cause and thereby avoid further delay. *Craddock v. Brinkley,* 177 N.C. 125, 127, 98 S.E. 280.

We express no opinion on the merits.

The judgment below sustaining the demurrer and dismissing intervenors' claim of interest in the proceeds of the sale of the land is

Reversed.

LEE EARL McARTHUR, BY HIS NEXT FRIEND, ALEX McARTHUR v. FRANCES T. STANFIELD AND WILLIAM W. STANFIELD, JR., BY HIS NEXT FRIEND, MYRES TILGHMAN.

(Filed 3 May, 1961.)

Appeal and Error § 19—

An assignment of error should present the asserted error without the necessity of going beyond the assignment itself.

APPEAL by defendants from *Hooks, Special Judge,* January Term, 1961, of HARNETT.

Personal injury action growing out of a collision on September 27, 1959, about 3:45 p.m., between a bicycle on which plaintiff was riding and a family purpose 1958 Oldsmobile Station Wagon owned by defendant Frances T. Stanfield and operated by her minor son, defendant William W. Stanfield, Jr. Plaintiff was then eleven years old. Stanfield, Jr., was sixteen.

The station wagon was proceeding west on a paved (18-foot) rural road. The McArthur residence is on the south side, and the Jernigan residence is on the north side, of said road. The McArthur yard is directly across the road from the private road or driveway to the Jernigan residence. The McArthur residence is 35-40 feet south of the paved portion of the road. The Jernigan residence is some one hundred yards north of the paved portion of the road. Ten children (no evidence as to age) were in the yard in front of the McArthur

residence. They were attending a party in honor of plaintiff's eleventh birthday.

Plaintiff had gone to the Jernigan residence. On his way back, plaintiff proceeded south on the Jernigan driveway, crossed the road and was in his own yard at the time of the collision.

Plaintiff's evidence tended to show: Plaintiff stopped when he reached the paved road and looked both ways. To his left, he saw a station wagon "right around by the curve . . . about a block away." He proceeded across the road. He was in his own yard when struck by the station wagon.

Defendants' evidence tended to show: Stanfield, Jr., then rounding a curve about 100 yards from the Jernigan driveway, saw plaintiff on his bicycle near the Jernigan front porch. Nothing obstructed plaintiff's view of the approaching station wagon. Stanfield, Jr., saw plaintiff come down the Jernigan driveway and assumed he would stop. When Stanfield, Jr., was 100-110 feet from the Jernigan driveway, he saw plaintiff "wasn't going to stop." He slammed on his brakes and cut to his left in an effort to avoid striking plaintiff. In doing so, he went completely off the paved portion of the road and into plaintiff's yard. Plaintiff ran into the right side of the station wagon as it was coming to a stop. Plaintiff did not slow down or stop before he went out onto the road.

Uncontradicted evidence tended to show the collision occurred in the McArthur yard, some 10-15 feet south of the paved portion of the road. There was conflicting evidence as to the speed of the station wagon. According to the investigating State Highway Patrolman, there were skid marks extending 88 feet to the point where the station wagon stopped in the McArthur yard, of which approximately 65 feet were on the "hard surfaced portion of the road."

Issues of negligence, contributory negligence and damages, raised by the pleadings, were submitted. The jury answered the issues in favor of plaintiff, awarding damages in the amount of $7,500.00.

Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed.

Wilson & Bain and Bryan & Bryan for plaintiff, appellee.

Robert B. Morgan and Charlie L. Dean, Jr., for defendants, appellants.

PER CURIAM. The evidence was amply sufficient to support a verdict in plaintiff's favor on the issues raised and submitted. Indeed, this was conceded by defendants' counsel on oral argument.

In an assignment of error, "(a)lways the very error relied upon

should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Allen v. Allen,* 244 N.C. 446, 450, 94 S.E. 2d 325; *Steelman v. Benfield,* 228 N.C. 651, 653, 46 S.E. 2d 829, and cases cited. Many of defendants' assignments of error are defective in that they do not point out in what respect defendants consider erroneous the court's rulings or instructions. Notwithstanding these deficiencies, each of defendants' exceptions has been carefully considered. Suffice to say, we find no error of law deemed sufficiently prejudicial to warrant a new trial.

No error.

CALVIN C. POPE v. JOHN M. JOYCE AND WIFE, HELEN J. JOYCE.

(Filed 3 May, 1961.)

APPEAL by defendants from *Pless, J.,* October, 1960 Term, HARNETT Superior Court.

Plaintiff instituted this civil action to recover for personal injury alleged to have been proximately caused by the negligence of Helen J. Joyce in the operation of a 1953 Chevrolet automobile owned by her husband, John W. Joyce, and maintained by him for family purposes. The accident occurred on the morning of March 28, 1958, at the intersection of South Layton Avenue and West Divine Street in the town of Dunn. The 1954 Buick driven south on South Layton Avenue by the plaintiff, and the Chevrolet driven east on Divine Street by Helen J. Joyce, collided in the intersection, resulting in injuries to both drivers. No traffic signs or signals regulate traffic at the intersection.

By their pleadings, each party claimed injuries and damage as the result of the other's actionable negligence. Evidence was offered and issues were submitted to the jury in accordance with the pleadings. The jury found for the plaintiff. From the judgment awarding damages as fixed by the jury, the defendants appealed, assigning as error the court's refusal to enter judgment of involuntary nonsuit against the plaintiff.

Bryan & Bryan, Wilson & Bain, Quillin, Russ & Worth, for plaintiff, appellee.

Robert B. Morgan, Charlie L. Dean, Jr., for defendants, appellants.

PER CURIAM. The evidence presented issues of negligence on the part of the defendant and contributory negligence on the part of the plaintiff, both of which were answered in favor of the plaintiff. The appellants did not include the court's charge in the case on appeal. The evidence supports the jury's findings, which become conclusive as to the facts. In the judgment, we find

No error.

THE NORTH ASHEBORO-CENTRAL FALLS SANITARY DISTRICT, PETITIONER v. R. L. CANOY AND WIFE, MYRTLE CANOY, DEFENDANTS (RESPONDENTS.)

(Filed 3 May, 1961.)

Appeal and Error § 19—

An assignment of error should present the asserted error without the necessity of going beyond the assignment itself.

APPEAL by petitioner from *Preyer, J.*, November Term, 1960, of RANDOLPH.

Condemnation proceeding in which the sole issue is the amount of damages, if any, respondents are entitled to recover from petitioner for the easements taken by petitioner under G.S. 130-130.

In a trial at November Term, 1959, the jury awarded damages in the amount of $5,000.00. Upon appeal by petitioner, this Court awarded a new trial. *Sanitary District v. Canoy,* 252 N.C. 749, 114 S.E. 2d 577, where the purpose and nature of the easements taken by petitioner are set forth.

Upon (second) trial at November Term, 1960, the jury awarded damages in the amount of $6,535.00, plus interest of $555.50, a total of $7,090.50.

Judgment was entered defining with particularity the easements acquired by petitioner, providing that respondents recover of petitioner the sum of $5,000.00 plus interest thereon from June 26, 1959, the date of the taking of the easements by petitioner, and taxing petitioner with costs. (Respondents agreed to remit the portion of the damages awarded in excess of the amount for which they obtained judgment.)

Petitioner appealed, assigning errors.

H. Wade Yates for petitioner, appellant.

Ottway Burton and Linwood T. Peoples for respondents, appellees.

PER CURIAM. In an assignment of error, "(a)lways the very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Allen v. Allen,* 244 N.C. 446, 450, 94 S.E. 2d 325; *Steelman v. Benfield,* 228 N.C. 651, 653, 46 S.E. 2d 829, and cases cited. Many of petitioner's assignments of error are defective in that they do not point out in what respect petitioner considers erroneous the court's rulings or instructions. Notwithstanding these deficiencies, each of petitioners' exceptions has been carefully considered. Suffice to say, we find no error of law deemed sufficiently prejudicial to warrant a new trial.

No error.

STATE AND ELLEN F. LOWE v. CHARLES N. LOWE

(Filed 3 May, 1961.)

1. Courts § 14—

A recorder's court established under G.S. 7-218 has jurisdiction of all criminal offenses below the grade of felony, G.S. 7-222, and therefore has jurisdiction of a proceeding under the Uniform Reciprocal Enforcement of Support Act to enforce an award of alimony rendered by a court of competent jurisdiction of another State. G.S. 52A-9.

2. Husband and Wife § 18—

The wilful failure of a husband to support his wife is a misdemeanor. G.S. 14-322 and G.S. 14-325.

APPEAL by defendant from *Preyer, J.,* November 7, 1960 Civil Term of RANDOLPH.

On 7 October 1960 Plaintiff Ellen F. Lowe filed a complaint with the clerk of the Recorder's Court of Randolph County alleging an award of alimony and support made to her by the Court of Common Pleas of Anderson County, South Carolina, in an action there entitled *Charles M. Lowe v. Ellen Faye Lollis Lowe.* She prays for enforcement of that decree as provided by the Uniform Reciprocal Enforcement of Support Act. G.S. c. 52A. In response to a summons defendant appeared, entered a special appearance, and moved to dismiss "for lack of jurisdiction on the ground that Randolph County Recorder's Court was not a court of record as contemplated in G.S. 52A-3 and defined in G.S. 7-326." Because of the failure of the judge of the Recorder's Court to promptly rule on the motion, defendant applied

for writ of *recordari* which was granted. Judge Preyer, after examining the records, concluded the Recorder's Court of Randolph County had jurisdiction. He remanded the cause to the "Recorder's Court of Randolph County to be disposed of according to law." Defendant appealed.

Attorney General T. W. Bruton and Staff Attorney Richard T. Sanders for the State.

Ottway Burton and Linwood T. Peoples for defendant appellant.

PER CURIAM. The Recorder's Court of Randolph County was established pursuant to the authorization given by G.S. 7-218. By express language courts created pursuant to that section are courts of record. They have jurisdiction of all criminal offenses "below the grade of a felony." G.S. 7-222.

The wilful failure of a husband to support his wife is a misdemeanor. G.S. 14-322, 14-325.

Jurisdiction of proceedings under the Uniform Reciprocal Enforcement of Support Act are vested in courts of record "having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding." G.S. 52A-9. When the statute was first enacted in 1951 jurisdiction was confined to the Superior Courts, but the statute was amended in 1955 and 1959. Courts established pursuant to the authority given by G.S. 7-218 now have jurisdiction to hear and determine complaints of the character filed by plaintiff in the Recorder's Court of Randolph County.

Affirmed.

FLORA TURNAGE ADAMS v. SAMUEL M. GODWIN, D/B/A GODWIN SALES COMPANY.

(Filed 3 May, 1961.)

Appeal and Error § 41—

It will not be held for error that the court refused to withdraw a juror and order a mistrial upon the intimation to the jury that defendant was protected by liability insurance when such fact is brought out by defendant's own counsel upon cross-examination of plaintiff, and substantially the same information is brought out on other occasions without objection, and any prejudicial effect being further obviated by common knowledge that liability insurance is required by law.

ADAMS *v.* GODWIN.

APPEAL by defendant from *Hobgood, J.*, October Civil Term 1960 of JOHNSTON.

This is a civil action instituted by the plaintiff to recover for personal injuries and property damage allegedly caused by the negligence of an employee of defendant. The cause of action grew out of a motor vehicle collision between a 1958 Edsel automobile owned and operated by the plaintiff and a 1950 Chevrolet truck owned by the defendant and operated by his employee, Raymond Howard Jackson, in the course and scope of his employment.

This case was here at the Spring Term 1960 of this Court and is reported in 252 N.C. 471, 114 S.E. 2d 76, where the facts are fully stated.

In the trial below the issues of negligence, contributory negligence and damage were answered in favor of the plaintiff, and from the judgment on the verdict the defendant appealed, assigning errors.

R. E. Batton; Levinson & Levinson for plaintiff appellee.

Smith, Leach, Anderson & Dorsett; C. K. Brown, Jr.; Canaday & Canaday for defendant appellant.

PER CURIAM. The defendant assigns as error the admission of certain evidence relating to insurance. This evidence was brought out in a vigorous cross-examination of the plaintiff by defendant's counsel. Moreover, later on, during the further cross-examination of this same witness, substantially the same information was brought out twice more and no objection or exception was made or entered thereto.

We have repeatedly held that an exception is waived when other evidence of the same import is admitted without objection. *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908; *White v. Price,* 237 N.C. 347, 75 S.E. 2d 244.

The authorities seem to support the view that when defendant's counsel opens the door to a certain line of inquiry, he will not be heard to complain if the inquiry when pursued brings to light the fact that the defendant is covered by liability insurance. *Gayson v. Daugherty,* 190 Wash. 133, 66 P. 2d 1148; *Garee v. McDonnell* (CCA 7th Cir.), 116 F. 2d 78; *Anderson v. Conterio,* 303 Mich. 75, 5 N.W. 2d 572; *Todd v. Libby McNeill & Libby* (Mo. App.), 110 S.W. 2d 830; *Kaley v. Huntley* (Mo. App.), 88 S.W. 2d 200.

Furthermore, it is now a matter of general knowledge that the owner of a motor vehicle in North Carolina is required by law to carry liability insurance at least to the extent required by the Motor Ve-

hicle Safety and Financial Responsibility Act of 1953, codified as G.S. 20-279.1 to 20-279.39.

This assignment of error is overruled.

Other assignments of error are without sufficient merit to warrant a disturbance of the verdict and judgment entered below.

Affirmed.

IN THE MATTER OF THE ESTATE OF ANNIE S. CLINE, DECEASED.

(Filed 3 May, 1961.)

APPEAL by respondent from *Preyer, J.*, at August 1960 Term of CABARRUS.

Special proceeding for revocation of letters testamentary.

The record on this appeal shows that Annie S. Cline, a resident of Cabarrus County, died 9 April 1959, leaving a last will and testament and a codicil thereto.

In her will and codicil the decedent named three of her children: Charlie J. Cline, Carl C. Cline, and Myrtle Cline Patterson, to serve as co-executors. They duly qualified as such on 14 April 1959.

On or about 13 July 1960, the wife of the respondent Charlie J. Cline instituted an action in the Superior Court of Cabarrus County against the named co-executors to recover $10,800.00 for alleged personal services rendered to the decedent during her lifetime. Thereafter the petitioners, Carl C. Cline and Myrtle Cline Patterson, filed a petition with the Clerk of the Superior Court of Cabarrus County in which they allege that the wife of Charlie J. Cline instituted the above mentioned action at his insistence, and for his benefit, and that Charlie J. Cline is indebted to the decedent's estate in the sum of $5,735.75 for money borrowed.

Upon the foregoing grounds, the petitioners pray that the letters testamentary of the respondent be revoked upon the ground that he is legally incompetent within the purview of G.S. 28-32.

The respondent denied the indebtedness alleged in the petition and further denied that he caused the suit to be filed by his wife against the co-executors.

The cause came on for hearing before the Clerk of the Superior Court of Cabarrus County upon the verified pleadings. The Clerk found facts and therefrom concluded that the respondent had become disqualified and incompetent to serve as co-executor, and revoked his letters testamentary.

In due course the case was appealed to the Superior Court, and the presiding judge affirmed the rulings of the Clerk in every respect.

To judgment entered in accordance therewith, the respondent excepts and appeals to the Supreme Court and assigns error.

Hartsell, Hartsell & Mills, J. Maxton Elliott for respondent appellant.

Williams, Willeford & Boger for petitioner appellee.

PER CURIAM. The single question brought forward in the present case is whether the evidence is sufficient to support the judgment of the court below. The case was heard upon the verified pleadings, as affidavits, and the facts found were to the effect that the respondent's personal interests conflict with his duties and responsibilities as co-executor.

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 judgment.

Therefore, the judgment of the Superior Court from which appeal is taken is

Affirmed.

THE NORTH ASHEBORO-CENTRAL FALLS SANITARY DISTRICT, PETITIONER v. WALTER STOWE AND WIFE, VALLIE O. STOWE, RESPONDENTS.

(Filed 3 May, 1961.)

APPEAL by respondents from *Sharp, S.J.*, July, 1960 Term, RANDOLPH Superior Court.

The petitioners instituted this proceeding to acquire, by condemnation, an easement over respondents' lands for the purpose of constructing a sewer line. The one issue raised by the pleadings is the amount of just compensation the respondents are entitled to recover for the easement rights taken.

The commissioners awarded $254.70. The respondents appealed to the superior court where the jury awarded $400.00. The court entered judgment on the verdict, from which the respondents appealed.

H. Wade Yates, for petitioner, appellee.
Ottway Burton, Linwood T. Peoples, for respondents, appellants.

PER CURIAM. The record shows this cause was carefully and accurately tried by the Presiding Judge. The assignments of error are without merit.

No error.

EMILY MYERS ALLEN, CO-EXECUTOR OF THE ESTATE OF SAMUEL G. ALLEN, DECEASED v. JAMES S. CURRIE, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 10 May, 1961.)

1. Fiduciaries—

An executor acts in a fiduciary capacity. G.S. 32-2, G.S. 105-163.1(8).

2. Executors and Administrators § 6—

Title to personal property of a person vests in his executor upon his death, but the executor takes title in trust for the payment of debts and the distribution of the assets in accordance with the terms of the will or in conformity with the rules of distribution.

3. Taxation § 30½—

The fact that a distributee of an estate is a nonresident does not warrant the exemption of a proportionate part of the intangibles of the estate from the State intangibles tax when the will does not bequeath the nonresident any specific property or set up a trust, since in such event the executor neither holds nor controls any specific intangible property for the benefit of such nonresident. G.S. 105-212.

APPEAL by defendant from *Crissman, J.*, September Term, 1960, of MOORE.

Civil action under G.S. 105-266.1(c) to recover for alleged overpayment of intangible personal property taxes.

Samuel G. Allen, "a resident of and domiciled in" Moore County, North Carolina, died testate on October 16, 1956. His will was probated and filed in Moore County. As stated in appellee's brief: "His widow, Emily Myers Allen of Pinehurst, North Carolina, and his nephew, Bertram S. Allen, of Greenwich, Connecticut, were named as Executors of said Will and duly qualified as such before the Clerk of the Superior Court of Moore County." They qualified on October 27, 1956.

On December 17, 1956, plaintiff, for the estate of Samuel G. Allen, filed a "Tentative Return" as of December 31, 1956, listing "Shares of Stock" of the net taxable value of $5,500,000.00, and paid "Estimated Tax" (25¢ per $100.00) of $13,750.00. On March 22, 1957, she filed a final return as of December 31, 1956, listing (1) "Money on Deposit Other than in N. C. Banks, including Certificates of Deposit, etc., or Postal Savings in and out of N. C." of the net taxable amount of $139,181.89, the tax thereon, at 10¢ per $100.00, being $139.18; (2) "Notes, Bonds and Other Evidences of Debt" of the net taxable amount of $73,750.00, the tax thereon, at 25¢ per $100.00, being $184.38; and (3) "Shares of Stock" of the net taxable amount of $5,441,059.50, the tax thereon, at 25¢ per $100.00, being $13,602.65. The total tax, according to said final return, was $13,926.21. Deducting from $13,926.21 the $13,750.00 paid on December 17, 1956, plaintiff then paid the balance of $176.21.

The item of $139,181.89 listed on said final return is shown as the "Average of Total Quarterly Deposit Balances," to wit, deposit balances at close of business February 15, 1956 — $199,401.25, at close of business May 15, 1956 — $186,862.04, at close of business August 15, 1956 — $91,661.58, at close of business November 15, 1956 — $78,802.68.

On December 17, 1957, plaintiff, for the estate of Samuel G. Allen, filed a "Tentative Return" as of December 31, 1957, listing (1) "Money on Deposit Other than in N. C. Banks, etc." of the net taxable amount of $50,000.00 (tax — $50.00), (2) "Notes, Bonds and Other Evidences of Debt," of the net taxable amount of $60,000.00 (tax — $150.00), (3) "Shares of Stock," of the net taxable amount of $2,940,000.00 (tax — $7,350.00), and paid the "Estimated Tax" of $7,550.00. On April 5, 1958, she filed a final return as of December 31, 1957, listing (1) "Money on Deposit Other than in N. C. Banks, etc." of the net taxable amount of $39,972.00, the tax thereon, at 10¢ per $100.00, being $39.97; (2) "Notes, Bonds and Other Evidences of Debt" of the net taxable amount of $70,250.00, the tax thereon, at 25¢ per $100.00, being $175.63; and (3) "Shares of Stock" of the net taxable amount of $3,325,152.96, the tax thereon, at 25¢ per $100.00, being $8,312.88. The total tax, according to said final return, was $8,528.48. Deducting from $8,528.48 the $7,550.00 paid on December 17, 1957, plaintiff paid the balance of $978.48.

The item of $39,972.00 listed on said final return is shown as the "Average of Total Quarterly Deposit Balances," to wit, deposit balances at close of business February 15, 1957 — $48,802.68, at close of business May 15, 1957 — $48,802.68, at close of business August

15, 1957 — $43,529.47, at close of business November 15, 1957 — $18,753.18.

On May 23, 1959, plaintiff demanded a refund of $10,444.65, being three-fourths of the $13,926.21 she had paid on account of intangibles held by the executors on December 31, 1956, and a refund of $6,396.36, being three-fourths of the $8,528.48 she had paid on account of intangibles held by the executors on December 31, 1957. These demands were based on the assertion that three-fourths of the gross adjusted estate of Samuel G. Allen, under the terms of his will, vested in and was distributable to nonresidents, and that the income received by the executors subsequent to the death of Samuel G. Allen (October 16, 1956) had been so distributed. Plaintiff based her asserted right to these refunds on the provisions of G.S. 105-212.

Defendant denied plaintiff's said demands. Thereupon, plaintiff, in apt time, instituted this action.

The hearing was on the pleadings, including exhibits attached to and made a part of the complaint. Defendant, by answer, admitted plaintiff's factual allegations.

The court, being of the opinion that plaintiff was a fiduciary within the meaning of G.S. 105-212 and entitled to the exemption provided therein, adjudged that plaintiff recover the amount of the refunds demanded, a total of $16,841.01, plus interest and costs.

Defendant excepted to the judgment, and to designated conclusions of law stated therein, and appealed.

John D. McConnell for plaintiff, appellee.

Attorney General Bruton and Assistant Attorneys General Abbott and Pullen for defendant, appellant.

BOBBITT, J. G.S. 105-212, in pertinent part, provides:

> "If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section from the tax imposed by this article, such intangible personal property shall be partially or wholly exempt from taxation under the provisions of this article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. 'Net income' shall be deemed to have the same meaning that it has in the income tax

article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Commissioner of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Commissioner of Revenue, establish in writing its claim to such exemption. No provision of law shall be construed as exempting trust funds or trust property from the taxes levied by this article except in the specific cases covered by this section."

The agreed case on appeal contains this stipulation:

"It is hereby stipulated by the parties to this action that all income received by the Executors of the Estate of Samuel G. Allen, during the administration of the same during the years 1956 and 1957 has been paid to the legatees in the ratio of one-fourth to Mrs. Emily Myers Allen of Pinehurst, North Carolina, and three-fourths to the residuary legatees under the Will of Samuel G. Allen, all of whom are non-residents of North Carolina.

"It is further stipulated that no income was distributed during the year 1956; and that $200,000.00 was distributed during the year 1957, $50,000.00 to Mrs. Emily Myers Allen, and $150,000.00 to the residuary non-resident legatees; and that the remaining income earned during the years 1956 and 1957 has been subsequently divided one-fourth to Mrs. Emily Myers Allen of Pinehurst, North Carolina, and three-fourths to the residuary non-resident legatees."

The question is whether the executors, in respect of intangible personal property held and controlled by them on December 31, 1956, and on December 31, 1957, respectively, are entitled to the refunds demanded. On these dates, the estate was in process of administration. As of now, there has been no final settlement.

Unquestionably, as plaintiff contends, an executor acts in a fiduciary capacity. *In re Will of Covington,* 252 N.C. 551, 114 S.E. 2d 261; *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231. In G.S. 36-9, they are classified with "guardians, trustees, and other fiduciaries . . ." They are expressly included in statutory definitions of "fiduciary." G.S. 32-2; G.S. 105-163.1(8). An executor's fiduciary obligation is to pay the decedent's debts as provided by law and to administer

the estate in compliance with the provisions of the decedent's will. *McGehee v. McGehee,* 190 N.C. 476, 130 S.E. 115; *Scott v. Jordan,* 235 N.C. 244, 250, 69 S.E. 2d 557.

The status of an executor is well stated in 21 Am. Jur., Executors and Administrators § 8, as follows: "While a personal representative of a decedent stands in the place of, and is regarded as, the representative of the deceased person for the purpose of settling his business affairs and distributing his estate, in reality he serves in a dual capacity, occupying also the position of trustee for the persons beneficially interested in the estate. Such persons are generally the creditors and the heirs of the decedent, those designated in the will as legatees or devisees, and, in the default of beneficiaries taking under the will, those entitled to the estate under the statute of distributions. After all claims have been paid, the representative remains as a trustee for the beneficiaries of the estate."

The personal property of the testator vests upon his death in his executor. *Darden v. Boyette,* 247 N.C. 26, 31, 100 S.E. 2d 359; *Sales Co. v. Weston,* 245 N.C. 621, 627, 97 S.E. 2d 267. "Although title to the personal property of a decedent vests in his executor or administrator, he takes such personal property in trust for the payment of the debts of the decedent and the distribution of the remainder among his next of kin, in accordance with the provisions of the will or the law. . . . For the time being the personal representative succeeds to all the rights and responsibilities of the decedent with reference thereto and represents the decedent with respect to such property." 21 Am. Jur., Executors and Administrators § 283.

G.S. 28-162 provides that an executor, immediately after the expiration of two years from his qualification, shall divide, deliver and pay to the persons entitled thereto under the will all of the estate remaining after payment of legal debts, charges and disbursements.

In the light of these well-established legal principles, it is appropriate to consider the provisions of the will. Summarized, they are as follows:

The testator gives, devises and bequeaths to his wife, Emily Myers Allen, such portion of all his property and estate, real, personal and mixed, whatsoever and wheresoever, "as will amount to one-fourth (1/4) of my adjusted gross estate as defined in Section 2056 of the Internal Revenue Code"; and, in addition thereto, he bequeaths and devises to his wife, in fee simple and absolutely, certain described real estate and tangible personal property. He then gives and bequeaths to various legatees specific monetary bequests aggregating $230,000.00. He directs his executors to pay out of the residue of his

estate "any and all Federal or State estate, inheritance or other tax that may be payable on or on account of any of my property and estate," so that "each devise and/or bequest . . . shall be received by the beneficiary free from the payment of, or any deduction for or on account of, any such tax."

In respect of all the rest, residue and remainder of his property and estate, real, personal and mixed, whatsoever and wheresoever, after payment of all taxes as theretofore provided, the testator orders and directs that his executors divide such residue into ten equal portions. Thereupon, he gives and bequeaths a specified number of these ten equal portions to each of six relatives, all of whom are nonresidents of North Carolina.

The testator confers upon his executors plenary powers, set forth in detail, with reference to the handling of the assets of his estate, including the right "(t)o sell, convert into cash and dispose of, at such time or times as my said Executors will determine, any of the investments and other property held by them, publicly or privately, at such price or prices and upon such terms and conditions as to them may seem satisfactory."

No *specific* property, tangible or intangible, was bequeathed or devised to any of said nonresident beneficiaries.

G.S. 105-206 provides: "Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, asignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this article or schedule, either as principal or agent, shall make and deliver to the Commissioner of Revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the local amount of tax due, shall be filed on or before the fifteenth day of April in each year."

In respect of the return filed as of December 31, 1956, the net taxable amount of money on deposit in banks other than N. C. banks is the average of four amounts, three of which were bank balances on dates prior to the death of the testator.

It will be noted that the net taxable amount of intangibles listed as of December 31, 1956, is substantially greater than the net amount of intangibles listed as of December 31, 1957. The clear inference is that the executors found it necessary to use a substantial portion of the intangibles held by them on December 31, 1956, in the payment of taxes, specific bequests, etc. Indeed, the complaint alleges that the executors paid the specific bequests in the amount of $230,000.00 pursuant to an order entered January 14, 1957, by the

Clerk of the Superior Court of Moore County. Moreover, the differences between the intangibles listed on the tentative returns and on the final returns indicate frequent changes from time to time in the identity of the intangibles held by the executors.

The conclusion is inescapable that the executors did not, as of December 31, 1956, and as of December 31, 1957, hold or control any *specific* property, tangible or intangible, for the benefit of nonresidents. While the estate was in process of administration, the executors held and controlled all assets of the estate for disbursement and distribution according to law and the provisions of the will without distinction as to the kind and character of the assets to be distributed to the widow or to the nonresident residuary beneficiaries upon final settlement. In short, the assets were in the hands of the executors in their capacity as the testator's personal representatives. In this connection, it is noteworthy that the testator conferred upon his executors the power "(t)o make payment or distribution in kind or in cash, or partly in kind and partly in cash, the valuations of securities or other property delivered in making payment or distribution to be fixed by my said Executors."

We have not overlooked the stipulation as to the distribution by the executors of income received subsequent to the testator's death. The will makes no provision for the distribution of income while the estate is in process of administration. Incidentally, the record does not disclose the source of the income so received and distributed. Whether the executors had legal authority to distribute such income is not before us. Ordinarily, distribution of assets or of income prior to final settlement is made by an executor at his own risk. *Mallard v. Patterson,* 108 N.C. 255, 13 S.E. 93.

Appellee cites *Trust Co. v. Jones,* 210 N.C. 339, 186 S.E. 335; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17; and *Trust Co. v. Grubb,* 233 N.C. 22, 62 S.E. 2d 719, all relating to testamentary trusts. These decisions are authority for the proposition that, where the assets of a testamentary trust consist of the residue of the testator's estate and the will does not otherwise provide, the amount of the income received by the executor during the period of administration is to be disbursed by the trustee to the life (income) beneficiaries of the trust and not added to the corpus of the trust estate. Suffice to say, the present case presents a different legal problem.

The ultimate question is whether the exemption provided in the quoted portion of G.S. 105-212 is available to plaintiff. This provision was incorporated in G.S. 105-212 in 1947. Session Laws 1947, c. 501, s. 7. It exempts intangible personal property held or con-

trolled for the benefit of a nonresident or nonresidents by "a fiduciary *domiciled in this State.*" (Our italics)

In our view, the intent and purpose of the 1947 amendment was not to exempt any intangibles theretofore subject to the intangible personal property tax but to dispel any idea that intangibles otherwise exempt would be subject to the intangible personal property tax *because* a fiduciary domiciled in this State held and controlled such intangibles. Under its provisions, a resident or nonresident creator of a trust, consisting wholly or in part of intangibles, can name as fiduciary a person, bank or trust company domiciled in North Carolina with the assurance that the interests of nonresident beneficiaries of the trust will not suffer on account thereof. Moreover, we think the 1947 amendment was intended to apply to an established or continuing trust, not to intangibles constituting general assets of an estate in process of administration. In this connection, it is noted (1) that the will does not establish a testamentary trust, and (2) that there is no legacy of specific intangible personal property to any beneficiary.

The exemption, if applicable at all to an estate in process of administration by an executor, is applicable only if such executor is domiciled in this State. A nonresident may qualify as executor by giving bond. G.S. 28-34; G.S. 28-35. He is not required to give bond if a resident qualifies as coexecutor. G.S. 28-38. Manifestly, the General Assembly did not intend the exemption should apply when the executor is a resident, or when a coexecutor is a resident, but not when a sole executor is a nonresident. This fortifies our view that the exemption was not intended to apply, and does not apply, to intangibles constituting general assets held and controlled by an executor of an estate during the process of administration.

In the factual situation presented on this appeal, we are of opinion, and so hold, that plaintiff is not entitled to the exemption provided in the quoted portion of G.S. 105-212. Hence, the judgment of the court below is reversed.

Reversed.

MYRTLE JONES v. MAGGIE BEATRICE OVERMAN SAUNDERS AND HUSBAND, BRYAN SAUNDERS.

(Filed 10 May, 1961.)

1. Cancellation and Rescission of Instruments § 10— Evidence of fraud or duress held insufficient to raise the issue.

Evidence tending to show that the owner conveyed a part of his land to his grandson and a part to his daughter, to the exclusion of other grandchildren and another daughter, that the grantees had lived with grantor continuously since the death of grantor's wife, that the daughter knew nothing of the deed until her father delivered it to her, without evidence that the father relied on the daughter for advice or guidance or that she exercised any dominating influence over him, *is held* insufficient to be submitted to the jury on the issue of whether the daughter procured the execution of the deed by fraud or duress, notwithstanding evidence of mutual trust and confidence between them.

2. Fraud § 2—

The mere relation of parent and child does not raise a presumption of fraud or undue influence in the conveyance of property by the parent to the child.

3. Cancellation and Rescission of Instruments § 10—

The fact that a deed from a father to his child is not founded on a valuable consideration raises no presumption of fraud, certainly where the evidence discloses services rendered by the child in looking after the parent and paying hospital and medical bills, etc., since even though such services are presumed gratuitous, the law does not preclude a parent from compensating a child for such services.

4. Deeds § 7—

The probate and registration of a deed raise the rebuttable presumption that the instrument had been signed, sealed, and delivered, and the burden is on the party asserting the invalidity of the deed for want of delivery to prove non-delivery.

5. Same—

The requisites of delivery of a deed, essential to its validity, are an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor, the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control, and the acquiescence by the grantee in such intention.

6. Same—

Evidence tending to show the owner of land had it surveyed and caused a deed to be prepared conveying a part thereof to his daughter, that he signed the deed and manually delivered it to her and permitted her to put it with her other valuable papers, is sufficient evidence of delivery, notwithstanding the repository was accessible to, and used by, both.

JONES *v.* SAUNDERS.

APPEAL by defendants from *Preyer, J.*, November 1960 Term of RANDOLPH.

This action was instituted 27 April 1957 to set aside and cancel a recorded deed on the ground there was no delivery, and on the alternate ground that its execution was procured by the fraud and duress of feme defendant.

Plaintiff Myrtle Jones and defendant Maggie Saunders are sisters. The subject of the suit is a 65-acre tract of land formerly owned by their father, C. S. (Charlie) Overman. Male defendant is the husband of Maggie Saunders and a formal party only. As hereinafter used, "defendant" refers to Maggie Saunders.

The evidence tends to show:

Charlie Overman owned 110 acres of land in Columbia Township, Randolph County, on which he lived and reared his children. He was a farmer. He had three children who reached adulthood — plaintiff, defendant, and a son John Overman who died about 1933 survived by eight children, all of whom are now living and of age. In 1921, when plaintiff was 18 years of age, she married and moved away and has not lived at her father's homeplace since.

Defendant lived with her father until his death in 1957. Her mother died in the late 1930s. Defendant was about 30 years old at the time; she was born in 1908. After the death of the mother, defendant and Arnold Overman lived at the home place with Charlie Overman. Arnold Overman is a son of John Overman and a grandson of Charlie Overman. Defendant had a cotton patch and raised chickens. In 1945 she got a job and earned wages.

In 1947 Charlie Overman had his land surveyed. On 26 March 1947 he went to Siler City and had two deeds prepared — one to Arnold Overman for 45 acres, the other to defendant for 65 acres including the home site. Arnold Overman was present at the time. Charlie Overman signed both deeds. Both deeds had the following provision inserted at the end of the description and preceding the *habendum* clause: "I hereby reserve for myself a life estate in the above described tract of land." Upon their return home Charlie Overman immediately delivered to Arnold the deed for the 45 acres. Defendant was at work. When she came home her father handed her the deed for the 65 acres. She and her father then went to their bedroom and put the deed in a dresser drawer. She, her father and Arnold regularly used this dresser drawer for their papers. Both before and after this date defendant at all times had a key to the house. Arnold kept his deed in this drawer. The deed to defendant recited a consideration of $500. She paid him nothing when he handed her the deed, but she paid him later. She paid bills for him, helped pay taxes. In 1947

Charlie Overman was 77 years old, had hardening of the arteries, spells with his stomach, and at times dizzy spells. Arnold paid rent during his grandfather's lifetime. Charlie Overman rented the land and collected rent on the 65 acres as long as he lived. He listed the 65 acres for taxes in his own name until he died.

In 1951 Charlie Overman fell and broke his hip. Defendant paid his hospital, medical and doctor's bills. When he left the hospital they went to plaintiff's to live. They lived there until 1955. Defendant continued to work at her job. Part of the time she paid plaintiff $5.00 rent each two weeks for upstairs rooms. Plaintiff was paying $8.00 per month for the entire house. Defendant furnished a small amount of groceries and vegetables. Plaintiff had the care of their father. The amount of attention given him by each is in dispute. He frequently visited the farm.

In 1955 defendant, then about 47 years old, married Bryan Saunders and they moved to the homeplace — the 65-acre tract. Her father moved there with them. Plaintiff states he did not want to. He remained with them at the homeplace until he died 27 February 1957. He was 87 years old when he died. In his last days he was in the hospital twice. Defendant paid his hospital and doctor's bills. Plaintiff visited her father weekly prior to 1951, and frequently from 1955 on.

After her father's death, defendant took the deed from the dresser drawer and had it recorded. The date of the recordation is 6 March 1957. Defendant went to plaintiff's home and delivered her a passbook entitling plaintiff to $500. Defendant said: "Here is what papa left you." Defendant also stated: "Now you know how things are fixed. God in heaven knows I didn't know a thing about it."

Defendant and her father had a joint account in a savings and loan association. The 65-acre tract is estimated to have a market value of $5,000 to $9,550. All grandchildren, except Arnold, signed a paper authorizing plaintiff to bring this suit in her name and on their behalf.

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

"1. Did C. S. Overman execute and deliver the paper writing recorded in Book 628, page 453, office of the Register of Deeds of Randolph County, to Maggie Beatrice Overman Saunders? Answer: No.

"2. Did the defendant Maggie Beatrice Overman Saunders procure the execution of the paper writing recorded in Book 623, page 458, office of the Register of Deeds of Randolph County, through fraud or undue influence? Answer: _____."

The court entered judgment declaring the deed in controversy null and void.

Defendants appeal.

Ottway Burton and Linwood T. Peoples for plaintiff.
Coltrane and Gavin and Donald L. Paschal for defendants.

MOORE, J. In apt time defendants moved for nonsuit. As to the cause of action based on alleged nondelivery of the deed, the exception to the refusal to nonsuit is not assigned as error and has been abandoned. But as to the alternative cause of action alleging that the deed was procured by fraud and duress, the question of the sufficiency of the evidence is raised — Assignment of error No. 26. We do not approve the method used in preserving the exception; it is not in accordance with procedural rules. When we look to the substance of the assignment, the exception is brought forward. Since there must be a new trial in any event, we feel justified in the exercise of discretion and in the interest of justice to treat the assignment as based on exception to denial of nonsuit. By disposing of this question at the outset, discussion of other assignments will be simplified.

When considered in the light most favorable to the plaintiff, giving her the benefit of every reasonable inference to be drawn therefrom, the evidence is insufficient to make out a *prima facie* case of fraud or duress. There is no evidence that defendant persuaded or even requested her father to execute the deed. There is not even an intimation that they discussed the matter beforehand or that she even knew he intended to execute the deed until he handed it to her. She was not present when the deed was prepared and signed. Its preparation was entirely under his direction. He had the land "run out" preparatory to making the deed. He deeded the land to the two persons who had stayed with him during the period of approximately ten years he had been a widower. Indeed, this daughter and grandson had been there all their lives. He was old, it is true — he was then 77. But there is no suggestion he was feeble or his mind was impaired. He had hardening of the arteries, spells with his stomach and occasional dizzy spells — conditions more or less common to old age. He lived to be 87, notwithstanding a serious accident in 1951. He attended to his own business affairs. There is no evidence that he relied on defendant for advice and guidance or that she exercised any dominating influence over, or imposed her will upon, him. It is reasonable to assume that she attended to household duties. She tended a cotton patch and raised chickens. Later she got a job and earned wages. She paid some of his bills, helped with taxes and defrayed his hospital and medical expenses. He had physical access to the deed for ten years prior to its recordation. The deed recited a valuable consideration of $500. It is reasonable to assume that he considered her constancy and devotion a more valuable consideration. It is true there was mutual

trust and confidence between them — they maintained a joint savings account.

The mere relation of parent and child does not raise a presumption of fraud or undue influence. *Walters v. Bridgers,* 251 N.C. 289, 293, 111 S.E. 2d 176; *Davis v. Davis,* 236 N.C. 208, 211, 72 S.E. 2d 414; *Gerringer v. Gerringer,* 223 N.C. 818, 821, 28 S.E. 2d 501. In certain known and fiduciary relations, if there be dealing between the parties, on complaint of the party in the power of the other, or those succeeding to his rights, the relation itself raises a presumption of fraud as a matter of law. *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615. But where no such relationship exists, no presumption of fraud arises. *Gerringer v. Gerringer, supra.* In the instant case defendant was not in such fiduciary relation with her father. It was a family relationship, not a fiduciary one. She exercised no power or control over him or his property. There is no evidence of overreaching or unfair dealing on her part. *Davis v. Davis, supra.*

Wessell v. Rathjohn, 89 N.C. 377, presents a factual situation quite similar to the case at bar. A father, having two daughters, executed to one of them a deed not founded on a valuable consideration. After the death of the father the other daughter sought to set aside the deed on the ground of mental incapacity of grantor and undue influence on the part of grantee. The verdict favored defendant. In discussing the trial court's ruling on a prayer for special instruction this Court said: "It is natural that the father should provide for his daughter: this is a proper and orderly thing to be done. It is what the paternal feelings of good men prompt them to do: it is what just men commend and the law tolerates. Why should the law cast suspicion upon such a transaction? When the transaction, the deed, is right in itself, such as the law tolerates and the common sense of men approves as just, reasonable and commendable, and there is the absence of the relation of suspicion founded on motives of policy, no adverse presumption arises; on the contrary, the law presumes such deed or transaction in all respects proper and just, until the contrary is made to appear. . . . (T)here must be evidence tending to show, not simply that there might have been, but that there was *mala fides.*"

"Right or wrong, it is to be expected that a parent will favor the child who stands by him, and to give to him, rather than the others, his property. To defeat a conveyance under those circumstances something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained." *Plemmons v. Murphey,* 176 N.C. 671, 679, 97 S.E. 648.

Plaintiff contends that inadequacy of consideration alone is sufficient to withstand the motion for nonsuit. "The controlling principle established by our decisions is that inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on an issue of fraud, but inadequacy of consideration standing alone will not justify setting aside a deed on the ground of fraud. However, if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence." *Garris v. Scott,* 246 N.C. 568, 575, 99 S.E. 2d 750. In the *Garris* case the transaction was between strangers. There was evidence of advantage, overreaching and oppression in addition to inadequacy of consideration. Love and affection, recognition of kindness and care, and provision for the future of a child furnish adequate consideration as between parent and child, in the absence of evidence of fraud and duress. *Walters v. Bridgers, supra; Cannon v. Blair,* 229 N.C. 606, 50 S.E. 2d 732. Services performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation. *Allen v. Seay,* 248 N.C. 321, 323, 103 S.E. 2d 332. But this principle of law does not prevent a parent from compensating a child for such services, and does not render consideration for a compensating conveyance inadequate. In the *Walters* case defendant paid nothing for the conveyance, yet nonsuit was affirmed.

The trial court erred in denying the motion for nonsuit in the cause of action based on alleged fraud and duress.

Defendants except to the following portion of the charge: "Now, the burden of proof on that issue (first issue) is on the defendant Mrs. Saunders to convince you by the greater weight of the evidence that the deed was properly executed and delivered to her."

The exception is well taken. Plaintiff has the burden of proving nondelivery. We dealt directly with this question in *Johnson v. Johnson,* 229 N.C. 541, 50 S.E. 2d 569. This was a special proceeding for partition. Defendants pleaded sole seizin. By way of reply plaintiffs attacked the deed under which defendants claimed, and alleged that it was a forgery and had not been signed, sealed and delivered. It had been recorded. After a general discussion of "burden of proof" this Court addressed itself to the exact question:

". . . . Manifestly, the burden of showing that the deed was a forgery devolved upon the plaintiffs under the pleadings in the case at bar for the reason that the nonexecution of the instrument by the supposed grantor constituted an essential element of their claim or cause of action. The reply of the plaintiffs disclosed the existence of

the alleged deed and the fact that it had been probated and registered. The probate and registration gave rise to the rebuttable presumption that the instrument had been signed, sealed, and delivered by the purported grantor. *Best v. Utley,* 189 N.C. 356, 127 S.E. 337. Thus, the plaintiff would have suffered defeat on the issue as to the execution of the deed if no evidence had been offered on either side with respect thereto.

"This conclusion is sanctioned by repeated decisions of this Court holding that the burden of proving his assertion of nonexecution rests on a plaintiff who seeks to establish a claim to land upon an allegation that the grantor named in a probated and registered deed regular on its face did not in fact execute the instrument. Besides, the same cases clearly establish the rule that a party claiming title under such probated and registered deed can call to his aid the rebuttable presumption that the supposed grantor executed such deed whenever the instrument is subjected to attack on an allegation of nonexecution without regard to whether he be the plaintiff or the defendant. (Citing many authorities)

"The trial judge was understandably misled on the question of the burden of proof as to the execution of the deed in issue by a too literal reliance upon certain language in *Belk v. Belk,* 175 N.C. 69, 93 S.E. 726; *Jones v. Coleman,* 188 N.C. 631, 125 S.E. 406; and *Burton v. Peace,* 206 N.C. 99, 173 S.E. 4."

In the argument before this Court counsel for plaintiff, with commendable candor, admitted that the burden of the issue was upon plaintiff. But he insisted that the error was harmless, contending that there was no evidence of an intent on grantor's part to deliver the deed, and that plaintiff was entitled to a peremptory instruction on the first issue. We do not agree.

"Delivery is essential to the validity of a deed of conveyance. Both the delivery of the instrument and the intention to deliver it are necessary to the transmutation of title." *Elliott v. Goss,* 250 N.C. 185, 188, 108 S.E. 2d 475. "The requisites to the valid delivery of a deed are threefold. They are: (1) An intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control, though not necessarily beyond his physical control; and (3) acquiescence by the grantee in such intention. (Citing many cases)." *Ballard v. Ballard,* 230 N.C. 629, 633, 55 S.E. 2d 316. Presumption of delivery arises from registration, even after the death of the grantor, and in the absence of other evidence is sufficient to support a finding of delivery. *Cannon v. Blair, supra.*

We think there was sufficient evidence of intent to deliver without resort to the presumption. Intent is an act or emotion of the mind and is usually not capable of direct proof. It is usually shown by the acts and declarations of the intender when considered in the light of circumstances known to him. That Charlie Overman had the land surveyed, caused the deed to be prepared, signed it, manually delivered it to defendant, permitted her to put it with her other valuable papers, and for ten years made no attempt to retrieve it or interfere with her access to and possession of it, though he could have physically retaken it, is strong evidence of his intent to deliver the deed according to legal definition of that term.

Questions raised by the further assignments of error may not recur when the cause is tried again. For this reason we do not discuss them here.

In the cause of action to set aside and cancel the deed from C. S. Overman to Maggie Beatrice Overman (Saunders) for nondelivery, there will be a

New Trial.

ZEB V. KIRK AND VIRGINIA SMITH YOUNG, CO-EXECUTORS OF JASON B. STRANGE, DECEASED, v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 10 May, 1961.)

1. Insurance §§ 3, 46—

In an action on an insurance contract, the burden is upon plaintiff to show coverage under the policy and upon insurer to prove an asserted defense under the exclusion clauses, but when plaintiff's own evidence establishes that his claim falls within a clause excluding liability, nonsuit is proper.

2. Insurance § 3—

An insurance contract is to be construed in accordance with the intention of the parties and must be enforced according to the terms of the agreement.

3. Same—

Where a term is defined in a contract of insurance, such definition will be applied to the term wherever used in the contract, including coverage and exclusion clauses, unless made inapplicable by the express language of the contract or unless inconsistent with and repugnant to the purpose and intent of the particular clause.

4. Same—

An endorsement is an integral part of the policy contract.

5. Insurance § 47— Vehicle held "commercial automobile" excluded from coverage under indemnity endorsement.

The policy in suit defined "commercial automobile" as one used principally in the business occupation of the named insured, including loading and unloading thereof, and provided coverage for loss or damage to a designated automobile, owned by insured, and for personal and property damage liability, and medical payments. By endorsement, for a small premium, it provided indemnity for injury or death of insured resulting from an automobile accident, but excluded coverage for injury or death arising while insured was engaged in duties incident to the operating, loading, or unloading of a commercial automobile. *Held:* Insurer cannot be held liable for death of the named insured resulting while he was assisting in loading, in the course of insured's employment, a vehicle of insured's employer used in the performance of the employer's business.

APPEAL by defendant from *Phillips, J.*, September 1960 Civil Term of DAVIDSON.

Action by plaintiffs, Co-Executors of Jason B. Strange, deceased, to recover, on account of testate's accidental death, $5,000 death benefit under the terms of an insurance policy issued by defendant insurance company.

There was verdict for plaintiffs. Judgment was entered accordingly. Defendant appeals.

Stoner & Wilson and T. H. Suddarth, Jr., for plaintiffs.
Walser & Brinkley for defendant.

MOORE, J. Jason B. Strange was employed by the Southern Railway Company in the car department. He worked in and out of the Spencer shops. On 26 November 1958 a railway car ran a "hot box" at Hickory. The car had been "jacked up" and the wheels changed. Strange and one Peacock, in the course of their employment, were sent to return the jacks to the shops. For this purpose they used a specially equipped 2½ ton Chevrolet maintenance truck owned and furnished by the Railway Company. They drove the truck to the location and prepared to load the jacks.

The truck had been "stripped" down, leaving of the original vehicle only the cab and chassis; and a special body was built on the back. The truck had one set of dual wheels on the rear, with flat steel fenders over, and extending three inches beyond, the wheels. A hydraulic boom, 16 to 18 feet long, was mounted on and attached to the body. The boom was powered by a dynamo motor. Levers and two crane wheels for controlling the boom were mounted to the rear of the cab. The

body had boxes, sections and compartments for storing and transporting tools, accessories, equipment, wood boards and wedges, chains, cables, hammers, train wheels, railroad jacks, and torches. There was a special place on the right side of the body for loading and carrying the jacks.

The jack which Strange and Peacock began loading first was three feet long and weighed about 250 pounds. A steel cable ran along the boom. At the end of the cable was a steel hook. Strange attached the hook to the jack. Peacock was at the controls to manipulate the boom. Strange remained on the ground to assist in guiding the jack to the proper position on the truck. To the right of and above the truck were high voltage electric transmission wires. In raising the jack, the boom and steel cable came into contact with the wires and Strange was electrocuted.

Peacock recounts the occurrence as follows: "He (Strange) was standing between the right rear wheels and the wires. . . . I could not see him but I would say he was approximately three or four feet from the truck. . . . The last thing I heard Strange say . . . he had a habit of say(ing), 'hey', and that was the last thing I heard. . . . I then got off the truck and went around and saw him lying on the ground . . . . I found his body lying at the right rear wheel. The closest part of his body to the wheel I would say was approximately six inches. His head was at the wheel and the body extended out toward the wire. . . . He was unconscious but breathing. . . . The jack that we had swung around was hanging up over his body approximately three feet from the ground."

Just prior to the accident the part of Strange's body nearest to the truck was his left hand. After the accident there were "a few black spots on his left hand . . . on the inside of the fingers near the end of the fingers." The truck was charged with electricity. Upon arrival at the hospital Strange was pronounced dead.

On 8 June 1958 defendant insurance company issued to Jason B. Strange and Southern Railway Company "Comprehensive Family Liability and Automobile Combination Policy No. 61-900-130. Endorsement 409B-1 was attached to and a part of the policy. The endorsement names Jason B. Strange as insured. The principal sum for death indemnity is $5,000. The pertinent portions of the endorsement are as follows:

"The Company agrees with the named insured, in consideration of the payment of the premium and in reliance upon the declarations and subject to the limits of liability, exclusions, conditions and other terms of this endorsement and of the policy . . . . To pay the principal sum . . . in the event of the death of the Insured which shall re-

sult directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while in or upon or while entering into or alighting from, or through being struck by, an automobile . . . .

"EXCLUSIONS. This insurance does not apply . . . to bodily injury or death sustained in the course of his occupation by any person while engaged . . . in duties incident to the operation, loading or unloading of, or as an assistant on, a public or livery conveyance or commercial automobile. . . ."

The premium had been fully paid and the insurance was in force at the time of insured's death. The annual premium on the Death Indemnity feature of the Endorsement was $1.80. Plaintiffs in apt time filed with defendant proof of loss and demanded payment of the principal sum. Defendant denied liability under the terms of the policy and this action was instituted.

At the trial defendant offered no evidence and moved for nonsuit at the close of plaintiffs' evidence. The motion was overruled and defendant excepted. The question for decision on this appeal is whether or not the court erred in refusing to nonsuit the action.

It is our opinion, and we so hold, that the trial court erred in denying defendant's motion for nonsuit.

In cases involving insurance contracts, the burden is on him who claims benefits thereunder to offer evidence which brings him *prima facie* within the coverage of the policy, and upon such showing the burden is upon the insurer to prove defenses under the exclusion clauses. *Fallins v. Insurance Co.*, 247 N.C. 72, 100 S.E. 2d 214. "When the plaintiff fails to show coverage under the insurance clause of a policy, nonsuit is proper. If the plaintiff's evidence makes out a case of coverage and at the same time establishes the defense that the particular injury is excluded from coverage, nonsuit is likewise proper." *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438.

In the instant case, it is unnecessary to decide whether or not plaintiffs have made out a case of coverage under the insuring clause. It must be understood that we express no opinion on this question. Plaintiffs' evidence definitely shows that the injury to and death of Jason B. Strange, under the terms of the Exclusions clause, is excluded from coverage.

In their brief plaintiffs make the following admissions: "In all candor it must be conceded that the death of plaintiffs' intestate was sustained in the course of his occupation and while he was engaged in the duties incident to the loading the maintenance truck. It is admitted that the truck in question is under the holdings of this and other jurisdictions an automobile. The Death Indemnity Endorsement

409B-1 defines automobile as 'a land motor vehicle or trailer not operated on rails or crawlertreads . . . .' Thus the sole question is whether the heavy maintenance truck which plaintiffs' intestate (testate) was helping to load is 'commercial automobile.' "

Plaintiffs very properly conceded that the truck in question is an "automobile" according to the definition contained in the policy itself, and under the decisions of this Court. *Seaford v. Insurance Co.*, 253 N.C. 719, 117 S.E. 2d 733. The sole question for decision is: Is it a "commercial automobile"?

An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. *Gaulden v. Insurance Co.*, 246 N.C. 378, 384, 98 S.E. 2d 355. It is to be construed and enforced according to its terms. *Haneline v. Casket Co.*, 238 N.C. 127, 129, 76 S.E. 2d 372. When the policy expressly defines such terms as "commercial automobile" or "commercial use" in reference to the coverage in question, the policy definition must be accepted and applied. *Commercial Standard Insurance Co. v. Blankenship*, 134 F. 2d 784 (6th Cir. 1943); *American Casualty Co. v. Fisher*, 23 S.E. 2d 395 (Ga. 1942); *Manthey v. American Automobile Insurance Co.*, 127 Conn. 516, 18 A. 2d 397 (1941); *Maryland Casualty Co. v. Tighe*, 115 F. 2d 297 (9th Cir. 1940). Ordinarily the same words and phrases used in different clauses of an insurance contract will be understood to have been used in the same sense. *Willingham v. Life & Casualty Co.*, 216 F. 2d 226, 47 A.L.R. 2d 1017. Thus when a term, such as "commercial automobile," is defined in an insurance policy, though not specifically in reference to the coverage in question, the definition will be applied to all clauses of the contract, including the coverage in controversy, unless it is made inapplicable by the express language of the contract, or is inconsistent with and repugnant to the provisions of the coverage under consideration. *Lancaster v. Insurance Co.*, 153 N.C. 285, 288, 69 S.E. 214.

The main policy in the instant case is denominated "Comprehensive Family Liability and Automobile Combination Policy." "Jason Burgess Strange & Southern Railway" are named insured. The main body of the policy provides five coverages: (B) Comprehensive — Loss or damage to automobile; (D-1) Deductible collision; (E) Property Damage Liability; (F) Bodily Injury Liability; (G) Automobile Medical Payments. The total premium is $111. The automobile described is a 1955 Cadillac 2-door coupe. The specified "use of automobile" is "Pleasure and Business" (not "Commercial"). There are the following definitions of automobiles as to use: "(a) 'Pleasure and Business' means personal, pleasure, family and business use. (b) 'Commercial' means that the automobile is used principally in the

business occupation of the named insured . . . including occasional use for personal, pleasure, family and other business purposes. Use of the automobile for the purposes stated includes the loading and unloading thereof."

The coverage involved here is set out in Endorsement 409B-1, attached to the policy above referred to. For a premium of $1.80 it provides a Death Indemnity of $5,000 should Jason B. Strange die as a result of accidental injury sustained while in or upon, or while entering into or alighting from, or through being struck by, an automobile. However, the Death Indemnity is not payable if the fatal injury is "sustained in the course of his employment . . . in duties incident to the operation, loading or unloading of, or as an assistant on, a . . . *commercial automobile.*" (Emphasis added). The language of the endorsement does not define "commercial automobile" as therein used, nor does it exclude the term from the definition given in the main portion of the policy. The endorsement is an integral part of the policy. *Lancaster v. Insurance Co., supra.*

The purpose of the policy is to protect insured from financial loss and liability in the use of the Cadillac automobile for "pleasure and business," and to provide indemnity for the death of Jason B. Strange resulting from accidental injury sustained, under specified circumstances, in the use of a "pleasure and business" automobile. The endorsement provides limited coverage, as indeed it must for a premium of $1.80. *Marshall v. Insurance Co.,* 246 N.C. 447, 448, 98 S.E. 2d 345; *Taft v. Casualty Co.,* 211 N.C. 507, 513, 191 S.E. 10. It is clearly not intended that the policy shall cover fatal injury by accident while insured is operating, an assistant on, loading or unloading a commercial automobile in the course of his employment.

The truck in question was used principally in the business of Southern Railway Co., and, therefore, a "commercial automobile" according to the policy definition. This application of the policy definition of "commercial automobile" is consistent with the general intent, meaning and express language of the policy.

The policy definition thus applied is in harmony with court decisions as to the meaning of "commercial automobile." Some authorities classify automobiles as "commercial" by reason of type and structure, others with reference to use. Most cases employ both approaches.

"The test is the character of the use of the vehicle taken into consideration with the form of the car." *Zabriskie v. Law,* 194 N.Y.S. 626 (1922). "An automobile truck is a vehicle for the conveyance for commercial purposes over ordinary roads, and the average type of that kind of vehicle is especially designed both in its propelling mechanism and in its body construction for that function." *American-La-*

France Fire Engine Co., Inc. v. Riordan, 6 F. 2d 964 (2d Cir. 1925). "The words 'commercial use' connote use in business in which one is engaged for profit." *Lintern v. Zentz,* 327 Mich. 595, 42 N.W. 2d 753, 18 A.L.R. 2d 713 (1950). "In *State v. D. L. & W. R. Co.,* 30 N.J. Law 473, it was held: 'By the term "commerce," is meant not traffic only, but every species of commercial intercourse, every communication, by land or by water, foreign or domestic, external and internal' . . . transportation is as much a part of commerce as are the goods transported." *Conecuh County v. Simmons,* 95 S. 488 (Ala. 1922).

Lloyd v. Insurance Co., 200 N.C. 722, 158 S.E. 386, involved a policy provision for indemnity for fatal injury sustained while riding in or driving a pleasure type automobile. The vehicle there in question was a 1½ ton Ford truck used principally on a milk route. This Court concluded: "The word 'type' used in the policy implies the idea of classification . . . the truck in which plaintiff's intestate was riding at the time of his death was by intention, use and construction a *commercial* vehicle and so classed by the North Carolina statute." (Emphasis added). Accord: *Marshall v. Insurance Co., supra.*

A passenger type automobile converted into a vehicle for the purpose of delivering groceries and other goods was held to be a truck. *Filson v. Johnson,* 222 P. 742 (Kan. 1924). A truck and semi-trailer designed for hauling oil field equipment was held to be a commercial vehicle, and the court said: ". . . 'Commercial vehicles' is that type or make of vehicle designed for and adapted to commercial purposes regardless of the use to which said vehicle is put at any particular time." *Corbett-Barbour Drilling Co. v. Hanna,* 222 P. 2d 376 (Okla. 1950).

The vehicle plaintiffs' testate was loading at the time of his fatal injury was a "commercial automobile" according to the policy definition, judicial decisions, and the common understanding of the term. Southern Railway was engaged in commerce for profit, the vehicle was used in its business exclusively, and it was a truck type motor vehicle designed to transport equipment and materials.

The judgment below is vacated and the ruling on the nonsuit motion is

Reversed.

STATE v. ALBERT STRICKLAND.

(Filed 10 May, 1961.)

1. Criminal Law § 154—

An assignment of error must be based upon an exception duly taken in apt time and preserved as required by the Rules. Rules of Practice in the Supreme Court Nos. 19(3), 21.

2. Criminal Law § 159—

Exceptions not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Criminal Law § 151—

Where the charge of the court is not in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence. G.S. 1-180.

4. Criminal Law § 94—

The interrogation by the court during the direct examination of the nine-year old prosecutrix as to whether she remembered whether defendant said anything when he hit her with a belt, made simply in the effort to persuade the child to answer a proper question asked by the solicitor, *is held* a question asked to obtain a proper understanding and clarification of the witness' testimony and did not constitute an expression of opinion by the court as to the weight and sufficiency of the evidence, or tend to prejudice defendant in the eyes of the jury under the attendant circumstances.

5. Rape §§ 8, 10—

In a prosecution for carnal knowledge of a female child under the age of 12 years, neither force nor lack of consent need be alleged or proven, and evidence in this case is held abundantly sufficient to take the case to the jury and to support the verdict of rape within the purview of G.S. 14-21.

APPEAL by defendant from *Carr, J.*, at January Criminal Term 1961 of WAKE.

Criminal prosecution upon a true bill of indictment found by grand jury of Wake County so to be, which stripped of unessential formalities, charges that Albert Strickland, the defendant, did, on the 24th day of December, 1960, unlawfully and feloniously carnally know a named female child under the age of twelve years, to-wit: 9 years of age, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Upon due arraignment defendant pleaded not guilty.

Thereupon the court finding as a fact that the defendant is indicted upon a bill of indictment wherein he is charged with the capital offense of rape; and after due and diligent inquiry, the court finds as a fact

that the defendant is, by reason of poverty, unable to employ counsel to represent him in the trial of the case, and the Solicitor for the State having announced that the defendant would be tried for his life, and the court, finding as a fact that the defendant is entitled to representation by counsel, by order duly entered on 10 January 1961, appointed Earle R. Purser to represent the said defendant in the trial of this case.

And thereafter on Monday, 23 January 1961, at a Superior Court begun and held for the County of Wake duly organized and sitting,— a jury of twelve good and lawful persons was chosen from regular jury supplemented by a special venire, and sworn and impaneled to speak the truth of and concerning the premises in said bill of indictment so specified.

And upon the trial the narrative of all the testimony offered by the State is not controverted. Indeed, the details of the offense are too sordid to serve any useful purpose by spreading them upon the pages of the printed opinions. It is sufficient to say that the evidence shows that the prosecutrix, about nine years old, was at home on Christmas Eve day with her three younger sisters. A colored girl was staying with the children while their mother was making a trip to Zebulon to buy toys for Christmas. About five minutes after the colored girl left, the defendant, step-father of the nine-year old prosecutrix, came home and asked "Where is Mama?" On being told, the defendant looked into the rooms. Then he called the prosecutrix and carried her into the back room and gave her three or four licks with his belt. And then followed the sordid details of the completed act of the sexual intercourse and accompanying abuse,— inflicting upon the child serious internal injuries requiring surgical and hospital treatment for four or five days.

The testimony of the child was corroborated in whole or in part by her mother, officers of the law, and doctors. And one witness testified to a confession by defendant.

Defendant did not offer any testimony.

Verdict: After the charge of the court the jurors for their verdict said that the defendant, Albert Strickland, is guilty of rape as charged.

Judgment: The jury having made no recommendation for life imprisonment, the court, in compliance with the law in this State, pronounced upon defendant Albert Strickland death by the inhalation of lethal gas as provided by law.

To this judgment defendant excepts and appeals to the Supreme Court.

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

Earle R. Purser, Michael J. Rabil for defendant appellant.

WINBORNE, C.J. The defendant brings forward twelve assignments of error. However only one is supported by an exception and set out in his brief. The remaining eleven are deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N.C. 544, at page 562.

An assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by the Rules of this Court. Rules 19 (3) and 21. See 221 N.C. 544, *supra,* and *S. v. Moore,* 222 N.C. 356, 23 S.E. 2d 31.

Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Rule 28 of the said Rules of Practice in the Supreme Court. See also *S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Proctor,* 213 N.C. 221, 195 S.E. 816; *S. v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649.

Furthermore, the charge of the court to the jury does not appear in the record. Therefore, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence as required by G.S. 1-180. This Court has so held in numerous decisions when the charge does not appear in the record. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132.

The sole question presented by the defendant in this case is whether or not the trial judge intimated an opinion to the jury, to the prejudice of the defendant as to the credibility of the prosecutrix and to the guilt of the defendant. The record shows the following transpired when the prosecutrix was testifying on direct examination: "I know Albert Strickland. I don't know if he is any kin to me. He is married to my mother. Last Christmas Eve day I was at home with my three sisters and 'Puddin'. I was there just before dinner that day with them. My mother was not at home at that time. She was gone to Zebulon to get some toys for Christmas. One of my sisters is five and one of them is just about two, and the other one is going into four. 'Puddin', a colored girl, was at home keeping us children. She was supposed to keep us but she left five minutes before Albert Strickland came in. I was sitting down holding my little baby sister in my arms when Albert Strickland came into the house. When he came into the home there, he asked me where was Mamma. I told him she was in Zebulon getting toys. When I told him my mother was in Zebulon, he looked in the rooms. I can't remember if Albert Strickland

looked under any of the beds in the rooms. Then he called me and carried me into the back room and he give me three or four licks with his belt."

"Question: (Solicitor) Did he tell you why he was whipping you? Answer: No.

"Question: (Solicitor) What did he say when he gave you the three or four licks? Answer: (No answer).

"The Court: Do you remember, Helen, whether he said anything when he hit you with the belt?" Exception #2.

"Answer: (No answer).

"Question: (Solicitor) Well, honey, after he hit you with the belt, what did he do then?"

Then the prosecutrix proceeded to testify as to the events immediately preceding the crime.

The appellant contends that the judge, by asking the question set out above, committed reversible error in that it tended to prejudice the defendant in the eyes of the jury and constituted an expression of opinion by the court as to the weight and sufficiency of the evidence. See G.S. 1-180 and numerous cases annotated thereunder. Considering the question in context and in the light of the circumstances in which it was asked, the conclusion is that the presiding judge did not intimate or express an opinion to the jury which prejudiced the defendant. It is well settled in this State that the trial judge can ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *S. v. Humbles*, 241 N.C. 47, 84 S.E. 2d 264; *S. v. Stevens*, 244 N.C. 40, 92 S.E. 2d 409; *S. v. Furley*, 245 N.C. 219, 95 S.E. 2d 448.

Moreover, it is well to note that the judge was talking to a nine-year old child who was describing a sordid and horrible crime. The judge simply made an effort to persuade the child to answer a proper question asked by the solicitor.

Notwithstanding failure to preserve exceptions to the denial of motions for judgment as of nonsuit, this Court deems it expedient to say: The statute, G.S. 14-21, pertaining to the punishment for rape provides that "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

Under the first clause of this statute, relating to ravishing and carnally knowing of a female person who is of the age of twelve

years or more, the elements of force and lack of consent must be alleged and proven before a conviction can be had on which a death sentence may be imposed.

On the other hand, under the second clause of the statute relating to unlawfully and carnally knowing and abusing any female child under the age of twelve years, neither force nor lack of consent need be alleged or proven, and such child is by virtue of the statute presumed incapable of consenting. See *S. v. Johnson,* 226 N.C. 266, 37 S.E. 2d 678.

In the instant case the defendant is indicted under the second clause of G.S. 14-21, that is for unlawfully and carnally knowing and abusing a named female child under the age of twelve years. Hence neither force nor lack of consent need be alleged or proven. The child is by virtue of the statute presumed incapable of consenting. And the evidence offered is abundantly sufficient to take the case to the jury and to support the verdict of rape within the purview of the statute G.S. 14-21.

Indeed, careful consideration of the whole case on appeal and the record proper fails to show error. Hence the judgment will be, and is hereby affirmed— there being

No error.

BETTY ANN STOCKWELL, MINOR, BY HER NEXT FRIEND, GEORGE E. STOCKWELL, v. GEORGE EDISON BROWN, ORIGINAL DEFENDANT, AND HERBERT RUSSELL YORK, ADDITIONAL DEFENDANT.

(Filed 10 May, 1961.)

1. Automobiles § 41g—

Evidence tending to show that defendant, travelling along a dominant highway, approached an intersection with a dirt road at a speed of 60 to 70 miles per hour, that he did not see a car approaching from the opposite direction until after he had struck a car entering the intersection from his right and had been forced or knocked to his left in the path of the oncoming vehicle, *is held* sufficient to be submitted to the jury on the issue of such defendant's actionable negligence. G.S. 20-141(c) and G.S. 20-140.

2. Automobiles § 6—

The standards of care prescribed by statute for the operation of motor vehicles on the State highways are absolute.

3. Automobiles § 17—

A motorist travelling a dominant highway does not have such absolute

right-of-way that he is not bound to exercise due care in regard to traffic on the servient highway, but notwithstanding his right-of-way is under duty to drive at a speed no greater than is reasonable and prudent under the conditions then existing, to keep his vehicle under control, to keep a reasonably careful lookout, and to take such action as an ordinarily prudent person would take to avoid collision when danger of such collision is discovered or should be discovered.

4. Negligence § 8—

Insulating negligence relates to proximate cause, and in order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party as one of the proximate causes of the injury.

5. Automobiles § 43— Evidence held not to warrant nonsuit on the ground of insulating negligence.

Evidence tending to show that the driver of a vehicle along a dominant highway was negligent in travelling at a speed which was excessive under the circumstances and in failing to maintain a proper lookout for oncoming traffic, that he saw a vehicle approaching from the intersecting servient highway, that he believed the driver thereof intended to turn right and that he saw that this driver did not look in his direction, but that he nevertheless continued on into the intersection without slackening his speed, that he struck the side of the vehicle entering the intersection from the servient highway and was forced or knocked into the path of plaintiff's vehicle, which was approaching from the opposite direction, *is held* not to warrant nonsuit on the ground of insulating negligence, since the evidence discloses that the negligence of the driver along the servient highway merely accelerated the result of the negligence of the driver along the dominant highway.

6. Appeal and Error § 41—

The admission of evidence over objections cannot be held prejudicial when testimony of the same import had theretofore been admitted without objection.

APPEAL by original defendant George Edison Brown from *Preyer, J.*, 28 November 1960 Term of RANDOLPH.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of the original defendant George Edison Brown.

Defendant Brown in his answer denied that he was negligent, and alleged that if he was negligent, his negligence was insulated by the independent intervening negligence of one Herbert Russell York. And as a cross action against York, Brown alleged that York was negligent in the operation of his automobile, and that if he, Brown, was negli-

gent, then the negligence of both concurred in proximately causing plaintiff's injuries, and he prayed that York be made a party defendant by virtue of G.S. 1-240 to enforce from him contribution. Brown does not plead any contributory negligence on the part of plaintiff.

The court, pursuant to G.S. 1-240, duly entered an order making York an additional defendant. Process was properly served on York on 25 June 1960. York filed no pleading.

The jury found by its verdict that plaintiff was injured by the negligence of the original defendant Brown, that she is entitled to recover $7,500.00 as damages, and that the additional defendant York by his concurrent negligence contributed to plaintiff's injuries.

Plaintiff at the suggestion of the court agreed to a remittitur in the verdict in the amount of $3,000.00. Whereupon, the court entered judgment that plaintiff recover from the original defendant Brown the sum of $4,500.00 with costs, and that the original defendant Brown recover from the additional defendant York the sum of $2,250.00 with one-half of the costs as contribution by virtue of G.S. 1-240.

From the judgment, the original defendant Brown appeals.

Miller and Beck By: Adam W. Beck for plaintiff, appellee.
Coltrane and Gavin By: T. Worth Coltrane for defendant, appellant.

PARKER, J. Plaintiff and the original defendant Brown offered evidence. The additional defendant York offered no evidence, nor is there anything in the record to indicate that he appeared at the trial.

Defendant Brown assigns as error the denial of his motion for judgment of involuntary nonsuit renewed at the close of all the evidence.

The evidence of plaintiff considered in the light most favorable to her, and a consideration of defendant Brown's evidence favorable to her, or which tends to clarify or explain her evidence not inconsistent therewith, and ignoring his evidence which tends to establish a different state of facts or which tends to contradict or impeach evidence presented by her (*Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1, and cases there cited) shows the following facts:

Rawley Farm Road is a main highway running east and west with pavement 21 feet wide, with dirt shoulders on each side 6 feet wide, and with a center line on the pavement. It is crossed at right angles by Highland Avenue Extension, a dirt road running north and south. There is a highway Stop sign on a post facing Highland Avenue Extension near the southeast corner of the intersection. At this point Rawley Farm Road is fairly straight with an upgrade past the intersection going west.

About 3:30 o'clock p.m. on 17 August 1959 plaintiff Betty Ann Stockwell was driving her mother's automobile west on Rawley Farm Road, and was approaching its intersection with Highland Avenue Extension. Victoria Anne Steele was riding with her as a passenger. When plaintiff travelling at a speed of 35 to 40 miles an hour was about 200 feet from the intersection, she saw an automobile driven by the additional defendant York travelling north on Highland Avenue Extension come to a complete stop near the intersection, and then start into the intersection. When about two-thirds of the York automobile had entered the intersection, she saw an automobile driven by defendant Brown in an easterly direction on Rawley Farm Road about two to three hundred feet from the intersection, and approaching it at a speed of 60 to 70 miles an hour. When defendant Brown entered the intersection, he turned his automobile toward the left in front of the York automobile, and had a head-on collision with plaintiff's automobile on her side of the road as she was entering the intersection. Then the York automobile collided with the Brown automobile.

The evidence of defendant Brown favorable to plaintiff is as follows: He drove on the Rawley Farm Road nearly every day, and was familiar with this intersection. Approaching this intersection on Rawley Farm Road from the west, the intersection can be seen 100 to 125 feet before it is reached. He noticed the York automobile on Highland Avenue Extension approaching the intersection. York kept coming, and Brown tooted his horn. York never did stop coming down the road to the intersection. He believed York intended to make a right turn. York never looked at him, and he thought he had better be stopping. He did not get quite stopped. As he entered the intersection on his side of the road, the right front fender of his automobile and York's left front fender collided, throwing his automobile to the left and York's automobile to the right. He though he was lucky until he glanced up, and saw plaintiff's automobile in front of him, and then they collided.

Thomas Routh, a passenger in Brown's automobile and a witness for him, testified, "the York car was out in the intersection about three feet at the time of the collision."

This evidence tends to show that defendant Brown was guilty of negligence in not decreasing speed when approaching and entering this intersection at a speed of 60 to 70 miles an hour in violation of G.S. 20-141(c). It also tends to show that he was guilty of negligence in failing to keep a proper lookout for approaching traffic, in that he did not see plaintiff's automobile until almost the moment of impact. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. It further tends to show that Brown was negligent in the operation of his automobile in driving

it upon the highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property in violation of G.S. 20-140. *Crotts v. Transportation Co.*, 246 N.C. 420, 98 S.E. 2d 502. Our statutes regulating the operation of motor vehicles on the highways of the State prescribe a standard of care, "and the standard fixed by the Legislature is absolute." *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331.

A consideration of defendant Brown's testimony to the effect that York's automobile kept coming down the road into the intersection, that he believed York intended to make a right turn, and that York did not look in his direction, did not permit Brown to assume that York would comply with the rules of traffic and stop at the intersection, and act with due regard for his own safety, as contended by him.

What is said in *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373, is applicable to defendant Brown here: "The driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger or such collision is discovered or should have been discovered."

Defendant Brown contends that even if he was negligent, his motion for judgment of involuntary nonsuit should have been allowed for the reason that his negligence was insulated by the new, independent and intervening negligence of the additional defendant York.

Evidence of an independent, negligent act of a third party is directed to the question of proximate cause. *Boyd v. R. R.,* 200 N.C. 324, 156 S.E. 507; *Butner v. Spease,* 217 N.C. 82, 6 SE. 2d 808.

The Court said in *Riggs v. Motor Lines,* 233 N.C. 160, 63 S.E. 2d 197: "To exculpate a negligent defendant the intervening cause must be one which breaks the sequence or causal connection between defendant's negligence and the injury alleged. The superseding act must so intervene as to exclude the negligence of the defendant as one of

the proximate causes of the injury. Citing authority. If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury."

Considering the above evidence in the light most favorable to plaintiff, it would permit a jury to find that the negligence of York did not break the line of causation between Brown's negligence and plaintiff's injuries, but merely accelerated the result of Brown's negligence as a contributing or concurring cause, and that Brown's negligence constituted at least one of the proximate causes of the injury to plaintiff. *Riggs v. Motor Lines, supra.* The trial court properly denied defendant Brown's motion for judgment of involuntary nonsuit made at the close of all the evidence.

After the collision plaintiff's mind was a complete blank for two weeks. In the collision she sustained a brain concussion, a broken knee, and cuts and bruises. She can't wear anything across her knee because it hurts. She is not able to wear hose. *There is a chipped bone in her knee which needs to be filed down.* At this point in her testimony she was asked by her counsel whether or not it will be necessary to have an operation on her leg. Defendant Brown objected, his objection was overruled, and he excepted. She replied: "Not necessary, but if I want to wear hose, it is." Defendant Brown assigns as error the admission of her answer. Her preceding testimony given without objection is substantially the same as the testimony challenged. We conclude that prejudicial error is not shown, and this assignment of error is overruled.

Defendant Brown has no assignments of error to the charge. His other assignments of error as to the denial of his motion to set the verdict aside as being against the greater weight of the evidence, and as being excessive, and to the signing of the judgment are without merit, and are overruled.

In the trial below we find

No error.

THE STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. CAROLINA COACH COMPANY AND SOUTHERN COACH COMPANY.

(Filed 10 May, 1961.)

1. **Carriers § 2: Utilities Commission § 8—**

Rule No. 9 of the Utilities Commission renders a carrier's failure, for a period of 30 days or longer, to provide an authorized service cause for cancellation of the right to furnish such service, but the rule is not self-executing, and where the controversy before the Commission is whether a carrier was authorized to provide through service between designated points by tacking previous authorities, and the Commission fails to determine the controversy because of its holding that the carrier had lost the authority by non-user, the cause must be remanded to the Commission.

2. **Utilities Commission § 5: Appeal and Error § 55—**

Where the Utilities Commision has determined a cause before it under a misapprehension of the applicable law, the cause must be remanded to the Commission for further consideration.

APPEAL by Carolina Coach Company from *McKinnon, J.*, November Regular Civil Term, WAKE Superior Court.

The Carolina Coach Company (hereafter called Carolina) instituted this proceeding before the North Carolina Utilities Commission (hereafter called Commission) by petition, claiming that Southern Coach Company (hereafter called Southern) had filed illegal and unauthorized bus tariffs and schedules between Raleigh and Durham by way of Holly Springs in violation of its operating authorities. Carolina called for investigation, hearing, and an order that Southern's proposed tariffs be canceled and its right to operate through service between Raleigh and Durham be denied.

Southern answered, alleging that it had the right to file the tariffs and operate through service between Raleigh and Durham by virtue of its operating authorities between Raleigh and Wilmington by way of Holly Springs, and between Raleigh and Holly Springs. After extensive investigation and a long hearing, the Commission found: (1) Carolina holds franchise authority to carry passengers by motor vehicle between Raleigh and Durham over U. S. Highways 70 and 70A — distance 23 miles — fare seventy cents. (2) Southern holds rights to operate between Durham and Wilmington by way of Holly Springs and between Raleigh and Holly Springs — distance between Raleigh and Durham 37 miles — fare $1.55. Southern proposes a through rate of seventy cents.

The Commission, among other things, concluded: "It (Carolina) seems to concede that the two authorities as here held by Southern

are subject to be tacked together or combined for through service when there are no restrictions. . . . Under the facts developed in this instance there seems to be no requirement to decide whether two separate authorities as held by Southern in this instance may be tacked together or combined for through service between the termini. Southern admits that both authorities have been operated since 1947, more than 12 years, and that for all practical purposes they have not been combined or tacked together for the rendering of through service between the termini of Raleigh and Durham but have been operated as separate authorities. If the authority exists for the tacking together or combining of such authorities for through service, the right to do so arose immediately upon the granting of the last authority. . . . in 1947 — and any such right that may have accrued to Southern or to its predecessor at that time *has been lost by failure to exercise that authority* for 12 years." (emphasis added)

As a basis for holding that Southern had abandoned its right to tack two authorities and operate a through bus between Raleigh and Durham, the Commission cites its Rule No. 9: "No common carrier or contract carrier shall abandon or discontinue any service authorized by its certificate or permit without first obtaining written authority from the Commission. The petition for such authority shall be filed with the Commission at least ten (10) days prior to any discontinuance, unless otherwise authorized by the Commission, and shall show the reasons therefor. The discontinuance or non-use of a service authorized by a certificate or permit for a period of thirty (30) days or longer without the written consent of the Commission *shall be considered good cause for cancellation,* seasonal service excepted." (emphasis added)

At the conclusion of the hearing, the Commission ordered Southern to abandon its through bus service and cancel its proposed new tariff schedule. The order further provided: "Nothing in this order shall be construed as denying or limiting Southern's right to haul passengers from Durham to Raleigh by way of Holly Springs *with change of bus at Holly Springs* (emphasis added) nor its right to file such other schedule and tariff schedules of rates and charges as it may deem advisable." From the Commission's order, Southern appealed to the Superior Court of Wake County.

In the superior court Judge McKinnon reviewed the record and entered an order remanding the proceeding for further consideration upon the ground the Commission had acted under a misapprehension of law in holding that Southern had abandoned its right to tack its authorities and run through bus schedules between Raleigh and Durham by way of Holly Springs. Carolina excepted and appealed.

Allen, Hipp & Steed, for defendant Carolina Coach Co., appellant.
Arendell, Albright & Green, for Southern Coach Co., appellee.

HIGGINS, J. This proceeding involves a dispute between Carolina and Southern with respect to Southern's schedules and rates for passenger and other service between Raleigh and Durham. Carolina Coach Company operates through buses over U. S. Highway 70 and 70A between Raleigh and Durham — distance 23 miles — fare seventy cents. This right is not challenged. Since 1947 Southern Coach Company has operated buses between Durham and Wilmington by way of Holly Springs and between Raleigh and Holly Springs — distance Raleigh to Durham 37 miles — fare $1.55. If permitted to operate through service between Raleigh and Durham, Southern's purpose is to route buses from Durham to Holly Springs to Raleigh and back to Holly Springs, thence to Wilmington, and reverse the schedule on the return from Wilmington to Durham. This change will permit Southern to eliminate the bus in use between Raleigh and Holly Springs. By its proposed change in tariff the fare between Raleigh and Durham over its line will be reduced to seventy cents and will meet the competitive fare charged by Carolina Coach Company. Southern claims the right to operate through buses between Raleigh and Durham by tacking its combined authorities which are without restrictions. Carolina denied Southern's right to furnish this through service. It seems to be admitted that the term "through service" means without change of bus.

The Commission refused to resolve the dispute, saying in any event Southern had lost any right to furnish through service under the Commission's Rule No. 9. The rule provides: "The discontinuance or non-use of a service authorized by a certificate or permit for a period of thirty (30) days or longer without the written consent of the Commission *shall be considered good cause for cancellation.*" (emphasis added)

Judge McKinnon held, and we think properly so, that the Commission decided the main issue upon a mistaken view of the law. A discontinuance or non-use is not a cancellation under Rule 9. *It shall be considered good cause for cancellation.* Insofar as cancellation is concerned, Rule No. 9 is not self-executing. The existence of the cause must be determined by the Commission as a basis for an order of cancellation. When a proceeding is heard upon a misapplication or a misinterpretation of pertinent legal principles, "the usual practice with us is to remand the case for another hearing." *Realty Co. v. Planning Board*, 243 N.C. 648, 92 S.E. 2d 82; *Youngblood v. Bright*, 243 N.C. 599, 91 S.E. 2d 559.

The order of the superior court remanding the proceeding to the Utilities Commission for further consideration is supported by the record. This disposition leaves the Commission free to resolve the matters in dispute between the parties.

Affirmed.

PRESTON RHINEHARDT v. NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY.

(Filed 10 May, 1961.)

1. Insurance §§ 3, 26—

Where the evidence and admissions establish the execution and delivery of the policy of life insurance sued on, the payment of premiums and the death of insured, plaintiff makes out a *prima facie* case precluding nonsuit or a directed verdict for insurer, since the burden is on insurer to establish misrepresentations relied on by it, and nonsuit on such defense cannot be allowed even though insurer's evidence in regard thereto is uncontradicted, nonsuit being proper in such instance only when plaintiff's evidence establishes such defense.

2. Trial § 29—

A directed verdict may not be given in favor of the party having the burden of proof, even though such party's evidence is uncontradicted, since the weight and credibility of the evidence is for the jury, but in proper cases the court may give a peremptory instruction upon an affirmative defense, upon apt request, when the evidence in regard thereto is uncontradicted.

3. Insurance §§ 17, 26—

Written answers to written questions relating to health in an application for life insurance are material as a matter of law, and entitle insurer to avoid the policy regardless of whether such answers are fraudulently or innocently made, and therefore it is error for the court to submit to the jury whether such answers were material, the sole inquiry being whether such statements were made and whether or not they were false.

APPEAL by defendant from *Gambill, J.*, January 30, 1961 Term of GUILFORD (High Point Division).

Action by plaintiff beneficiary to recover death benefit under policy of life insurance issued by defendant.

Verdict and judgment for plaintiff.

Defendant appeals.

John W. Langford for plaintiff.
W. G. Pearson, II, and W. W. Perry for defendant.

PER CURIAM. At the trial defendant stipulated that a policy of insurance in the amount of $500 was issued and delivered by it on 7 September 1959 on the life of Angeline Rhinehardt, that insured died 29 November 1959, and that the premiums were paid to and including the date of death. Plaintiff then introduced the policy and rested.

Defendant introduced evidence tending to show: Insured was a diabetic. She had been treated by a physician for chronic diabetes from 1938 to the time of her death. She had been hospitalized six or seven times a year for diabetes. She had taken insulin for several years, at one period in large quantities. In her written application for insurance Angeline Rhinehardt stated that she had never had diabetes. Defendant, as a matter of policy, did not insure diabetics.

Defendant's evidence was uncontradicted. At the close of all the evidence defendant moved for a judgment of involuntary nonsuit. The motion was overruled.

By offering in evidence the policy of insurance and defendant's admission of its execution and delivery, the payment of premiums and the death of insured, plaintiff made out a *prima facie* case. The burden was on defendant to establish misrepresentations relied on by it to avoid the policy. *Wells v. Insurance Co.*, 211 N.C. 427, 431, 190 S.E. 744. When a plaintiff has made out a *prima facie* case, nonsuit is improper and it would constitute reversible error to sustain a motion therefor. Furthermore, the court may not direct a verdict in favor of a party having the burden of proof, even though the evidence is uncontradicted. The weight and credibility of the evidence is for the jury.

It is true that, when *plaintiff's* evidence establishes defendant's affirmative defense, nonsuit is proper, *Slaughter v. Insurance Co.*, 250 N.C. 265, 269, 108 S.E. 2d 438. But this is not the case here. Plaintiff offered no evidence bearing on defendant's affirmative defense.

Since defendant's evidence was uncontradicted, defendant was entitled to a peremptory instruction. *Slaughter v. Insurance Co., supra,* page 269. But defendant made no request for such instruction. The court properly overruled the motion for nonsuit.

The trial court instructed the jury in part as follows: ". . . . (T)he defendant is relying upon the claim or contentions that Angeline Rhinehardt at the time the application was made had diabetes and that she stated at that time she did not, and that that was a false statement, and further, that it was a material statement in that had the company known at the time she made application that she had diabetes, it would not have issued the policy. Now, that is what you

are to determine from this evidence, and by its greater weight, whether or not that is true. . . . (I)f you are satisfied from this evidence and by its greater weight, the burden being on the defendant to so satisfy you, that Angeline Rhinehardt at the time she made an application for the policy, if she had or had had diabetes, if you find that she made a false statement to the person taking her application; that statement being that she did not have diabetes, when you find as a fact that she did, and if you so find, the burden being on the defendant to so satisfy you, and you further find that that false statement is a material statement or material false statement in that if you are satisfied from the evidence and by its greater weight that the company would not have issued the policy had they known that she had diabetes, then it would be a material statement, so the burden is on the defendant to satisfy you from this evidence and by its greater weight as to that issue."

The court erred in permitting the jury to determine whether or not the representation was material. In an application for a policy of life insurance, written questions relating to health and written answers thereto are deemed *material as a matter of law. Tolbert v. Insurance Co.*, 236 N.C. 416, 419, 72 S.E. 2d 915. The inquiry for the jury is whether or not insured made the statement and whether or not it was false. If insured made the statement and if it was false, the question as to whether it was fraudulently, knowingly or innocently made is of no importance. The statement in either case is material as a matter of law, and the policy will be avoided. *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 831; *Petty v. Insurance Co.*, 212 N.C. 157, 193 S.E. 228.

For error in the charge there will be a

New trial.

CARLTON BRUCE PRIEST v. VERNON LEE THOMPSON.

(Filed 10 May, 1961.)

Negligence § 7—

Nonsuit held proper in this action to recover for injuries resulting when plaintiff was struck by the blade of the fan which broke off and struck plaintiff while he was looking under the hood of defendant's car to locate mechanical trouble as defendant, after having accelerated the engine, turned off the switch, since such result was not reasonably foreseeable.

PRIEST *v.* THOMPSON.

APPEAL by plaintiff from *Williams, J.* November, 1960 Term, BLADEN Superior Court.

Civil action to recover for injuries alleged to have been sustained by the plaintiff as a result of defendant's actionable negligence.

While the plaintiff, the defendant, and three others were on their way from their homes in Bladen County to their work on a construction job in Greensboro, and while it was yet dark, a noise developed under the hood of the defendant's Chevrolet in which all were riding. The defendant and one of the passengers, by the aid of a flashlight, attempted to locate the trouble, having raised the hood for that purpose. During their examination the plaintiff, who was a mechanic, moved under the wheel and accelerated the engine by pressing on the gas feed. Thereupon, the plaintiff got out of the vehicle and by the use of the light, attempted to find the cause of the trouble. In the meantime, the defendant got back under the wheel, accelerated the engine, and then cut off the switch. Immediately, one of the blades of the fan broke off and struck the plaintiff, putting out one eye and inflicting serious head and some brain injury. At the close of the plaintiff's evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Frank T. Grady, for plaintiff, appellant.
Anderson, Nimocks & Broadfoot, for defendant, appellee.

PER CURIAM. The plaintiff's evidence disclosed he was the only mechanic in the party. While the defendant examined the engine the plaintiff accelerated it. The two changed places. The mechanic was in the act of making the examination and the owner, back under the wheel, accelerated the engine. As the switch was cut off, one of the blades separated from the hub of the fan, striking the plaintiff and causing his injury. The evidence does not disclose how or by what means either party could reasonably foresee such injurious consequences. Hence the judgment of nonsuit was proper and is

Affirmed.

WILLIAM DAVID ALFORD v. WILMA JOYCE McGEHEE AND CLAUDE ALFRED McGEHEE.

(Filed 10 May, 1961.)

APPEAL by plaintiff from *Gambill, J.*, 10 October Regular Civil Term 1960 of GUILFORD (Greensboro Division).

This is a civil action to recover damages for personal injuries sustained by the plaintiff when he was struck by an automobile driven by the defendant Wilma Joyce McGehee about 1:00 a.m. on 18 July 1959.

The plaintiff's evidence tends to show that he attempted to cross O. Henry Boulevard at night at a point where there was no crosswalk marked for the use of pedestrians; that he safely crossed the three lanes of southbound traffic; that before the plaintiff started to cross the three lanes for northbound traffic he saw the automobile driven by the defendant Wilma Joyce McGehee approaching from the south at a distance of about 180 yards. "Seeing that the car was * * * apparently a safe distance from me, I started across the northbound lanes of travel. I was trotting across, but I did not trot straight across. * * * I went across at roughly a 45-degree angle from a line exactly parallel with the highway. I was trotting, and at no time did I stop at any place in the highway. I had reached the eastern curb of the highway and had one foot up on the curb when I was struck by the automobile driven by the defendant * * *."

The evidence of the defendant Wilma Joyce McGehee tends to show that she was driving her car in the middle northbound lane at a speed of from 40 to 45 miles an hour; that she first saw the plaintiff at a distance of approximately 40 to 50 feet from her; that he was standing on the white dividing line between the westernmost lane of the northbound lanes of travel. "He appeared to have stopped there to wait for me to go by, and since I was in the middle lane of the northbound lanes of travel I cut to my right and went to the easternmost lane * * * of the northern lanes of travel in an effort to make sure that I would avoid the plaintiff, but when I did so Alford suddenly attempted to cross right in front of me, and although I hit my brakes, I was unable to avoid striking him with my right front fender * * *."

The plaintiff introduced certain portions of the pleadings tending to show that the automobile driven by the defendant Wilma Joyce McGehee was registered in the name of her co-defendant and husband, Claude Alfred McGehee, but the paragraphs of the answer of Claude Alfred McGehee, also offered in evidence by the plaintiff, are to the effect that Claude Alfred McGehee and his wife, Wilma Joyce Mc-

Gehee, were separated in January 1959; that he gave the automobile to his wife and that she assumed the outstanding and unpaid installments thereon; that on or about 28 April 1959 he executed the transfer of title to her when they met at her request at the office of the finance company.

At the close of all the evidence, the defendants moved for judgment as of nonsuit. The motion was allowed as to defendant Claude Alfred McGehee but denied as to defendant Wilma Joyce McGehee.

The case was submitted to the jury on the issues of negligence, contributory negligence and damages. The jury answered the first issue in favor of the defendant Wilma Joyce McGehee.

From the judgment entered on the verdict and the judgment as of nonsuit as to defendant Claude Alfred McGehee, the plaintiff appeals, assigning error.

Smith, Moore, Smith, Schell & Hunter for plaintiff.
No counsel contra.

PER CURIAM. It is presumed that this case was submitted to the jury upon a correct charge on proximate cause and other essential features in connection with the issues of negligence and contributory negligence, since the charge was not included in the case on appeal. *S. v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281; *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481.

The appellant insists that while he did not plead the doctrine of last clear chance as such, his general allegations with respect to defendant's conduct in operating her automobile were sufficiently broad to require the submission of such an issue, which was tendered by him in apt time.

In our opinion, the questions raised by the pleadings were not complicated and presented no factual situation that could not be properly determined by the jury on a correct charge on the issues of negligence and contributory negligence, and we so hold.

In view of the conclusion we have reached, the answer on the issue of negligence having been rendered by the jury in favor of the defendant Wilma Joyce McGehee, the ruling on the motion for judgment as of nonsuit as to Claude Alfred McGehee becomes academic.

The judgment as of nonsuit as to the defendant Claude Alfred McGehee is affirmed, and in the verdict and judgment as to the defendant Wilma Joyce McGehee no error sufficiently prejudicial to warrant a new trial has been shown.

No error.

VICTORIA ANNE STEELE, MINOR, BY HER NEXT FRIEND, BEATRICE C. TROTTER, v. GEORGE EDISON BROWN, ORIGINAL DEFENDANT, AND HERBERT RUSSELL YORK, ADDITIONAL DEFENDANT.

(Filed 10 May, 1961.)

APPEAL by original defendant George Edison Brown from *Preyer, J.*, 28 November 1960 Term of RANDOLPH.

Civil action to recover damages for personal injuries allegedly caused by the actionable negligence of the original defendant George Edison Brown.

The plaintiff Virginia Anne Steele was riding as a passenger in an automobile driven by Betty Ann Stockwell on 17 August 1959, when the Stockwell automobile was involved in a collision with an automobile driven by defendant Brown. Plaintiff's case was consolidated and tried with the case of Betty Ann Stockwell, minor, by her next friend, George E. Stockwell, against the same defendants here, which case is reported *ante* 662, 119 S.E. 2d 795, and is hereby referred to for the pleadings, for the facts, and for the bringing in of the additional defendant York by the original defendant Brown. The complaint of the plaintiff here, with the exception of a description of her injuries, and the answer of the defendant Brown are identical with the pleadings in the *Stockwell* case, except as to the description of Betty Ann Stockwell's injuries in her complaint. The evidence is the same in both cases. Separate appeals were brought up in each case.

Separate issues were submitted in the instant case, which are identical with the issues submitted in the *Stockwell* case, and they were answered identically as the issues were answered in the *Stockwell* case, except that in the instant case the damages awarded were $3,750.00.

Plaintiff at the suggestion of the court agreed to a *remittitur* in the verdict in the sum of $1,875.00. Whereupon, the court entered judgment that plaintiff recover from the original defendant Brown the sum of $1,875.00 with costs, and that the original defendant Brown recover from the additional defendant York the sum of $937.50 with one-half of the costs as contribution by virtue of G.S. 1-240.

From the judgment the original defendant Brown appeals.

Miller & Beck By: Adam W. Beck for plaintiff, appellee.
Coltrane & Gavin By: T. Worth Coltrane for defendant, appellant.

PER CURIAM. The assignments of error by defendant Brown in this case are identical with his assignments of error in the *Stockwell* case, with the exception that here there is no assignment of error to the evidence. The briefs in both cases are the same, with the exception

of a discussion in the briefs in the *Stockwell* case of the challenged evidence in Betty Ann Stockwell's testimony as to the need of an operation, if she wants to wear hose.

Upon authority of the *Stockwell* case, *ante* 662, 119 S.E. 2d 795, we hold that the trial court properly overruled defendant Brown's motion for a judgment of involuntary nonsuit renewed at the close of all the evidence.

The other assignments of error are without merit, and are overruled.

In the trial below we find

No error.

STATE v. CHARLES BELTON HAWKINS.

(Filed 10 May, 1961.)

APPEAL by defendant from *Hooks, S.J.*, October 23, 1960 Special Term of GASTON.

Defendant was charged in a bill of indictment containing two counts with (a) operating a motor vehicle on the public highway while under the influence of an intoxicating beverage, which operation was a second offense, and (b) operating a motor vehicle on a public highway while under the influence of some narcotic drug. There was no evidence tending to show conviction of a prior offense or the use of narcotic drugs.

The court submitted the case to the jury on the question of defendant's guilt of operating a motor vehicle on a highway while under the influence of an intoxicating beverage. The jury returned a verdict of guilty. Prison sentence of two years was imposed, suspended with the consent of defendant upon condition that defendant pay a fine, costs, and abstain from the use of intoxicants for a defined time. Defendant appealed as permitted by G.S. 15-180.1.

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

Robert E. Gaines and Whitener & Mitchem for defendant appellant.

PER CURIAM. The record contains twenty assignments of error. None conform to our rules. *Sanitary District v. Canoy, ante* 630; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405.

The refusal of the court to nonsuit is not assigned as error. Nonetheless, lack of sufficient credible evidence to establish guilt is asserted in the brief. Notwithstanding the failure to assign errors in the manner required by our rules or the failure to include in the assignments of error the refusal to allow the motion to nonsuit, we have examined the evidence and charge. The evidence was sufficient to support the verdict. Our examination does not disclose prejudicial error.

No error.

H. E. WOOLARD, ADMINISTRATOR OF THE ESTATE OF JESSE J. SOUTHARD, v. EARLY G. LYNN, GEORGE K. MIDDLETON AND SHIRLEY LEE LYNN.

(Filed 10 May, 1961.)

APPEAL by plaintiff from *Olive, J.*, at January 9, 1961, Civil Term of GUILFORD— Greensboro Division.

Civil action to recover damages for alleged wrongful death caused by the alleged joint and concurrent negligence of defendants. It appears from the complaint and amended complaint that intestate of plaintiff was killed on 30 November 1958, at approximately 8:30 P.M., on U. S. Highway #29 Bypass, just west of the city limits of the city of Reidsville, North Carolina, when struck by an automobile driven by the defendant Early G. Lynn, which was owned by defendant Shirley Lee Lynn, and subsequently struck by an automobile owned and operated by defendant George K. Middleton.

Defendants Early G. Lynn and Shirley Lee Lynn on the one hand, and George K. Middleton on the other, by separate answers, denied liability.

All parties offered evidence, and the case was submitted to the jury upon issues of negligence, contributory negligence and damages. The jurors for their verdict answered that plaintiff's intestate was not injured by the negligence either of the defendants Early G. Lynn and Shirley Lee Lynn or of defendant George K. Middleton as alleged in the complaint.

And from judgment for defendants in acordance therewith, plaintiff appeals to Supreme Court and assigns error.

Smith, Moore, Smith, Schell & Hunter, Charles E. Melvin, Jr., for plaintiff appellant.

Adams, Kleemeier & Hagan, Daniel W. Fouts for defendant George K. Middleton.

Holt, McNairy & Harris for defendants Early G. Lynn and Shirley Lee Lynn.

PER CURIAM. The record of case on appeal shows that no new questions of law are presented on this appeal, and that the case was tried in substantial accord with correct legal principles. Indeed the record fails to show error for which the judgment below should be disturbed.

No error.

GEORGE L. GREENE, PLAINTIFF, v. CHARLOTTE CHEMICAL LABORATORIES, INC., A CORPORATION, AND SUGGS WRECKING & REMOVAL COMPANY, INC., A CORPORATION, DEFENDANTS.

(Filed 24 May, 1961.)

1. Pleadings § 34—

Allegations are irrelevant when evidence in support of them is not competent.

2. Same—

A party is entitled to have striken from the pleadings irrelevant allegations which are prejudicial to him.

3. Same: Negligence § 20—

In an action against two tort-feasors, allegations in the answer of one referring to and attaching as an exhibit a contract under which the second tort-feasor was obligated to carry liability insurance, are properly striken on motion of plaintiff and the second tort-feasor, since the existence of liability insurance is irrelevant to the cause of action for negligence and is prejudicial.

4. Same: Indemnity § 8—

In an action against two defendants to recover for negligent injury, allegations in the answer of one defendant referring to and attaching as an exhibit a contract of the second defendant obligating him to indemnify the first defendant from all losses resulting from the second defendant's operation and control of the premises upon which the injury occurred, is properly striken on motion of plaintiff and the second defendant, since the indemnity agreement is not germane to plaintiff's cause but is a matter of concern only between defendants *inter se*.

5. Pleadings § 8—

One defendant is not entitled to file a cross-action against a codefendant when such cross-action is independent of, and irrelevant to, the action stated in the complaint.

6. Pleadings § 34: Negligence § 20—

In an action against two defendants to recover for negligent injury, parts of a contract between the defendants which disclose the authority of one to enter upon and control the premises upon which the injury occurred, are competent, and are properly alleged by the defendant owning the premises, but other parts of the contract, relating to liability insurance and indemnity, are irrelevant, and therefore the fact that the complaint also refers to relevant portions of the contract does not entitle the second defendant to incorporate the entire contract in his pleading.

7. Pleadings § 2—

A pleading should contain allegations of ultimate relevant facts and not evidential facts. G.S. 1-222.

8. Pleadings § 34: Negligence § 20—

In an action to recover for negligence, order of the court striking allegations in the answer of one defendant that the other defendant had failed to comply with the terms of a written contract between them, will not be disturbed, since the allegation is of a mere conclusion and the failure to perform contractual obligations is never a tort unless it is also an omission to perform a legal duty.

9. Negligence § 10—

The doctrine of last clear chance may be asserted only by a plaintiff against the defendant and may not be asserted as between defendants sought to be held liable as joint *tort-feasors.*

10. Pleadings § 34: Torts § 4—

In an action against two defendants to recover for negligent injury, it is not error for the court to strike from the answer of one defendant allegations that the other had the last clear chance and that therefore its negligent acts were the sole proximate cause of the injury.

11. Pleadings §§ 7. 19—

While ordinarily one defendant may not demur to a defense made by a codefendant, when the defense is not available as against plaintiff, and the allegations thereof are prejudicial to the first defendant, his demurrer thereto is properly sustained.

12. Negligence § 9—

Where one *tort-feasor* is passively negligent and the other is guilty of positive acts of negligence, both are liable to the person injured if the negligence of each is a contributing cause of the injury, but as between themselves, the party exposed to liability by reason of the active negligence of another may recover of such other under the doctrine of primary and secondary liability, and such defense is germane to

plaintiff's cause of action and defendants are entitled to an adjudication of their rights *inter se* in plaintiff's action. G.S. 1-222.

13. Pleadings § 7—

A defendant may plead as many defenses as he has, and it is not required that the defenses be consistent with each other.

14. Same: Torts § 6—

Where there is an express contract between defendants that one should indemnify the other for any loss or damages arising out of the performance of the contract, the express contract precludes the application of the doctrine of primary and secondary liability, which is predicated upon an implied contract.

15. Same: Pleadings § 24: Negligence § 20—

Where plaintiff alleges that both defendants were actively negligent, neither is entitled to indemnity from the other, and the doctrine of primary and secondary liability does not arise, nor is the doctrine applicable when one defendant alleges sole responsibility on the part of his co-defendant, and in such instance order striking from the answer of one defendant allegations of primary and secondary liability will not be disturbed.

16. Torts § 6—

Where plaintiff elects to sue both joint *tort-feasors* and alleges active negligence on the part of both which concurred in producing the injury, each is entitled to contribution from the other if there is a judgment of joint and several liability against them, but during the course of the trial each is a defendant as to the plaintiff only, and neither may preclude the dismissal of the action against the other if plaintiff fails to make out a *prima facie* case against the other, and allegations and prayer for contribution contained in the answer of one are properly striken on motion of the other. G.S. 1-240.

17. Pleadings § 34: Courts § 6—

Where one judge of the Superior Court has refused motion to strike certain allegations from a pleading and no appeal is taken therefrom, another judge of the Superior Court is without jurisdiction to allow motion to strike the identical allegation from the amended pleading, since one Superior Court judge may not modify or change an order of another Superior Court judge affecting a substantial right.

18. Appeal and Error § 1—

Where motion to strike certain allegations from a pleading is erroneously denied by one Superior Court judge but later allowed by another Superior Court judge, the Supreme Court, in the exercise of its supervisory jurisdiction, may permit the second order to stand notwithstanding it was entered without authority, in order that the case may be tried on the correct theory without unnecessary delay. Constitution of North Carolina, Art. IV, Sec. 8.

BOBBITT, J., dissenting in part.

PARKER and RODMAN, J.J., concur in dissent.

On *certiorari* from *Hooks, S.J.*, November 14, 1960 Special Term of MECKLENBURG.

Action to recover damages for personal injuries sustained by plaintiff by reason of the alleged actionable negligence of defendants.

The court struck some of the allegations from the complaint on motion of defendants. Plaintiff was permitted to strike other allegations on his own motion. The allegations of the complaint, excluding those deleted, are in substance as follows (numbering ours):

(1) Plaintiff on 9 July 1959 was a regular fireman of the City of Charlotte assigned to Fire Station No. 2.

(2) Defendant, Charlotte Chemical Laboratories, Inc., (hereinafter referred to as "Laboratory"), was engaged in the manufacture, storage and sale of chemicals. It owned a three-story building on Templeton Avenue in the City of Charlotte. In 1956 it moved its business to a new location on Pineville Road. From July 1956 to July 1959 it had certain chemicals stored in tanks in the building on Templeton Avenue.

(3) Defendant, Suggs Wrecking & Removal Company, Inc., (hereinafter referred to as "Suggs") was in the business of demolition of various types of old buildings. From December 1958 to 9 July 1959 it was engaged in dismantling and demolishing the building on Templeton Avenue pursuant to a contract with Laboratory. During demolition Laboratory removed from the building various tanks and other equipment.

(4) On the first floor of the three-story building Laboratory had a steel tank, 6 feet long, 3 feet wide, and 4 feet deep. In this tank it had a quantity of "metallic sodium which was stored under kerosene or other petroleum substance." The tank was covered by a sheet of metal. There was a hole in the metal sheet, 20 inches square, covered by a loosely fitting hinged metal lid. Within 8 months preceding 9 July 1959 Laboratory inspected the contents of the tank and discovered that some of the sodium had deteriorated. Laboratory advised that it would remove the tank and instructed Suggs not to disturb it.

(5) Suggs removed the roof and floors of the building above the first floor, and the tank was exposed to the elements. On 9 July 1959, while Suggs was engaged in demolishing the building, it began to rain. Smoke began to arise from the tank, increasing in proportion to the amount of rain. About 3:00 P.M. Suggs notified Laboratory. Suggs was advised to keep his employees away from the tank. Two officials of Laboratory, who were chemical engineers, came to the building and observed the tank from a distance of about 50 feet. The rain was heavy and the tank was steaming and smoking. The chemical

engineers departed and, in doing so, passed directly in front of Fire Station No. 2 where plaintiff was on duty. The fire station is about a block from the building and tank. Suggs' employees promptly left the building.

(6) The tank caught fire about 4:00 p.m. A fire alarm was turned in. The firemen from Station 2, including plaintiff, answered the alarm. They discovered the burning tank and smelled the odor of kerosene. Under orders from a superior, plaintiff attached a fog application nozzle and sprayed the burning tank. Fog spray is the customary application for extinguishing a petroleum fire. The firemen did not know that the tank contained metallic sodium, and did not know the peril involved when this substance is exposed to water. It was still raining heavily. While plaintiff was spraying the tank it exploded violently and plaintiff was seriously injured.

(7) Metallic sodium oxidizes when exposed to air, and when it comes in contact with water it generates heat and releases explosive gases.

(8) Defendants knew, or in the exercise of reasonable care should have known, the perilous nature of metallic sodium when exposed to air and water. Notwithstanding, defendants negligently maintained the tank, exposed it to the elements, took no measures to correct the condition and remove the peril upon discovery that the tank was smoking and steaming, gave no warning or notice to the public, the fire department or plaintiff of the peculiar danger involved, and abandoned the premises realizing the nature of the peril would not be known and understood by the fire department or others who might be in the vicinity of the tank.

Suggs and Laboratory filed separate answers. On motion of plaintiff and Suggs the court struck some of the allegations from Laboratory's answer and permitted it to file an amended answer.

Laboratory's amended answer, part in summary and part verbatim, is as follows:

Plaintiff's allegations of negligence are denied. Two officials of Laboratory, chemical engineers, did go to the building on Templeton Avenue 9 July 1959 and observe that the tank was steaming. A written contract between Laboratory and Suggs is referred to, made a part of the amended answer, and a copy is attached and marked "Exhibit A."

Exhibit A is summarized as follows:

Suggs agrees to demolish the building on Templeton Avenue, as an independent contractor and not subject to the control of Laboratory. Suggs agrees to carry liability insurance in specified amounts, and to protect Laboratory from liability for damages and injuries

arising from the demolition. Suggs agrees to carry workmen's compensation insurance to protect its employees. Laboratory retains ownership of all personal property on the premises, including tanks and mixers, with right to remove them. Suggs agrees to give two weeks notice before requiring the removal of personal property. Suggs is to have all materials from the building itself as sole compensation for the demolition, and is to remove the materials and leave the premises in neat order. "Wrecker (Suggs) agrees to hold owner (Laboratory) harmless from any and all loss or liability of any nature in connection with the demolition of said building(s) and any of its activities in connection therewith." Contract executed 15 December 1958.

Laboratory sets up a number of affirmative defenses, among them SEVENTH FURTHER ANSWER AND DEFENSE as follows:

1. Prior to December 1958 Laboratory owned the building on Templeton Avenue.

"2. That on or about December 15, 1958, this answering defendant and the co-defendant, Suggs Wrecking & Removal Company, Inc., entered into a written agreement providing for the demolition of the aforesaid building or buildings by the said co-defendant, Suggs Wrecking & Removal Company, Inc., a copy of which contract is hereto attached and made a part hereof and which has been heretofore identified as Exhibit A.

"3. That pursuant to the terms and provisions of said written agreement, the co-defendant, Suggs Wrecking & Removal Company, Inc., subsequent to the execution of the aforesaid agreement, entered onto the aforesaid premises located on Templeton Avenue.

"4. That on the occasion complained of, the premises herein involved were in the exclusive control and possession of the co-defendant, Suggs Wrecking & Removal Company, Inc., pursuant to the terms and provisions of said written agreement."

5(a), (b) & (c). If the tank contained dangerous substances and chemicals, which is denied, Suggs was negligent in the following respects: It knew or should have known that the tank contained such substances and chemicals; it negligently permitted the tank to be exposed to the elements and took no precaution to correct the dangerous condition; it observed that the tank was undergoing a chemical change, failed to take action to prevent an explosion, failed to give notice of the danger, and departed from the premises realizing the hazard to others if no warning was given.

"5(d). That said co-defendant failed to exercise toward the plaintiff reasonable care consistent with the circumstances then and there existing upon the premises herein involved; and that the said co-

defendant negligently failed to comply with the terms and provisions of the written agreement."

5(e), (f), (g), (h) & (i). Suggs failed to exercise reasonable care in maintaining the tank and created an extra hazard, failed to notify plaintiff and the fire department of the contents of the tank and their chemical nature, abandoned the premises when it knew there was imminent danger of an explosion and without taking steps to prevent explosion, and removed the lid from the tank and removed a part of the contents without notifying Laboratory.

6. The negligence of Suggs was the sole proximate cause of plaintiff's injuries.

7. The negligence of Suggs intervened and insulated the negligence, if any, of Laboratory.

"8. That if it should be found that this answering defendant was negligent herein, which is expressly denied, the said co-defendant, Suggs Wrecking & Removal Company, Inc., nevertheless had the last clear chance of avoiding the occurrence complained of, and because of same, its negligent acts were the sole proximate cause of the damages sustained by the plaintiff.

"9. That if it should be found that this answering defendant was negligent herein, which is specifically denied, the co-defendant, Suggs Wrecking & Removal Company, Inc., is primarily liable to the plaintiff, and should the plaintiff recover any judgment against this answering defendant, then this answering defendant is entitled to be indemnified by the said Suggs Wrecking & Removal Company, Inc., for any damages which may be awarded against this answering defendant.

"10. That without waiving any of the aforementioned defenses, but specifically relying upon them, this answering defendant alleges that if it was negligent on the occasion complained of, which is emphatically denied, then and in that event the wrongful and negligent acts and omissions of the co-defendant, Suggs Wrecking & Removal Company, Inc., contributed to and was one of the proximate causes of any damages sustained by the plaintiff and that the said co-defendant, Suggs Wrecking & Removal Company, Inc., is jointly and concurrently liable for said damages, if any, together with this answering defendant under the laws of the State of North Carolina, and particularly G.S. 1-240."

Prayer: 1. That the action be dismissed as to Laboratory. "2. Alternatively, for contribution from the defendant," Suggs. 3. That the costs be taxed against Suggs. 4. For such other and further relief as to the court may seem just and proper.

On motion of plaintiff and defendant Suggs the court struck from the amended answer Exhibit A and paragraph 2 of the Seventh Fur-

ther Answer and Defense. On motion of Suggs the court struck paragraphs 3, 4, 5(d), 9 and 10 of the Seventh Further Answer and Defense and paragraph 2 of the prayer for relief. And the court sustained Suggs' demurrer *ore tenus* to paragraph 8 of the Seventh Further Answer and Defense.

Defendant Laboratory petitioned this Court for *certiorari*. The writ was granted 7 February 1961.

Defendant Laboratory assigns errors.

Uzzell and Dumont; Craighill, Rendleman & Clarkson for defendant Charlotte Chemical Laboratories, Inc., appellant.

William T. Grist; Warren C. Stack; and William E. Graham, Jr., for plaintiff, appellee.

Clayton & London; Pierce, Wardlow, Knox & Caudle for defendant Suggs Wrecking & Removal Company, Inc., appellee.

MOORE, J. Five questions are here presented for determination.

(1) Did the court below err in striking from the amended answer of defendant Laboratory Exhibit A (the contract between Suggs and Laboratory) and the references thereto contained in paragraphs 2, 3, 4 and 5(d) of the Seventh Further Answer and Defense?

The provisions of the contract requiring Suggs to carry liability insurance for the protection of Laboratory are not relevant or material to plaintiff's cause of action or to any defense available to Laboratory. Any reading of these provisions or reference thereto in the presence of the jury would, over objection, constitute prejudicial error. The fact that defendants in a negligence action are protected by liability insurance can throw no light on the question of negligence or other circumstances of the accident and is inadmissible in evidence. Stansbury: North Carolina Evidence, s. 88, p. 163. Nothing should remain in a pleading, over objection, which is incompetent to be introduced in evidence. *Daniel v. Gardner,* 240 N.C. 249, 251, 81 S.E. 2d 660. A policy of liability insurance is for the protection and indemnity of those insured by it, and in an action by an injured party against insured all references to such insurance is prejudicial, and all such references should be stricken from the pleadings. *Jordan v. Maynard,* 231 N.C. 101, 103, 56 S.E. 2d 26.

The contract, Exhibit A, not only requires Suggs to carry liability insurance for Laboratory's protection but specifies minimum limits. If the insurance is injected into the case, it can conceivably prejudice both plaintiff and Suggs. A party to an action is entitled to have stricken irrelevant matters which are prejudicial to him. *Council v.*

Dickerson's, Inc., 233 N.C. 472, 476, 64 S.E. 2d 551; *Patterson v. R. R.*, 214 N.C. 38, 42, 198 S.E. 364

Furthermore, Suggs' agreement to hold Laboratory "harmless from any and all loss or liability of any nature in connection with the demolition of said buildings and any of its activities in connection therewith" is a matter which concerns Suggs and Laboratory only. Plaintiff is not privy thereto. Therefore, it is not germane to plaintiff's cause of action, and the determination of the rights and liabilities of defendants with respect to this agreement of indemnity is not necessary to a conclusion of plaintiff's cause of action. Only matters relevant to the original or primary action in which all parties have a community of interest may be litigated. *Wrenn v. Graham*, 236 N.C. 719, 721, 74 S.E. 2d 232; *Montgomery v. Blades*, 217 N.C. 654, 656, 9 S.E. 2d 397.

In *Clark v. Freight Carriers*, 247 N.C. 705, 102 S.E. 2d 252, an original defendant set up a cross-action against an additional defendant and alleged an implied contract to indemnify original defendant with respect to injuries to original defendant's employees. The trial court allowed the motion of additional defendant to strike the cross-action. This Court affirmed the ruling and said: ". . . it was discretionary with the trial judge as to whether or not . . . (original defendant) would be permitted to litigate its claim under the implied contract of indemnity against (additional defendant) in this action."

In *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659, the owner of a building sued his contractor for breach of contract because of defects in a roof. Contractor sought to join his subcontractor (who had installed the roof) as an additional party defendant, on the ground that the subcontractor had failed to do the work according to specifications and was therefore liable to the owner and contractor. Contractor asked for recovery over against subcontractor. The trial court refused to make the subcontractor an additional party defendant. This Court sustained the ruling of the trial court and declared: "The plaintiff has elected to pursue his action against the contractor with whom he contracted in order to recover damages for an alleged breach of that contract, and plaintiff should be permitted to do so without having contested litigation between the contractor and his subcontractor projected into the plaintiff's lawsuit." Accord: *Board of Education v. Deitrick*, 221 N. C. 38, 18 S.E. 2d 704.

In *Eledge v. Light Co.*, 230 N.C. 584, 55 S.E. 2d 179, the original defendant set up a cross-action based on an indemnity contract against additional defendants. This Court affirmed the ruling of the trial court in striking the cross-action.

A cause of action independent of and unrelated to the original and primary action may not be litigated in the latter action. *Clothing Store v. Ellis Stone & Co.*, 233 N.C. 126, 131, 63 S.E. 2d 118.

Laboratory contends that it has the right to set out the contract in full inasmuch as the contract is referred to in the complaint. The reference in the complaint is only for the purpose of explaining the presence of Suggs on the premises. Portions of a contract may be relevant and competent, and portions immaterial and incompetent, in a suit not based on the contract. A pleading should contain allegations of ultimate relevant facts, not evidential facts. G.S. 1-222. Even in a suit on a contract, the contract need not be set out in full in the pleadings. *Wilmington v. Schutt*, 228 N.C. 285, 45 S.E. 2d 364.

In the instant case relevant parts of the contract may be pleaded and offered in evidence, but not irrelevant and prejudicial provisions. The portions of the contract which tend to explain Suggs' presence and activities on the premises of Laboratory on Templeton Avenue are competent and material, also the portion tending to show Laboratory's ownership of and relation to the premises and property. For this reason the allegations of paragraphs 3 and 4 of the Seventh Further Answer and Defense are permissible and should not have been stricken. We express no opinion as to whether or not the facts alleged in these paragraphs conform to pertinent terms of the contract.

Paragraph 5(d) of the Seventh Further Answer and Defense contains a mere conclusion of the pleader, that Suggs "negligently failed to comply with the terms and provisions of the written contract." The Seventh Further Answer and Defense fails to state any facts upon which the conclusion is based. Furthermore, an omission to perform a contractual obligation is never a tort unless such omission is also the omission of a legal duty. *Council v. Dickerson's, Inc., supra; Insurance Association v. Parker*, 234 N.C. 20, 23, 65 S.E. 2d 341.

(2) Did the court err in sustaining defendant Suggs' demurrer *ore tenus* to defendant Laboratory's plea (paragraph 8 of the Seventh Further Answer and Defense) that Suggs had the "last clear chance" to avoid the accident and injury to plaintiff?

The doctrine of last clear chance cannot be invoked as between defendants concurrently negligent. 38 Am. Jur., Negligence, s. 227, p. 912. The doctrine arises only when plaintiff is guilty of contributory negligence, and one defendant may not resist recovery by plaintiff on the ground that a co-defendant had the last clear chance to avoid the accident. *Taylor v. Rierson*, 210 N.C. 185, 189, 185 S.E. 627. The doctrine has application only as between plaintiff and a defendant. The doctrine as applied in this jurisdiction is defined and explained in

Irby v. R. R., 246 N.C. 384, 391, 98 S.E. 2d 349; and *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 448, 35 S.E. 2d 337.

Under the facts as alleged in the instant case the last clear chance doctrine is not available, even to plaintiff. It is certainly not a proper pleading for defendant Laboratory since it has not set up a counterclaim. "Viewed as a phase of the principle of proximate cause, the doctrine of last clear chance negatives an essential element of contributory negligence by rendering plaintiff's negligence a mere condition or remote cause of the accident." 38 Am. Jur., Negligence, s. 216, p. 903.

Laboratory contends that the allegation of "last clear chance" is an affirmative defense and Suggs is in no position to question it. As already stated, it does not arise in this case. But, as Laboratory erroneously seeks to apply it, the plea proposes to place responsibility on Suggs and to relieve Laboratory. It is true that "a mere defense made by one co-defendant is not subject to demurrer by the other defendant . . . ." *Bargeon v. Transportation Co.*, 196 N.C. 776, 777, 147 S.E. 299. But an irrelevant allegation by one defendant may be stricken by a co-defendant when prejudicial to the latter. *Council v. Dickerson's, Inc., supra.*

The court properly sustained the demurrer *ore tenus.*

(3) Did the court err in striking paragraph 9 of the Seventh Further Answer and Defense in which defendant Laboratory alleges that its negligence, if any, imposes only secondary liability and that defendant Suggs is primarily liable?

Where one joint *tort-feasor* is only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both are equally liable to the injured party. Where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and required to pay damages, the latter may recover against the principal delinquent, and the court will inquire into the real delinquency and place the ultimate liability upon him whose fault was the primary cause of the injury. *Johnson v. Asheville*, 196 N. C. 550, 553, 146 S.E. 229. See also *Kimsey v. Reaves*, 242 N.C. 721, 89 S.E. 2d 386; *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648. The inquiry as to primary and secondary liability, when properly pleaded and supported by evidence, is germane to plaintiff's cause of action. *Clothing Store v. Ellis Stone & Co., supra.* The entry of judgment fixing primary and secondary liability as between joint *tort-feasors* is sanctioned by statute G.S. 1-222. *Bell v. Lacey*, 248 N.C. 703, 705, 104 S.E. 2d 833; *Bowman v. Greensboro*, 190 N.C. 611, 130 S.E. 502.

A defendant may plead as many defenses as he has, and it is not required that the defenses be consistent with each other. *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434.

"The doctrine of primary-secondary liability is based upon a contract implied by law. *Hunsucker v. Chair Co.,* 237 N.C. 559, 75 S.E. 2d 768. There can be no implied contract where there is an express contract between the parties in reference to the same subject matter. (Citing cases)." *Crowell v. Air Lines,* 240 N.C. 20, 34, 81 S.E. 2d 178. The doctrine of primary-secondary liability "is based upon a contract implied in law from the fact that a passively negligent tort-feasor has discharged an obligation for which the actively negligent tort-feasor was primarily liable." *ibid.* If there is an express contract of indemnity, the indemnitee is relegated to his contract, a matter not germane to plaintiff's tort action.

In the instant case there is an express contract between Suggs and Laboratory whereby Suggs undertakes to protect Laboratory from any negligence of Suggs involved in the demolition of the building. Therefore the doctrine of primary-secondary liability does not arise. Furthermore, plaintiff alleges that both defendants were actively negligent. There can be no indemnity among joint *tort-feasors* when both are actively negligent. *Newsome v. Surratt,* 237 N.C. 297, 300, 74 S.E. 2d 732. It is also true that the doctrine of primary-secondary liability does not arise where one defendant alleges sole responsibility of his co-defendant. *Ballinger v. Thomas,* 195 N.C. 517, 522, 142 S.E. 761.

The court did not err in striking paragraph 9 of the Seventh Further Answer and Defense.

(4) In an action against two defendants, as joint *tort-feasors,* may one defendant set up a plea for contribution against the co-defendant and thereby preclude dismissal of the co-defendant during the trial and before judgment (paragraph 10 of Seventh Further Answer and Defense)?

The answer is "No." The question was definitely and clearly decided in *Bell v. Lacey, supra,* in which many decisions of this Court are collected and reviewed. This Court there declared:

"At common law, no right of contribution existed between or among joint tort-feasors who were in *pari delicto.* The right is purely statutory with us and its use necessarily depends upon the terms and provisions of the statute. . . .

"When negligence is joint and several, the injured party may elect to sue either of the joint tort-feasors separately, or any or all of them together. . . .

"When a plaintiff elects to sue one or more joint tort-feasors, but

not all of them, the others are not necessary parties and plaintiff cannot be compelled to pursue them. . . . Nor can an original defendant in such action use G.S. 1-240 to compel plaintiff to join issue with a defendant he has not elected to sue. In such case, if an original defendant avails himself of the provisions of the statute for contribution, he cannot rely upon any liability of the party he has brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. . . .

"This Court has uniformly held that where all the joint tort-feasors are brought in by a plaintiff and a cause of action is stated against all of them, such defendants under our statutes, G.S. 1-137 and G.S. 1-138, are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross-actions as between themselves which involve affirmative relief not germane to the plaintiff's action. . . . This is so, notwithstanding the fact that the defendants' claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed.

. . . .

"On the other hand, where the plaintiff does not bring his action against all the joint tort-feasors, and an original defendant sets up a cross-action against a third party and has him brought in as an additional defendant, under the provisions of G.S. 1-240, for contribution, such original defendant makes himself a plaintiff as to the additional party defendant. . . .

"Ordinarily, such additional party defendant has no cause of action stated against him except that asserted in the cross-action and set out in the cross-complaint. Hence, the additional party defendant is under no obligation to answer any allegations in the original complaint, but only those alleged against him in the cross-complaint. . . ."

However, when the plaintiff, as in the instant case, proceeds against two or more parties, as joint *tort-feasors,* each is entitled to contribution from the other or others if there is a judgment of joint and several liability against them. G.S. 1-240. But during the course of the trial each is a defendant as to plaintiff only, and neither of them may preclude the dismissal of the other or others if plaintiff fails to make out a *prima facie* case as to them. See *Loving v. Whitton,* 241 N.C. 273, 276, 84 S.E. 2d 919.

That portion of the prayer for relief asking for contribution was properly stricken together with paragraph 10 of the Seventh Further Answer and Defense.

(5) Defendant Suggs moved to strike portions of defendant Laboratory's *original* answer, including paragraphs 5(d) and 11 of the Fifth Further Answer and Defense. This motion was heard before Craven, S.J., 20 September 1960. Judge Craven struck parts of the original answer but did not strike paragraphs 5(d) and 11 of the Fifth Further Answer and Defense. The record does not disclose any exception to Judge Craven's order by defendant Suggs. Laboratory brought these paragraphs forward verbatim in its amended answer, as paragraphs 5(d) and 10 of the Seventh Further Answer and Defense. Suggs again moved to strike these particular paragraphs, among others. They were stricken from the amended answer by Judge Hooks in the order now in controversy.

Defendant Laboratory contends that Judge Hooks had no authority to vacate the order of Judge Craven with respect to the paragraphs in question.

No appeal lies from one superior court judge to another. *Wall v. England,* 243 N.C. 36, 39, 89 S.E. 2d 785. A judge has no power to review a judgment rendered at a former term upon the ground that such judgment is erroneous. *Cameron v. McDonald,* 216 N. C. 712, 715, 6 S.E. 2d 497; *Dail v. Hawkins,* 211 N.C. 283, 284, 189 S.E. 774; *Wellons v. Lassiter,* 200 N.C. 474, 478, 157 S.E. 434. A judge of superior court is without authority to review and vacate orders or judgments, not merely interlocutory, entered in the cause by another judge of superior court. *Cuthbertson v. Burton,* 251 N.C. 457, 459, 111 S.E. 2d 604.

An order or judgment is merely interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. Such an order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case. But an order or judgment which affects some substantial right claimed by a party may not be modified or vacated by another judge on the ground that it is erroneous. Relief from an erroneous judgment is by appeal to the Supreme Court. *Russ v. Woodard,* 232 N.C. 36, 59 S.E. 2d 351.

In *Wall v. England, supra,* an order striking certain allegations from an answer was entered at term by the presiding judge, with leave to file amended answer or other pleading. No exception was taken. Defendant filed an amendment to his answer. Plaintiff again moved to strike. The court found that the amendment contained the identical matter stricken in the first instance and allowed the motion to strike. Defendant appealed. In holding that defendant was bound by the ruling in the first instance, this Court said: "If the ruling of the Judge of Superior Court were erroneous, the remedy of defendant was to

except thereto and appeal to Supreme Court. And upon failure of defendant to except and appeal the judgment becomes, not so much (as) *res judicata,* as the law of the case."

The ruling of Judge Hooks was legally correct, but erroneous nevertheless. He was without authority to overrule another superior court judge. Even so, the paragraphs in question are inapplicable and should have been stricken in the first instance. The Supreme Court has supervisory jurisdiction over the lower courts and will exercise this jurisdiction in order that the case may be tried on the correct theory below and unnecessary delay in the administration of justice be thereby prevented. Constitution of North Carolina, Article IV, section 8. *Terrace, Inc., v. Indemnity Co.,* 243 N.C. 595, 91 S.E. 2d 584. The order of Judge Hooks with respect to these paragraphs will not be disturbed.

The order of Judge Hooks as to paragraphs 3 and 4 of the Seventh Further Answer and Defense is reversed. In all other respects it is affirmed.

Modified and affirmed.

BOBBITT, J., dissenting in part. In my opinion, paragraph 10 of the Seventh Further Answer and Defense, and paragraph 2 of the prayer for relief, should not have been stricken, and in these respects the order of the court below should be reversed.

In the Court's opinion, this question is posed: "In an action against two defendants, as joint tort-feasors, may one defendant set up a plea for contribution against the codefendant and thereby preclude dismissal of the codefendant during the trial and before judgment (paragraph 10 of the Seventh Further Answer and Defense)?" The Court answers, "No." In my opinion, the correct answer is, "Yes."

In *Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833, cited by the Court, the plaintiff alleged he received personal injuries proximately caused by the collision of an automobile operated by Miss Lucy Lacey and an automobile owned by Vincent Walter Christopher and operated by Larry Cecil Christopher. He sued Miss Lacey and the Christophers, alleging the collision and his injuries were proximately caused by their joint and concurrent negligence. Answering, Miss Lacey denied negligence on her part and alleged, conditionally, in the event she were found negligent, the codefendants Christopher were joint tort-feasors and, under G.S. 1-240, she was entitled to contribution from them in respect of any recovery plaintiff obtained against her.

Miss Lacey's right to allege such cross action for contribution was not challenged.

The Christophers, in reply to Miss Lacy's cross action for con-

tribution, alleged the collision was caused solely by her negligence. Thereafter, they alleged two cross actions against Miss Lacey *for affirmative relief,* one for $300.00 for damages to the Christopher car, the other for $5,000.00 for personal injuries received by the driver thereof.

The hearing was on Miss Lacey's motion to strike the Christophers' said cross actions *for affirmative relief.* Judgment allowing Miss Lacey's said motion was affirmed.

Under *Bell v. Lacey, supra,* and cases cited therein, where two defendants are sued jointly by the plaintiff, neither may allege a cross action against the other *for affirmative relief.* Such a cross action is not germane to the plaintiff's claim. But *Bell v. Lacey, supra,* is not authority for the proposition that a defendant may not allege, conditionally, that his codefendant is a joint tort-feasor from whom, under G.S. 1-240, he is entitled to contribution in respect of any amount plaintiff may recover against him. A recovery by plaintiff is a prerequisite to such cross action.

An original defendant may, under G.S. 1-240, join an additional party and allege, conditionally, a cross action for contribution. At the close of the plaintiff's evidence, the original defendant moves for judgment of nonsuit. The only question then before the court is whether the evidence is sufficient for submission to the jury as between the plaintiff and the original defendant. If the motion is allowed, this ends the case since the cross action for contribution presupposes a recovery by plaintiff against the original defendant. If the motion is overruled, the original defendant may offer evidence. The original defendant's cross action for contribution may not be dismissed until the original defendant has had opportunity to offer evidence in support of such cross action. *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773. If an original defendant may join an additional defendant and allege such cross action for contribution, I perceive no sound reason why he may not so allege where the codefendant is already a party to the action.

In *Smith v. Kappas,* 218 N.C. 758, 12 S.E. 2d 693, plaintiff sued Kappas and the Straus Company as joint tort-feasors. Over the objection of the Straus Company the court permitted plaintiff, before plaintiff had concluded his evidence, to take a voluntary nonsuit as to Kappas. Straus Company, in its original answer, did not allege, conditionally, it was entitled to contribution from Kappas but made such allegation in an amended answer. The opinion contains this statement: "In the original answer in the present action no demand was made for affirmative relief, but *before the trial* an amended answer was filed by the Straus Company, Inc., which we think sufficient to have

Kappas held as a party defendant under N. C. Code, 1939 (Michie), sec. 618." (Our italics) C.S. 618 is now codified as G.S. 1-240. Based on this factual situation, the court held that, upon Straus' demand for contribution against Kappas, his codefendant, it was error to permit plaintiff to take a voluntary nonsuit as to Kappas and awarded a new trial.

In *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375, a petition to rehear was allowed on the ground the record did not support the quoted factual statement but showed Straus Company "did not tender its proposed amended answer and move that it be permitted to file the same until after verdict. Nor did it request that Kappas be made a party defendant, as a joint tort-feasor, prior to verdict." On rehearing, the court overruled the exception of Straus Company on the ground it had failed to assert in apt time its alleged cause of action against Kappas for contribution.

In *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566, the plaintiff sued the Receivers of the Seaboard Air Line Railway Company and Fred W. Staudt, trading and doing business as Staudt's Bakery, alleging he was injured by the joint and concurring negligence of said defendants. The Receivers' demurrer *to the complaint* was sustained on the ground it did not allege facts sufficient to constitute a cause of action against the Receivers. Upon failure of plaintiff to amend his complaint in respect of allegations against the Receivers, the action, as to the Receivers, was dismissed. Thereafter, Staudt answered, denying negligence and alleging, conditionally, a cross action against the Receivers for contribution; and, upon Staudt's motion, the Receivers were again made parties. The Receivers then demurred to Staudt's cross complaint for contribution. It was held that Staudt's cross complaint did allege facts sufficient to constitute a cause of action for contribution and that the Receivers' demurrer to said cross complaint was properly overruled.

In my opinion, the decisions in *Smith v. Kappas, supra,* and in *Canestrino v. Powell, supra,* are authority for the proposition that where two defendants are sued jointly by the plaintiff, one defendant *may* allege, conditionally, a cross action against his codefendant for contribution. If he elects to do so, the procedure is as follows: If, when plaintiff has rested his case, the evidence is sufficient for submission to the jury as to defendant A (plaintiff in the cross action for contribution) but not as to defendant B, judgment of nonsuit as to *plaintiff's action* against defendant B should then be entered. Even so, the action as to defendant B should not be dismissed. Defendant A should be permitted to offer evidence in support of his cross action against defendant B for contribution. The action as to defendant B

in respect of said cross action for contribution should be dismissed only if defendant A fails to offer evidence sufficient to support the allegations of his cross complaint.

The question considered in *Bell v. Lacey, supra,* was quite different from that here presented. This Court had held in *Norris v. Johnson, supra,* and cases cited therein, that, where the plaintiff sued one defendant and the original defendant joined an additional defendant for contribution under G.S. 1-240, the additional defendant could assert a cross action against the original defendant *for affirmative relief.* In *Bell v. Lacey, supra,* the Court refused to extend this rule to a situation where plaintiff had sued both defendants. Here, we are not concerned with cross actions by one defendant against his codefendant for affirmative relief, that is, for the recovery of damages by the plaintiff in said cross action from the defendant therein, but are concerned only with a cross action for contribution as permitted by G.S. 1-240.

The foregoing is in accord with what I have understood and now understand to be the correct rule and procedure.

PARKER and RODMAN, JJ., concur in dissenting opinion.

RALPH C. BRITTAIN v. PIEDMONT AVIATION, INC.

(Filed 24 May, 1961.)

1. Aviation § 3: Carriers § 18—

A common carrier by aircraft is not an insurer of the safety of its passengers, but is under duty to exercise the highest degree of care for their safety as is consistent with the practical operation and conduct of its business.

2. Trial § 22—

On motion to nonsuit, the evidence favorable to plaintiff must be taken as true and the conflicting evidence disregarded, since the weight and credibility of evidence is in the exclusive province of the jury.

3. Aviation § 3: Carriers § 18— Evidence of negligence of common carrier by air, resulting in injury to passenger, held for jury.

In this action by a passenger of a common carrier by aircraft to recover for injuries during flight, defendant's evidence to the effect that in that area of the flight which crossed a mountain range the light

warning passengers to fasten seat belts was turned on because of expected air turbulence, with its evidence as to speed and time, permitting the conclusion that the accident occurred during such portion of the flight, together with plaintiff's evidence that the warning light was not burning when he left his seat, that the flight steward, immediately before the injury, handed him a cup of water while he was standing, without giving him any warning, and that minutes thereafter the plane dropped vertically for some distance in a downdraft, resulting in plaintiff's being thrown to the ceiling, to his injury, *is held* sufficient to be submitted to the jury on the issue of negligence of the carrier in failing to give plaintiff warning in an area in which defendant knew that downdrafts were apt to occur.

4. Evidence § 14—

Communications between physician and patient are privileged, and while the court may compel disclosure of such communications if in the court's opinion it is necessary to a proper administration of justice, whether the court should do so rests in its sound discretion. G.S. 8-53.

5. Appeal and Error § 46—

Where the court assigns no reason for a ruling upon a matter resting in its discretion, it will be assumed that the court made the ruling in the exercise of its discretion, it being incumbent upon the objecting party to request the court to make the record show that the ruling was made as a matter of law, if this be the case.

APPEAL by defendant from *Farthing, J.*, Regular Civil Schedule B, October 3, 1960 Term of MECKLENBURG.

Plaintiff began this action to recover damages for injuries suffered while a passenger on defendant's plane. His ticket entitled him to transportation from Charleston, W. Va., to Hickory, N. C., with a stop at Tri-Cities Airport (Near Johnson City, Tenn.). The flight was at night. The route from Tri-Cities Airport to Hickory crosses the Blue Ridge Mountains in the vicinity of Grandfather Mountain. Plaintiff was thrown and injured by a sudden and violent loss of altitude when he was in the washroom—in airline parlance, the "Blue Room." The rate of descent was sufficient to suck the contents of a Coca Cola bottle held by a passenger from the bottle and throw it to the ceiling.

Plaintiff alleges: The plane was equipped with safety belts for use by passengers when the plane was apt to make dangerous movements during ascent, descent, or when "flying through rough weather." There were no means of protection against such movements in the Blue Room. Lights inform passengers when to fasten their seat belts. Defendant knew "that the weather in the area in which Flight 26 was flying was and is usually rough, and therefore dangerous to fly through with safety belts unfastened, but the defendant negligently and care-

lessly failed to advise the plaintiff before the plaintiff left his seat for the washroom, by turning on the seat belt light or otherwise to fasten the safety belt about him." The flight attendant on the plane, with knowledge of the likelihood of air turbulence in the vicinity of the mountains, saw plaintiff leave his seat and go to the washroom without warning him of the danger of so doing. While in the washroom the plane encountered a downdraft, causing it to suddenly drop a great distance, throwing plaintiff to the ceiling, throwing the contents of the toilet out and on him and causing severe injuries.

Defendant admitted plaintiff was a passenger on its Flight 26, operating between Cincinnati, Ohio, and Wilmington, N. C. It denied it was negligent. It pleaded contributory negligence of plaintiff, alleging: "The route of this flight between the two airports was over the Blue Ridge Mountains, and close to the crest of Grandfather Mountain in Western North Carolina. There is usually some air turbulence in the area of these mountains, and therefore shortly after the take-off from the Tri-Cities Airport the seat belt light came on warning and instructing all passengers to remain in their seats and to fasten their seat belt." Plaintiff was in "a substantially intoxicated condition," when he entered the plane, and, contrary to defendant's orders, consumed alcoholic beverages while a passenger; failed to follow instructions of the flight attendant and the signal lamps warning him to remain in his seat and keep his seat belt fastened "at a time when the airplane of the defendant was entering a turbulent condition of air over the mountains of Western North Carolina."

After the original answer was filed, defendant was permitted to amend its answer to allege: "At the time and place of the passage of the defendant's airplane in the area of Grandfather Mountain, the weather was cold, clear, cloudless, and the winds were moderate. No rough air or turbulence was encountered approaching and flying over the higher portions of the mountains, but after leaving said area, the defendant's airplane encountered a severe downdraft which caused it to drop more or less vertically some distance. Said downdraft was clear-air turbulence, which could not be seen by eye or instrument, was unexpected, and could not be anticipated from existing weather conditions."

Issues of negligence, contributory negligence, and damage were submitted to and answered by the jury in favor of plaintiff. Judgment was entered on the verdict. Defendant excepted and appealed.

Grier, Parker, Poe & Thompson for plaintiff appellee.

John H. Small for defendant appellant.

RODMAN, J. Defendant's principal assignment of error is directed to the refusal of the court to allow its motion for nonsuit. It argues here that there is no evidence to support the allegations of negligence, strenuously contending that all the evidence shows that the violent movement of the plane, which admittedly happened, occurred at a time and place where there was no reason to suspect any abnormal atmospheric conditions, asserting that the violent movement was due to what it refers to as clear-air turbulence.

The law applicable to this case was stated by *Moore, J.*, in *Jackson v. Stancil*, 253 N.C. 291, 116 S.E. 2d 817. He said: "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. . . . 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." He follows this statement by distinguishing between ordinary care and the highest degree of care. Briefly the distinction is the care which an ordinarily prudent carrier would exercise as compared with the care which an unusually prudent and competent carrier would exercise.

With apparent approval of the law enunciated in the *Stancil* case, *supra*, defendant requested the court in charging the jury to inform it that defendant contended: "The area of the mountain ridge including Grandfather Mountain usually or generally had some rough air or turbulence for airplanes flying across it, and for this reason Piedmont Airlines on the flight from Tri-Cities Airport to Hickory Airport as standard operating procedure required that the sign requiring that seat belts be fastened be on for the passage over this area. The defendant says that this was a general precaution followed whether actual turbulence was expected, or not, or whether actual turbulence was encountered, or not.

"The defendant says that no rough air or turbulence was encountered in the area where it might have been expected and that the airplane had proceeded beyond and east of the mountain area when the violent downdraft occurred."

The case was tried on defendant's theory of the law. The jury was told that plaintiff, to recover, had to establish (1) the injury occurred in an area where defendant knew downdrafts were apt to occur and for that reason owed a duty to warn its passengers, and (2) it failed to give such warning.

The question we are now required to answer is: Was there any evidence on which the jury could find these basic facts? We are not

called upon nor are we permitted to weigh the evidence. If a trial court is of the opinion that the jury has not properly evaluated the evidence, and its findings will result in a miscarriage of justice, it may prevent such injustice by setting the verdict aside.

Taking the requisite facts in inverse order, the record discloses plaintiff testified: "Before I got up out of my seat, the seat belt light was not on. I looked at it. I don't know exactly where the flight steward was, but I had asked him for a cup of water a few minutes prior to getting up . . . and as I got up and got to the door, he handed me a cup of water . . . I have false dentures and wanted to clean my teeth. That was the purpose for which I wanted the water. I don't know where the flight steward went after he handed me the water as I went directly inside." According to plaintiff the plane dropped just after he got in the Blue Room. On cross-examination he said: "When I stood up the last time to go to the Blue Room, the seat belt light was not on . . . The cup which the flight attendant handed me was a small paper cup with water in it, a flat-bottomed cup."

The flight attendant testified that the light warning passengers to fasten their seat belts came on at least five minutes prior to the time plaintiff was injured and remained on until after the injury. He said that the cup of water was given to plaintiff when he was in his seat and not as he was entering the Blue Room. There is evidence from other passengers tending to corroborate the flight attendant's statement that the warning light was on. But to determine whether it was or was not would be to weigh the evidence. We must accept plaintiff's version.

Did the injury occur in an area where air turbulence could be expected? Plaintiff testified: ". . . it was around Grandfather Mountain. I don't know whether it occurred before we reached Grandfather Mountain or after we reached Grandfather Mountain . . ." Defendant's evidence on this question was more specific. It was, we think, in part as least, susceptible to inferences favorable to plaintiff's contention. The co-pilot testified: "It (warning light) was turned off at approximately an altitude of 4,000 to 5,000 feet. It was turned on next in the vicinity of Heaton . . . The seat belt light was turned on over the village of Heaton, which is about ten miles previous to entering the mountain area." The pilot said the light "was next turned on approximately three or four minutes prior to approaching Grandfather Mountain, I would say in the vicinity of Heaton." Defendant in its brief informs us: "Because Heaton is in the right location and is always identifiable in flight by the radio range, it is the position on eastbound flights where the seat belt sign is turned on." The evidence fails to disclose such a definite point east of the mountains

where the area of turbulence terminates. It may be inferred from the testimony of the plane officials that Lenoir is such a point.

Defendant also informs us by brief that the distance from Tri-Cities to Heaton is 33 miles, to Lenoir, 62 miles, and to Hickory, 76 miles.

The co-pilot testified: "The air speed would have been approximately 227 knots, or nautical miles, slightly longer than the regular mile." The course from Tri-Cities to Hickory is 141 degrees. "The status of the winds in that area at that altitude was 280 degrees at about 40 miles per hour." The ground speed would, therefore, be something in excess of four miles per minute. The co-pilot fixed the place of injury as "in the vicinity of Lenoir. . . . This would be, roughly speaking, 18 or 20 miles from the ridges we had passed." Such position would be fourteen miles west of Hickory, slightly more than three minutes flying time, yet the flight attendant says that it was eight to ten minutes after the injury before arrival at Hickory. He also fixes the time elapsing between the giving of the warning signal until the injury as "at least five minutes." Accepting, as the jury could, five minutes as the period of time elapsing between the turning on of the lights and the injury, the plane would travel about twenty miles from the turning on of the lights and the moment of fall; but the jury could draw the inference that twelve to sixteen miles of this distance was west of Grandfather. The downsweep of the air takes place after passing the mountain range. The jury could infer from the testimony that the plane had only passed Grandfather some four miles when the downdraft which caused plaintiff's injury was encountered. If, in such close proximity, would not an unusually prudent man have expected the exact air turbulence or downdraft which the plane encountered? The original answer responds in the affirmative and asserts the light was on because in an area where turbulence could be expected.

Because there was evidence on which the jury could find both facts necessary to establish defendant's negligence, the court properly overruled the motion to nonsuit.

Plaintiff offered medical testimony in support of his assertion that he sustained serious and permanent injuries. Defendant called as one of its witnesses Dr. Coffey, who had treated plaintiff. Dr. Coffey had not been called or examined by plaintiff as a witness. On plaintiff's objection, the court excluded his testimony. Dr. Coffey, by stipulation of plaintiff, is an expert neurological physician. He was requested to examine plaintiff by Dr. Wrenn, a medical expert specializing in the field of orthopedic surgery. Dr. Wrenn treated plaintiff for the injuries sustained. He testified as an expert on plaintiff's behalf. Dr.

Coffey testified without objection that he examined plaintiff on 25 February 1959. He was then asked: "Q. Doctor, what was the result of that examination?" Defendant objected. The objection was sustained. Counsel for plaintiff stated that his objection was "on the ground that the examination of the plaintiff by Dr. Coffey constituted a communication between physician and patient, and information obtained therefrom by Dr. Coffey was privileged." The record discloses: "The Court stated that in his opinion the evidence was privileged and that the Court would not permit Dr. Coffey to testify as to his examination of the plaintiff, or as to information obtained therefrom." Our statute (G.S. 8-53) declares communications between surgeons and patients privileged and in general protects the surgeon from being compelled to disclose information obtained from his patient in order to furnish proper treatment, but the statute contains a provision "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." Counsel for defendant insists that the evidence excluded was competent, relying on *Capps v. Lynch,* 253 N.C. 18, 116 S.E. 2d 137. The distinction between that and the present case is, we think, readily apparent. First, there is nothing to indicate that Dr. Coffey would have given any testimony beneficial to defendant, but passing that point, we think it clear that defendant has not brought himself within the statutory proviso. It is said in *Capps v. Lynch, 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."

If it appeared that the court excluded the testimony of Dr. Coffey because he was compelled by statute to do so, we would direct a new trial; but the record, we think, clearly negatives any idea that the ruling was based on want of authority. The use of the word "permit" implies a discretion and a refusal because the court did not deem the evidence necessary to a proper administration of justice.

When no reason is assigned by the court for a ruling which may be made as a matter of discretion for the promotion of justice or because of a mistaken view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion. *Phelps v. McCotter,* 252 N.C. 66, 112 S.E. 2d 736; *Ogburn v. Sterchi Bros.,* 218 N.C. 507, 11 S.E. 2d 460; *Warren v. Land Bank,* 214 N.C. 206,

198 S.E. 624; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789; *Jones v. Insurance Co.,* 210 N.C. 559, 187 S.E. 769. If a party adversely affected by the ruling desires to review it on appeal, he may request the court to let the record show whether the ruling is made as a matter of law or in the exercise of the court's discretion.

We have carefully reviewed the other assignments of error but find nothing that we deem prejudicial or requiring discussion. Hence we reach the conclusion there is

No error.

STATE v. DAVID FOYE, JR., AND CHARLES HERBERT WILLIAMS.

(Filed 24 May, 1961.)

1. Homicide § 20: Criminal Law § 101—

Evidence that the body of a person was found with marks of violence upon it, or under circumstances indicating that such person came to his death by violent means, is proof of the *corpus delicti aliunde* the confession of defendant, so that such evidence, together with evidence that defendant entered into an agreement with another to rob the deceased and admitted that he met his co-conspirator and was present at the time of the commission of the murder in the perpetration of the robbery, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree.

2. Criminal Law 61½—

Testimony as to the result of a lie detector test is incompetent in this State to prove the guilt or innocence of a defendant charged with crime.

3. Same—

Where the testimony of a co-conspirator has implicated the defendant in the commission of the crime charged, the admission in evidence of the results of a lie detector test submitted to by the co-conspirator, which thus tends indirectly to establish the guilt of defendant, is incompetent and highly prejudicial.

4. Criminal Law § 162—

Where incompetent evidence of such highly prejudicial nature that its effect cannot be erased from the minds of the jurors is admitted, the error in its admission cannot be cured by instructions of the court that such evidence should not be considered against the defendant.

5. Criminal Law § 106—

An instruction upon defendant's evidence of alibi, that if the jury were satisfied from the evidence that defendant was not at the place when the crime charged was committed, to return a verdict of not guilty, is erroneous, the correct rule being that defendant's evidence of an alibi should be considered only in determining whether the evidence for the

State is sufficient to satisfy the jury beyond a reasonable doubt of the fact of guilt.

6. Criminal Law § 118: Homicide § 30—

A verdict of guilty of murder in the first degree with recommendation of mercy is not in accord with law, the proper verdict being, in such instance, guilty of murder in the first degree with recommendation of imprisonment for life in the State prison.

APPEAL by defendant Charles Herbert Williams from *Cowper, J.*, at January Term 1961, of CRAVEN.

Criminal prosecution upon a bill of indictment charging "that David Foye, Jr., and Charles Herbert Williams, late of Craven County, on the 29th day of October, A.D., 1960, with force and arms, at and in the said county, feloniously, willfully, and of his malice aforethought, did kill and murder Garfield Henderson, contrary to the form and the statute in such case made and provided, and against the peace and dignity of the State."

Upon arraignment the said Charles Herbert Williams "saith that he is not guilty of the felony and murder as charged in the bill of indictment." And so did defendant Foye.

A true bill of indictment having been returned against each of the defendants at the November Term 1960, and it appearing to the court that each of them is insolvent and is without means to employ counsel to represent him, the court ordered that Henry A. Grady, Jr., Esq., an attorney of New Bern, North Carolina, be appointed as counsel to represent defendant Foye, and that John W. Beaman, Esq., also an attorney of New Bern, be appointed as counsel to represent the defendant Williams.

The case on appeal shows that defendants were tried upon theory of homicide committed allegedly in the perpetration of robbery. And that the defendant David Foye, Jr., confessed to having killed the said Garfield Henderson with an ice pick, implicated the defendant Williams as a party to the crime of robbery of the deceased.

Upon the trial in Superior Court both the State and the defendants offered evidence upon which, under the charge of the court, the case was submitted to the jury.

Verdict: As to each defendant "Guilty of murder in the first degree with recommendation of mercy."

Judgment: As to each defendant that he be "confined in the State Prison at Raleigh for the term of his natural life."

To the above verdict and judgment the defendant Charles Herbert Williams gave notice of appeal and appeals to the Supreme Court, and assigns error.

Thereupon John W. Beaman, upon his own motion at January Term 1961, for personal reasons, was permitted to withdraw from further appearance on behalf of this defendant. And Kennedy W. Ward, attorney of the New Bern Bar, was appointed by the court to represent defendant Charles Herbert Williams in preparing the appeal to the Supreme Court of North Carolina, and to do all and everything necessary to protect the rights of the said defendant.

Moreover, in accordance with the statute G.S. 15-181 defendant was permitted to appeal *in forma pauperis,* and the necessary cost of preparing the appeal, and the appeal were provided at the county's expense.

Attorney General Bruton, Assistant Attorney General G. A. Jones, Jr., for the State.

Kennedy W. Ward for defendant appellant.

WINBORNE, C.J. The evidence in the present case, when considered in the light most favorable to the State, is sufficient to warrant submitting the case to the jury and to support the verdict and judgment. Where the dead body of a person is found with marks of violence upon it or other circumstances that indicate that the deceased came to his death by violent means, proof of such fact, independent of defendant's confession, establishes *corpus delicti.* The defendant Williams, by his confession, admitted meeting defendant Foye, and being present at the time the murder was committed. He is also shown to have entered into an agreement with Foye to rob the deceased. Hence the assignment of error directed to the court's refusal to allow defendant's motion for judgment as in case of nonsuit (G.S. 15-173) is overruled. *S. v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *S. v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411.

However, upon a thorough examination of the record we are of the opinion that the defendant is entitled to a new trial on two grounds: 1. The first error relates to the admission of certain evidence concerning a lie detector test given both defendants. In this connection Deputy Sheriff Edwards, under cross-examination by counsel for the defendant Foye testified as follows: "Q. Now, did you take David Foye to Raleigh last week to give him a lie detector test? A. Yes, sir.

"Q. Did you talk with David on your way to Raleigh? A. No, sir, didn't talk too much with David, and we did not have any conversation on the way to Raleigh.

"Q. Was he given a lie detector test? A. Yes, sir.

"Q. Were you where you could hear what was said on the questioning while he was being given the test? A. Yes, sir.

"Q. Who operated the machine in Raleigh? A. Mr. John Boyd.

"Q. He is a recognized expert in connection with operating a lie detector machine, is he not? A. Yes, sir.

"Q. Did David Foye, while then and there being given the test make substantially the same statements to Mr. Boyd that you testified to here this morning? A. Yes, sir.

"Q. Would you tell the court and the jury the result of that test? A. I can tell you what Mr. Boyd told me; he said that David Foye had told the truth.

"Q. And that the machine so indicated? A. Yes, sir."

Upon direct examination by the solicitor, Deputy Sheriff Edwards testified as follows concerning the lie detector test:

"Q. Who else, if anyone, went to Raleigh with you? A. Myself, Deputy Sheriff Taylor, FBI Agent John Edwards.

"Q. Well, did the defendant Charles Williams also go? A. Yes, sir, Charles Williams went, and David Foye.

"Q. And was he likewise interviewed by Mr. Boyd? A. Yes, sir."

Thereafter, defendant Foye, testifying in his own behalf brought out the following evidence:

"Q. Now, you were carried to Raleigh last week? A. Yes, sir.

"Q. They sat you down in this contraption up there that looked like one of Rube Goldberg's inventions. A. Yes, sir.

"Q. When you took your seat at that lie detector machine, were you questioned by Mr. Boyd, the operator of the machine? A. Yes, sir.

"Q. Did he ask you the same questions in substance that I've asked you here on the stand? A. Yes, sir.

"Q. Did you give him substantially the same answers that you have given me? A. Yes, sir."

In each instance the trial judge instructed the jury to apply the evidence only to the defendant Foye and renewed the admonition concerning the use of the lie detector evidence as to the defendant Williams in the final charge. These statements with reference to the lie detector test as introduced into this case were highly prejudicial to the defendant Williams and in our opinion constituted prejudicial error. It is of such a character that it cannot be purged of its harmful effect by an admonition to the jury.

The courts of this country, in the absence of stipulation, have uniformly rejected the results of lie detector tests when offered in evidence for the guilt or innocence of one accused of a crime, whether the accused or the prosecution seek its introduction. See 23 A.L.R. 2d 1306 and 1960 A.L.R. 2d Supplement Service p. 1998.

The reason most commonly assigned for the exclusion of such evidence is the contention that the lie detector has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception. *Tyler v. United States,* 90 App. D.C. 2, 193 F. 2d 24, cert. den. 343 U.S. 908; *Henderson v. State,* 94 Okl. Crim. 45, 230 P. 2d 495, cert. den. 342 U.S. 898.

The courts have also ruled inadmissible testimony in regard to lie detector tests on various other grounds: (1) On the ground that no expert evidence had been introduced in the particular case showing a general scientific recognition of the efficacy of such tests. *People v. Becker,* 300 Mich. 562, 2 N.W. 2d 503; *People v. Forte,* 279 N.Y. 204, 18 N.E. 2d 31.

(2) On the ground that the admission of lie detector tests would distract the jury. *S. v. Cole,* 354 Mo. 181, 188 S.W. 2d 43.

(3) On the ground that it would permit the defendant to have extrajudicial tests made without the necessity of submitting to similar tests by the prosecution. *S. v. Bohner,* 210 Wisc. 651, 246 N.W. 314.

(4) On the ground that the lie detecting machine could not be cross-examined. *S. v. Lowry,* 163 Kan. 622, 185 P. 2d 147; *Boeche v. S.,* 151 Neb. 368, 37 N.W. 2d 593; *S. v. Bohner, supra.*

Furthermore, these authorities show that the lie detector tests prove correct in their diagnosis in about 75% of the instances used. In other words, such factors as mental tension, nervousness, psychological abnormalities, mental abnormalities, unresponsiveness in a lying or guilty subject account for 25% of the failure in the use of the lie detector. See Inbau, LIE DETECTION AND CRIMINAL INTERROGATION, 2nd Ed. (1948).

Hence, we are of opinion that the foregoing enumerated difficulties alone in conjunction with the lie detector use presents obstacles to its acceptability as an instrument of evidence in the trial of criminal cases, notwithstanding its recognized utility in the field of discovery and investigation, for uncovering clues and obtaining confessions. This conclusion is in line with the weight of authority repudiating the lie detector as an instrument of evidence in the trial of criminal cases.

One of the recent cases stating a reason for the denial of the use of lie detector results in evidence is that of *Lee v. Commonwealth,* 200 Va. 233, 105 S.E. 2d 152, wherein it is said: "While there are several valid reasons for the exclusion of the evidence showing the result of the test in this instance, suffice it to say that such tests generally have not as yet been proved scientifically reliable * * * ." See also *S. v. Hollywood* (Cal.), 358 P. 2d 437.

These devices are unlike the science of handwriting, fingerprinting,

and X-Ray, which reflect demonstrative physical facts that require no complicated interpretation predicated upon the hazards of unknown individual emotional differences, which may and oftentimes do result in erroneous conclusions. See Inbau, *supra.*

One exception to the majority rule is *People v. Kenny,* 167 Misc. 51, 3 N.Y.S. 2d 348 (N. Y. Queens C. C. Ct. 1938). There a lower court admitted a lie detector test into evidence. However, in that case the defendant was acquitted and there was no opportunity for a review of the trial court's ruling. In a later case, *People v. Forte, supra,* the New York Court of Appeals made the *Kenny* case questionable precedent. The Court said: "We cannot take judicial notice that this instrument is, or is not, effective for the purpose of determining the truth * * * The record is devoid of evidence tending to show a general scientific recognition that the Pathometer possesses efficiency * * * ."

Moreover, the parties should not be permitted to introduce lie detector results into evidence by indirection. *People v. Aragon,* 154 Cal. App. 2d 646, 316 P. 2d 370; *People v. Wochnick,* 98 Cal. App. 2d 124, 219 P. 2d 70; *Leeks v. State,* 95 Okl. Cr. App. 326, 245 P. 2d 764.

The trial court in the present case, by allowing the lie detector evidence through the examination of Deputy Sheriff Edwards and defendant Foye as set out above, did indirectly what would be highly improper if done directly. It was designed to leave the inference that the defendant Foye was telling the truth about the whole matter and amounted to informing the jury of the results of the lie detector tests.

Therefore, despite the instructions of the court, the conclusion is that the evidence of the results of the lie detector test was indelibly implanted in the minds of the jurors and had a prejudicial effect.

II. The second error relates to the court's charge upon the question of alibi. The court charged the jury as follows: "I want to define to you alibi. The definition of alibi, which literally means elsewhere, not only goes to the essence of the guilt of the accused person, but it traverses one of the material ingredients in the bill of indictment, namely, that the prisoner did then and there commit the particular act charged. It is not an affirmative or stringent definition and an alibi upon the idea that the accused was elsewhere at the date of the act does, of course, thoroughly established precludes the possibility of guilt. It is enough if the evidence adduced in support of it viewed in connection with all the testimony in the case created such a probability of its truth as to raise a reasonable doubt of the defendant's guilt.

"After a consideration of all the evidence if the jury entertains a reasonable doubt of the defendant's presence at and participation in the crime they should return a verdict of not guilty. The fact that a prisoner relies upon alibi which means elsewhere and could not have

been at the place of the crime when it was committed if he was elsewhere at the time is that he is not required to satisfy you of the alibi beyond a reasonable doubt, but if you ladies and gentlemen are satisfied from the evidence that he was not at the place when the crime charged against him was committed and as charged in the bill of indictment, then a verdict of not guilty should be returned."

This instruction fails to make clear who has the burden of proof, the defendant or the State, when the former relies on alibi as a defense. In *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844, *Ervin, J.,* said: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to acquittal." This being true, the charge as to alibi is not in accord with the approved precedents. *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105; *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867; *S. v Minton, supra; S v. Stone,* 241 N.C. 294, 84 S.E. 2d 923.

Finally, while there is in the record no exception in respect thereto, it is appropriate to call attention to the fact that the verdict of the jury is not in keeping with the language of the statute G.S. 14-17. There is no such crime in this State as "'murder in the first degree with recommendation of mercy." The correct expression is "recommendation of imprisonment for life in the State's prison." In the instant case the court correctly charged the jury, but the verdict as recorded is "recommendation of mercy." See *S. v. Denny,* 249 N.C. 113, 105 S.E. 2d 446. This error may not occur upon another trial.

For reasons stated let there be a

New trial.

CHARLIE RICHARDSON v. LIBERTY LIFE INSURANCE COMPANY.

(Filed 24 May, 1961.)

1. Insurance § 3—

While the court must construe a contract of insurance as written, when the language of the policy is susceptible to two constructions, the court will adopt that construction which is favorable to insured.

2. Insurance § 37½— Loss of use of member of body will be construed as loss of such member in absence of restrictive language.

The policy in suit provided benefits if insured lost a "hand by severance" and that "loss of four fingers entire of a hand shall be construed as loss of such hand." Insured's evidence was to the effect that insured lost by accidental amputation three fingers of a hand and thereafter, through accident, severed the fourth finger behind the first joint, and that when he used this finger, it swelled some. *Held:* The issue of liability under the policy is for the determination of a jury, since the loss of use of a finger is loss of a finger entire, and the policy, in stipulating that the loss of four fingers entire of the hand should be construed as loss of such hand, does not require that the loss of the fingers be by "severance."

APPEAL by defendant from *Gambill, J.*, 30 January 1961 Civil Term of GUILFORD, Greensboro Division.

Civil action to recover $2,000.00 benefits under an accident insurance policy, heard *de novo* in the superior court on appeal by defendant from an adverse judgment in the municipal court of the city of High Point.

Plaintiff introduced in evidence the accident policy issued to him by defendant. Defendant stipulated that it issued this policy to plaintiff on 23 September 1957, that the policy had been and is now in force and effect, that claim or notice of injury was made to it by plaintiff and received by it, as required under the policy, and that the claim was denied by defendant.

The policy provides that the company will pay the insured for the "Loss of Either Hand by severance — $2,000.00" if the insured shall have suffered such loss while the policy is in force, and shall have survived such loss at least ten days. The policy further provides "that loss of four fingers entire of a hand shall be construed as loss of such hand." The exclusions from coverage in the policy are not relevant in the case at bar.

Plaintiff's evidence consists of the accident policy, a picture of his left hand, and of his testimony. His evidence shows:

He has paid all the premiums on the policy. When defendant issued the policy to him he had all his fingers on his left hand. He worked at the Alma Desk Company, and while at work for it on 24 April

1958, he had an accident when a rip saw cut off three fingers on his left hand — his little finger, his ring finger and his third finger. These three fingers were all severed at approximately the same place. What is left of these three fingers are three small stubs — the little finger stub is about a quarter of an inch long, the ring finger stub is about a half-inch long, and his third finger stub is about three quarters of an inch long.

On 16 July 1960 while sawing off a plywood door with a skill saw at his home, he accidentally severed his fourth finger or forefinger behind the first joint. Two little joint bones stick up on his forefinger. When he uses this finger, it swells somewhat.

Defendant offered no evidence.

The following issue was submitted to the jury, and answered as appears: Did the plaintiff, Charlie Richardson, lose a hand through accident by severance in July 1960? Answer, Yes.

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

Schoch & Schoch By: Arch K. Schoch for plaintiff, appellee.

Jordan, Wright, Henson & Nichols By: Charles E. Nichols for defendant, appellant.

PARKER, J. Defendant offered no evidence. Its sole assignments of error are the refusal of the trial court to grant its motion for judgment of involuntary nonsuit made at the close of plaintiff's evidence, and the denial by the trial court of its like motion, when it stated it would offer no evidence.

The policy provides that it will pay plaintiff insured for loss of one hand by severance $2,000.00, if occurring while the policy was in force, and if plaintiff survived such injury at least ten days. The policy further provides "that loss of four fingers entire of a hand shall be construed as loss of such hand."

Defendant contends that the word "entire" means "whole" or "total," and, therefore, the four fingers of a hand must be entirely, *i.e.*, wholly or totally, severed to meet the requirements for payment under the policy for loss of a hand. However, when the policy refers to fingers, it does not provide that *severance* of four fingers entire of a hand shall be construed as loss of such hand, but clearly and plainly and in explicit words provides "that *loss* of four fingers entire of a hand shall be construed as loss of such hand." It is to be noted that while the policy provision speaks of the "loss of four fingers entire of a hand," it does not say loss of four fingers entire to the palm of the hand.

It is a thoroughly settled rule in the construction of a policy of in-

surance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured. *Roach v. Insurance Co.*, 248 N.C. 699, 104 S.E. 2d 823; *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295.

However, we have in mind that it is our duty to construe policies of insurance as written, not to rewrite them. *Scarboro v. Insurance Co.*, 242 N.C. 444, 88 S.E. 2d 133.

Webster's New Collegiate Dictionary, 2nd Ed., 1953, states: "The hand, or *manus*, includes the *phalanges*, or fingers or fingers and thumb; the *metacarpus*, or hand proper; and the *carpus*, or wrist."

The terms of the policy here are reasonably susceptible of this interpretation: The policy insures plaintiff against the loss of either hand by severance, and it insures him against the loss, not severance, of "four fingers entire of a hand," providing that such loss shall be construed as loss of such hand, and such provision as to loss of four fingers entire on a hand is not restricted or modified by the word "severance" appearing in the terms of the policy as to the "loss of either hand by severance."

Counsel have not referred us to a case concerned with an accident policy containing a provision as to the loss of fingers similar to the one here, nor have we after a diligent search found one.

In *Sheanon v. Pacific Mutual Life Ins. Co.*, 77 Wis. 618, 46 N.W. 799, 9 L.R.A. 685, 20 Am. St. Rep. 151, there was a provision for indemnity in case of the loss of "two entire feet." Plaintiff was accidentally shot in the back by a pistol ball which penetrated his spine, and produced an immediate and total paralysis of the lower part of his body, and entirely destroyed the use of both feet. The Court, after quoting the words of the policy to the effect that the company agrees to pay a certain sum if the insured, while the policy is in force, from a violent and accidental injury, which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot," goes on to say: "This is the language of the policy, and the question is, What does it mean? or What must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt

such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word 'loss,' when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost, as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and, if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body. It is not necessary to go into any recondite or elaborate discussion of the language of the policy, but only to give it its ordinary and popular sense. And, understanding it in that sense, we are very clear that the complaint states a cause of action, and that the demurrer was properly overruled."

In *Sneck v. Travellers' Ins. Co.*, 88 Hun. 94, 34 N.Y. Supp. 545, affirmed in a memorandum decision, 156 N.Y. 669, 50 N.E. 1122, the policy provided for the payment of a certain amount to insured for the "loss by severance of one entire hand or foot." Plaintiff's surgeon testified: "The fingers and heads of all the metacarpal bones were cut off with a planer. . . . A little over half the hand, speaking anatomically, is gone. There are twenty-seven bones in the skeleton of the hand. Thirteen bones are gone entirely, and parts of five more, and the parts of the five are simply the heads of the metacarpal bones and the head of the middle bone of the thumb." On a former trial plaintiff testified he could use the injured hand for certain purposes. On the second trial he testified he had no use of the injured member as a hand, and explained his former testimony by saying he had the use of the whole arm, not the use of the hand. The Court said: "The term 'entire hand' is to be taken in its general acceptation and ordinary meaning. In construing this contract the law does not require an injury which comes within a strictly accurate and technical definition of the words employed, but one which reasonably, fairly, and practically comes within the meaning of the terms employed in their general and

usual meaning and acceptation. In a contract of insurance providing for indemnity for the loss of a limb the compensation to be paid is not merely for the physical pain of its amputation, but principally for the deprivation of its use as a member of the body. It would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration. Is it not more reasonable and logical to conclude that in the use of the language above referred to the 'entire hand' as a part of the human structure is considered in connection with the use to which it is adapted, and the injury which the loss of such use would entail? Is it not also fair to assume that this was regarded by the parties as the sense in which the contract was to be understood, and was one of the considerations which influenced the insured to enter into the contract?" The Court held that the trial court erred in holding that plaintiff had not suffered the loss "by severance of one entire hand," and was not entitled to recover, and granted a new trial.

In *Life & Casualty Ins. Co. v. Peacock,* 220 Ala. 104, 124 So. 229, there was a policy of accident insurance, which insured, *inter alia,* against the loss by severance of both feet. Plaintiff lost her left foot and the toes on her right foot. The Court after citing authority said: "'These cases establish the proposition that, where the policy insures against the loss of a member, or the loss of an entire member, the word 'loss' should be construed to mean the destruction of the usefulness of that member, or the entire member, for the purpose to which, in its normal condition, it is susceptible to application, in the absence of more specific definition in the policy." The Court upheld a judgment for plaintiff.

Lord v. American Mut. Acci. Asso., 89 Wis. 19, 61 N.W. 293, 26 L.R.A. 741, 46 Am. St. Rep. 815, was a suit on an accident insurance policy. The Court said: "But the more serious question is whether the tearing off of three fingers wholly, and a part of the other, and cutting the hand, and destroying the joint of the thumb, as mentioned in the proofs, was the loss of one hand, 'causing immediate, continuous, and total disability' of the same, within the meaning of the contract of insurance. After careful consideration we are constrained to hold that it was a question of fact for the jury; and the jury have found that such loss of the hand was entire. On the part of the defendant it is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured so as

to become useless as a hand, then the defendant became liable for its loss under the contract."

In *Beber v. Brotherhood of Railroad Trainmen,* 75 Neb. 183, 106 N.W. 168, the Court held: It is for the jury to determine whether a total loss of three fingers and an injury to the remaining finger and thumb, which materially interferes with their use, and a cutting away of a part of the palm of the hand, constitute a total loss of the hand within the meaning of a by-law of a mutual benefit association, which provides indemnity for any member in good standing suffering "by means of physical separation, the loss of a hand at or above the wrist joint."

In *Travellers' Protective Ass'n. v. Brazington,* 71 Ind. App. 130, 123 N.E. 221, the Court held: Constitution of fraternal beneficiary association providing for indemnity "in case of loss of four fingers on either hand by severance" construed to require payment "where, through loss by severance of any material part of each of the four fingers on one hand, and because of such severance, each of said fingers was left in such a condition that it was thereafter practically useless."

In *Noel v. Continental Casualty Co.,* 138 Kan. 136, 23 P. 2d 610, the policy provided "for loss of thumb and index finger of either hand . . . one-half said principal sum." The Supreme Court of Kansas said: "The loss of a member of the body, as used in an accident insurance policy, unless restricted or modified by other language, carries the common meaning of the term 'loss,' which is the loss of the beneficial use of the member. Obviously, this may occur when there is not a complete severance of the member from the body. Citing some thirteen cases." See *Garcelon v. Commercial Travellers' Eastern Acc. Ass'n.,* 184 Mass. 8, 67 N.E. 868, 100 Am. St. Rep. 540; *Sisson v. Supreme Court of Honor,* 104 Mo. App. 54, 78 S.W. 297.

Our case of *Brinson v. Insurance Co.,* 247 N.C. 85, 100 S.E. 2d 246, is apposite. In this case the insurance company contracted to pay plaintiff $2,000.00 for the permanent loss of the entire sight of one or both eyes through external, violent and accidental means. Plaintiff's left eye was injured in a fall from a truck, and as a result he is permanently blind in the injured eye to the extent he cannot distinguish objects or colors or tell the difference between day and night, though he can perceive some movement to the side and discover there is a little light when the sun is shining. The Court after citing plenary authority to the effect that the insured need not be totally blind, but that if he has lost all practical use of his eye, which practical use cannot be restored, he is entitled to recover, for such amounts in effect to the entire loss of an eye. Plaintiff's evidence was held sufficient to entitle him to a jury trial.

Muse v. Metropolitan Life Ins. Co., 193 La. 605, 192 So. 72, strongly relied upon by defendant is clearly distinguishable. There "the policy provides in plain terms that its beneficiaries are entitled to a certain sum for 'Loss of one hand by severance at or above wrist-joint.' "

Plaintiff's evidence shows conclusively that, while the policy was in force, he sustained by accident the loss by severance of three fingers entire, *i.e.*, wholly, totally, on his left hand. His evidence also shows that later, while the policy was in force, he sustained by accident the loss by severance of his forefinger behind the first joint on his left hand, that two little joint bones stick up on this forefinger, and that when he uses this finger, it swells some. We think, and so hold, that there is a loss of a finger entire, *i.e.* wholly, totally, if a sufficient part of it has been destroyed to make it useless as a finger.

To the minds of some men the evidence here and the sight of plaintiff's left hand would warrant the conclusion that there was a total loss of the use of "four fingers entire" as fingers on his left hand, while to the minds of others it might seem that the loss of part of his forefinger on his left hand did not entirely destroy its use as a finger, and, therefore, plaintiff did not have a total loss of the use of "four fingers entire" as fingers on his left hand. Such being the case, plaintiff was entitled to have a jury pass upon the evidence, and the trial judge properly overruled defendant's motions for judgment of involuntary nonsuit.

The judgment below is

Affirmed.

FIRST PRESBYTERIAN CHURCH OF RALEIGH, NORTH CAROLINA, AND BOARD OF MANAGERS OF PEACE COLLEGE v. ST. ANDREWS PRESBYTERIAN COLLEGE, INC.

(Filed 24 May, 1961.)

1. Injunctions § 13—

Where plaintiff seeks injunctive relief upon allegations disclosing a grave controversy in regard to the subject matter, and it appears that if the matter is not held in *statu quo* plaintiff's primary equity, even though established upon the hearing, would be lost or irreparably impaired, while continuance of the status to the hearing would result in no injury to defendant which could not be compensated in money, the temporary order will be continued until the hearing upon the merits, since to do otherwise would be to determine the merits upon the hearing of the order to show cause.

2. Colleges and Universities—

Where, in the creation of a successor corporation to own and operate a denominational educational institution, it is expressly provided in the articles of incorporation that the operation of the institution should not be interrupted until opportunity had been given a particular church and Presbyteries of the denomination to resume control of the institution, and there is grave controversy as to whether the power to resume control was joint in the specified Presbyteries and the church, or whether the church alone, the Presbyteries having waived their right to resume control, could exercise such right, a temporary injunction is properly continued to the hearing upon the merits.

3. Same: Parties § 4—

In an action between two denominational educational corporations to determine which has the right to operate a particular college and control its assets, the Board of Trustees of plaintiff is a proper party, since order authorizing such Board to continue control may be issued, and therefore motion of defendant to dismiss the action as to such Board is properly denied. The Synod controlling defendant is not a necessary party, and therefore motion of defendant that it be made a party is addressed to the discretion of the court.

APPEAL by defendant from *Bickett, J.*, in Chambers in WAKE on February 15, 1961.

This action was begun 12 January 1961 to obtain a judgment declaring the right of First Presbyterian Church of Raleigh, North Carolina (hereafter called Church), to reassume control of and to operate Peace College in Raleigh (hereafter called Peace) with the right of plaintiff Board of Managers of Peace (hereafter called Board) to operate Peace in Raleigh until the rights of Church have been determined.

Plaintiff Church filed a verified complaint setting forth factual allegations on which it based its asserted right to reassume control over the operation of Peace, notwithstanding a consolidation agreement between Presbyterian College for Men, Inc., Peace College, Inc., and Flora Macdonald College creating defendant. Plaintiff Board joined in the action "for the sole purpose of having the Court declare and determine its duties, responsibilities and obligations in connection with the operation of Peace College pending the final determination of this action. . ." It expressly averred that it was not taking sides but desired to perform its duties in accordance with the rights of the parties as determined by the court.

The complaint contained a prayer for injunctive relief to prevent defendant from interfering with the control and operation of Peace pending determination of Church's right to reassume control. When process issued, plaintiffs applied to Judge Carr, then presiding over the

courts of Wake County, for an injunction as prayed for in the complaint. He declined to issue the restraining order without notice to defendant. He entered an order directing the parties to appear before Judge Bickett, Resident Judge, on 21 January 1961. Process was served on defendant 18 January 1961. Judge Carr subsequently fixed the time for the hearing before Judge Bickett as 4 February 1961. On that date defendant moved to dismiss the action as to Board for that it was not a real party in interest. It also moved to make the Synod of North Carolina Presbyterian Church in the United States (hereafter called Synod) a party defendant. At the hearing before Judge Bickett defendant filed affidavits to support its assertion that Church had not made such showing as warranted the court in issuing an order preventing it from taking possession of the assets and exercising control and supervision over Peace.

Judge Bickett denied the motions made by defendant, made findings of fact on which he issued an order enjoining defendant from interfering with the control or operation of Peace pending a determination of the right of plaintiff Church to supervise and control. Defendant excepted to the findings of fact, the conclusions of law, and order based thereon, and appealed.

Malcolm B. Seawell and Edward B. Hipp for plaintiff appellees.
Smith, Leach, Anderson & Dorsett for defendant appellant.

RODMAN, J. The questions for decision are these: (1) Was there error in granting the restraining order? (2) Was there error in denying the motions with respect to parties?

The law applicable to a decision of the first question was stated by the Supreme Court of the United States in *Ohio Oil Company v. Conway, Supervisor,* 279 U.S. 813, 73 L. ed. 972, in this language: "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted." This statement of the law was quoted with approval by this Court in *Restaurant, Inc. v. Charlotte,* 252 N.C. 324, 113 S.E. 2d 422, and *Castle v. Threadgill,* 203 N.C. 441, 166 S.E. 313.

Walker, J., said in *Cobb v. Clegg,* 137 N.C. 153: "In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that

the plaintiff will be able to maintain his primary equity and there is a reasonable apprehenison of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in *statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." Recent applications of the rule appear in *Coach Lines v. Brotherhood,* 254 N.C. 60; *McDaniel v. Quackenbush,* 249 N.C. 31, 105 S.E. 2d 94; *Railroad v. Greensboro,* 247 N.C. 321, 101 S.E. 2d 347; *Edwards v. Hunter,* 246 N.C. 46, 97 S.E. 2d 463.

Defendant did not, by demurrer, challenge the sufficiency of the factual allegations to state a cause of action. It has not answered. It merely presented affidavits to establish facts which it insists completely negative plaintiff's assertion of a right to reassume control.

The evidence presented to Judge Bickett is sufficient to establish the following facts:

William Peace, an elder in Church in 1857, gave $10,000 to promote the education of women. This gift was the nucleus for the establishment of an educational institution for women. Its site is located on Peace Street in Raleigh.

In 1911 George Allen and others created a corporation known as Peace Institute, Inc. "for the purpose of providing for the higher education of women, under the name or style of 'Peace Institute, Inc.' " to be managed by a board not to exceed thirty trustees, two to be elected by Synod, two by each presbytery of Synod, and seven by the officers of Church, with a provision that if any presbytery failed to elect trustees, the other trustees might elect the additional members. Only five Presbyteries, Albemarle, Granville, Kings Mountain, Orange, and Wilmington, exercised the option accorded them to elect trustees.

In 1954 Peace College, Inc. was incorporated under the laws of North Carolina. It was created "for the purpose of conducting and perpetuating a Christian college under the name of Peace College for the higher education of women." Sec. 6 of the articles of incorporation provided: "The Board of Trustees of this Corporation shall not suspend the work of Peace College until ample opportunity is given to the First Presbyterian Church of Raleigh and the Presbyteries of

Albemarle, Granville, Kings Mountain, Orange, and Wilmington, which organizations exercised control of said Peace College up to the time this certificate of incorporation became effective, to reassume control of Peace College from the Synod of North Carolina of the Presbyterian Church in the United States."

In the summer of 1955 Synod adopted a report of its committee on educational institutions looking to the establishment of a college in the eastern section of North Carolina by the consolidation of Flora Macdonald College, Peace College, Inc., and Presbyterian Junior College for Men, Inc.

In conformity with the resolution of Synod, an agreement dated 17 December 1957 was executed by Presbyterian College for Men, Inc., Peace College, Inc., and Flora Macdonald College, creating a corporation known as Consolidated Presbyterian College, Inc., which name was thereafter changed to St. Andrews Presbyterian College, Inc.

The consolidation agreement recites the governing bodies of these three institutions had authorized the consolidation. It refers to the action of the board of trustees of Peace College, Inc., adopted 17 December 1957, authorizing its officials to execute the consolidation agreement. That resolution recited "that the work of the College would not be suspended until ample opportunity had been given to the original agencies to reassume control," and authorized the president and secretary of Peace to execute the consolidation agreement "provided that said agreement fully preserves any and all reassumption rights now vested in the First Presbyterian Church of Raleigh by paragraph 6 of the certificate of incorporation of Peace College, Inc."

The consolidation agreement contains this language: "Provided, that this consolidation shall be subject to any and all reassumption rights now existing in the charter of any constituent or consolidating corporation in favor of the organization heretofore owning or exercising control of any said constituent corporation."

The quoted language must be read and interpreted in the light of the fact that each of the Presbyteries of Wilmington, Orange, Granville, and Kings Mountain had, prior to the adoption of the resolutions by the trustees of Peace authorizing consolidation, expressly released and waived any right or privilege which it had or might thereafter have "to reacquire or re-assume control of Peace College or any of its property whether by virtue of any provisions of the charter of Peace College, Inc., or otherwise."

Defendant insists that the right to reassume control was a joint right to be exercised only by the named Presbyteries and Church and

as the Presbyteries have expressly waived their rights, there is nothing left which authorizes Church to act.

Church, however, maintains that the parties contemplated and intended that the right reserved was several as well as joint; therefore Church had the right to reassume irrespective of the action of the Presbyteries. It asks: Why make any reference to the right to reassume control if no such right then existed or could thereafter arise because of the express waiver by the Presbyteries?

We express no opinion on the interpretation of the consolidation agreement. The meaning of the agreement, viewed in the light of the authority of the officials of Peace to execute it, must be determined at a trial on the merits. Our factual review is limited to the justification for continuing the restraining order to the final hearing.

It is manifest that if the educational institution now in operation in Raleigh is closed, and defendant is permitted to take all of the assets in August of this year, as it has announced it intends doing, those presently attending the college would be materially affected, and plaintiffs will find it difficult, if not impossible, to resume operations if the court, when the cause is heard on the merits, finds Church has a right to do so.

For the reasons given, we are of the opinion and hold that the court properly continued the restraining order to the hearing.

Since Peace is to continue to operate, the court properly authorized Board to exercise control. It may not be a necessary party but certainly it is a proper party.

Synod has not asked that it be made a party. It is the authority which controls and directs its agency, St. Andrews Presbyterian College, Inc., a body corporate. Clearly Synod is not a necessary party. Hence the court was not compelled to make it a party. The conclusion now reached is not intended to indicate how the court should rule if a motion directed to the court's discretion is hereafter made by Synod asking that it be made a party.

Affirmed.

IN THE MATTER OF THE CUSTODY OF AMY ELIZABETH ORR, ERIC JAMES ORR, AND WILLIAM EARL ORR, MINOR CHILDREN OF MRS. BARBARA ORR, PETITIONER, AND WILLIAM ORR, RESPONDENT.

(Filed 24 May, 1961.)

1. Habeas Corpus § 4—

In *habeas corpus* proceedings to determine the right to custody of minors, the findings of fact of the court are conclusive when supported by competent evidence.

2. Appeal and Error § 22—

An exception to the judgment does not challenge the sufficiency of the evidence to support the court's findings of fact, exceptions directed to the specific findings appellant wishes to controvert being necessary for such purpose.

3. Domicile § 2—

Evidence that, after their separation, the wife advised friends that she was considering making her home in North Carolina, and that thereafter she returned to this State and definintely decided to make her home in a city of this State, and thereafter resided here, corroborated by affidavits of her friends, is sufficient to support a finding that she had made her domicile here.

4. Habeas Corpus § 3: Infants § 8—

Where a wife, separated from her husband, has made her home in this State and has the minor children of the marriage residing with her here, the courts of this State have jurisdiction of a controversy as to the right of custody of the children, even though the husband is domiciled in another state, the residence of the children here being sufficient to confer jurisdiction upon our courts.

5. Same: Judgments § 1—

Where writ in *habeas corpus* to determine the right of custody of minor children of the marriage is personally served on the nonresident husband, the court issuing the writ has jurisdiction to render an *in personam* judgment against the husband.

6. Habeas Corpus § 3: Infants § 8—

When, at the time of filing petition in *habeas corpus* for the custody of minor children, the petitioning wife is domiciled here and the children are resident in this State, the jurisdiction of the court cannot thereafter be defeated by the wrongful act of the nonresident husband in removing the children from this State in violation of lawful order theretofore issued by the court in the proceeding.

7. Trial § 4—

Where, after denial of respondent's motion for continuance, both parties introduced evidence by affidavit without objection by either, and it appears that the evidence presented was adequate for the adjudication of the controversy, and there is nothing in the record to show that either party was deprived of adequate opportunity of presenting any evidence

which he might wish to offer, the record fails to show that the refusal of the motion for continuance was arbitrary, and the discretionary refusal of the motion will not be disturbed.

APPEAL by William Orr, respondent, from *Preyer, J.*, in Chambers at GREENSBORO on September 30, 1960.

On 24 August 1960 Barbara Orr, petitioner, filed with the Superior Court of Guilford County a petition for writ of *habeas corpus* to determine the right to custody of the minors named in the caption.

The allegations of the petition summarily stated are: Petitioner and William Orr, respondent, were married in April 1949. They separated in February 1960 and have, since that date, lived separate and apart. The infants Amy Elizabeth, Eric James, and William Earl are children of the marriage. Petitioner has her residence in Greensboro. Respondent is a resident of Orlando, Florida. The children of the marriage are actually in Greensboro, living with petitioner, and domiciled in North Carolina. Respondent has threatened to forcibly take the children from the custody of petitioner and carry them to Florida. Petitioner is a proper and suitable person to have custody of the children. Respondent is emotionally disturbed and unstable, erratic, improvident, unfit, unable, or unwilling to give said minors proper care, and he is not a fit person to have their custody.

Based on the allegations of the verified petition, Judge Gwyn, on 24 August 1960, issued a writ directed to the sheriff of Guilford County commanding him to summon the respondent to appear before Judge Preyer in Greensboro on 24 September 1960 to show cause if any he had why the court should not decide the question of custody of the infants and make such orders with respect thereto as might seem just and proper. He further ordered: "That pending hearing and final determination of this proceeding, said minor children shall remain in the custody of petitioner within the State of North Carolina, and that said William Orr, respondent, shall not remove or cause said minor children to be removed from the jurisdiction of this Court." This writ was personally served on respondent by the sheriff of Guilford County on 27 August 1960. Because of another engagement, Judge Preyer postponed the hearing from 24 September, as fixed by Judge Gwyn, to 30 September 1960.

At the time fixed by Judge Preyer respondent entered a special appearance and moved to dismiss. As a basis for his motion he asserted (1) that he, his wife, and the children were all residents of Florida, (2) the infants Eric James and William Earl were then in Florida, (3) that petitioner and the oldest child, Amy Elizabeth, had only temporary residence in this State. That motion was denied. Respon-

dent excepted. He thereupon moved for a continuance. That motion was denied. He excepted. He then filed an answer. He denied that petitioner was a resident of Greensboro or domiciled in North Carolian or that the two youngest children were in fact in North Carolina. He admitted that he was a resident citizen of Florida. He did not deny the marriage. He denied that petitioner was a fit or suitable person to have custody of the children, asserted that he was the proper person entitled to the custody, and their best interest and welfare would be served by awarding custody to him.

The court heard evidence offered by the parties in support of their respective contentions. Based on the evidence offered it found facts summarily stated or quoted as follows:

Petitioner, domiciled in North Carolina, had custody and control of the infants at the time she made the application for the writ of *habeas corpus* and had had such control since she and respondent separated in February 1960. The infant Amy Elizabeth was present at the hearing. The writ issued by Judge Gwyn was lawfully and personally served on respondent in Guilford County on 27 August 1960.

"That on August 28, 1960, the respondent, in violation of the provisions of the writ of habeas corpus served upon him, and with the assistance of his brother, Donald Orr, forcibly abducted the children Eric James Orr and William Earl Orr from the custody of the petitioner and without her consent, and took them outside the State of North Carolina, and that they have not been returned to the custody of the petitioner."

Petitioner and respondent were married in 1949 but have been living separate and apart since February 1960 when respondent left petitioner. Respondent is "emotionally disturbed and unstable, erratic, improvident, and unfit to care for minor children."

"That the ages of the minor children whose custody is at issue in this action are: Amy Elizabeth Orr, daughter, 6½ years; Eric James Orr, son, 5 years; and William Earl Orr, son, 1½ years;

"That Mrs. Barbara Orr, mother of these children, is a person of good character and habits who has a deep and sincere affection for her children; that said children are of an age to require their mother's care, love and affection; that petitioner is in a position to provide such care;

"That it will be to the best interest of said children if they are placed in the care and custody of Mrs. Barbara Orr, petitioner herein."

Based on its findings the court awarded custody of all three of the minors to petitioner. It directed respondent "to return the children, Eric J. Orr and William Earl Orr to the custody of petitioner within ten days next following the date of this order," and enjoined

and restrained respondent from interfering with the custody of the minors awarded petitioner. Respondent was directed to pay petitioner $100 per month "for the maintenance and support of said minor children."

Defendant did not appear at the hearing but was represented by counsel and offered evidence to support his contentions. He excepted to the judgment and appealed.

Wharton, Ivey & Wharton for petitioner appellee.
J. F. Motsinger for respondent appellant.

RODMAN, J. Respondent assigns three errors, namely: (1) the refusal of the court to dismiss the action in accordance with his motion made on his special appearance; (2) the refusal of the court to continue the hearing and make further investigation with respect to the fitness of petitioner and respondent to have custody of the children; (3) signing the judgment awarding custody of the children to petitioner.

Respondent does not challenge by exception any of the findings of fact made by the court. Findings of fact made in the custody proceeding, when supported by competent evidence, are conclusive on appeal. *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85. Findings cannot be challenged because not supported by competent evidence by a mere exception to the judgment. The exception must be directed to the specific finding which the complaining party contends is not supported by competent evidence. *Rubber Co. v. Crawford,* 253 N.C. 100, 116 S.E. 2d 491; *Jarvis v. Souther,* 251 N.C. 170, 110 S.E. 2d 867; *Columbus County v. Thompson,* 249 N.C. 607, 107 S.E. 2d 302; *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421.

Notwithstanding our procedural rules noted above, we have, because of the challenge to the jurisdiction of the court and the propriety of exercising such jurisdiction, examined the evidence on which Judge Preyer made his findings.

Petitioner is explicit in her statement that she considered making her home in North Carolina as early as July 1960. She and the children visited Dr. Greenfield, an assistant professor of sociology at Woman's College, and his wife on the way from Florida to Indiana on a visit to petitioner's parent. Petitioner informed her friends, the Greenfields, of her plans. Upon completion of the visit to her parents, she returned to Greensboro and early in August 1960 definitely decided to make that her home. She secured employment there and secured a place where she and the children made their home. Her testimony relating

to the establishment of her residence and domicile in Greensboro is supported by the affidavits of Dr. and Mrs. Greenfield.

That the children were living with petitioner when she asked the court to take jurisdiction is conceded. Their presence in North Carolina was not casual and temporary. There were both abode and intent to make Greensboro a permanent home. That sufficed to vest the court with jurisdiction. *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744; *Hoskins v. Currin,* 242 N.C. 432, 88 S.E. 2d 228; *Gafford v Phelps,* 235 N.C. 218, 69 S.E. 2d 313; *Finlay v. Finlay* (N.Y.) 148 N.E. 624, 40 A.L.R. 937; *Rogers v. Commonwealth* (Va.) 11 S.E. 2d 584.

The Supreme Court of Florida has declared the law in this language: "The law is and has been from time immemorial that each state is not only empowered, but is charged with the duty, to regulate the custody of infants within its borders. This is true even though the parents may be residents of another state. (Citations) For this, the residence of the child suffices, though the domicile be elsewhere." *Di Giorgio v. Di Giorgio,* 13 So. 2d 596. The Superior Court of Guilford County had jurisdiction to pass on the question of custody, and the facts warranted the exercise of its jurisdiction.

Personal service of the writ on respondent in Guilford County is established by the officer's return and is not challenged by respondent. This gave the court the right to enter an *in personam* judgment against respondent, enforceable by appropriate process whenever he might be found within the jurisdiction of the court.

The court's power to act and award custody of the oldest child cannot be doubted.

The finding that respondent, in disregard of Judge Gwyn's order, had, by force, removed the two youngest children from petitioner's custody and taken them out of the State is established by the affidavit of respondent's brother, an accomplice in the attempt to thwart the jurisdiction of the court and contemptuously disregard its lawful orders. This affidavit was part of respondent's evidence. The brother was, by his admission, charged and convicted of a criminal assault for his part in forcibly taking the children from the custody of petitioner.

Respondent contends his flagrant violation of the lawful order of the court not to remove the children from its jurisdiction deprived the court of the right to hear and determine what would best promote the welfare of those children. The contention is wanting in merit. The right to hear and decide came into being the instant the writ was served on respondent. He could not thereafter deprive the court of the jurisdiction so acquired. *Kinross-Wright v. Kinross-Wright,* 248 N.C. 1, 102 S.E. 2d 469; *Maloney v. Maloney,* 154 P. 2d 426; *Vaughan v.*

Vaughan, 100 So. 2d 1; *Brown v. Cook,* 260 P. 2d 544; *Onderdonk v. Onderdonk,* 88 N.W. 2d 323; *Clemens v. Kinsley,* 239 P. 2d 266; *Barnes v. Rogers,* 41 So. 2d 58; *Boardman v. Boardman,* 62 A. 2d 521, 13 A.L.R. 2d 295; *Miller v. Miller,* 46 N.W. 2d 618; *Griffin v. Harmon,* 132 S.E. 108; 21 C.J.S. 144.

The court correctly declined to dismiss the action on respondent's special appearance and motion based on the assertion that the court did not have jurisdiction.

Without objection the matters in controversy were heard on affidavits. Respondent submitted for the court's consideration his own affidavit, the affidavit of his brother, his mother, and another in support of his claims. Petitioner likewise submitted affidavits. There is nothing to indicate that respondent was deprived of adequate opportunity of presenting any evidence which he might wish to offer. The evidence presented to the court was adequate for it to determine the question of jurisdiction and what was for the best interest of the parties. Notwithstanding the assertion that the refusal of the court to continue was arbitrary, we find nothing to support the assertion. The error assigned in refusing to continue is without merit.

For practical purposes the only fact in controversy was: Will the welfare of the children be best served by awarding custody to petitioner or respondent? Each of the parents asserted the unfitness and inability of the other to properly care for the minors. The court, on ample evidence, resolved this question of fact in favor of petitioner.

Finally, respondent inquires how the decree, insofar as it relates to the two youngest children, can be enforced. A sufficient answer is: That question is not now before us.

If it be that respondent is beyond the jurisdiction and hence the power of this Court to enforce orders lawfully made, courts do exist where respondent resides with adequate power to compel respect and obedience to lawful orders of a court having jurisdiction of the parties and subject matter.

We find

No error.

EFFIE BANKS WILLIAMS v. EDDIE WILLIAMS ADMINISTRATOR OF DAVID M. WILLIAMS; EDDIE WILLIAMS AND WIFE, MRS. VIOLA WILLAMS; AND CASSIE MORGAN WILLIAMS, INTERVENOR.

(Filed 24 May, 1961.)

1. Evidence § 10—

A party voluntarily intervening has the burden of proving his case and establishing the rights claimed.

2. Dower § 8: Marriage § 2—

Where, in proceedings for the allotment of dower, a party intervenes, admits the prior marriage of petitioner but proves a second marriage to herself, the burden is upon intervenor to prove that the first marriage had been terminated by divorce so as to establish the legality of the second marriage, and in the absence of such evidence nonsuit of the intervenor's claim is proper. Distinction is noted where the first spouse is dead at the time of the hearing.

RODMAN, J., dissenting.

DENNY and BOBBITT, JJ., concur in dissent.

APPEAL by intervenor, Cassie Morgan Williams, from *Hooks, S.J.*, at January-February 1961 Term of JOHNSTON.

Special proceeding for the allotment of dower.

On 29 February 1960, the petitioner, Effie Banks Williams, filed a special proceeding in the office of the Clerk of the Superior Court of Johnston County alleging that David Williams died intestate on 25 April 1959, possessed of two tracts of land containing in the aggregate 29.9 acres located in Johnston County and requesting that she, as surviving widow of David Williams, be alloted dower in said land.

Thereafter Cassie Morgan Williams filed an interplea in which she alleges that she married the intestate in South Carolina on 30 December, 1953, and that she is the surviving widow and, therefore, entitled to dower.

Upon the issues raised by the intervenor the cause was transferred to the civil issue docket of the Johnston County Superior Court. When the matter came on for hearing it was stipulated by the parties that the petitioner, Effie Banks Williams, and the intestate, David Williams, were lawfully married on 21 December 1929, and lived together as man and wife, and that David Williams died intestate on 25 April 1959, seized and possessed of the land in controversy.

At the close of all the evidence the petitioner's motion for judgment as of nonsuit as to the intervenor was allowed and the court proceeded to make findings of fact and conclusions of law thereon.

From judgment in favor of the petitioner, the intervenor excepts and appeals to the Supreme Court, and assigns error.

James R. Pool, Levinson & Levinson for plaintiff appellee.
Lyon & Lyon for intervenor appellant.

WINBORNE, C.J. The determinative question on this appeal is whether or not the lower court erred in nonsuiting the intervenor and concluding as a matter of law, upon the admitted facts and the evidence adduced at the trial, that the petitioner is entitled to dower in the lands of which David M. Williams died seized and possessed.

Ordinarily the petitioner has the burden of proof. However, in cases of voluntary intervention the intervenor has the burden of proving his case and establishing the rights claimed. *McKinney v. Sutphin,* 196 N.C. 318, 145 S.E. 621; *Jennings v. Shannon,* 200 N.C. 1, 156 S.E. 89.

It is said in the *McKinney* case, *supra:* "The intervener becomes the actor and the burden of the issue is on the intervener," citing *Sitterson v. Speller,* 190 N.C. 192, 129 S.E. 191; *Lockhart v. Ins. Co.,* 193 N.C. 8, 136 S.E 243; *Sugg v Engine Co.,* 193 N.C. 814, 138 S.E. 169.

In the case in hand there is evidence that the petitioner and the intestate were married in 1929 and lived together for about two years before separation. In fact the intervenor stipulated and agreed that Effie Banks Williams and David Williams were lawfully married on 21 December 1929, and lived together as husband and wife in Johnston County. There is further evidence to the effect that after the separation the deceased visited petitioner periodically for four years. There is also evidence that the parties involved lived only four or five miles from each other from the time of the marriage between the petitioner and deceased in 1929 until the latter's death in 1959. Furthermore, the petitioner testified that she had not married again; that she had not signed any papers concerning a divorce or separation; and that she had never been served by anyone with papers relating to an action for divorce. The intervenor, Cassie Morgan Williams, offered evidence of her alleged marriage to the intestate in 1953, and that thereafter she continuously lived with him in his home until the date of his death.

Indeed, the intervenor, Cassie Morgan Williams, does not allege in her interplea that David Williams was ever divorced from the petitioner, Effie Banks Williams, or that she had defeated her right to dower by abandonment and infidelity as provided by G.S. 52-20. In short, the intervenor has not alleged nor offered any evidence show-

ing or tending to show that David Williams was legally able to marry her on 30 December 1953.

One who asserts a property right which is dependent upon the invalidity of a marriage must make good his cause by proof. See *Kearney v. Thomas,* 225 N.C. 156, 33 S.E. 2d 871.

The appellant relies on the language in the *Kearney* case to reverse the trial court's ruling. There it is said: "A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first and former marriage." However, in that case, the death of the first wife being admitted, the question before the Court was whether or not the evidence was sufficient to be submitted to the jury upon the validity of a subsequent marriage.

The law indulges in presumptions from the necessities of the case in the absence of sufficient evidence to establish the fact to be proved. In the present case, the burden was not upon the petitioner to show that her marriage was valid because this was stipulated and admitted by the intervenor. And the burden was upon the intervenor to show by evidence that the marriage had been invalidated or dissolved. This she has failed to do. In fine, all the evidence is to the effect that the marriage between Effie Banks Williams and David Williams had not been legally dissolved at his death. There is no evidence to the contrary. Therefore, the conclusion is that the court properly nonsuited the intervenor and decided the questions as a matter of law.

For reasons stated the judgment from which appeal is taken is

Affirmed.

RODMAN, J., dissenting: Decisive of this controversy is the answer to this question: Was Cassie Morgan Williams lawfully married to David Moses Williams, who died 25 April 1959?

The majority concludes as a matter of law the question must be answered in the negative. I think the evidence requires a jury determination.

Perhaps some amplification of the evidence as stated in the opinion may be helpful. Petitioner Effie Banks and David Williams were married in 1929. At the time of his death she lived four or five miles from him. Petitioner, a witness in her own behalf, did not testify how long she and deceased lived together as husband and wife, but evidence offered by petitioner would justify the jury in finding that the marital relationship lasted no longer than four years. There was evidence from which the jury could find that petitioner and deceased lived within

four or five miles of each other from the time of their separation until his death.

On 17 August 1941 a marriage certificate was issued in Dillon, South Carolina, to David Williams and Louella Pearce. Pursuant to this certificate a marriage ceremony was performed in South Carolina. They returned to Johnston County and lived as man and wife until Louella's death in 1952. In December 1948 a deed for land in Johnston County was made to David M. Williams and wife Louella C. Williams, perhaps a part of the land in which petitioner now seeks dower. In March 1952 David M. Williams and wife Louella C. Williams executed a mortgage or deed of trust on real estate in Johnston County. On 21 December 1953 the register of deeds of Johnston County issued a certificate authorizing the marriage of David M. Williams and Cassie Morgan. This was more than a year after the death of Louella. The certificate was duly returned showing the marriage ceremony was performed. From that time until Williams' death, nearly five and one-half years, they lived together as man and wife in Johnston County. A death certificate was issued and recorded showing "Name of husband or wife: Cassie Williams." David Williams lived within four or five miles of petitioner during the eighteen years he was openly proclaiming Louella, and following her death, Cassie, as his wife. Apparently the truthfulness of that assertion was not challenged until after David's lips were sealed in death.

Does this evidence require submission of the determinative question of fact to the jury? I think it does. The reason leading to that conclusion is clearly and concisely stated by *Buchanan, J.*, in *Parker v. American Lumber Corp.*, 56 S.E. 2d 214, 14 A.L.R. 2d 1. He said: "The decided weight of authority, and we think the correct view, is that where two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than and overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. Where both parties to the first marriage are shown to be living at the time of the second marriage, it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumes morality and legitimacy, not immorality and bastary." This statement of the law is supported by many cases assembled in the notes to the *Parker* case, 14 A.L.R. 2d 9-60.

Many other cases announcing the same legal principle are to be found in *Osmak v. American Car & Foundry Co.*, 77 A.L.R. 722, and the annotations supplementing that report. It is said in 55 C.J.S. 894: "(W)here a valid first marriage has been established, it may be pre-

sumed in favor of the second marriage that at the time thereof the first marriage had been dissolved, either by decree of divorce or by the death of the former spouse, so as to cast the burden of adducing evidence to the contrary on the party attacking the second marriage." In note 3 are assembled cases supporting the presumption of divorce terminating the first marriage.

This legal presumption so generally recognized and applied led *Seawell, Jr.*, speaking for a unanimous Court, to quote Chamberlayne, Trial Evidence and say: " 'A second or subsequent marriage is presumed legal until the contrary be proved, and he who asserts its illegality must prove it. In such case the presumption of innocence and morality prevail over the presumption of the continuance of the first or former marriage.' This statement is so abundantly supported by well-considered cases, so consonant with reason, and so consistent with analogous practices, as to justify its adoption." *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871. Among the more recent cases applying the rule as there announced are *Page v. U. S.*, 193 F. 2d 936, and *Batts v. U. S.*, 120 F. Supp. 26, both based on North Carolina law; *Harper v. Dupree*, 345 P. 2d 644; *In re Nidever's Estate*, 5 Cal. Rep. 343; *King v. Keller*, 117 So. 2d 726.

Could the court weigh the evidence offered by petitioner for the purpose of determining whether it outweighed the presumption and evidence supporting intervenor's claim, or was it required to submit that question to the jury?

Brown, J., stated the law in this manner: "Whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether such presumption is rebutted by parol evidence, introduced for the purpose, must go to the jury, unless the truth of such rebutting testimony is admitted." *Fortune v. Hunt*, 149 N.C. 358. This is a repetition of the law as declared by *Avery, J.*, in *Kendrick v. Dellinger*, 117 N.C. 491. *Trust Co. v. Bank*, 166 N.C. 112, 81 S.E. 1074; *In re Will of Wall*, 223 N.C 591, 27 S.E. 2d 728; *Davis v. R.R.*, 134 N.C. 300; *Brothers v. Jernigan*, 244 N.C. 441, 94 S.E. 2d 316; *Page v. U. S., supra;* McCormick, Evidence, sec. 311, p. 650; 88 C.J.S. 473-474.

If *Kearney v. Thomas* is not the law in North Carolina, we ought, I think, to expressly overrule it, specifically stating what the law is.

DENNY and BOBBITT, JJ., concur in dissenting opinion.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND NORTH CAROLINA ASSOCIATION OF LAUNDERERS AND CLEANERS v. PIEDMONT NATURAL GAS COMPANY, INC.

(Filed 24 May, 1961.)

1. Appeal and Error § 21—

A sole exception to the judgment presents for review only whether error of law appears on the face of the record.

2. Gas § 3: Utilities Commission § 3—

The reasonableness of classifications of customers of a utility depends upon a number of factors, such as quantity of energy used, the time of use, the manner of service, and the equipment which the utility must provide and maintain in order to take care of the requirements of a particular class of customers.

3. Same—

The fact that coin-operated washers and dryers in launderettes are substantially the same as those used in residences has no bearing upon whether this class of customers should be given the same rates as residential users or should be given rates other than the usual commercial classification, and a classification of the Utilities Commission based upon evidence of such similarity of equipment is not supported by substantial and material evidence.

4. Same—

Variances in the day to day use of gas by a particular classification of customers and the time of day when such customers consume their peak load may be sufficient in some instances to affect rates to such customers, since a utility must invest sufficient capital in plant and equipment to meet the peak demands.

5. Same—

A utility must make no unreasonable discrimination in rates between customers receiving the same kind and degree of service.

6. Same—

The fact that customers of a launderette participate by inserting coins in its washing and drying machines is immaterial to, and constitutes no basis for, a classification of such commercial users distinct from other commercial customers of the utility.

7. Same—

Rates of different utilities are not competent or material in fixing the rates of another utility in the absence of evidence showing the comparative costs and conditions under which the respective utilities operate.

8. Utilities Commission § 5—

Where an order of the Utilities Commission granting complainants a reduction in rates must be reversed because findings of the Utilities Commission are not supported by competent, material, and substantial evidence, the remand to the Commission should not ordinarily direct

dismissal, but the Commission should be allowed to hear additional evidence in order to determine in the manner provided by law whether there is any unfair or unjust discrimination in the rates charged complainants.

APPEAL by complainant from *Campbell, J.*, 16 January 1961, in Chambers, Charlotte, North Carolina. From MECKLENBURG.

This cause was instituted before the North Carolina Utilities Commission (hereinafter referred to as Commission) by a complaint verified on 11 September 1959 and filed with said Commission by the North Carolina Association of Launderers and Cleaners (hereinafter referred to as complainant or complainants) on behalf of its members operating coin-operated and fast-service laundries in the area served by the Piedmont Natural Gas Company, Inc. (hereinafter referred to as Piedmont), alleging that the commercial rates now applicable to them in Schedule No. 11 are excessive, unreasonable, unfair, unjust and unwarranted, and that they are entitled to rates as low as those provided for residential users in Schedule No. 10, or a rate substantially lower than the present commercial Schedule No. 11.

The names and addresses of the 41 members of the complainant Association on whose behalf the complaint was filed are set out in Schedule A, attached to and made a part of the complaint.

Piedmont shortly thereafter filed a request for a general rate increase applicable to all its customers and this cause was heard as a companion case to the general rate increase application. This complainant and its members were also protestants to the general rate increase application, and the order entered therein contained the following provision: "The rates and charges which were in effect on October 16, 1959, shall be reinstated as the lawful rates and charges of the Company, after amendments in accordance with the order of this Commission in Docket G 9, Sub 31," (which is the docket in this proceeding). The order of the Commission denying Piedmont's application for a general rate increase was reversed on appeal to the Superior Court, and the order of the Superior Court, reversing the order of the Commission and remanding the cause to the Commission for further findings and determination, was affirmed on appeal to this Court, *ante* 536.

Piedmont's rates:

Schedule No. 10, for residential users, is as follows:

"First 300 cu. ft. or less per month $1.35. Next 700 cu. ft. per month @ $0.29 per hundred cu. ft. Next 2,000 cu. ft. per month @ $0.165 per hundred cu. ft. All over 3,000 cu. ft. per month @ $0.11 per hundred cu. ft."

Schedule No. 11, for commercial and industrial services, is as follows:

"First 300 cu. ft. or less per month $1.35. Next 700 cu. ft. per month @ $0.29 per hundred cu. ft. Next 9,000 cu. ft. per month @ $0.165 per hundred cu. ft. All over 10,000 cu. ft. per month @ $0.12 per hundred cu. ft."

The Commission's findings of fact are as hereinafter set out:

"1. That the specific type of laundry under consideration in this proceeding and the use made thereof by the public is not so substantially different from that used by Piedmont's residential customers as to justify a difference in rates.

"2. That the washing machines and dryers referred to by complainants and Piedmont are similar to the type of machines used by the residential customers, to such an extent as to justify the application of similar rates.

"3. That the laundries referred to by complainants and Piedmont in this case involve such customer participation in their operation as to render them dissimilar from other consumers of gas to which Schedule 11 is available to such an extent as to justify their removal from said Schedule 11 so as to permit the application of a rate applicable to residential users.

"4. That the rates charged complainants by Piedmont in Schedule 11 discriminate against the complainants to the extent that they exceed rates charged residential users in Rate Schedule 10 and are therefore unjust and unreasonable."

Upon the foregoing findings of fact the Commission in pertinent part entered the following order:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Piedmont Natural Gas Company, Inc., file a rate schedule with the Commission which will have the effect of reducing its rates for laundries as hereinabove described to its level of rates applicable to residential customers.

"IT IS FURTHER ORDERED that the application of the above-prescribed rates shall become effective on all bills rendered on and after the effective date of this order.

" * * *

"This the 12th day of May, 1960."

Commissioner Eller filed a dissenting opinion to the foregoing order.

This cause came on to be heard in the Superior Court upon appeal by Piedmont, and the court having reviewed the record, examined the law and considered the arguments and briefs of counsel for the complainant and Piedmont, reached the conclusions of law and decision hereinafter stated:

"That the decision and order of the Utilities Commission should be, and is hereby, reversed for that in said decision and order the Commission committed reversible error, and the substantial rights of the appellant have been prejudiced because the findings, inferences, conclusions and decisions in the order of the Commission are affected by errors of law; are unsupported by proper findings; are not supported by, but are contrary to, the competent, material, and substantial evidence in view of the entire record as submitted; and are arbitrary and capricious:

"1. Complainant failed to sustain the burden of establishing that the existing rate schedule and rate classification applicable to the concerns involved are unjust and unreasonable.

"2. The evidence overwhelmingly established a valid basis for a different and higher rate classification for launderettes (coin-operated and quick-service laundries) than for residential customers, it being shown by uncontradicted evidence that the cost of providing gas, the cost of installation, and the cost of service were all higher for launderettes than for residential consumers, and that the launderettes to which the commercial rate schedule (No. 11) has been applicable are commercial, for-profit business operations, as distinguished from domestic customers to whom the residential rate schedule (No. 10) is applicable.

"3. The findings of fact of the Commission are not supported by the evidence and do not constitute a proper basis for the decision and order entered in this proceeding.

"4. The order of the Commission creates discrimination between the launderettes involved in the complaint in this proceeding, and other commercial concerns which are subject to Commercial Rate Schedule No. 11, and gives special treatment to launderettes different from any other commercial concerns, which fails to comply with the requirement of uniform treatment to all customers within the same class, and is unjustified, unreasonable, and discriminatory.

"Accordingly, the decision and order of the Commission is reversed, and this cause is remanded to the Commission with directions to dismiss the complaint of the North Carolina Association of Launderers and Cleaners.

"This the 25th day of January 1961."

The complainant appealed to the Supreme Court, assigning error.

Stanley Winborne, Vaughan S. Winborne for complainant.

McLendon, Brim, Holderness & Brooks; Hubert Humphrey for appellee.

DENNY, J. The complainant entered but one exception in the hearing below and that was to the judgment, reversing the decision and order of the Commission and remanding the cause to the Commission with directions to dismiss the complaint of the complainant. Therefore, the exception to the judgment presents this single question: Does error in law appear on the face of the record? *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E. 2d 320; *Moore v. Crosswell*, 240 N.C. 473, 82 S.E. 2d 208; *Barnette v. Woody*, 242 NC. 424, 88 S.E. 2d 223; *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486.

Since the court below held that the findings of fact by the Commission are not supported by, but are contrary to, the competent, material, and substantial evidence set out in the record, and that the inferences and conclusions in the order of the Commission are affected by errors of law, we shall examine and consider the record in light of the ruling of the court below.

Finding of fact No. 1 of the Commission, set out hereinabove, simply finds that the specific type of laundry under consideration in this proceeding is not so substantially different from that used by Piedmont's residential customers as to justify a difference in rates. Likewise, finding of fact No. 2 is to the effect that the washing machines and dryers referred to by the complainants and Piedmont are similar to the type of machines used by Piedmont's residential customers to such an extent as to justify the application of similar rates.

We do not consider the fact that many of the washers and dryers used in coin-operated and fast-service laundries are similar to those used by residential consumers has any material bearing on the question of rates. The coin-operated and fast-service laundries operated by the complainant's members are commercial enterprises and operated for profit. The washers are operated by electricity and not by gas. Gas is used only to heat water for use in the washers and to heat the air in some types of dryers. The evidence is to the effect that the washing machines used by many of the laundries involved are larger than those in residential use. Even so, since gas is used only to heat air in some of the dryers and to heat the water used in the washing machines, and not for the operation of the machines, the type and kind of machines used in a commercial laundry do not constitute a proper basis for determining proper rates for gas used in heating air and water used in such machines.

The test for determining classifications and rates depends upon a number of factors, such as the quantity of gas used, the time of use, the manner of service, and the equipment which the utility must provide and maintain in order to take care of the customers' requirements.

Utilities Commission v. Municipal Corporations, 243 N.C. 193, 90 S.E. 2d 519.

The evidence on this record tends to show that the residential customers average using about 25 per cent of maximum capacity or peak load available, while the laundries involved herein use an average of only 11 per cent of the peak load Piedmont has to keep available at all times. It is common knowledge that a residential consumer uses on the average about the same amount of gas each day, dependent of course upon the number of appliances used by the residential customer. The peak period of a residential consumer usually comes at the time meals are being prepared and during the early hours of the night. A utility, however, furnishing gas to its commercial or industrial users must invest sufficient money in its plant and equipment to meet the peak demands of its customers, and when the load falls below the peak, the utility obtains payment only for the percentage of the peak load actually consumed. This may be a sufficient factor in some cases to affect a rate. *Utilities Commission v. Municipal Corporations, supra.*

We said in *Utilities Com. v. Mead Corp.,* 238 N.C. 451, 78 S.E. 2d 290, "There must be substantial differences in service or conditions to justify difference in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service."

Likewise, in *Brown v. Penn. Public Utilities Comm.,* 152 Pa. Super. 58, 31 A. 2d 435, it is said: "The charging of different rates for service rendered under varying conditions and circumstances is not unlawful." Certainly the installation of equipment necessary to furnish an ample amount of gas to heat water and air in quantities sufficient to operate a coin-operated or fast-service laundry for 24 hours a day at peak capacity if required, constitutes service rendered under conditions not applicable to the ordinary residential customers.

Finding of fact No. 3 of the Commission is to the effect that customer participation in the operation of these laundries renders them dissimilar to other consumers of gas to which Schedule No. 11 is available, to such an extent as to justify their removal from Schedule No. 11 and to permit the application of the rates applicable to residential users.

Finding of fact No. 4 is to the effect that the rates charged complainant by Piedmont in Schedule No. 11 discriminates against complainant to the extent that the rates therein exceed those charged residential users in Schedule No. 10, and are, therefore, unjust and unreasonable.

We are unable to ascertain from the evidence on this record how or in what respect the customer participation has any bearing on the question of rates, or why the rates set out in Piedmont's Schedule No.

11 are discriminatory as between coin-operated and fast-service laundries and other commercial customers.

Evidence was admitted without objection in the hearing below that tends to show that all utility companies distributing natural gas in North Carolina, except Piedmont, have on file with the Commission schedules of rates for coin-operated and fast-service laundries that are lower than their commercial rates. However, evidence in which the rates of different utilities are sought to be compared is not competent or proper in the absence of evidence showing the comparative costs and conditions under which the respective companies operate. *Utilities Commission v. Municipal Corporations, supra; Bd. of Supervisors v. Virginia Electric & Power Co.*, 196 Va. 1102, 87 S.E. 2d 139; *Smyth v. Ames*, 169 U.S. 466, 42 L. Ed. 819.

In our opinion, the evidence on this record is insufficient to support the findings of the Commission and the conclusions of law based thereon. *Utilities Com. v. Mead Corp., supra.* However, we think, in the interest of justice, the order entered below should be modified to the extent of allowing the Commission to hear additional evidence in order to determine in the manner provided by law whether or not there is any unfair and unjust discrimination as between the type of service rendered the members of the complainant and other commercial customers under Schedule No. 11, and, if so, to determine whether or not such schedule should be modified in any respect or whether a new schedule of rates should be filed by Piedmont for coin-operated or fast-service laundries, as the evidence tends to show all other utilities distributing natural gas in North Carolina have done.

G.S. 62-70 prohibits discrimination by public service corporations in the following language: "No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section."

Except as modified, the judgment below is affirmed.

Modified and affirmed.

OPAL HERRING v. LLOYD HUMPHREY.

(Filed 24 May, 1961.)

1. Negligence § 36—

The doctrine of attractive nuisance applies only in an action to recover for injury to a child and the doctrine is not a predicate for liability on the part of the owner for injuries resulting when a child sets in motion a dangerous instrumentality which causes damage to the property of a third person.

2. Negligence § 7—

Foreseeability is an element of proximate cause, but the law requires only reasonable foresight, judged from the circumstances prior to the occurrence, and does not require that the unusual, unlikely or remotely probable be anticipated.

3. Negligence § 24a— Evidence held insufficient to show negligence in leaving bulldozer unattended on vacant lot.

The evidence tended to show that defendant parked his bulldozer upon a vacant lot some 35 to 40 feet from a street, that the bulldozer could be set in motion by any person who intentionally manipulated the starter and gears, that on the occasion in suit children climbed upon the bulldozer and one of them started it in motion, and that the bulldozer, without any person on it, travelled some 300 yards and ran into plaintiff's house, causing the damage in suit. There was no evidence that any child or children had theretofore climbed on the bulldozer, tampered with it in any manner, or had even been observed close thereto. *Held:* The evidence is insufficient to be submitted to the jury on the question of defendant's negligence.

PARKER, J., dissents.

APPEAL by plaintiff from *Parker, J.*, October, 1960, Civil Term, of LENOIR.

Plaintiff's action is to recover damages for personal injuries and for damage to her furniture sustained December 1, 1958, when defendant's bulldozer, "with nobody on it," crashed into the dwelling at 413 East Grainger Avenue (Kinston) in which plaintiff resided.

The dwelling at 413 East Grainger Avenue was west of the track of the Atlantic Coast Line Railroad. To the west of said track, there was, first, a vacant lot, second, a dwelling occupied by Mr. and Mrs. Jake Moore, and third, the dwelling at 413 East Grainger Avenue. To the east of said track, there was, first, the Neuse Distributing Company, second, a vacant lot, and third, Grady's Hardware.

Defendant was engaged in the operation of motor driven equipment, including bulldozers. On December 1, 1958, defendant owned a bulldozer, weighing several tons, which was parked, unattended, on

a vacant lot between the Neuse Distributing Company and Grady's Hardware.

Plaintiff alleged children, playing thereon, set the bulldozer in motion and immediately abandoned it, after which the bulldozer, unattended and out of control, traveled approximately one block, crossing the railroad track and crashing into said dwelling.

Plaintiff alleged the damages she sustained were proximately caused by the negligence of defendant. She alleged, in substance, that the bulldozer "was so constructed and equipped that the switch, including the ignition system could not be locked, and . . . the motor could be started and the said machine set in motion by simply turning the switch on the ignition system and putting the same in gear"; that the bulldozer, in the hands of a child or children of tender years, was a dangerous instrumentality and "its presence in a thickly populated community in which children of tender years were accustomed to play constituted an attractive nuisance"; that defendant knew or should have known that children of tender years frequented the lot where the bulldozer was parked and were attracted by its presence; that defendant knew or should have known that a child of tender years could start the motor and set the bulldozer in motion by turning the switch and putting it in gear or, if left in gear, simply by starting the motor; and that defendant knew or should have known that children "would play upon the said machine, tamper with the switch and other gadgets with which the machine was equipped and start the motor of the said machine and set the said machine in motion, constituting the same a dangerous instrumentality and endangering the life, limb and property of persons in the area in which the said bulldozer was parked."

Elijah Jones (sometimes referred to as Simon Blango) was the only witness who testified as to what started the bulldozer on its destructive course. His testimony, in substance, is set forth in the following numbered paragraphs.

1. Three boys were walking on the paved street (Grainger Avenue) on their way to "Mr. Hill's store, . . . across the street from Grady Hardware." William Blango, referred to as Elijah's brother, had been sent to the store by his father. William was fourteen. Charlie McKinne, whose age was ten years, eight months and four days, and Elijah, who was ten but younger than McKinne, went along with William.

2. The three boys were on the opposite side of the street when they saw the bulldozer. It was "parked on the side of Grady's," 35 to 40 feet back from Grainger Avenue. There was no fence between the street and the bulldozer. McKinne went over to where the bulldozer was and Elijah soon followed him. Both got on the bulldozer. William did not stop but "walked on toward the store." When he saw

McKinne and Elijah on the bulldozer, William told them "to get down," but they "stayed up there."

3. McKinne "pushed down on the piece where *(sic)* starts it." He "cranked it up and jumped down." He "mashed down on the spring, or something, up there to start it. I (Elijah) don't know what it was. When he mashed down, it started going." Elijah jumped off the bulldozer before it started in motion. McKinne jumped off after it started in motion.

4. The bulldozer "kept on going" but "wasn't going fast." It crossed a ditch, then crossed the railroad track. Thereafter, Elijah could not see what happened. McKinne and Elijah joined William at the store and thereafter went home.

On the west side of the track, George S. Taylor "heard the bulldozer and thought it was a train." He testified: "I saw it was a bulldozer coming with nobody on it. It was within 10 yards of the house when I saw it." Again: "The path it came across (was) halfway between the street and Mr. Moore's house because it cracked the walk." He testified the distance from the vacant lot on the north end of Grady's Hardware to the dwelling at 413 East Grainger Avenue was 300 yards.

Reference will be made in the opinion to other features of the evidence.

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Jones, Reed & Griffin for plaintiff, appellant.
White & Aycock for defendant, appellee.

BOBBITT, J. Plaintiff's evidence tends to show persons of all ages frequently passed along Grainger Avenue, the railroad track and on or near the vacant lot where the bulldozer was parked. It does not disclose (1) when, why, or by whom, the bulldozer was parked on this vacant lot, or any circumstance incident to the parking thereof, or (2) whether it had been parked at this location on any occasion prior to December 1, 1958, or (3) the ownership of the lot on which it was parked.

The testimony of Elijah Jones is the only evidence as to where the bulldozer was parked. Buck Waters testified the lot referred to by Jones was "between Neuse Distributors and Grady Hardware." Presumably, the bulldozer was on a portion of the vacant lot that extended beyond (north) of any building or structure of Neuse Distributors.

Elijah Jones testified this "was the first time (he) had been there." There is no evidence that Charlie McKinne had been there on any

prior occasion. McKinne, although in Kinston, did not testify. Mrs. Cogdell, case worker for Lenoir County Welfare Department, testified that McKinne had been "to Morrison Training School, Hoffman, sent there by the Juvenile Court on an accumulation of charges, one of which was his admission of his participation in driving the bulldozer, truancy, and . . . was . . . on violation of court probation."

There was no evidence as to whether the bulldozer was so constructed and equipped that the ignition system could not be locked. Nor was there evidence as to whether the bulldozer was left in gear when parked.

Jones and McKinne, when they got on the bulldozer, were intermeddlers and trespassers and were well aware of that fact. They refused to heed William Blango's warning "to get down." It was after dark. Nothing appears to indicate any other person was near the bulldozer. McKinne's prior experience, if any, with automotive equipment is not disclosed. Whatever he did, it was sufficient to start the motor and to set the bulldozer in motion. There was no evidence, apart from the testimony of Jones, as to how the bulldozer could be set in motion.

Neither Jones nor McKinne was injured. The attractive nuisance doctrine, considered recently in *Dean v. Construction Co.*, 251 N.C. 581, 111 S.E. 2d 827, applies only in favor of (injured) children of tender years. 38 Am. Jur., Negligence § 156; 65 C.J.S., Negligence § 29(11). It is an exception to the general rule "that an owner or person in charge of property has no duty to a trespasser except to refrain from injuring him intentionally, or wantonly." 65 C.J.S., Negligence § 29(1), p. 457; 38 Am. Jur., Negligence § 144.

The parked bulldozer, until set in motion by McKinne, was harmless. It became dangerous on account of McKinne's wrongful conduct.

The evidence was sufficient to show that defendant knew or should have known the bulldozer, if set in motion and abandoned while in motion, would likely endanger persons or property in the area. It was sufficient to show that the bulldozer could be seen by passersby, including children of tender years. But there was no evidence that any child or children, in play or otherwise, had ever climbed upon the bulldozer or had tampered with it in any manner or had even observed it at close hand. The crucial question is whether, under these circumstances, the evidence is sufficient to support a finding that defendant in the exercise of reasonable care should have foreseen that a trespassing child would likely get on the bulldozer and set it in motion.

In *Campbell v. Laundry*, 190 N.C. 649, 130 S.E. 638, cited by plaintiff, the action was for the wrongful death of a four-year old boy. There, the parking of the laundry truck in violation of the city ordi-

nance constituted the alleged negligence. Similarly, in *Arnett v. Yeago,* 247 N.C. 356, 100 S.E. 2d 855, an action for injury to a three-year old boy, the parking of the automobile in violation of statutes constituted the alleged negligence. See Annotation, "Liability for damage or injury by stranger starting motor vehicle left parked on street." 51 A.L.R. 2d 633. As stated by *Higgins, J.,* in *Williams v. Mickens,* 247 N.C. 262, 264, 100 S.E. 2d 511: "Negligence in the *Campbell* case consisted in the leaving of a motor vehicle illegally parked in such condition as rendered it dangerous to heedless children who were known by the owner to be exposed to the hazard." This applies equally to the factual situation in the *Arnett* case. Here, the bulldozer was not parked on a public street but on a private lot. It was not set in motion by an accidental touching of a lever or gear shift (as in *Campbell* and *Arnett*) but by McKinne's intentional and deliberate efforts.

It was held in *Williams v. Mickens, supra,* that the owner of an automobile, who had parked his car in a lawful manner but had left the keys in the ignition switch, was not liable for injuries inflicted by the negligent operation thereof by a thief.

Ordinarily, in this jurisdiction, foreseeability of injury is considered an element of proximate cause. *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459. Thus, in *Campbell* and *Arnett* the question was whether the defendant should have reasonably foreseen consequences of an injurious nature would likely result *from the illegal parking* of the vehicles. Here, there is neither allegation nor evidence that the bulldozer was illegally parked. Moreover, the fact the bulldozer was left in such condition it could be started by any unauthorized person capable of manipulating the starter and gears would not constitute negligence *(Williams v. Mickens, supra)* unless the circumstances were such that defendant should have reasonably foreseen that a trespassing child would likely get on the bulldozer and set it in motion. Under these circumstances, foreseeability is essential to the basic element of negligence.

"The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." *Osborne v. Coal Co.,* 207 N.C. 545, 177 S.E. 796. In *Brady v. R. R.,* 222 N.C. 367, 373, 23 S.E. 2d 334, *Devin, J.* (later *C.J.*), quotes with approval this statement: "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." See 65 C.J.S., Negligence § 5, p.p. 361-362; 38 Am. Jur., Negligence § 24.

In summary: Defendant's bulldozer was parked, after dark, 35 to 40 feet from Grainger Avenue. It could be seen from Grainger Avenue. It could be set in motion by any person, adult or child, who intentionally and deliberately manipulated the starter and gears. There was no evidence defendant knew or should have known of any prior incident where a bulldozer so parked and equipped had been set in motion by any unauthorized person. There was no evidence that any child or children, in play or otherwise, had ever climbed upon the bulldozer or tampered with it in any manner or even observed it at close hand.

It now appears the bulldozer was started and set in motion by the intentional, deliberate and wrongful conduct of McKinne, a boy then subject to the Juvenile Court. But, "(f)oresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated." Shearman and Redfield on Negligence, Revised Edition, § 24.

The conclusion reached is that the evidence was insufficient to support a finding that defendant's bulldozer was parked at such place and in such manner that defendant in the exercise of due care should have foreseen that a trespassing child would likely get on the bulldozer and set it in motion. While a possibility, such an occurrence would seem unlikely, improbable and remote.

While in sympathy with plaintiff's predicament, the evidence here discloses her injuries and damage were caused solely by the intentional, deliberate and wrongful acts of McKinne. Hence, the judgment of involuntary nonsuit must be affirmed.

Affirmed.

PARKER, J., dissents.

W. C. CASSTEVENS, D/B/A W. C. CASSTEVENS COMPANY v. WILKES TELEPHONE MEMBERSHIP CORPORATION.

(Filed 24 May, 1961.)

1. Venue § 3—

A motion for change of venue made before expiration of time for filing answer is made in apt time, and when the cause is one which is triable in another county under provisions of statute, the right to removal is a substantial right.

2. Venue § 1—

Venue is not jurisdictional since the Superior Court is a Court having state-wide jurisdiction, and venue may be waived or changed by consent of the parties, express or implied. G.S. 1-83.

3. Venue § 2a—

In an action on contract, an amendment which seeks to have plaintiff's claim declared a lien upon realty of defendant and the realty sold to satisfy the claim, constitutes the action one involving realty, and defendant is entitled to removal to the county in which the realty is situated upon his motion made in apt time.

4. Venue § 3— Defendant held to have waived right to have motion for removal heard before amendment obviating ground for removal.

Plaintiff's complaint as amended stated a cause *ex contractu* and demanded that the recovery be declared a lien on defendant's realty. Defendant moved for change of venue from the county of plaintiff's residence to the county in which the land is situate. Plaintiff moved to strike from his complaint the allegations upon which he demanded the lien. The parties agreed that both motions be heard at the same time. *Held:* The agreement for hearing the motions together waived defendant's right to have the motion to remove heard first, and upon the allowance of plaintiff's motion to amend the action was no longer subject to removal.

5. Pleadings § 25—

The trial court has almost unlimited authority to permit amendments to pleadings, both before and after judgment. G.S. 1-163.

APPEAL by defendant from *Gwyn, J.*, 24 October 1960 Term of GUILFORD — Greensboro Division.

Civil action instituted in Guilford County, where plaintiff resides, to recover for the alleged breach of a contract whereby plaintiff agreed to construct a telephone system for defendant in Wilkes County about 285 miles in length, and to recover damages for alleged fraud perpetrated on plaintiff by defendant, heard on a motion by defendant to remove the case for trial to Wilkes County as a matter of right, and on a motion by plaintiff to amend his complaint.

After plaintiff had filed his complaint, and before defendant had answered and before its time for answering had expired, plaintiff amended his complaint by adding thereto paragraphs 22 and 23 and a third prayer for relief, which are in substance: The property of defendant for which plaintiff furnished material and labor is situate in Wilkes County, and that plaintiff has properly filed a notice of laborers' and materialmen's lien on such property in the office of the clerk of the superior court of Wilkes County within six months from the last day upon which materials and labor were furnished. His third prayer for relief is that the judgment be declared a lien on this property, and enforced according to law by a sale of the property.

Whereupon, defendant on 10 August 1960 before the time for answering had expired, and no extension of time for answering having been granted, filed a motion to remove the case for trial to Wilkes County as a matter of right. On 17 August 1960 plaintiff filed a motion for leave to amend his complaint by deleting therefrom paragraphs 22 and 23 and his third prayer for relief.

The two motions came on to be heard on 26 August 1960 by the clerk of the superior court of Guilford County, who entered an order in substance: It appeared to him that he must rule on the motion for a change of venue first, and it appeared to him that the proper venue of the action was Wilkes County. Whereupon, he declined to rule on plaintiff's motion, and ordered the action be removed to the superior court of Wilkes County for trial. From this order plaintiff appealed to the judge of the superior court.

The appeal came on to be heard by Judge Gwyn, who entered an order in substance as follows: Judge Gwyn found as a fact from arguments of counsel, facts admitted by counsel, and matters of record that the two motions were both pending before the clerk of the superior court regardless of the order in which they were filed, and both parties agreed that the two motions should be considered at the same time. He was of the opinion that the hearing before the clerk and before him constituted one transaction and one sitting, and that the two motions should be considered simultaneously. Whereupon, he ordered and decreed in his discretion that plaintiff's motion to amend his complaint by deleting therefrom any claim for a specific lien on defendant's property in Wilkes County be allowed, and that defendant's motion to remove the action to Wilkes County for trial be denied.

From this order defendant appealed.

Douglas, Ravenel, Josey & Hardy and C. Kitchin Josey for plaintiff, appellee.

W. G. Mitchell and Smith, Moore, Smith, Schell & Hunter for defendant, appellant.

PARKER, J. G.S. 1-76, subsections 1 and 3, read: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law: 1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. . . . 3. Foreclosure of a mortgage of real property."

Defendant's written motion for change of venue as a matter of right, by virtue of G.S. 1-76, subsections 1 and 3, having been made

before the time for answering expired, was made in apt time. G.S. 1-83; *Mortgage Co. v. Long,* 205 N.C. 533, 172 S.E. 209.

"As it relates to the Superior Court of North Carolina, venue refers to the county in which the action is to be tried." *Jones v. Brinson,* 238 N.C. 506, 78 S.E. 2d 334.

The venue of an action as fixed by statute is not jurisdictional, and may be waived by any party or changed by consent of the parties, express or implied. G.S. 1-83; *Teer Co. v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E. 2d 54; *Jones v. Brinson, supra.*

The nature and purpose of plaintiff's action is to be determined by the allegations of his complaint. *Mortgage Co. v. Long, supra.* According to the allegations in plaintiff's complaint, and his amendment thereto, he is not only seeking a money recovery from defendant, but is also seeking to enforce his laborers' and materialmen's lien by a sale of defendant's property in Wilkes County.

Penland v. Church, 226 N.C. 171, 37 S.E. 2d 177, was a civil action instituted in Yancey County, where plaintiff resides, to recover an alleged balance due plaintiff on a contract for the construction of a church building for defendant in Mitchell County, and for an order directing the sale of the church property to satisfy the same which is secured by a laborers' and materialmen's lien duly filed in Mitchell County. In apt time defendant made a motion before the clerk of the superior court of Yancey County to remove the case to Mitchell County for trial by virtue of G.S. 1-76. The clerk granted the motion, and upon appeal the judge entered an order that Mitchell County was the proper venue for the trial of the action, and entered an order accordingly. Upon appeal the order of the lower court was affirmed. This Court said: "And we see no essential difference in so far as an interest in real property is involved, in an action to foreclose a mortgage, a lien created by contract, and in one to foreclose a specific statutory lien on real property."

R. R. v. Thrower, 213 N.C. 637, 197 S.E. 197, was a civil action instituted in Cumberland County by plaintiff, which had its principal place of business in Wilmington, New Hanover County, North Carolina, to recover of defendant, a resident of Mecklenburg County, the amount of an unpaid cheque. In apt time defendant duly filed a written motion to remove the action for trial to Mecklenburg County. Thereupon, plaintiff filed a motion that the Court retain the action in Cumberland County for that: "(2) The convenience of witnesses and the ends of justice would be promoted by retaining this action for the trial in this court, for the reason that": and the motion then sets out pertinent facts in support thereof. From an order denying defendant's motion for a change of venue, and in the court's discretion

retaining the case for trial in the superior court of Cumberland County for the convenience of witnesses and to promote the ends of justice, defendant appealed. This Court reversed the order of the trial judge. In its opinion it said: "Speaking to the subject in *Roberts v. Moore,* 185 N.C. 254, *Hoke, J.,* says: 'While it is clear from a perusal of section 470 (now G.S. 1-83) that this question of venue is not in the first instance jurisdictional, and may be waived by the parties, and the decisions construing the section so hold, these decisions are also to the effect that where the motion to remove is made in writing and in apt time, the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon.' "

In *Huntley v. Express Co.,* 191 N.C. 696, 132 S.E. 786, defendant, in apt time, filed its petition and bond for removal of the action to federal district court for trial on the ground of diverse citizenship. Upon the hearing of the petition before the clerk, plaintiff was allowed to reduce the amount claimed in his complaint from $10,000.00 to $2,999.00, and the petition was denied. Defendant appealed to the judge, and on the hearing plaintiff was allowed, over defendant's objection, to take a voluntary nonsuit. Defendant appealed. This Court said: "The cause being a proper one for removal, and the petition and bond having been filed in apt time, it was error for the clerk or the judge of the State Court to enter any order therein, affecting the rights of the parties, save the order of removal. . . . When a sufficient cause for removal is made out in the State Court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had therein unless and until its jurisdiction has been restored." We refer to this case for the sole purpose of illustrating orders which substantially affect the rights of the parties. See also *Mason v. R. R.,* 214 N.C. 21, 197 S.E. 566.

In the case at bar plaintiff's motion to amend his complaint by deleting therefrom paragraphs 22 and 23 and his third prayer for relief followed defendant's motion to remove the case for trial to Wilkes County as a matter of right. The judge's order allowing plaintiff in his discretion to amend his complaint by deleting therefrom paragraphs 22 and 23 and his third prayer for relief substantially affected the rights of the parties, before defendant's motion for removal as a matter of right was considered and passed upon. In allowing such amendment the judge committed error, unless defendant had waived his right to have his motion for removal as a matter of right considered and passed upon first, or had consented to such procedure. We are concerned here with venue, not jurisdiction. The superior court

is one court having statewide jurisdiction. *Rhyne v. Lipscombe,* 122 N. C. 650, 29 S.E. 57; *Lovegrove v. Lovegrove,* 237 N.C. 307, 74 S.E. 2d 723.

Judge Gwyn found "as a fact from argument of counsel, facts admitted by counsel, and matters of record, that the plaintiff's motion to amend the complaint and the defendant's motion to remove as a matter of right were both pending before the clerk of superior court regardless of the order in which the said motions were filed; *and both parties had agreed that the two motions should be considered at the same time.*" Judge Gwyn's opinion, as expressed in his order, that the two motions should be considered simultaneously was error, but defendant consented that he should so consider the two motions.

Defendant did not except to these findings of fact. Defendant has one exception and one assignment of error, and that is: "That the court below erred in entering and signing the order as appears in the record for that the defendant, as a matter of right, was entitled to have this case removed to Wilkes County for the purpose of trial."

In *Mortgage Co. v. Long,* 206 N.C. 477, 174 S.E. 312, plaintiff's counsel was held entitled to notice of defendant's application for judgment on the certificate of the Supreme Court reversing judgment of the lower court refusing defendant's motion for change of venue as a matter of right, so that nonsuit might be entered if plaintiff so desired.

In our opinion, when defendant agreed before Judge Gwyn that the two motions should be considered at the same time, he waived his right to have his motion for removal as a matter of right considered and passed upon first. G.S. 1-163 vests in the judge presiding almost unlimited authority to permit amendments, either before or after judgment. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. Pursuant to the agreement of plaintiff and defendant that the two motions should be considered at the same time, Judge Gwyn, in his discretion, entered an order allowing plaintiff to amend his complaint, and to strike out and delete any claim for a specific lien on defendant's property in Wilkes County, and then denied defendant's motion for removal. Such a discretionary ruling on a motion to amend the complaint is not reviewable on appeal, unless there has been a manifest abuse of discretion, and no such abuse of discretion appears here. *Sawyer v. Cowell,* 241 N.C. 681, 86 S.E. 2d 431. When Judge Gwyn allowed plaintiff's motion to amend, the basis for defendant's motion to remove the case to Wilkes County for trial as a matter of right was annihilated, and was annihilated by defendant's agreement before Judge Gwyn, for the reason that G.S. 1-76, subsections 1 and 3, no longer had any application.

The order of Judge Gwyn is

Affirmed.

LOTTIE ELLIOTT GREITZER v. JOHN ALBERT EASTHAM, JR.

(Filed 24 May, 1961.)

1. Appeal and Error § 49—

Where movant makes no request that the court find the facts upon his motion to set aside a judgment for surprise and excusable neglect, it will be presumed that the court found facts from the evidence supporting its ruling upon the motion.

2. Judgments § 22—

A defendant is not entitled to have a judgment by default set aside in the absence of a showing by him and a finding by the court that his neglect was excusable and that he has a meritorious defense, and in the absence of a finding of excusable neglect, the question of meritorious defense is immaterial.

3. Same—

Where defendant promptly reports the accident to the agent of his insurance carrier and thereafter delivers the summons and complaint to the agent, and relies upon the assurance that insurer would look after the matter, defendant makes his insurer and its agent his agents, and their inexcusable neglect to defend the action will be imputed to defendant and preclude his right to have the judgment by default entered in the case set aside.

APPEAL by defendant from *Parker, J.*, November Term 1960 of LENOIR.

This is an action instituted by the plaintiff to recover for personal injuries sustained by her resulting from the alleged negligence of the defendant.

The plaintiff alleges in her complaint that on 22 August 1959, about 12:45 p.m., she was riding as a guest passenger in a 1954 Cadillac automobile being driven by her husband, Albert Greitzer, in an easterly direction on Highway No. 70 toward the City of Kinston; that as the automobile approached the intersection of said highway with the railroad tracks of the Atlantic & East Carolina Railway Company, about one-half mile west of the corporate limits of Kinston, the operator of the automobile observed a line of westbound automobiles stopped in the northern lane of the highway on the east side of the tracks, and a locomotive whistle was heard; that the driver decreased the speed of his automobile and stopped in the right lane of traffic immediately west of the tracks. The complaint further alleges that the defendant while driving his station wagon in an easterly direction approached the automobile in which plaintiff was riding from the rear and drove his station wagon into the automobile, in which plaintiff was riding, seriously injuring her.

On 29 October 1958, L. R. Cayton, agent for the Westchester Fire Insurance Company, wrote on behalf of said company an automobile liability policy, No. FCA 404078, and issued it to the defendant covering his 1956 Nash station wagon.

On 24 August 1959, the defendant reported the accident involved herein to L. R. Cayton, the agent of his insurer; that Cayton advised the defendant that he, Cayton, would report the accident to the company. Later, insurance adjusters were requested to investigate the matter and one of the adjusters, John L. Hassell, conferred with the defendant about the accident and obtained from him a statement concerning the same. These adjusters contacted and discussed the case with plaintiff's attorneys.

On 23 March 1960, the plaintiff through her counsel instituted this action and filed a complaint. On 24 March 1960, the defendant was personally served with summons and complaint. On 26 March 1960, the defendant carried the copy of the summons and the complaint which had been served on him to Cayton's office; that Cayton took the papers and then handed them back to defendant and said "the company would look after it and not to worry."

On 17 August 1960, judgment by default and inquiry was entered against the defendant by the Assistant Clerk of the Superior Court of Lenoir County on motion of the plaintiff. Thereafter, on 12 September 1960, the action was heard on the issue of damages. The jury returned a verdict in favor of the plaintiff in the sum of $12,514.94.

The defendant knew nothing about the trial until he saw a report of it in the local paper to the effect that the plaintiff had obtained judgment against him in the above amount. The defendant again went to the office of Cayton and was informed by him that he knew nothing about it.

Thereafter, on 19 September 1960, the Casualty Claims Manager of Westchester Fire Insurance Company instructed its adjusters to employ counsel. Counsel was employed and the defendant was requested by Cayton on 20 September 1960 to bring the summons and complaint to his office, which request was complied with promptly. On 21 October 1960, the defendant filed a motion in the Superior Court of Lenoir County to set aside the judgment of default and inquiry and of default final for mistake, inadvertence, surprise and excusable neglect on the part of the defendant.

It is stated in the defendant's motion to set aside the judgments referred to hereinabove, that before entering Highway No. 70, about 1,000 feet west of the railroad crossing, he saw the Cadillac automobile pass, headed towards Kinston. After the automobile passed, the defendant entered the highway and followed the Cadillac at a distance

of several hundred feet; that as he approached the railroad crossing a railroad shifting engine was in the Willis Hines Lumber Yard, which is a considerable distance west of the highway crossing; that the engine was not attempting to approach the crossing and the signal lights at the highway crossing were not operating. "That defendant noticed the rear red lights on the Cadillac, as if the operator were slowly applying brakes to slow down. That at the same time he heard a whistle blow on the shifting engine which was still in the lumber yard. That at said time he was following several car-lengths behind the Cadillac. That he applied his brakes and was slowing down, when suddenly and without any warning to him the Cadillac stopped. That he applied his brakes to come to a complete stop and his car skidded about 5 feet. That he was unable to stop completely and as a result the front of his car hit the rear bumper of the Cadillac with a relatively slight blow."

On the hearing below, the court considered the complaint, defendant's motion and affidavits, and the argument of counsel, and held that the defendant had failed to show "mistake, inadvertence, surprise or excusable neglect," and had further failed to show a meritorious defense. Therefore, the court in the exercise of its discretion refused to set aside the judgments theretofore entered.

The defendant appeals, assigning error.

White & Aycock for plaintiff.
Whitaker & Jeffress for defendant.

DENNY, J. The decisions on the subject now before us are not entirely satisfactory with respect to their consistency. In fact, many of them are irreconcilable. *Sutherland v. McLean,* 199 N.C. 345, 154 S.E. 662.

In the instant case, the court below was not requested to find the facts. Therefore, it will be presumed that the court declined to set aside the judgments on the facts as alleged in the complaint, the motion of the defendant and the affidavits filed in support thereof. *Crissman v. Palmer,* 225 N.C. 472, 35 S.E. 2d 422.

In the case of *Holcomb v. Holcomb,* 192 N.C. 504, 135 S.E. 287, *Stacy, C.J.*, speaking for the Court, said: "This is an appeal from a refusal to set aside a judgment by default final on the ground of 'mistake, inadvertence, surprise or excusable neglect,' under C.S. 600 (now G.S. 1-220). The judge, not being requested to do so, found no facts upon which he based his ruling. *Carter v. Rountree,* 109 N.C. 29 (13 S.E. 716). In the absence of such finding, it is presumed that the judge, upon proper evidence, found facts sufficient to support his judg-

ment. *McLeod v. Gooch,* 162 N.C. 122 (78 S.E. 4). Hence, there is nothing for us to review. *Osborn v. Leach,* 133 N.C. 428 (45 S.E. 783). 'We do not consider affidavits for the purpose of finding facts ourselves in motions of this sort.' *Gardiner v. May,* 172 N.C. 192 (89 S.E. 955). It would have been error for the judge not to have found the facts, had he been requested to do so. *McLeod v. Gooch, supra.*"

A defendant is not entitled to have a judgment by default set aside in the absence of a showing by him and a finding by the court that his neglect was excusable and that he had a meritorious defense to plaintiff's cause of action. *Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155; *Stephens v. Childers,* 236 N.C. 348, 72 S.E. 2d 849; *Perkins v. Sykes,* 233 N.C. 147, 63 S.E. 2d 133; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67.

In the absence of a showing of excusable neglect, the question as to whether or not the defendant has a meritorious defense becomes immaterial. *Stephens v. Childers, supra; Pate v. Hospital,* 234 N.C. 637, 68 S.E. 2d 288; *Hanford v. McSwain,* 230 N.C. 229, 53 S.E. 2d 84; *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525.

In the case of *Stephens v. Childers, supra,* summons and a verified complaint were duly served upon the defendant on 31 January 1952. The day following service of suit papers upon the defendant notice thereof was given by telephone to his liability insurer's agent in Hickory, North Carolina. In the telephone conversation the insurance agent requested that the suit papers be forwarded to him by mail, and this was done the next day, 2 February. The insurance agent, under date of 4 February, forwarded the papers by mail to the Resident Adjuster of the defendant's liability insurance carrier, at his office in Charlotte. The Resident Adjuster contacted the defendant and assured him that the insurance company would undertake the defense of the litigation and would take all necessary steps to employ counsel and protect the interest of the defendant, and that it would not be necessary for the defendant to employ legal counsel. Counsel was employed, but not until after a default judgment had been obtained. This Court said: "All the evidence tends to show that the insurance company assumed the responsibility of defending the action for the defendant with his full knowledge and consent, under circumstances which constituted the insurance company the agent of the defendant for the purpose of employing counsel and arranging for the defense of the action. On this record the negligence of the insurance company was inexcusable and clearly imputable to the defendant.

"The rule is established with us that ordinarily the inexcusable neglect of a responsible agent will be imputed to the principal in a pro-

ceeding to set aside a judgment by default. *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890."

In the case of *Faircloth v. Insurance Co.,* 253 N.C. 522, 117 S.E. 2d 404, it is stated: "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.' "

In the present case, the defendant promptly reported the accident to the agent of his insurance carrier, and was assured that the company would look after it. When the summons and complaint were served on the defendant he took them and delivered them to the agent, and the agent handed them back to the defendant and again informed him that the company would look after the matter.

Under the decision in *Stephens v. Childers, supra,* the defendant made the insurance company and its agent his agents, to look after and defend the action, and their negligence was imputable to the defendant.

The failure of the agent of the defendant's liability insurance carrier in the present case to take the suit papers when they were deliverd to him in his office and to take such steps as might be necessary to a proper defense of the action, was inexcusable.

On the record before us, in our opinion, the ruling of the court below must be upheld.

Affirmed.

CECIL G. BULLARD, PLAINTIFF *v.* BERRY COAL & OIL COMPANY, A CORPORATION, DEFENDANT.

(Filed 24 May, 1961.)

1. Pleadings § 8—

Where a permissible counterclaim will survive regardless of the determination of the issues raised by plaintiff's pleading, defendant at his election may assert his claim as a counterclaim or institute a separate action thereupon, but if the determination of the issues arising upon plaintiff's pleading will preclude defendant's claim, defendant must assert the matter, if at all, by counterclaim. G.S. 1-137.

2. Same: Automobiles § 35: Negligence § 20: Parties § 1—

In paintiff's action to recover for personal injuries received in an automobile accident, defendant asserted that the accident was caused by the negligence of plaintiff driver, had plaintiff's principal joined as a party and sought to recover damages to its vehicle against plaintiff and against the principal under the doctrine of *respondeat superior. Held:* Defendant was entitled to file in plaintiff's action the counterclaim against plaintiff and the cross-action against the principal.

APPEAL by Berry Coal & Oil Company from *Gambill, J.*, February 6, 1961, Civil Term, of GUILFORD, Greensboro Division.

Civil action growing out of a collision between a 1950 Plymouth car owned and operated by plaintiff and a 1951 Ford oil delivery truck owned by Berry Coal & Oil Company (Oil Company) and operated by its agent in furtherance of its business.

Plaintiff instituted this action against the Oil Company to recover damages for personal injuries he received and for the damage sustained by his 1950 Plymouth car as the result of said collision. He alleges the collision was proximately caused by the negligence of the Oil Company's driver.

Answering, the Oil Company (1) denied negligence on the part of its driver, (2) pleaded contributory negligence of plaintiff, and (3) alleged a counterclaim (also referred to as a cross action) against both plaintiff and Franklin Life Insurance Company (Franklin) for the damage sustained by its oil truck as the result of said collision. In its counterclaim or cross action, the Oil Company alleged the collision was caused solely by plaintiff's negligence and that, when the collision occurred, plaintiff was operating his 1950 Plymouth car as agent for Franklin and in the course and scope of his agency. Upon the Oil Company's motion, the clerk, by *ex parte* order, joined Franklin as an additional defendant.

Franklin (1) demurred to the counterclaim or cross action, (2) moved that all references to it be stricken therefrom, (3) moved that the *ex parte* order making it a party be vacated, and (4) moved that the counterclaim or cross action be dismissed as to it. Plaintiff, separately, moved that designated portions of the answer and of the counterclaim, to wit, portions containing references to Franklin, be stricken therefrom as irrelevant, redundant and prejudicial to plaintiff.

The court entered an order sustaining Franklin's demurrer, allowing its said motions, dismissing the counterclaim or cross action as to Franklin, and allowing plaintiff's said motion to strike.

The Oil Company excepted and appealed.

H. L. Koontz and Shuping & Shuping for plaintiff, appellee.

Sapp & Sapp for defendant Berry Coal & Oil Company, appellant.

Jordan, Wright, Henson & Nichols for additional defendant Franklin Life Insurance Company, appellee.

BOBBITT, J. The sole ground of objection asserted in Franklin's demurrer is that the Oil Company may not assert herein its alleged cause of action against Franklin but must do so in a separate action.

Ordinarily, in respect of causes of action defined in G.S. 1-137 as permissible counterclaims, a defendant *may* plead his cause of action as a counterclaim in plaintiff's action or institute a separate action thereon. But where the issues raised in the plaintiff's action, if answered in his favor, will necessarily establish facts sufficient to defeat the defendant's cause of action, the defendant *must* assert his cause of action by way of counterclaim in the plaintiff's action. *Hill v. Spinning Co.*, 244 N.C. 554, 558, 94 S.E. 2d 677, and cases cited.

Here, as between plaintiff and the Oil Company, the issues raised in plaintiff's action will determine whose negligence caused the collision. If answered in plaintiff's favor, the Oil Company cannot recover from plaintiff. Hence, the Oil Company's sole remedy in respect of the cause of action it asserts against plaintiff is by way of counterclaim in plaintiff's action. As stated by *Clark, C.J.*, in the oft-cited case of *Allen v. Salley*, 179 N.C. 147, 150, 101 S.E. 545: "There is in this case but one cause of action, the collision, and the remedy sought by plaintiffs and that sought by the defendant depends upon identically the same state of facts, and must be settled in one action."

Franklin is not a plaintiff but a new party. As to Franklin, the Oil Company's cause of action is not a counterclaim. Nor does the Oil Company assert that Franklin is liable as a joint tort-feasor or otherwise for plaintiff's injuries and damage. It bases its right to recover from Franklin solely on account of its liability for plaintiff's negligence under the doctrine of *respondeat superior*. Franklin is a party (defendant) only in relation to the cause of action alleged by the Oil Company against both plaintiff and Franklin.

The Oil Company, prior to the institution of plaintiff's action, could have sued plaintiff, the alleged agent, or Franklin, the alleged principal, or *both*, on the cause of action it now asserts. *Bullock v. Crouch*, 243 N.C. 40, 89 S.E. 2d 749. The question here is whether the Oil Company is deprived of its right to sue both in the same action because it was required, under the rule stated above, to sue plaintiff by way of counterclaim.

G.S. 1-73, cited by appellant, contains this provision: ". . . when

a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in." But a complete determination of the controversy as between plaintiff and the Oil Company can be made without the presence of Franklin; and if, prior to the institution of plaintiff's action, the Oil Company could have sued either plaintiff, the alleged agent, or Franklin, the alleged principal, or both, we perceive no reason why the Oil Company is now *required* to join Franklin as a codefendant to its cause of action against plaintiff. The question is whether the Oil Company, at its election, *may* do so.

This question arises: If the Oil Company is not permitted to join Franklin as an additional party and as codefendant in relation to the cause of action it asserts herein, to what extent, if any, will the Oil Company be prejudiced?

It should be noted that the Oil Company, in relation to the cause of action it asserts against plaintiff and Franklin, is the plaintiff.

Assuming Franklin is not a party to this action: A verdict and judgment *adverse to* the Oil Company would bar a later action by the Oil Company against Franklin. *Taylor v. Hatchery, Inc.*, 251 N.C. 689, 692, 111 S.E. 2d 864, and cases cited therein; *Reid v. Holden*, 242 N.C. 408, 415, 88 S.E. 2d 125. On the other hand, notwithstanding a verdict and judgment *in its favor*, the Oil Company, in order to recover from Franklin in a later action, would be required to establish *again* that the collision was proximately caused by the negligence of the present plaintiff. The only effect of the Oil Company's verdict and judgment would be *to preclude* the Oil Company from recovering from Franklin damages in excess of the amount previously awarded against plaintiff. *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, and cases cited; *Bullock v. Crouch, supra.*

Unless permitted to join Franklin as an additional party and as codefendant to the cause of action it asserts herein, the Oil Company will be seriously prejudiced, indeed barred, in respect of its right to recover from Franklin if the verdict and judgment herein are adverse to it but will be in no way benefited if the verdict and judgment herein are in its favor. On the other hand, if the Oil Company is permitted to do so, neither Franklin nor plaintiff will be prejudiced in respect of any legal right. The mere fact that the trial will involve one additional issue, namely, whether plaintiff, when the collision occurred, was operating his 1950 Plymouth car as agent for Franklin and in the course and scope of his agency, is of negligible significance when compared to the prejudice the Oil Company may suffer if it is not permitted to join Franklin as an additional party and as codefendant to the cause of action it asserts.

Appellees rely on *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397, and decisions of like import, in which it is held that, where the plaintiff's action is to recover from two (or more) defendants, jointly and severally, defendant A may not set up a cross action against defendant B to recover damages defendant A sustained on account of the alleged negligence of defendant B. Since plaintiff is in no way involved, it is held such cross action is "not germane to the plaintiff's action." Here, plaintiff is directly involved in the Oil Company's counterclaim against him. Too, he is involved in the Oil Company's action against Franklin in that the very foundation thereof is the alleged negligence of plaintiff.

In the factual situation here presented, we are of opinion, and so hold, that the only way in which the Oil Company may avoid the unequal and prejudicial position in which it would otherwise be placed is by joining Franklin as a party (defendant) in relation to the cause of action the Oil Company asserts against both plaintiff and Franklin, and that it should be permitted to do so.

The conclusion reached is determinative of Franklin's demurrer and motions and of plaintiff's motion. For the reasons stated, the order of the court below is, in all respects, reversed.

Reversed.

STATE v. JAMES FRANKLIN JENNINGS.

(Filed 24 May, 1961.)

1. Criminal Law § 138—

Payment of costs upon conviction is required by statute, but the payment of costs constitutes no part of the punishment. G.S. 6-45.

2. Criminal Law § 135—

The time at which a sentence shall be carried into execution forms no part of the judgment of the court.

3. Same—

Where definite sentence is imposed upon conviction of defendant of a criminal offense, but the judgment provides that commitment should issue at the pleasure of the court at any time within the succeeding five years, *held*, the sentence is not a suspended sentence and the phrase "at the pleasure of the court" is unnecessary and surplusage, and, upon conviction of defendant of another offense less than seven months thereafter, the court may properly order commitment of defendant for service of the prior sentence.

4. Criminal Law § 127—

Where, upon conviction of defendant of a criminal offense the court orders that defendant be forthwith taken into custody to serve a sentence imposed by a previous judgment, the order of commitment must be definite as to the judgment under which the commitment is issued, but when both judgments are entered by the same court, the reference to the prior judgment by case number of that court identifies with sufficient certainty the sentence for which the commitment is ordered.

APPEAL by defendant from *Johnston, J.*, January Term, 1961, of SURRY.

In the Recorder's Court of Mt. Airy Township, Surry County, defendant was tried June 20, 1960, in case #60-820, for the unlawful possession (on or about May 30, 1960) of nontaxpaid liquor for the purpose of sale and found guilty. The court pronounced judgment that defendant "be confined in the common jail of Surry County for 12 months, to be assigned to work on the public highways of North Carolina under the supervision of the State Prison Department and pay the cost of the action with Commitment to issue at the pleasure of the Court within the next five years." Defendant gave notice of appeal in open court but on June 21, 1960, withdrew his appeal and paid the costs.

In said Recorder's Court, defendant was tried December 19, 1960, in case #60-1808, for the unlawful possession of nontaxpaid liquor for the purpose of sale, and for the unlawful transportation of nontaxpaid liquor, on or about December 4, 1960, and found guilty. The court pronounced judgment that defendant "be confined in the common jail of Surry County for 18 months, to be assigned to work on the public highways of North Carolina under the supervision of the State Prison Department and pay the cost of the action with Commitment to issue at the pleasure of the Court within the next five years."

Immediately after pronouncing judgment in case #60-1808, the court ordered defendant committed for service of the "previous sentence" imposed by the judgment pronounced in "Case No. 60-820." Defendant gave notice of appeal in open court from this order. The court refused to allow such appeal; and defendant was taken into custody forthwith under commitment issued December 19, 1960, pursuant to the court's said order, for service of the sentence of twelve months imposed by the judgment pronounced June 20, 1960.

Defendant, on December 19, 1960, also gave notice of appeal in open court from the judgment pronounced in case #60-1808. Thereafter, defendant withdrew this appeal and paid the costs in case #60-1808.

On December 22, 1960, while in custody under said commitment,

defendant applied for, and Judge Gambill issued, a writ entitled "Writ of Certiorari," requiring said Recorder's Court to produce its records pertinent to the legality of defendant's imprisonment. In accordance with Judge Gambill's order, defendant was released from custody upon giving bond for his appearance at the January Term, 1961, of Surry Superior Court, for the hearing on return of said writ.

At the hearing, Judge Johnston found the facts to be as set forth above and ordered "that the defendant be remanded to the custody from which he was released by the order of Judge Gambill, for the purpose of completing the service of the sentence pronounced by Judge Llewellyn in Case No. 60-820."

Defendant excepted to, and appealed from, Judge Johnston's said order and gave appeal and appearance bonds as required by its terms.

Attorney General Bruton for the State.
Blalock & Swanson for defendant, appellant.

BOBBITT, J. The judgments pronounced imposed unconditional prison sentences upon defendant's conviction of separate criminal offenses committed May 30, 1960, and December 4, 1960, respectively, and ordered that defendant pay the costs. "Every person convicted of an offense . . . shall pay the costs of prosecution." G.S. 6-45. "The payment of costs constitutes no part of the punishment in a criminal case." *Barbour v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 169, 172, 97 S.E. 2d 855; *S. v. Crook*, 115 N.C. 760, 20 S.E. 513.

Upon defendant's conviction for the criminal offense committed May 30, 1960, the Recorder's Court had authority to enter judgment imposing a sentence of twelve months as punishment therefor and to order defendant to serve said sentence forthwith. It pronounced said judgment but did not order immediate service of the sentence. It did not suspend execution of the sentence upon stated conditions but provided, in effect, that commitment for service thereof should issue only if the Court, within five years, should so order. Defendant contends the court had no authority to defer issuance of commitment in this manner and, therefore, the court's order of December 19, 1960, is invalid. Hence, defendant contends, he cannot now be required to serve the only punishment imposed for his criminal offense of May 30, 1960, the sentence of twelve months.

Whether defendant, if he had so requested on June 20, 1960, or thereafter, had the legal right to begin service of the sentence of twelve months forthwith, is not presented. The withdrawal of his appeal from the judgment of June 20, 1960, indicates defendant decided to accept the provisions of the judgment. Indeed, it seems clear the

provision now challenged, if not adopted at the suggestion of defendant, was intended for his benefit and so accepted.

"In North Carolina, and it is so in numerous other jurisdictions, the time at which a sentence shall be carried into execution forms no part of the judgment of the court." *S. v. Vickers,* 184 N.C. 676, 678, 114 S.E. 168, and cases cited; *In re Smith,* 218 N.C. 462, 11 S.E. 2d 317, and cases cited.

In *Vickers,* a judgment entered at February Term, 1921, of Durham Superior Court, was as follows: "The defendant comes into open court and pleads guilty of receiving more than one quart (of liquor) within fifteen days. The court then orders that the defendant be sentenced to twelve months on the roads with *capias* to issue at the request of the sheriff of Durham County." Vickers was arrested on a capias issued by the Clerk on March 6, 1922, upon application made therefor by the sheriff on February 22, 1922. Vickers' appeal from an order remanding him to custody for service of the sentence of twelve months imposed by the judgment entered at February Term, 1921, was dismissed. *Walker, J.,* said: ". . . the judgment was a direct one, sentencing him to the public roads of Durham County for a period of twelve months, the execution of the sentence, however, to be delayed until the sheriff asked for a *capias.*"

In *Smith,* the defendant was tried November 14, 1938, in the Recorder's Court of Wilson for the unlawful possession and sale of intoxicating liquor, and found guilty. This judgment was pronounced: "After hearing the evidence, it is adjudged that the defendant is guilty of the offense charged. Fine $25.00 and costs and six months on the road, *capias* for road sentence to issue on motion of Solicitor." On June 17, 1940, Smith was again tried in the same court for (separate offense) the unlawful possession and sale of intoxicating liquor and again found guilty. Thereupon, the court, upon the solicitor's motion, ordered the issuance of capias and commitment in the case tried November 14, 1938, and defendant was arrested. Judgment remanding defendant to custody for service of the sentence of six months imposed by the judgment pronounced November 14, 1938, was affirmed. *Devin, J.* (later *C.J.*), said: "This was not a case of judgment suspended upon condition. (Citations) Here the sentence was definitely imposed by the judgment and the term of imprisonment was fixed. There were no conditions attached. The execution of the sentence was not at the time put into effect, but was delayed until the solicitor should make a motion in court for *capias.* (Citation) Thereafter the petitioner being before the court, and it appearing that the sentence had not been served, upon motion of the solicitor, and in the exercise of the power of the court, the sentence already adjudged was ordered to be executed

and service of sentence to be begun. (Citations) The validity of the original judgment was not impaired by reason of the delay in putting it into effect."

Defendant contends the order of December 19, 1960, is invalid because the reference to the "previous sentence" in "Case No. 60-820" does not identify with certainty the sentence for which commitment is ordered. The factual situation in *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169, cited by defendant, is quite different from that here considered. Here, the judgments of June 20, 1960, and December 19, 1960, were pronounced by the same judge in the same court. In the order of December 19, 1960, the court identifies the "previous sentence" by reference *to its own records,* that is, "Case No. 60-820" on its docket.

If the court, as held in *Vickers* and *Smith,* had authority on December 19, 1960, to order defendant committed for service of the sentence of twelve months imposed by the judgment pronounced June 20, 1960, the use of the phrase, "at the pleasure of the Court," has no legal significance. The court derived no authority therefrom nor was its authority impaired thereby. The phrase, "at the pleasure of the Court," evidently intended and understood as the equivalent of the phrase, "in the discretion of the Court," put defendant on notice that the court, while it did not on June 20, 1960, order defendant committed for service of the sentence of twelve months imposed by the judgment then pronounced, reserved the right to do so at any time within five years.

The record dispels any suggestions that the court's said order of December 19, 1960, was not fully justified. It was entered *after* defendant had been tried and convicted of a subsequent criminal offense of like nature.

To paraphrase the statement of *Walker, J.,* in *S. v. Vickers, supra,* it would be a mockery of justice if the defendant could, on account of the court's use of the wholly unnecessary phrase, "at the pleasure of the Court," escape the lawful punishment for his crime.

Affirmed.

STATE v. CHARLES KENNETH STROUD AND JOHN HENRY MILLER.

(Filed 24 May, 1961.)

1. **Criminal Law § 90—**

In the trial of two defendants for a crime, the admissions made by each, when properly restricted to the defendant making them, are competent.

2. **Criminal Law § 71—**

The court's admission of confessions in evidence, after hearing and findings, supported by evidence, that the confessions were voluntary, will not be disturbed.

3. **Criminal Law § 42—**

Articles which the evidence shows were used in connection with the commission of the crime charged are properly admitted in evidence.

4. **Criminal Law §§ 86, 87—**

Motions for continuance and for severance held properly denied.

5. **Criminal Law § 9: Conspiracy § 3—**

Criminal conspiracy is complete as to each participant from the time he enters into the unlawful agreement with knowledge of its unlawful objective, while the commission of an unlawful act pursuant to the agreement is a separate, substantive offense, and indictment will lie for either or both.

6. **Homicide § 20—**

Evidence that one defendant took the deceased to a place for the performance of an illegal abortion which caused her death and carried her body away after the operation, and that the other defendant actually performed the illegal operation, is sufficient to sustain the conviction of each of the offense of manslaughter, each being a participant in the commission of crime.

APPEAL by defendants from *Preyer, J.*, October, 1960 Term, CABARRUS Superior Court.

Criminal prosecution upon an indictment which charged the defendants with the crime of murder in the death of one Anna Ruth Bass Ammons. At the call of the case the Solicitor announced he would not ask for a verdict of guilty of murder in the first degree, but only of second degree, or manslaughter, as the evidence might warrant. Four doctors and Sheriff Roberts testified for the State. The defendants neither testified nor offered evidence. The jury returned a verdict of guilty of manslaughter as to both defendants. From the judgment imposed, both appealed.

T. W. Bruton, Attorney General, H. Horton Rountree, Asst. Attorney General, for the State.

Henry L. Fisher, Llewellyn & McKenzie, for defendants, appellants.

HIGGINS, J. The defendants were jointly indicted and jointly tried for murder. Both were convicted of manslaughter. According to the medical evidence, Anna Ruth Bass Ammons ". . . died directly as a result of pulmonary air embolism. . . . It (death) was directly caused by an attempted abortion . . . Pulmonary air embolism is always followed immediately by death, in a matter of seconds. . . . There are many ways, seven or eight, in which air may get into the blood stream. In this particular case there was only one way it could because there was no other evidence. In this case air had to have been, on the basis of our findings, injected into the uterus under pressure, and this air immediately is picked up by the veins of the uterus. The air is then transmitted immediately . . . to the vein of the heart . . . where it creates a turmoil so that blood cannot circulate in the heart. From there it goes into the lungs and completely stops the circulation, . . . and from that moment death is instantaneous, . . ."

Sheriff Roberts questioned the defendant Stroud on the evening of Mrs. Ammons' death. This is the substance of Stroud's statement: He first met Mrs. Ammons about the middle of January, 1960, while he was delivering groceries. He had a date with her about February 14, and another in March, and frequently thereafter. He had intercourse with her "pretty regular." In May she told him she was pregnant. She asked him if he knew anyone that could perform an abortion. He told her that he did not. Two weeks later she told him she had met a fellow . . . Johnny Miller. Johnny had a friend "that could perform an abortion, so they decided that they would come to Concord to try to find Johnny."

At about 7:30 on June 14, 1960, Stroud picked up Mrs. Ammons and her five-year-old boy and on their way from Charlotte to Concord she told him she had a syringe, a catheter tube, and at her request they stopped at a grocery store where Stroud got a box of Kotex. They stopped at a garage on the Roberta Mill Road near Concord. The building was dark. Mrs. Ammons, after an unsuccessful effort at the front door, entered from a side door. Stroud kept the boy in his car outside and in a short time drove to a cafe where drinks and ice cream were purchased. Soon Miller, whom he had not previously known, came to the cafe and told him to follow. Stroud followed Miller who stopped at a service station, motioning Stroud to pull alongside. As soon as Stroud stopped, Miller opened the door of Stroud's vehicle, picked up Ruth Ammons and carried her or half dragged her, and sat her in his car, telling him (Stroud) to take the girl to the hospital and tell that she had fainted. Stroud told the Sheriff that "he had brought the girl here (from Charlotte) for an

abortion and had left her at the garage, and when he picked her up she was in that condition."

Sheriff Roberts testified that the defendant Miller made admissions to him, a part of which is here quoted: "He said that Ruth Ammons came out there . . . this man was supposed to have been there about 7:30, and he wasn't there; that they sat at the garage for a while, they didn't have any cigarettes; they got in his car and went to the cafe for cigarettes; that they came back, and he said that Ruth asked Johnny to perform the abortion, and he told her he didn't know how, . . . He said that he consented after she showed him what to do. . . . that he took a catheter tube that she had, took a clothes hanger out of his car, cut the ends off . . . and straightened it out and put the clothes hanger in the catheter, . . . put it into the mouth of the womb and then pulled the wire out of the tube, . . . took the rubber syringe, put it in the end of the catheter tube, gave it one squirt of air, turned around, went over to the sink, . . . washed his hands . . . she said, 'Johnny, I feel faint,' . . . she fell back and said, 'Oh.' " He later "took her out of his car and put her in Charles' car, and told Charles to tell them at the hospital that she had fainted."

An autopsy was performed. Medical testimony established pregnancy of about seven weeks duration, and that probably a prior unsuccessful attempt at abortion had been made.

The court was careful to instruct the jury neither to consider Stroud's admissions as evidence against Miller, nor Miller's against Stroud. As thus limited the evidence was competent. *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732; *State v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837. When the State offered the evidence of Sheriff Roberts as to Miller's admissions, Miller objected on the ground they were not voluntary. After a full hearing in the absence of the jury, the trial judge held the statements were voluntary and admitted them in evidence. The evidence was ample to support the finding that Miller's admissions were voluntary. *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885.

The defendants objected to the admission in evidence of a bloody towel, the syringe, the tube, box of Kotex, and pieces of wire. The evidence tied these items into the offense charged and made them properly admissible. *State v. Rhodes,* 252 N.C. 438, 113 S.E. 2d 917; *State v. Vann,* 162 N.C. 534, 77 S.E. 295. The motions for continuance and for severance were properly denied. *State v. Ipock,* 242 N.C. 119, 86 S.E. 2d 798; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670.

The evidence introduced at the trial disclosed an understanding between Mrs. Ammons and the defendant Stroud that an abortion should be performed. Mrs. Ammons ascertained that Johnny Miller

had a friend who would perform the operation. For that purpose Stroud "picked up" Mrs. Ammons and her five-year-old son and drove them from Charlotte to Concord. Mrs. Ammons had a syringe, a catheter tube, and she needed a box of Kotex. This Stroud bought on the way. Mrs. Ammons entered Miller's garage from a side door at a time when the building was unlighted. Stroud, with full knowledge of what was intended, waited a short distance away. Miller's friend, expected about 7:30, did not show up. At Mrs. Ammons' request, Miller attempted the operation, with the fatal result. Immediately he sought out his codefendant and transferred the body from his to Stroud's automobile. Stroud took it to the hospital where the autopsy was performed. The active participants in the plan were Mrs. Ammons, Stroud and Miller.

The defendants were not indicted for conspiracy, the gravamen of which is an unlawful agreement. The crime is complete as to each participant from the time he enters into it knowing of its unlawful objective. Making the unlawful plan is conspiracy. Carrying it out is a separate — a substantive offense. Indictment will lie for either, or both. *State v. Hedrick*, 236 N.C. 727, 73 S.E. 2d 904; *State v. Wrenn*, 198 N.C. 260, 151 S.E. 261.

The State's evidence made out a case of manslaughter against both defendants. Stroud took the deceased to the place for the unlawful act, kept her son while it was performed, carried her body away. Miller performed the act. Each defendant played a willing, though different part. *State v. Gardner*, 226 N.C. 310, 37 S.E. 2d 913; *State v. Layton*, 204 N.C. 704, 169 S.E. 650.

We have examined the many assignments of error. They are without merit.

No error.

FLOY LOUISE PRINCE v. MERRIWELL T. SMITH AND JAMES O. WALDEN, D/B/A S & W FOOD CENTER.

(Filed 24 May, 1961.)

1. Food §§ 1, 2—

The implied warranty of wholesomeness for human consumption in the sale of food in a sealed container usually obtains only between the parties to the contract of sale, and ordinarily a consumer may hold the manufacturer liable only on the ground of negligence, subject to certain exceptions.

2. Food § 2—

The implied warranty that a bottled beverage is fit for human consumption will not be extended to include the safety of the container when the evidence shows that the bottle burst in the hands of the purchaser some 18 hours after it had been purchased from defendant retailer, during which time it had been subjected to cold during its transportation to plaintiff's apartment, and then to heat during its storage in plaintiff's apartment.

APPEAL by plaintiff from *Hobgood, J.*, January, 1961 Term, CUMBERLAND Superior Court.

Civil action instituted by the plaintiff to recover for personal injury resulting from the explosion of a bottled drink — Coca Cola. The plaintiff alleged she purchased a carton containing six bottles of Coca Cola from the defendants' self-service grocery store. The defendants' "warranty to her that said Coca Cola was safe and fit for human consumption and handling, . . . and unknown to the plaintiff . . . a bottle of the said product contained defects which caused the said bottle to explode when being handled by the plaintiff in the usual and customary manner. . . ." She further alleged that as a result of the explosion she sustained a painful and permanently disfiguring injury.

The plaintiff's evidence disclosed the following: About 3:30 p.m. on November 17, 1956, while a customer in defendants' self-service store, she purchased a carton (six bottles) of Coca Cola and other groceries, all of which she placed in her automobile and drove directly home, a distance of about four miles. The weather was cold. She placed the carton on the drainboard near the kitchen sink and about three feet from the stove. The apartment in which she, her husband and two small children lived consisted of three rooms in addition to the kitchen. An oil heater located away from the kitchen furnished heat for the apartment. The temperature was kept at 70 to 75 degrees.

The plaintiff, her husband and children left home about 5:30 and returned after midnight. The following morning about 9:15 she went to the kitchen where the carton still remained as she had left it. Before transferring the bottles from the carton to the Frigidaire, she undertook to wipe dust from them with a cloth. The second or third bottle she removed from the carton exploded in her hand, throwing fluid and glass all over the kitchen, including the ceiling. A piece of glass cut her cheek and lip, causing severe pain and leaving a permanent and unsightly scar.

The defendants introduced, over plaintiff's objection, evidence as to the process followed by the manufacturer in making and testing the bottles and by the bottling company in cleansing and filling them.

At the close of all the evidence the court entered judgment of compulsory nonsuit, from which the plaintiff appealed.

Butler, High and Baer, Charles E. Noell, for plaintiff, appellant.
Quillin, Russ & Worth, for defendants, appellees.

HIGGINS, J. This differs from other exploding bottle cases which have been reviewed by this Court. Most prior actions were in tort against the bottling company for injury proximately caused by the company's negligence. *Styers v. Bottling Co.*, 239 N.C. 504, 80 S.E. 2d 253; *Davis v. Bottling Co.*, 228 N.C. 32, 44 S.E. 2d 337; *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Lamb v. Boyles*, 192 N.C. 542, 135 S.E. 464; *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135.

This action is against the retailer who sold to the plaintiff. The action is in contract, based on alleged breach of implied warranty that the Coca Cola was fit for human consumption as a beverage, and safe for handling. Ordinarily, for breach of implied warranty, the seller is liable only to a party to the contract of sale. A cause of action by the injured party otherwise than against the seller must be based on negligence. *Wyatt v. Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21. Our court recognizes certain exceptions and variations to the general rule. The manufacturer may attach to the product a warranty to the ultimate consumer. *Simpson v. Oil Co.*, 217 N.C. 542, 8 S.E. 2d 813. A manufacturer may be liable under certain circumstances if he sells an article likely to cause injury in its ordinary use because of its inherently dangerous character, if he fails to guard against hidden defects and to give notice of concealed danger. *Tyson v. Mfg. Co.*, 249 N.C. 557, 107 S.E. 2d 170. In some of the cases liability on the basis of breach of implied warranty and for negligence seem to shade into each other. See the many cases cited in *Wyatt v. Equipment Co., supra; Lemon v. Lumber Co.*, 251 N.C. 675, 111 S.E. 2d 868; *Tyson v. Mfg. Co., supra;* N. C. Law Review, Vol. 30, p. 191, *et seq.*, (1951-52).

Because of the danger to life and health, the manufacturer and packer of foods and the bottler of beverages intended for human consumption, by offering them for sale, impliedly warrant the fitness of their products for such use. As pointed out, however, the warranty extends no further than the parties to the contract of sale. *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30. For breach of the warranty, the injured party may sue his retailer who, in turn, may sue the wholesaler or jobber, and he the manufacturer, packer, or bottler upon whom finally rests the primary responsibility. N. C. Law Review, Vol. 32, 1953-54, p. 351, *et seq.*

"The deliberate policy of carrying the responsibility back to the manufacturer who is best able to meet it is indicated by a few decisions which have refused to find any warranty from a wholesaler to the consumer. Less comprehensible are the decisions of three courts which have confined the manufacturer's warranty to the food or beverage inside of a container, and have refused to find any warranty that the container itself will not explode in the customer's face." To the above is added a footnote: "The distinction of course makes no sense. One may speculate that these courts were uneasy about the proof that the plaintiff had not damaged the container himself." Prosser on Torts, 2d Ed., Ch. 17, p. 509; *Loch v. Confair,* 372 Pa. 212, 93 A. 2d 451; *Haller v. Rudmann,* 249 App. Div. 831, 292 N.Y.S. 586; *Mahoney v. Shaker Square Beverages,* 108 N.E. 2d 281 (Ohio).

Implied warranty that beverage is fit for human consumption is not applicable to "a bottle or container which may become weakened by the manner and method in which it is handled." *Soter v. Griesedieck Western Brewery Co.,* 200 Okla. 302, 193 P. 2d 575, 4 A.L.R. 2d 458.

Research has not disclosed any case in which this Court has extended the implied warranty of fitness to a container in which the product comes from the producer. The wisdom of extending implied warranty beyond the present limit recognized by the Court is at least debatable. In this case the bottle had been in the hands of the plaintiff, first in cold weather, transported by automobile four miles to her apartment, then stored in the kitchen for 18 hours, after which it gave way while the plaintiff was removing dust from it by rubbing it with a cloth. The facts leave the legitimate inference the explosion resulted from an increase in the pressure while it was in the plaintiff's possession. She had been familiar with bottled Coca Cola for years. Evidently she knew as much about the risk of breakage as the defendants.

A bottle filled with Coca Cola sells for less than ten cents. If implied warranty against breakage is attached to the sale, how long does it continue after the purchaser has taken complete control? When a customer buys food or beverage there is an implied warranty that it is not dangerous to health. Only the evil effect after use discloses the danger. Then it is too late to take precautionary measures. On the other hand, the danger that a glass bottle filled with Coca Cola under pressure may explode, is obvious. The purchaser buys with that knowledge and must deal with it accordingly. We hold that under the facts of this case implied warranty did not cover the bottle.

The judgment of nonsuit is

Affirmed.

STATE v. DAN PERRY, H. V. HIGH AND PAT HUNNINGS.

(Filed 24 May, 1961.)

1. Criminal Law § 19—

In a county in which G.S. 7-64 is not applicable and in which the courts inferior to the Superior Court therefore have exclusive original jurisdiction of general misdemeanors, the Superior Court can acquire original jurisdiction and try defendant upon an indictment only when defendant, in the recorder's court, demands a jury trial pursuant to statute (Chapter 115, Public Laws of 1919), and the Superior Court can acquire derivative jurisdiction only when defendant appeals from a conviction in the recorder's court.

2. Same—

In a county in which courts inferior to the Superior Court have exclusive original jurisdiction of general misdemeanors, the demand in the recorder's court of a trial by jury on a warrant charging a particular assault gives the Superior Court original jurisdiction of the assault charged, but the Superior Court can acquire no jurisdiction of a separate assault committed some hours after the first, even though committed by the same defendant upon the same person, and it is error for the Superior Court in its charge to submit to the jury evidence of defendant's guilt of such other assault.

3. Criminal Law § 164—

Where the court correctly submits the question of defendant's guilt of the assault charged, but erroneously instructs the jury on the evidence of another assault over which the court had no jurisdiction, the conviction of defendant cannot be held harmless since it cannot be ascertained whether or not the jury in reaching its verdict considered the evidence relating to the assault over which the court had no jurisdiction.

APPEAL by defendant Dan Perry from *Cowper, J.*, January Criminal Term 1961 of Craven.

Criminal prosecution upon an indictment charging Dan Perry with unlawfully assaulting on 6 December 1960 Mary Gaskins, a female person, he being a male person over 18 years of age.

Plea: Not Guilty. Verdict: Guilty.

Defendants H. V. High and Pat Hunnings were tried at the same time on similar and separate indictments — the three cases being consolidated for trial — and found Not Guilty.

From a judgment of imprisonment, defendant Dan Perry appeals.

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

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

PARKER, J. The prosecution of Dan Perry had its genesis in a

warrant issued by the recorder's court for Craven County, a court inferior to the superior court in a constitutional sense. The recorder's court for Craven County was created in 1921 by the Board of County Commissioners of Craven County by virtue of Public Laws of North Carolina 1919, Chapter 277, Section 25 *et seq.*, County Recorder's Courts, now G.S. Chapter 7, Subchapter VI, Article 25. *S. v. Sloan,* 238 N.C. 547, 78 S.E. 2d 312; *S. v. Morgan,* 246 N.C. 596, 99 S.E. 2d 764.

The warrant was based on a criminal complaint alleging in pertinent part that on 6 December 1960 the defendant "Dan Perry did unlawfully, wilfully assault one Mary Gaskins with his fists inflicting serious bodily injuries, and did threaten to kill the said Mary Gaskins, a female person, he being a male person over 18 years of age."

Similar and separate warrants were issued by the recorder's court for Craven County against defendants H. V. High and Pat Hunnings.

Craven County is one of our counties in which exclusive original jurisdiction of general misdemeanors is vested in its inferior courts, because G.S. 7-64, concurrent jursdiction between the superior court and inferior courts, does not apply to Craven County. *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772; *S. v. Morgan, supra; S. v. Sloan, supra.*

Public Laws of North Carolina 1929, Chapter 115, provides: "In all trials in the Recorder's Court for Craven County, upon demand for a jury by the defendant or the Prosecuting Attorney representing the State, the Recorder shall transfer said trial to the Superior Court of Craven County." See *S. v. Rooks,* 207 N.C. 275, 176 S.E. 752.

In the recorder's court for Craven County a jury trial was demanded in all three cases, and the recorder transferred the three cases for trial to the superior court.

Public Laws of North Carolina 1929, Chapter 115, in effect divested the recorder's court for Craven County of jurisdiction of the alleged criminal offense charged against defendant Dan Perry of assaulting Mary Gaskins with his fists, when demand was made for a jury trial. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381. The same was true in respect to the defendants H. V. High and Pat Hunnings. When the jurisdiction of the recorder's court for Craven County was thus divested, the jurisdiction acquired by the superior court was original as to the charge against defendant Dan Perry of assaulting Mary Gaskins with his fists, and not derivative, and because original, defendant Dan Perry could not there be put on trial except upon a true bill found by the grand jury. *S. v. Norman, supra; S. v. Davis, supra.* The same was true as to H. V. High and Pat Hunnings.

This is a summary of the State's evidence: On 6 December 1960

Mary Gaskins, Dan Perry, H. V. High and Pat Hunnings were in a room in the Friendly Pines Motel in Bridgeton. All were drinking. Dan Perry snatched off Mary Gaskins' slip and bra. He pushed her down on the bed. High and Hunnings held her, and Perry shaved her body. Later all four left. That night all four were in Perry's trailer on the Kinston Highway, about three or four miles distant from the Friendly Pines Motel. There Dan Perry beat Mary Gaskins in her face with his fists. Later, while they were carrying her home, Dan Perry continued beating her with his fists. As a result of such beating her face and nose became swollen, and her face and forehead looked like a balloon.

Defendant Dan Perry assigns as error that part of the charge in which the court instructed the jury in substance as follows: If the State has satisfied you from the evidence and beyond a reasonable doubt that on 6 December 1960 Dan Perry did unlawfully assault Mary Gaskins in a room in the Friendly Pines Motel in Bridgeton by tearing off parts of her clothing, pushing her down on a bed or by attempting to shave any portion of her body, or if you find from the evidence and beyond a reasonable doubt that Dan Perry struck Mary Gaskins in the face with his hands, or if the defendant Dan Perry "committed one or more of these acts" it would be your duty to return a verdict of Guilty. If you are not so satisfied, you should return a verdict of Not Guilty.

The State's evidence shows two assaults on Mary Gaskins at different times and in separate places: one, in a motel room in Bridgeton by Dan Perry's tearing off her slip and bra, pushing her down on the bed, and shaving her body; two, by Dan Perry beating her in the face with his fists in his trailer and when carrying her home.

The warrant issued by the recorder's court charged Dan Perry with the second assault shown by the State's evidence. The demand for a jury trial, and the transfer of that case to the superior court for trial, gave the superior court original jurisdiction of that assault case, as before set forth.

The recorder's court for Craven County has original, exclusive jurisdiction over the first assault shown by the State's evidence to have occurred in the motel room in Bridgeton. As to this first assault the superior court of Craven County could acquire jurisdiction in only one of two ways: One, by the recorder's court issuing a warrant charging Dan Perry with that offense, and by a demand for a jury trial, which, by transfer of the case to the superior court, would give it original jurisdiction. Two, by the recorder's court issuing a warrant charging Dan Perry with that offense, and upon his trial and conviction of such offense, he appealed from the judgment pronounced against

him to the superior court, when the jurisdiction of the superior court would be derivative. *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189. There is nothing in the record to show that the recorder's court for Craven County has ever issued a warrant charging Dan Perry with the first assault shown by the State's evidence. The superior court had no jurisdiction to try Dan Perry for the first assault shown by the State's evidence. *S. v. Hall, supra; S. v. Morgan, supra.*

It was prejudicial error for the trial court to instruct the jury that if the State satisfied them from the evidence and beyond a reasonable doubt that Dan Perry unlawfully assaulted Mary Gaskins in a room in the motel in Bridgeton by tearing off parts of her clothing, pushing her down on a bed or by attempting to shave any portion of her body, it would be their duty to return a verdict of Guilty, because the superior court had no jurisdiction of this specific assault shown by the State's evidence. For all we can know the jury may have convicted Dan Perry of the first assault shown by the State's evidence, and acquitted him of the second assault shown by the State's evidence.

This appeal and many other appeals to this Court, particularly from Craven County, concerning the different jurisdictions of our hodgepodge system of inferior courts, show an urgent need for legislation to make the jurisdiction and procedure in the inferior courts uniform throughout the State similar to the superior court.

For error in the charge defendant is entitled to a new trial, and it is so ordered.

New trial.

CAPPA FLYING CLUB, INCORPORATED v. AIR HARBOR FLYING SERVICE, INCORPORATED.

(Filed 24 May, 1961.)

Landlord and Tenant § 7— Evidence held insufficient to show negligence of landlord in failing to protect goods of tenant from damage.

Plaintiff rented hangar space for its planes from defendant. Plaintiff's planes were damaged when the roof of the hangar caved in after a heavy snow. The evidence tended to show that defendant had no authority with reference to the use, removal or replacement of plaintiff's planes in the hangar and that on the late afternoon before the accident plaintiff's agent and defendant's agent together inspected the hangar and observed no condition indicating that the roof was sagging or was otherwise unsafe. *Held:* The evidence is insufficient to show negligence on the part of defendant in failing to remove the snow from the roof

of the hangar, in failing to remove the aircraft to a place of safety, or in failing to provide additional support to the roof of the hangar.

APPEAL by plaintiff from *Gambill, J.*, November 14, 1960, Civil Term, of GUILFORD, Greensboro Division.

Plaintiff's two light aircraft were damaged during the night of March 2, 1960, when the roof of the hangar or shed in which they were stored collapsed, allegedly due to the weight of the snow that had accumulated thereon. Plaintiff had rented from defendant two storage spaces at a monthly rental of $7.00 per space. Plaintiff seeks to recover damages, alleging the damage to its aircraft was proximately caused by the negligence of defendant in that defendant (1) failed to remove the snow that was rapidly accumulating on the roof of the hangar, (2) failed to remove the aircraft to a place of safety, and (3) failed to provide additional supports to the roof of the hangar.

This appeal is from a judgment of involuntary nonsuit entered at the close of plaintiff's evidence.

Rollins & Rollins and Sapp & Sapp for plaintiff, appellant.
Cooke & Cooke for defendant, appellee.

PER CURIAM. Plaintiff, a nonprofit corporation, operated a Flying Club composed of 35 or 37 members. Each member was entitled to use a plane owned by plaintiff in accordance with plaintiff's "Operations Rules." When doing so, a member removed the plane from its place of storage in the hangar and was obligated to put it back. Defendant had no authority or obligation with reference to the use, removal or replacement of plaintiff's planes.

The evidence discloses plaintiff rented from defendant two *specific* spaces in a "five-bay" hangar. The contention that the relationship between plaintiff and defendant was that of bailor-bailee is not supported by plaintiff's evidence. Moreover, plaintiff, in its complaint, seeks to recover on account of negligence of defendant in the particulars therein alleged.

Admittedly, defendant did not (1) remove any snow from the roof of the hangar, or (2) remove plaintiff's aircraft from the hangar, or (3) provide additional supports to the roof of the hangar. The crucial question is whether the evidence is sufficient to support a finding that defendant, by the exercise of due care, could and should have reasonably foreseen that a collapse of the roof was likely to occur.

The structure was built in 1952 or 1953. It had no walls. It was "open all the way around on all four sides." There was no floor. It was

"just ground." Storage in this structure was for protection from sun, hail, rain, snow, etc.

Mr. Mitchell, a member of plaintiff's board of directors, had been familiar with this structure from the time it was built. He had observed snow on the roof on other occasions. No plane had been removed therefrom on account of weather conditions. According to the records of the meteorologist at the Greensboro-High Point Airport, the weather conditions on February 13, 1960, "produced more precipitation, deeper snow, and stronger wind than they did on March 2nd." There was no evidence that the roof of the hangar sagged or was otherwise affected by the weather conditions on February 13th. It is noted that the roof of the hangar, made of tin, rose from each side to a peak in an inverted "V" shape and that the angle of the peak of the roof was 30 or 40 degrees.

Mr. Mitchell was *plaintiff's* maintenance man. He went to defendant's air strip twice during the afternoon of March 2nd. On each occasion, he and Mr. Brookbank, employed as a mechanic by defendant, inspected the "five-bay" hangar or shed in which plaintiff's two planes and three others were stored. They observed no condition indicating the roof was sagging or was otherwise unsafe. When Mitchell left, about 6:00 p.m., it was getting dark. Mitchell testified: "We, again, went out and inspected the hangar where Cappa's planes were. It looked OK so we decided we would go home." He testified further: "I felt it was perfectly all right to leave the planes in there when I left there at six o'clock that evening." He testified further that, as a result of his observations, *he* decided to leave plaintiff's planes in the hangar or shed. Brookbank testified: "I recall going to the hangar with Mr. Mitchell and looking at it to determine whether or not there was any evidence of strain being put on it. At that time, it appeared perfectly normal to me. There was no evidence, whatsoever, of any effect of this snow that was there on the hangar. As a result of my observations, Mr. Mitchell and I left the planes where they were. We did not take them out."

Mitchell and Brookbank left the hangar about 6:00 p.m. for their respective homes and did not return. Brookbank lived in a trailer some five hundred feet from the hangar. Mitchell lived some two and a half miles therefrom. When they left, "it wasn't snowing or anything, and the sky was beginning to look lighter, like it was going to clear up." Later, during the night of March 2nd, there was light snow, sleet and freezing rain.

There is no evidence as to when, during the night of March 2nd, the roof collapsed. The next morning, about 9:00 a.m., Brookbank discovered the roof had collapsed. It is noteworthy that when Brook-

bank advised Mitchell by telephone that the roof had collapsed, Mitchell thought Brookbank "was kidding."

It is deemed unnecessary to discuss the evidence in greater detail. Suffice to say, neither Mitchell nor Brookbank, upon careful inspection, observed any condition suggesting the roof of the hangar or shed was likely to collapse.

Close analysis of all the evidence impels the conclusion that there is no evidence sufficient to support a finding that the conditions were such that defendant, in the exercise of due care, could and should have reasonably foreseen that the roof of the hangar or shed was likely to collapse. Hence, the judgment of involuntary nonsuit is affirmed.

Affirmed.

STATE v. DONALD REEL, JR.

(Filed 24 May, 1961.)

1. Criminal Law § 154—

An assignment of error should disclose the question of law sought to be presented without the necessity of going beyond the assignment itself.

2. Criminal Law § 121—

Motion in arrest of judgment must be based on matters appearing on the face of the record proper and cannot present any question relative to the evidence.

3. Indictment and Warrant § 6—

The evidence in this case is held not to show that defendant was kept in custody for more than 12 hours before the issuance of a warrant. G.S. 15-47.

4. Arrest and Bail § 7—

While it is a better practice to call a physician when requested by a person in custody, the evidence in this case that defendant was highly intoxicated when arrested during the early evening and that he was released from custody the next day, *is held* not to show the deprivation of a substantial right in failing to accede to his request that a physician be called.

5. Arrest and Bail § 8—

Defendant was arrested in a highly intoxicated condition early in the evening and was released under bond the next day. *Held:* Defendant was not detained for an unreasonable period of time before being allowed to fix bail.

6. Criminal Law § 160—

The burden is on defendant to show error.

APPEAL by defendant from *Cowper, J.*, January 1961 Criminal Term of CRAVEN.

This is a criminal action.

Offense charged: Operating a motor vehicle on a public highway while under the influence of intoxicating liquors.

Plea: Not guilty. Verdict: Guilty.

Judgment: Fine and costs.

Defendant appeals.

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

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

PER CURIAM. There are eight assignments of error. Several of these do not comply with the requirements of Rule 19(3), Rules of Practice in the Supreme Court, 221 N.C. 543. ". . . (T)he very error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment itself to learn what the question is." *Steelman v. Benfield,* 228 N.C. 651, 653, 46 S.E. 2d 829.

The question of nonsuit *is* properly presented. But the State's evidence is sufficient to make out a case for the jury.

Defendant assigns as error the refusal of the court to arrest judgment. A motion in arrest of judgment can be based only on matters which appear on the face of the record. The evidence in a case is no part of the record proper. *State v. Williams,* 253 N.C. 337, 347, 117 S.E. 2d 444. "For the motion to be sustained it must appear that the Court is without jurisdiction, or that the record is in some respects fatally defective and insufficient to support a judgment." *State v. Doughtie,* 238 N.C. 228, 231, 77 S.E. 2d 642. The assignment of error is without merit.

Defendant contends that his constitutional rights were violated in that he was arrested and placed in jail without bail having been fixed, without being permitted to make bail bond, and without an examination by a physician after request therefor. G.S. 15-47. He insists that he was thereby deprived of the opportunity to secure evidence necessary to his defense.

The arresting officer testified that defendant "was very much under the influence of whiskey, staggering around in the street and very thick-tongued," that he said "he wanted to be taken to a doctor." The defendant testified that he had drunk "a beer" and "got sick five

minutes after (he) drank the beer." He stated he was not permitted to use the telephone in the jail.

Defendant was arrested about 7:00 P.M. A warrant was issued on the night of his arrest. He was released under bond the next day. The hour of release does not appear. G.S. 15-47 provides "that in no event shall the prisoner be kept in custody for a longer period than twelve hours without a warrant." There is no showing that this provision was violated. No physician testified for defendant at the trial. It is a reasonable inference that he was not examined by a doctor upon his release from custody. If he was ill, he apparently recovered during the night. It is a reasonable assumption that his nausea was caused by the beer. It is better practice to call a doctor when requested by a person in custody, but the failure to do so under the circumstances here presented does not amount to a substantial denial of a constitutional right.

We do not hold that the failure to fix bail and release one who appears to be in a drunken condition, under the factual situation in this case, constitutes a violation of the Constitution, State or Federal, when he is not detained for an unreasonable period. Defendant's detention seems to have been the best course for his security and that of the public.

The burden is on defendant to show error. This he has failed to do.

No error.

JANIE M. RIDDLE v. PRESTON J. RIDDLE.

(Filed 24 May, 1961.)

Divorce and Alimony § 21—

The court may properly order defendant to be confined for contempt upon findings, supported by evidence, that defendant had wilfully refused to pay his wife alimony or support as ordered by a prior decree of the court in the action.

APPEAL by defendant from *Gwyn, Resident J.*, 17th Judicial District, in Chambers, 24 September, 1960 of ROCKINGHAM.

Civil action for divorce from bed and board, and for support pending trial and for reasonable amount for attorney's fees.

The parties stipulated and agreed that the summons was duly issued, and served on 20th day of June, 1958, and the court was properly organized and duly constituted to try the cause, and the

parties were duly before the court on 24 September, 1960. And the cause being heard upon notice to defendant to show cause why he should not be attached for contempt for failure to abide the orders of the court made in the cause, and the court finding as a fact: (1) That the defendant has wilfully failed and refused to pay to the plaintiff any part of his earnings since the 20th day of August, 1960, as he was ordered to do on that date; (2) that the defendant has wilfully failed to pay any part of the sum due under the consent order entered into by the parties at the September 1959 Civil Term as he was ordered to do in the order of this court rendered 20 August, 1960; (3) that the defendant was in arrears in the payments which he was ordered by the court to make prior to the entry of said consent order; (4) that the defendant is able-bodied and able to work and earn money; (5) that he does in fact earn weekly wages; and (6) that he has avowed his intention and purpose not to pay his wife any further amounts, and does not intend to abide the orders of the court, thereupon Gwyn, J., as aforesaid, "considered, ordered and adjudged, that the defendant is in contempt of court." And it is further ordered and adjudged that the defendant be confined in the common jail of Rockingham County for the term of fifteen days.

And it is further ordered that the Sheriff of Rockingham County do receive the defendant Preston J. Riddle and confine him in the County jail in conformity to the judgment.

Defendant objects and excepts thereto and appeals to Supreme Court of North Carolina, and assigns error.

Fagg, Vaughn, Harrington & Fagg for plaintiff appellee.
Charles J. Nooe, W. T. Combs, Jr. for defendant appellant.

PER CURIAM. Under Chapter 5 of the General Statutes it is declared, among other things, that "any person guilty of disobedience of any process or order lawfully issued by any court" * * * "may be punished for contempt." Applying the provisions of this statute to the findings of fact herein, the court below properly adjudged defendant in contempt. Hence the judgment from which appeal is taken is

Affirmed.

MYRTLE G. LINKOUS, ASSIGNEE OF G. K. LINKOUS, TRADING AS "LINKS" OF DANVILLE, VIRGINIA v. J. B. MILLNER.

(Filed 24 May, 1961.)

APPEAL by plaintiff from *Johnston, J.*, March Civil Term 1961 of CASWELL.

This action was instituted by the plaintiff as the assignee of her deceased husband who, prior to his death in March 1958, did business under the name of "LINKS."

The plaintiff alleges in her complaint that certain goods were sold and delivered to the defendant by "LINKS." The defendant in his answer denies having received the goods. Invoices, one dated 30 July 1957 itemizing certain goods allegedly sold and delivered to the defendant in the sum of $50.38, and another dated 23 August 1957 covering items allegedly sold and delivered to the defendant in the sum of $207.00, were introduced in evidence by the plaintiff.

Plaintiff's evidence tends to show that one William Batterman, the delivery man in the employment of "LINKS" at the time the goods were allegedly sold and delivered, is dead. The plaintiff's evidence further tends to show that no signature or receipt was obtained from the defendant or any of his agents or employees, and that such signature was ordinarily obtained upon delivery of goods.

The plaintiff and J. M. McFarling, the employee of "LINKS" who testified he made out the invoices introduced in evidence, testified that they did not know whether the goods were delivered to the defendant or not.

The defendant testified that he did not receive the goods and could not find among his records any invoice or invoices therefor.

The cause was submitted to the jury on an appropriate issue, which the jury answered in favor of the defendant. From the judgment entered on the verdict the plaintiff appeals, assigning error.

D. Emerson Scarborough for plaintiff.
No counsel contra.

PER CURIAM. A careful consideration of the assignments of error set out in the record on this appeal, fails to reveal any prejudicial error that would justify disturbing the result of the trial below.

No error.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND APPROVED SPRING TERM, 1961

INDEX

(Numbers refer to Rules)

Appeal, abatement, and revivor, R. 37.
Appeal bond, R. 6 (1).
Appeal in criminal actions, R. 6.
Appeal dismissed for failure to prosecute, R. 15.
Appeal dismissed if not docketed in time, R. 17.
Appeal dismissed under Rule 17 not reinstated till cost paid, R. 18.
Appeal dismissed for failure to file brief, R. 28.
Appeal dismissed for failure to group exceptions, R. 19 (3).
Appeal dismissed for failure to mimeograph or print, R. 24, 28.
Appeal, motion to dismiss, when to be made, R. 16.
Appeal dismissed when frivolous, etc. R. 17 (1).
Appeals, two in one action, R. 19 (2).
Appeals, how docketed, R. 4.
Appeals *in forma pauperis*, R. 22.
Appeals, when heard, R. 5.
Agreements of counsel, R. 32.
Appearances, R. 33.
Arguments, R. 30, 31.
Arguments, printed submission, R. 10.
Briefs, appeal dismissed if not printed or mimeographed, R. 28.
Brief of appellant, when to be filed, R. 28.
Brief of appellant, copy to be furnished appellee, R. 28.
Brief of appellant, in criminal cases, extra copy for Attorney General, R. 25.
Brief of appellee, when to be filed, R. 29.
Brief not received after argument, R. 11.
Brief regarded as personal appearance, R. 12.
Briefs, submission on, R. 10.
Briefs to be printed or mimeographed, R. 27.
Certification of decisions, R. 38.
Certiorari, R. 4a; R. 34 (1), (2), (3).
Citation of Reports, R. 46.
Clerk and commissioners, R. 40.
Costs of printing or mimeographing records and briefs, R. 25, 26.
Court's opinions to be copied and distributed, R. 42.
Court reconvened, when, R. 47.

Court, sittings of, R. 45.
Criminal actions, R. 6.
Death of party, when suggested, R. 37 par. 2.
Decisions, certification of, R. 38.
Demurrer, No appeal from order overruling, R. 4 (a).
Districts, call of, R. 7.
Docket, call of, R. 9.
Docket, end of, R. 8.
Evidence to be in narrative form, R. 19 (4).
Exceptions, R. 21.
Exceptions grouped, R. 19 (3).
Executions, R. 43.
Frivolous appeal dismissed, R. 17 (1).
Hearing case out of order, R. 13.
Hearing cases together, when, R. 14.
Issues, R. 35.
Judgment docket, R. 39.
Librarian, R. 41.
Mimeographing records and briefs, R. 25, 26.
Minute docket, R. 39.
Motions, R. 36.
Motion for certiorari, R. (4) (a), R. 34 (1), (2), (3).
Notice of certiorari, R. 34 (3).
Opinions of Court copied and distributed by clerk, R. 42.
Opinions of Court, when certified to Superior Court, R. 38.
Parties, death of, when suggested, R. 37, par. 2.
Pauper appeals, R. 22.
Petition for certiorari, R. 34 (1), (2), (3).
Petition to rehear, R. 44.
Pleadings, R. 20.
Pleadings, amendment to, R. 20 (4).
Pleadings, no appeal from motion to strike, R. 4 (a).
Pleadings, when deemed frivolous, R. 20 (1).
Pleadings, when containing more than one cause, R. 20 (2).
Pleadings, when scandalous, R. 20(3).
Printing transcripts, R. 22, 23, 24, 25.
Prosecution bond, R. 19 (9).
Reargument, R. 31.
Rehearing, R. 44.
Reports of Supreme Court, how cited, R. 46.
Sittings of Court, R. 45.
Supreme Court Reports, how cited, R. 46.
Transcripts, what to contain and how arranged, R. 19.
Transcripts in pauper appeals, R. 22.
Transcripts, unnecessary portions, how taxed, R. 19 (5).
Transcripts printed or mimeographed, R. 22, 23, 24, 25.
Transcripts, when to be docketed, R. 5.

RULES

[Rules 1, 2, 3, 3 (A), 3 (B), 3 (C), Obsolete.]

4. Appeals—How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

APPEALS STATUTORY AND ALLOWED ONLY FROM FINAL JUDGMENTS OR ORDERS AFFECTING SUBSTANTIAL RIGHTS: *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98; *Moore v. Hinnant*, 87 N.C. 505; *Merrill v. Merrill*, 92 N.C. 657; *Lutz v. Cline*, 89 N.C. 186; *S. v. Keeter*, 80 N.C. 472.

DISMISSED IF ONLY MOOT QUESTION PRESENTED: *Rousseau v. Bullis*, 201 N.C. 12, 158 S.E. 553; *Kistler v. R. R.*, 164 N.C. 365, 79 S.E. 676.

4(a). The Supreme Court will not entertain an appeal:

(1) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order overruling the demurrer.

(2) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of *certiorari* within thirty days from the date of the entry of the order.

NO APPEAL FROM ORDER ALLOWING MOTION TO STRIKE: *Lamson v. Lamson*, 253 N.C. 336, 116 S.E. 2d 789; *Bogue v. Arnold*, 243 N.C. 622, 91 S.E. 2d 670.

ORDER ALLOWING MOTION TO STRIKE DEFENSE IN ITS ENTIRETY AMOUNTS TO ORDER ALLOWING DEMURRER AND IS APPEALABLE: *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E. 2d 554.

NO APPEAL FROM ORDER OVERRULING DEMURRER EXCEPT DEMURRER FOR MISJOINDER OF PARTIES AND CAUSES: *Lamson v. Lamson,* 253 N.C. 336, 116 S.E. 2d 789; *Guinn v. Kincaid,* 253 N.C. 228, 116 S.E. 2d 380; *Willcox v. Di Capadarso,* 244 N.C. 741, 94 S.E. 2d 925; *Clements v. Simmons,* 244 N.C. 523, 94 S.E. 2d 480; *Wilks, Inc., v. Dillingham,* 244 N.C. 522, 94 S.E. 2d 495.

APPEAL LIES FROM ORDER OVERRULING DEMURRER FOR MISJOINDER OF PARTIES AND CAUSES: *Hall v. Mica Co.,* 244 N.C. 182, 93 S.E. 2d 56.

UPON DEMURRER FOR MISJOINDER OF PARTIES AND CAUSES, VOLUNTARY NONSUIT OBVIATING MISJOINDER OF PARTIES PRECLUDES RIGHT OF APPEAL: *Boles v. Graham,* 249 N.C. 131, 105 S.E. 2d 296.

ATTEMPTED APPEAL FROM ORDER ALLOWING MOTION TO STRIKE MAY BE TREATED AS PETITION FOR CERTIORARI ONLY WHEN ORDER APPEALED FROM WAS ENTERED PRIOR TO 1 JANUARY 1956: *Bogue v. Arnold,* 243 N.C. 622, 91 S.E. 2d 670.

PETITION FOR CERTIORARI MUST BE FILED WITHIN 30 DAYS FROM DATE OF ENTRY OF ORDER: *Lowry v. Dillingham,* 246 N.C. 618, 99 S.E. 2d 771.

CERTIORARI NOT GRANTED WHEN IT IS NOT MADE TO APPEAR THAT SUBSTANTIAL RIGHT WOULD BE ADVERSELY AFFECTED IF MATTER IS NOT HEARD BEFORE FINAL JUDGMENT: *Bogue v. Arnold,* 243 N.C. 622, 91 S.E. 2d 670.

CERTIORARI GRANTED: *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; *Winston-Salem v. Coach Lines,* 245 N.C. 179, 95 S.E. 2d 510.

ALLOWANCE OF CERTIORARI WILL BE TREATED AS EXCEPTION TO ORDER OR ORDERS PETITIONER SEEKS TO HAVE REVIEWED: *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; *Winston-Salem v. Coach Lines,* 245 N.C. 179, 95 S.E. 2d 510; *Collier v. Mills,* 245 N.C. 200, 95 S.E. 2d 529.

GRANTING OF CERTIORARI BRINGS UP ONLY EXCEPTIONS TO RULINGS AND DOES NOT PERMIT DEMURRER ORE TENUS: *Harrell v. Powell,* 249 N.C. 244, 106 S.E. 2d 160.

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.

See G.S. 1-268, *et seq.,* and annotations thereunder.

RULE SALUTARY AND MANDATORY: *In re De Febio,* 237 N.C. 269, 74 S.E. 2d 531; *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *S. v. Presnell,* 226 N.C. 160, 36 S.E. 2d 927; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Harris,* 199 N.C. 377, 154 S.E. 628; *Covington v. Hosiery Mills,* 195 N.C. 478, 142 S.E. 705; *S. v. Surety Co.,* 192 N.C. 52, 133 S.E. 172; *Stone v. Ledbetter,* 191 N.C. 777, 133 S.E. 162; *Trust Co. v. Parks,* 191 N.C. 263, 131 S.E. 637; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562; *Walker v. Scott,* 102 N.C. 487, 9 S.E. 488.

CANNOT BE ABROGATED BY AGREEMENT OR OTHERWISE: *In re Suggs,* 238 N.C. 413, 78 S.E. 2d 157; *S. v. Moore,* 210 N.C. 459, 187 S.E. 586; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126;

Covington v. Hosiery Mills, 195 N.C. 478, 142 S.E. 705; *Waller v. Dudley,* 193 N.C. 354, 137 S.E. 149; *Finch v. Commissioners,* 190 N.C. 154, 129 S.E. 195; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562; *S. v. Butner,* 185 N.C. 731, 117 S.E. 163; *Cooper v. Commissioners,* 184 N.C. 615, 115 S.E. 893; *Rose v. Rocky Mount,* 184 N.C. 609, 113 S.E. 506.

FAILURE TO DOCKET: *In re Suggs,* 238 N.C. 413, 78 S.E. 2d 157; *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *Hawkins v. Land Bank,* 223 N.C. 858, 26 S.E. 2d 901; *Gregg v. Graybeal,* 209 N.C. 575, 184 S.E. 85; *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Hines,* 204 N.C. 507, 168 S.E. 841; *Pentuff v. Park,* 195 N.C. 609, 143 S.E. 139; *Stone v. Ledbetter,* 191 N.C. 777, 133 S.E. 162; *S. v. Brown,* 183 N.C. 789, 111 S.E. 780; *Mimms v. Seaboard,* 183 N.C. 436, 111 S.E. 778; *S v. Ward,* 180 N.C. 693, 104 S.E. 531; *Carroll v. Mfg. Co.,* 180 N.C. 660, 104 S.E. 365; *Caudle v. Morris,* 158 N.C. 594, 74 S.E. 98; *Truelove v. Norris,* 152 N.C. 755, 67 S.E. 487; *Hewitt v. Beck,* 152 N.C. 757, 67 S.E. 586; *Mortgage Co. v. Long,* 116 N.C. 77, 20 S.E. 964.

CAPITAL CASE WILL BE DISMISSED ONLY AFTER INSPECTION OF RECORD FAILS TO DISCLOSE ERROR: *S. v. Hall,* 233 N.C. 310, 63 S.E. 2d 636; *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428; *S. v. Harrell,* 226 N.C. 743, 40 S.E. 2d 205.

PRACTICE IN REGARD TO DOCKETING APPEALS SUMMARIZED: *Porter v. R. R.,* 106 N.C. 478, 11 S.E. 515.

DOCKETING REMOVES CASE FROM CONTROL OF PARTIES: *Carswell v. Talley,* 192 N.C. 37, 133 S.E. 181.

ABANDONMENT OF APPEAL: *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Jordan v. Simmons,* 175 N.C. 537, 95 S.E. 919; *Avery v. Pritchard,* 93 N.C. 266.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED: *Pentuff v. Park,* 195 N.C. 609, 143 S.E. 139.

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.

See G.S. 15-177, *et seq.*, and annotations thereunder.

DOCKETING SAME AS CIVIL CASES: *S. v. O'Kelly,* 88 N.C. 609.

DISMISSED IF DEFENDANT FLEES OR IS "IN THE WOODS.": *S. v. Devan,* 166 N.C. 281, 81 S.E. 293; *S. v. Keebler,* 145 N.C. 560, 59 S.E. 872; *S. v. Jacobs,* 107 N.C. 772, 11 S.E. 962.

NO APPEAL EXCEPT FROM FINAL JUDGMENT: *S. v. Nash,* 97 N.C. 514, 2 S.E. 645; *S. v. Hazel,* 95 N.C. 623.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by G.S. 1-286, the appeal will be dismissed.

FAILURE OF SURETY TO JUSTIFY: *S. v. Wagner,* 91 N.C. 521.

(2) *Pauper Appeals.* See Rule 22.

STATUTORY REQUIREMENTS COMPULSORY AND JURISDICTIONAL: *S. v. Marion,* 200 N.C. 715, 158 S.E. 406; *S. v. Smith,* 152 N.C. 842, 67 S.E. 965.

DIFFERENT IN CIVIL AND CRIMINAL CASES: G.S. 1-288 and G.S. 15-181; *S. v. Gatewood,* 125 N.C. 694, 34 S.E. 543.

IN CIVIL PAUPER CASES: *Honeycutt v. Watkins,* 151 N.C. 652, 65 S.E. 762.

(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed if Transcript Not Printed or Mimeographed.* See Rule 24.

MUST DOCKET RECORD: *S. v. Moore,* 210 N.C. 459, 187 S.E. 586; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562; *S. v. Johnson,* 183 N.C. 730, 110 S.E. 782; *S. v. Trull,* 169 N.C. 363, 85 S.E. 133.

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.

S. v. Edwards, 205 N.C. 443, 171 S.E. 608; *Carroll v. Mfg. Co.*, 180 N.C. 660, 104 S.E. 365.

8. End of Docket.

At the Spring Term, causes not reached and disposed of during the period alloted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Fifteenth and Sixteenth Districts, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the appeal, if in a civil action, may be put to the foot of the district by consent of counsel or for cause, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory. At the first week of each term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put at the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

NO DAILY CALENDAR: *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Lunsford v. Alexander,* 162 N.C. 528, 78 S.E. 275.

10. Submission on Printed Arguments.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Fourteenth and Seventeenth Districts has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(NOTE. A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

NECESSITY OF BRIEF: *Mills v. Guaranty Co.,* 136 N.C. 255.

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been

argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

OPPOSITION TO CONTINUANCE: *Dibbrell v. Ins. Co.*, 109 N.C. 314, 13 S.E. 739.

13. When Case May Be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the Calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

TITLE TO PUBLIC OFFICE: *Caldwell v. Wilson*, 121 N.C. 423, 28 S.E. 363.

14. When Cases May Be Heard Together.

Two or more cases involving the same question may, by order of the court, be heard together and argued as one case.

15. Appeal Dismissed if not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, not later than the corresponding week of the next succeeding term, move for cause to have the same reinstated, on notice to the appellee.

RULE MANDATORY: *Wiseman v. Commissioners*, 104 N.C. 330, 10 S.E. 481.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED: *Pentuff v. Park*, 195 N.C. 609, 143 S.E. 139.

16. Motion To Dismiss Appeal—When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the argument of the appeal upon its merits. Such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, or unless the Court shall allow appropriate amendments.

DISMISSAL OF APPEAL: *Winchester v. Brotherhood of R. R. Trainmen,* 203 N.C. 735, 167 S.E. 49; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Martin v. Chambers,* 116 N.C. 673, 21 S.E. 402; *Wiseman v. Commissioners,* 104 N.C. 330, 10 S.E. 481.

BURDEN ON APPELLANT TO SHOW DILIGENCE: *S. v. Goldston,* 201 N.C. 89, 158 S.E. 926; *Simmons v. Andrews,* 106 N.C. 201, 10 S.E. 1052.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant shall fail to bring up and file a transcript of the record twenty-eight days before the call of cases from the district to which the case belongs, the appellee may file with the clerk of this Court motion to docket and dismiss at appellant's cost. The appellee must file 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. The motion may 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.)

LACHES OF APPELLANT: *Ins. Co. v. Stafford, Inc.*, 238 N.C. 678, 78 S.E. 2d 607; *Brock v. Ellis,* 193 N.C. 540, 137 S.E. 585; *Baker v. Hare,* 192 N.C. 788, 136 S.E. 113; *Rogers v. Asheville,* 182 N.C. 596, 109 S.E. 865; *Carrol v. Mfg. Co.,* 180 N.C. 660, 104 S.E. 528; *Johnson v. Covington,* 178 N.C. 658, 100 S.E. 881; *Cox v. Lumber Co.,* 177 N.C. 227, 98 S.E. 704; *Murphy v. Electric Co.,* 174 N.C. 782, 93 S.E. 456; *McNeill v. R. R.,* 173 N.C. 729, 92 S.E. 484.

LACHES OF APPELLEE: *S. v. Wescott,* 220 N.C. 439, 17 S.E. 2d 507; *S. v. Flynn,* 217 N.C. 345, 7 S.E. 2d 700; *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *Mitchell v. Melton,* 178 N.C. 87, 100 S.E. 124; *McLean v. McDonald,* 175 N.C. 418, 95 S.E. 769; *Gupton v. Sledge,* 161 N.C. 213, 76 S.E. 527; *Marbee v. Green,* 91 N.C. 158.

CAPITAL CASE DISMISSED FOR FAILURE TO PROSECUTE APPEAL ONLY AFTER INSPECTION OF RECORD FAILS TO SHOW ERROR: *S. v. Hall,* 233 N.C. 310; 63 S.E. 2d 636; *S. v. Lewis,* 230 N.C. 539, 53 S.E. 2d 528; *S v. Garner,* 230 N.C. 66, 51 S.E. 2d 895; *S. v. Little,* 227 N.C. 701, 41 S.E. 2d 833; *S. v. McLeod,* 227 N.C. 411, 42 S.E. 2d 464; *S. v. Harrell,* 226 N.C. 743, 40 S.E. 2d 205; *S. v. Nelson,* 226 N.C. 529, 39 S.E. 2d 391; *S. v. Buchanan,* 224 N.C. 626, 31 S.E. 2d 774; *S. v. Brooks,* 224 N.C. 627, 31 S.E. 2d 754; *S. v. Poole,* 223 N.C. 394, 26 S.E. 2d 858; *S. v. Moody,* 222 N.C. 763, 24 S.E. 2d 530; *S. v. Wilfong,* 222 N.C. 746, 24 S.E. 2d 629.

APPEAL DOCKETED BEFORE MOTION TO DISMISS: *State v. Jones,* 225 N.C. 363, 34 S.E. 2d 202; *S. v. Baldwin,* 221 N.C. 471, 20 S.E. 2d 298; *S. v. Blue,* 221 N.C. 36, 18 S.E. 2d 697; *S. v. Morrow,* 220 N.C. 441, 17 SE. 2d 507; *S. v. Page,* 217 N.C. 288, 7 S.E. 2d 559; *S. v. Williams,* 216 N.C. 740, 6 S.E. 2d 492; *S. v. Watson,* 208 N.C. 70, 179 S.E. 456; *McLean v. McDonald,* 175 N.C. 418, 95 S.E. 769; *Dupton v. Sledge,* 161 N.C. 213, 76 S.E. 622.

FRIVOLOUS APPEALS DISMISSED: *Stephenson v. Watson,* 226 N.C. 742, 40 S.E. 2d 315; *Ross v. Robinson,* 185 N.C. 548, 118 S.E. 4; *Hotel Co. v. Griffin,* 182 N.C. 539, 109 S.E. 371; *Blount v. Jones,* 175 N.C. 708, 95 S.E. 541; *Ludwick v. Mining Co.,* 171 N.C. 60, 87 S.E. 949.

FRAGMENTARY APPEALS: *Headman v. Commissioners,* 177 N.C. 261, 98 S.E. 776; *Yates v. Ins. Co.,* 176 N.C. 401, 97 S.E. 209; *Martin v. Flippin,* 101 N.C. 452, 8 S.E. 345; *Leak v. Covington,* 95 N.C. 193.

PREMATURE APPEALS: *Johnson v. Mills Co.,* 196 N.C. 93, 144 S.E. 534.

APPELLANT NOT ENTITLED TO NOTICE: *Kerr v. Drake,* 182 N.C. 764, 108 S.E. 393; *Johnston v. Whitehead,* 109 N.C. 207, 13 S.E. 731.

WHERE MOTION TO DOCKET AND DISMISS IS ALLOWED, ORDER IN THE CAUSE IN THE SUPERIOR COURT IS VOID FOR WANT OF JURISDICTION: *Futrell v. Trust Co.,* 224 N.C. 221, 29 S.E. 2d 698.

IF NO "CASE" FILED, APPEAL NOT DISMISSED, BUT JUDGMENT AFFIRMED: *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *Smith v. Smith,* 199 N.C. 463, 154 S.E. 737; *Roberts v. Bus Co.,* 198 N.C. 779, 153 S.E. 398; *Wallace v. Salisbury,* 147 N.C. 58, 60 S.E. 713; *Walker v. Scott,* 102 N.C. 487, 9 S.E. 488.

APPELLEE MAY PROCEED IN SUPERIOR COURT: *Pentuff v. Park,* 195 N.C. 609, 143 S.E. 139.

18. Appeal Docketed and Dismissed Not to be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

As to costs on appeal, see G.S. 6-33, *et seq.,* and also G.S. 1-285, *et seq.*

Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126.

19. Transcripts.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several proc-

esses, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

See G.S. 1-282; 1-283; 1-284.

IMPERFECT OR INCOMPLETE TRANSCRIPT: *In re Adoption of Anderson,* 251 N.C. 176, 110 S.E. 2d 832; *Thrush v. Thrush,* 245 N.C. 63, 94 S.E. 2d 897; *Pace v. Pace,* 244 N.C. 698, 94 S.E. 2d 819; *Griffin v. Barnes,* 242 N.C. 306, 87 S.E. 2d 560; *Macon v. Murray,* 240 N.C. 116, 81 S.E. 2d 126; *Warshaw v. Warshaw,* 236 N.C. 754, 73 S.E. 2d 900; *S. v. Jenkins,* 234 N.C. 112, 66 S.E. 2d 819; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517; *Washington County v. Land Co.,* 222 N.C. 637, 24 S.E. 2d 338; *Messich v. Hickory,* 211 N.C. 531, 191 S.E. 43; *Ins. Co. v. Bullard,* 207 N.C. 652, 178 S.E. 113; *S. v. Simmerson,* 202 N.C. 583, 163 S.E. 571; *Parks v Seagraves,* 203 N.C. 647, 166 S.E. 747; *Waters v. Waters,* 199 N.C. 667, 155 S.E. 564; *Schwarberg v. Howard,* 199 N.C. 126, 147 S.E. 741; *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181; *Hobbs v. Cashwell,* 158 N.C. 597, 74 S.E. 23; *Cressler v. Asheville,* 138 N.C. 482, 51 S.E. 53; *Sigman v. R.R.,* 135 N.C. 181, 47 S.E. 420; *Wiley v. Mining Co.,* 117 N.C. 489, 23 S.E. 448; *Jones v. Hoggard,* 107 N.C. 349, 12 S.E. 286.

ORGANIZATION OF COURT MUST APPEAR ON TRANSCRIPT: *Credit Corp. v. Motor Co.*, 223 N.C. 859, 27 S.E. 2d 442; *Thomas v. Ins. Co.*, 222 N.C. 754, 22 S.E. 2d 711; *Vail v. Stone*, 222 N.C. 431, 23 S.E. 2d 329; *S. v. Patterson*, 222 N.C. 179, 22 S.E. 2d 267; *Brown v. Johnson*, 207 N.C. 807, 178 S.E. 570; *S. v. May*, 118 N.C. 1204, 24 S.E. 118.

ENTRY OF APPEAL MUST APPEAR ON RECORD: *Walton v. McKesson*, 101 N.C. 428, 7 S.E. 566; *R. R. v. Brunswick County*, 198 N.C. 549, 152 S.E. 632; *Mfg. Co. v. Simmons*, 97 N.C. 89, 1 S.E. 923.

TRANSCRIPT MUST SHOW JURISDICTION AND BEFORE WHOM CASE TRIED: *In re Adoption of Anderson*, 251 N.C. 176, 110 S.E. 2d 832; *S. v. Banks*, 241 N.C. 572, 86 S.E. 2d 76; *Spence v. Tapscott*, 92 N.C. 576; *S. v. Butts*, 91 N.C. 524.

FAILURE TO INDEX: *Milwood v. Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560; *Redding v. Dunn*, 185 N.C. 311, 117 S.E. 26; *Kearnes v. Gray*, 173 N.C. 717, 92 S.E. 149; *Sigman v. R. R.*, 135 N.C. 181, 47 S.E. 420.

PURPOSE OF RULE: *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

TWO RECORDS UNNECESSARY: *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593; *S. v. Jackson*, 226 N.C. 760, 40 S.E. 2d 417; *Pope v. Lumber Co.*, 162 N.C. 208, 78 S.E. 65; *Hagaman v. Bernhardt*, 162 N.C. 381, 78 S.E. 209.

WHEN TWO RECORDS ARE NECESSARY: *Osborne v. Canton and Kingsland v. Mackey*, 219 N.C. 139, 13 S.E. 2d 265.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of

not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

APPEAL FROM JUDGMENT ONLY: *Casualty Co. v. Green,* 200 N.C. 535, 157 S.E. 797; *Owens v. Hines,* 178 N.C. 325, 100 S.E. 617; *Hoke v. Whisnant,* 174 N.C. 658, 94 S.E. 446; *Ullery v. Guthrie,* 148 N.C. 417, 62 S.E. 552; *Wilson v. Lumber Co.,* 131 N.C. 163, 42 S.E. 565.

ERROR ON FACE OF RECORD PROPER: *Clark v. Freight Carriers,* 247 N.C. 705, 102 S.E. 2d 252; *Rogers v. Bank,* 108 N.C. 574, 13 S.E. 245.

RULE MANDATORY: *Pamlico County v. Davis,* 249 N.C. 648, 107 S.E. 2d 306; *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *Tillis v. Cotton Mills,* 244 N.C. 587, 94 S.E. 2d 600; *Baker v. Clayton,* 202 N.C. 741, 164 S.E. 233; *Thresher Co. v. Thomas,* 170 N.C. 680, 87 S.E. 327; *Wheeler v. Cole,* 164 N.C. 378, 80 S.E. 241; *Pegram v. Hester,* 152 N.C. 765, 68 S.E. 8; *Davis v. Wall,* 142 N.C. 450, 55 S.E. 350; *Hicks v. Kenan,* 139 N.C. 337, 51 S.E. 941; *Sigman v. R.R.,* 135 N.C. 181, 47 S.E. 420; *Brinkley v. Smith,* 130 N.C. 224, 41 S.E. 106.

ASSIGNMENTS OF ERROR MUST BE SPECIFIC: *Columbus County v. Thompson,* 249 N.C. 607, 107 S.E. 2d 302; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492; *Travis v. Johnston,* 244 N.C. 713; 95 S.E. 2d 94; *S. v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *Davis v. Vaughn,* 243 N.C. 486, 91 S.E. 2d 165; *S. v. Bostic,* 242 N.C. 639, 89 S.E. 2d 261; *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *Poniros v. Teer Co.,* 236 N.C. 145, 72 S.E. 2d 9; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175; *McKinnon v. Morrison,* 104 N.C. 354, 10 S.E. 513; *Harrison v. Dill,* 169 N.C. 542, 86 S.E. 518; *Boyer v. Jarrell,* 180 N.C. 479, 105 S.E. 9.

FAILURE OF RECORD TO CONTAIN ANY ASSIGNMENT OF ERROR IS GROUND FOR DISMISSAL: *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; *Milling Co. v. Laws,* 242 N.C. 505, 87 S.E. 2d 925; *S. v. Liles,* 232 N.C. 622, 61 S.E. 2d 603.

ASSIGNMENT OF ERROR MUST PRESENT QUESTION WITHOUT NECESSITY OF GOING BEYOND THE ASSIGNMENT ITSELF: *S. v.*

Reel, 254 N.C. 778; *McArthur v. Stanfield*, 254 N.C. 627; *Sanitary District v. Canoy*, 254 N.C. 630; *Nichols v. McFarland*, 249 N.C. 125, 105 S.E. 2d 294; *Armstrong v. Howard*, 244 N.C. 598, 94 S.E. 2d 594; *Tillis v. Cotton Mills*, 244 N.C. 587, 94 S.E. 2d 600; *S. v. Mills*, 244 N.C. 487, 94 S.E. 2d 324.

ASSIGNMENT TO RULING ON MOTION TO NONSUIT IS SUFFICIENT IF IT REFERS TO THE MOTION, THE RULING THEREON, THE NUMBER OF THE EXCEPTION, AND PAGE OF RECORD WHERE FOUND: *Nichols v. McFarland*, 249 N.C. 125, 105 S.E. 2d 294.

HOW ASSIGNMENTS MADE: *Harrell v. White*, 208 N.C. 409, 181 S.E. 268; *Jenkins v. Castelloe*, 208 N.C. 406, 181 S.E. 266; *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735; *Rawls v.* Lupton, 193 N.C. 428, 137 S.E. 175; Merritt v. R. R., 169 N.C. 244, 85 S.E. 2; *Porter v. Lumber Co.*, 164 N.C. 396, 80 S.E. 443; *Jones v. R. R.*, 153 N.C. 419, 69 S.E. 427; *McDowell v. Kent*, 153 N.C. 555, 69 S.E. 626; *Smith v Mfg. Co.*, 151 N.C. 261, 65 S.E. 1009; *Thompson v. R.R.*, 147 N.C. 413, 61 S.E. 286.

ASSIGNMENTS OF ERROR MAY NOT BE FILED INITIALLY IN SUPREME COURT: *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271.

EXCEPTIVE ASSIGNMENTS OF ERROR, AND NONE OTHER, CONSIDERED: *Darden v. Bone*, 254 N.C. 599; *S. v. Strickland*, 254 N.C. 658; *Bulman v. Baptist Convention*, 248 N.C. 392, 103 S.E. 2d 487; *S. v. Worley*, 202 N.C. 246, 97 S.E. 2d 837; *Tynes v. Davis*, 244 N.C. 528, 94 S.E. 2d 496; *Utilities Com. v. Greensboro*, 244 N.C. 247, 93 S.E. 2d 151; *S. v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322; *S. v. Moore*, 222 N.C. 356, 23 S.E. 2d 31; *Hobbs v. Hobbs*, 218 N.C. 468, 11 S.E. 2d 311; *S. v. Oliver*, 213 N.C. 386, 196 S.E. 325; *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631; *S. v. Anderson*, 208 N.C. 771, 182 S.E. 643; *In re Beard*, 202 N.C. 661, 163 S.E. 748; *Rawls v. Lupton*, 193 N.C. 428, 137 S.E. 175; *S. v. Freeze*, 170 N.C. 710, 86 S.E. 1000.

COURT WILL NOT MAKE VOYAGE OF DISCOVERY THROUGH RECORD: *Darden v. Bone*, 254 N.C. 599; *Shepard v. Oil & Fuel Co.*, 242 N.C. 762, 89 S.E. 2d 464; *Cecil v. Lumber Co.*, 197 N.C. 81, 147 S.E. 735.

EXCEPTIONS MUST BE GROUPED AND BROUGHT FORWARD: *Daniel v. Lumber Co.*, 254 N.C. 504; *Tillis v. Cotton Mills*,

244 N.C. 587, 94 S.E. 2d 600; *Ellis v. R. R.*, 241 N.C. 747, 86 S.E. 2d 406; *Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444; *Investment Co. v. Chemicals Laboratory*, 233 N.C. 294, 63 S.E. 2d 637; *S. v. West*, 229 N.C. 416, 50 S.E. 2d 3; *S. v. Biggerstaff*, 226 N.C. 603, 39 S.E. 2d 619; *S. v. Thompson*, 224 N.C. 661, 32 S.E. 2d 24; *Watkins v. Grier*, 224 N.C. 334, 30 S.E. 2d 219.

DISMISSED FOR FAILURE TO FOLLOW RULE: *Merritt v. Dick*, 169 N.C. 244, 85 S.E. 2.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED: *Taylor v. Plummer*, 105 N.C. 56, 11 S.E. 266.

EXCEPTIONS AND ASSIGNMENTS OF ERROR TO FINDINGS OF FACT HELD IN COMPLIANCE WITH RULE: *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912.

(4) *Evidence To Be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

STENOGRAPHER'S NOTES INSUFFICIENT: *Rhodes v. Asheville*, 220 N.C. 443, 17 S.E. 2d 500; *Casey v. R. R.*, 198 N.C. 432, 152 S.E. 38; *Rogers v. Asheville*, 182 N.C. 596, 109 S.E. 865; *Brewer v. Mfg. Co.*, 161 N.C. 211, 76 S.E. 237; *Skipper v. Lumber Co.*, 158 N.C. 322, 74 S.E. 342; *Bucken v R.R.*, 157 N.C. 443, 73 S.E. 137; *Cressler v. Asheville*, 138 N.C. 482, 51 S.E. 53.

EVIDENCE SHOULD BE SET OUT IN NARRATIVE FORM EXCEPT WHEN NECESSARY TO PRESENT PARTICULAR EXCEPTIONS: *Trucking Co. v. Dowless*, 249 N.C. 346, 106 S.E. 2d 510; *Anderson v. Heating Co.*, 238 N.C. 138, 76 S.E. 2d 458.

A RECORD CONTAINING IN AN "AGREED STATEMENT OF FACTS" A MERE SUMMARY OF THE EVIDENCE, LARGELY IN THE FORM OF

CONCLUSIONS, IS INSUFFICIENT: *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 343.

RULE MANDATORY: *Amusement Co. v. Tarkington,* 251 N.C. 461, 111 S.E. 2d 538; *S. v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49; *Huie v. Templeton,* 246 N.C. 86, 97 S.E. 2d 455; *Whiteside v. Purina Co.,* 242 N.C. 591, 89 S.E. 2d 159; *S. v. McNeill,* 239 N.C. 679, 80 S.E. 2d 680; *Laughinghouse v. Ins. Co.,* 239 N.C. 678, 80 S.E. 2d 457; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Carter v. Bryant,* 199 N.C. 704, 155 S.E. 602; *Bank v. Fries,* 162 N.C. 516, 77 S.E. 227.

PAUPER APPEALS: *Skipper v. Lumber Co.,* 158 N.C. 322, 74 S.E. 342.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Nine copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

FILING COPIES OF PLAT: *Stephens v. McDonald,* 132 N.C. 135, 43 S.E. 592.

PRINTING EXHIBITS: *Hicks v. Royal,* 122 N.C. 405, 29 S.E. 413; *Fleming v. McPhail,* 121 N.C. 183, 28 S.E. 258.

(8) *Appeal Bond.* See Rule 6 (1).
See G.S. 1-285 *et seq.* and G.S. 6-33 *et seq.*
Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126.

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which

an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Pruitt v. Wood, 199 N.C. 788, 156 S.E. 126.

20. Pleadings.

(1) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Thrush v. Thrush, 245 N.C. 63, 94 S.E. 2d 897; *Pace v. Pace,* 244 N.C. 698, 94 S.E. 2d 819; *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517; *Washington County v. Land Co.,* 222 N.C. 637, 24 S.E. 2d 338; *Plott v. Construction Co.,* 198 N.C. 782, 153 S.E. 396.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

PROPER JOINDER MUST APPEAR ON FACE OF PLEADING OR FROM FACTS ALLEGED: *Vollers Co. v. Todd,* 212 N.C. 677, 194 S.E. 84; *Lykes v. Grove,* 201 N.C. 254, 159 S.E. 360; *Mfg. Co. v. Barrett,* 95 N.C. 36; *Allen v. Jackson,* 86 N.C. 321.

EACH CAUSE MUST BE SEPARATELY STATED: *Tart v. Byrne,* 243 N.C. 409, 90 S.E. 2d 692; *Mills v. Cemetery Park Corp.,* 242 N.C. 20, 86 S.E. 2d 893; *Heath v. Kirkman,* 240 N.C. 303, 82 S.E. 2d 104; *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648.

BUT ON DEMURRER THE ENTIRE PLEADING WILL BE CONSIDERED: *Pearce v. Pearce,* 226 N.C. 307, 37 S.E. 2d 904.

PLEADING MAY NOT INCORPORATE BY REFERENCE PRIOR PARAGRAPHS: *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232.

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

SCANDALOUS, IMPERTINENT, AND IRRELEVANT MATTER STRICKEN OUT: *Hosiery Mill v. Hosiery Mills,* 198 N.C. 596, 152 S.E. 794; *Ellis v. Ellis,* 198 N.C. 767, 153 S.E. 449; *Mitchell v. Brown,* 88 N.C. 156; *Powell v. Cobb,* 56 N.C. 1.

(4) *Amendment.* The court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

See G.S. 1-163 and 7-13, and annotations thereunder.

AMENDMENT NOT ALLOWED TO GIVE LIFE TO A LIFELESS PROCEEDING: *Hunt v. State,* 201 N.C. 37, 158 S.E. 703.

21. Exceptions. (See, also, Rule 19[3])

When appellant is required to serve a case on appeal, he shall set out in his statement of case on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When case on appeal is not required, appellant shall file said exceptions in the office of the clerk of the court below within ten days next after the end of the term at which judgment is rendered from which the appeal is taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission, that its purpose shall be restricted.

JUDGE'S CHARGE: *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *S. v. Jones,* 182 N.C. 781, 108 S.E. 376; *Bank v. Pack,* 178 N.C. 388, 100 S.E. 619.

RULE MANDATORY: *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *In re Bailey,* 180 N.C. 30, 103 S.E. 896;

Thresher Co. v. Thomas, 170 N.C. 680, 87 S.E. 327; *Hoggs v. Cashwell,* 158 N.C. 597, 74 S.E. 23.

CORROBORATIVE AND CONTRADICTORY EVIDENCE: *S. v. Scoggins,* 225 N.C. 71, 33 S.E. 2d 473; *S. v. Johnson,* 218 N.C. 604, 12 S.E. 2d 278; *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313; *Medlin v. Board of Education,* 167 N.C. 239, 83 S.E. 483; *Cooper v. R. R.,* 163 N.C. 150, 79 S.E. 418; *Crisco v. Yow,* 153 N.C. 434, 69 S.E. 422; *Tise v. Thomasville,* 151 N.C. 281, 65 S.E. 1007; *Hill v. Bean,* 150 N.C. 436, 64 S.E. 212; *Liles v. Lumber Co.,* 142 N.C. 39, 54 S.E. 795; *Westfeldt v. Adams,* 135 N.C. 591, 47 S.E. 816.

MOTION IN ARREST OF JUDGMENT: *S. v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901; *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401; *S. v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Jones,* 218 N.C. 734, 12 S.E. 2d 292.

MUST BE CLEARLY STATED AND NUMBERED: *Columbus County v. Thompson,* 249 N.C. 607, 107 S.E. 2d 302; *S. v. Mercer,* 249 N.C. 371, 106 S.E. 2d 866; *Bulman v. Baptist Convention,* 248 N.C. 392, 103 S.E. 2d 487; *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Liles,* 232 N.C. 622, 61 S.E. 2d 603; *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428; *S. v. McKnight,* 226 N.C. 766, 40 S.E. 2d 419; *S. v. Herring,* 226 N.C. 213, 37 S.E. 2d 319; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *Smith v. Supply Co.,* 214 N.C. 406, 199 S.E. 392; *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299; *Myrose v. Swain,* 172 N.C. 223, 90 S.E. 118; *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117; *Carter v. Reaves,* 167 N.C. 131, 83 S.E. 464; *Spruce Co. v. Hunnicutt,* 166 N.C. 202, 81 S.E. 1079; *Thompson v. R. R.,* 147 N.C. 412, 61 S.E. 286.

DUTY OF ATTORNEY: *S. v. Hendricks,* 207 N.C. 873, 178 S.E. 557; *McLeod v. Gooch,* 162 N.C. 122, 78 S.E. 4; *Allred v. Kirkman,* 160 N.C. 392, 76 S.E. 244; *Worley v. Logging Co.,* 157 N.C. 490, 73 S.E. 107.

EVIDENCE COMPETENT FOR SOME PURPOSES, BUT NOT FOR ALL: *Bailey v. Westmoreland,* 251 N.C. 843, 112 S.E. 2d 517; *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *S. v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837; *Hughes v. Enterprises,* 245 N.C. 131,

95 S.E. 2d 577; *Hatcher v. Clayton,* 242 N.C. 450, 88 S.E. 2d 104; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *Humphries v. Coach Co.,* 228 N.C. 399, 45 S.E. 2d 546; *S. v. Perry,* 226 N.C. 530, 39 S.E. 2d 460; *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; *S. v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *S. v. Sutton,* 225 N.C. 332, 34 S.E. 2d 195; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449.

ASSIGNMENT MUST DISCLOSE THE QUESTION SOUGHT TO BE PRESENTED WITHOUT THE NECESSITY OF GOING BEYOND THE ASSIGNMENT ITSELF: *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271.

ASSIGNMENT MUST BE SUPPORTED BY EXCEPTION: *S. v. Strickland,* 254 N.C. 658; *Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428; *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *S. v. Moore,* 222 N.C. 356, 23 S.E. 2d 31.

ASSIGNMENT SHOULD REFER TO PAGE OF TRANSCRIPT ON WHICH EXCEPTION IS TO BE FOUND: *Shepard v. Oil & Fuel Co.,* 242 N.C. 762, 89 S.E. 2d 464.

IN CAPITAL CASES ASSIGNMENTS MAY BE CONSIDERED THOUGH NOT BASED ON EXCEPTIONS CLEARLY STATED AND NUMBERED: *S. v. Herring,* 226 N.C. 213, 37 S.E. 2d 319.

EVIDENCE COMPETENT AT TIME OF INTRODUCTION BUT MADE INCOMPETENT BY SUBSEQUENT PROCEEDINGS: *Ziglar v. Ziglar,* 226 N.C. 102, 36 S.E. 2d 657.

22. Printing Transcripts. (But see Rule 25).

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible

typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

NUMBER OF COPIES MANDATORY IN PAUPER APPEALS: *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 102; *Trust Co. v. Miller,* 191 N.C. 787, 133 S.E. 97; *Fisher v. Toxaway Co.,* 171 N.C. 547, 88 S.E. 887; *Estes v. Rash,* 170 N.C. 341, 87 S.E. 309.

FAILURE TO COMPLY WITH RULE WORKS ABANDONMENT OF THE ASSIGNMENTS OF ERROR: *Wishon v. Weaving Co.,* 220 N.C. 420, 17 S.E. 2d 509; *S. v. Hopkins,* 217 N.C. 324, 7 S.E. 2d 566; *S. v. Hooker,* 207 N.C. 648, 178 S.E. 75.

APPEAL DISMISSED FOR FAILURE TO COMPLY: *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428.

BUT IN A CAPITAL CASE THE COURT WILL EXAMINE THE RECORD FOR ERROR: *S. v. Scriven,* 232 N.C. 198, 59 S.E. 2d 428.

23. How Printed.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

NECESSITY OF RULE: *Lumber Co. v. Privette,* 179 N.C. 1, 101 S.E. 489; *Howard v. Tel. Co.,* 170 N.C. 495, 87 S.E. 313; *Barnes v. Crawford,* 119 N.C. 127, 25 S.E. 791.

24. Appeal Dismissed if Transcript Not Printed or Mimeographed.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

RULE MANDATORY: *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *S. v. Charles,* 161 N.C. 286, 76 S.E. 715; *Truelove v. Norris,* 152 N.C. 755, 67 S.E. 487; *Stroud v. Tel. Co.,* 133 N.C. 253, 45 S.E. 592; *Dunn v. Underwood,* 116 N.C. 525, 20 S.E. 965.

25. Mimeographed Records and Briefs.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.40 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

In criminal actions, counsel for appellant, upon delivering a copy of his manuscript record of the statement of the case on appeal, as agreed to by counsel or as settled by the court, to the clerk of this Court to be printed or mimeographed, shall file an extra copy with the clerk for use by the Attorney-General.

26. Cost of Printing and Mimeographing Transcripts and Briefs to be Recovered.

The actual cost of printing the transcript of appeal and of the brief

shall be allowed the successful litigant not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed; Provided, receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of preparing typewritten copies of the transcript of appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page, and not to exceed sixty pages for transcript and twenty pages for brief.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has alrady paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

See G.S. 6-33.

EXCESSIVE COSTS: *R. R. v. Privette*, 179 N.C. 1, 101 S.E. 489; *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182; *Brown v. Harding*, 172 N.C. 835, 90 S.E. 3; *Handy v. Ins. Co.*, 167 N.C. 569, 83 S.E. 801; *Overman v. Lanier*, 157 N.C. 544, 73 S.E. 192; *Brazille v. Marytes Co.*, 157 N.C. 454, 73 S.E. 215; *Yow v. Hamilton*, 136 N.C. 357, 48 S.E. 782; *Roberts v. Lewald*, 108 N.C. 405, 12 S.E. 1028.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in

Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the Marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

MUST BE PRINTED OR MIMEOGRAPHED: *Bradshaw v. Stansberry,* 164 N.C. 356, 79 S.E. 302.

FAILURE TO FILE: *Dillard v. Brown,* 233 N.C. 551, 64 S.E. 2d 843; *S. v. Robinson,* 214 N.C. 365, 199 S.E. 270; *S. v. Kinyon,* 210 N.C. 294, 186 S.E. 368; *Theiling v. Wilson,* 203 N.C. 809, 167 S.E. 32; *Commissioners v. Dickson,* 190 N.C. 330, 129 S.E. 726; *S. v. Dawkins,* 190 N.C. 443, 129 S.E. 814.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

FAILURE TO COMPLY: *Daniel v. Lumber Co.,* 254 N.C. 504; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492; *S. v. Liles,* 232 N.C. 622, 61 S.E. 2d 603; *Steelman v. Benfield; Parsons v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Caldwell v. R. R.,* 218 N.C. 63, 10 S.E. 2d 680; *Lumber Co. v. Latham,* 199 N.C. 820, 155 S.E. 925; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. 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.

EXCEPTIONS OR ASSIGNMENTS OF ERROR NOT BROUGHT FORWARD AND DISCUSSED DEEMED ABANDONED: *S. v. Strickland,* 254 N.C. 658; *Power Co. v. Currie Comr. of Revenue,* 254 N.C. 17; *Dinkins v. Booe,* 252 N.C. 731, 114 S.E. 2d 272; *Conrad v. Conrad,* 252 N.C. 412; 113 S.E. 2d 912; *Friday v. Adams,* 251 N.C. 540, 111 S.E. 2d 893; *Cotton Mills v. Local 578,* 251 N.C. 413, 111 S.E. 2d 529; *Evans v. Coach Co.,* 251 N.C. 324, 111 S.E. 2d 187; *S. v. Rose,* 251 N.C. 281, 111 S.E. 2d 311; *S. v. Parrish,* 251 N.C. 274, 111 SE. 2d 314; *S. v. Clayton,* 251 N.C. 261; 111 S.E. 2d 299; *Cotton Mills v. Local 584,* 251 N.C. 254, 111 S.E. 2d 480; *Cotton Mills v. Local 484,* 251 N.C. 248, 111 S.E. 2d 467; *Cotton Mills v. Local 584,* 251 N.C. 234, 111 S.E. 2d 476; *Millas v. Coward,* 251 N.C. 88, 110 S.E. 2d 606; *In re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470; *Darroch v. Johnson and Colville v. Johnson,* 250 N.C. 307, 108 S.E. 2d 589; *S. v. Corl,* 250 N.C. 262, 108 S.E. 2d 613; *S. v. Corl,* 250 N.C. 258, 108 S.E. 2d 613;

DeBruhl v. Harvey & Son Co., 250 N.C. 161, 108 S.E. 2d 469; *S. v. Perry*, 250 N.C. 119, 108 S.E. 2d 447; *Coffey v. Greer*, 249 N.C. 256, 106 S.E. 2d 209; *Beaty v. Asbestos Workers*, 248 N.C. 170, 102 S.E. 2d 763; *S. v. Knight*, 247 N.C. 754, 102 S.E. 2d 259; *Speights v. Carraway*, 247 N.C. 220, 100 S.E. 2d 339; *Beasley v. McLamb*, 247 N.C. 179, 100 S.E. 2d 387; *Construction Co. v. Electrical Workers Union*, 246 N.C. 481, 98 S.E. 2d 852; *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222; *S. v. Adams*, 245 N.C. 344, 95 S.E. 2d 902; *Harmon v. Harmon*, 245 N.C. 83, 95 S.E. 2d 355; *S. v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853; *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911; *S. v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915; *Watson v. Assurance Corp.*, 244 N.C. 696, 94 S.E. 2d 839; *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658; *Paul v. Neece*, 244 N.C. 565, 94 S.E. 2d 596; *S. v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472; *S. v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63; *S. v. Garner*, 244 N.C. 79, 92 S.E. 2d 445; *Cudworth v. Insurance Co.*, 243 N.C. 584, 91 S.E. 2d 580; *Credit Corp. v. Barnes*, 243 N.C. 335, 90 S.E. 2d 893; *Credit Corp. v. Motors*, 243 N.C. 326, 90 S.E. 2d 886; *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104; *Ford v. Blythe Bros. Co.*, 242 N.C. 347, 87 S.E. 2d 879; *Hardison v. Gregory*, 242 N.C. 324, 88 S.E. 2d 96; *S. v. Atkins*, 242 N.C. 294, 87 S.E. 2d 507; *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444; S. v. Faulkner, 241 N.C. 609, 86 S.E. 2d 81; *S. v. Cole*, 241 N.C. 576, 86 S.E. 2d 303; *S. v. Gordon*, 241 N.C. 356, 85 S.E. 2d 322; *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904; *S. v. Floyd*, 241 N.C. 79, 84 S.E. 2d 299; *S. v. Stantliff*, 240 N.C. 332, 82 S.E. 2d 84; *Edgewood Knoll Apts. v. Braswell*, 239 N.C. 560, 80 S.E. 2d 653; *Rex Hospital v. Comrs. of Wake*, 239 N.C. 312, 79 S.E. 2d 892; *S. v. Turberville*, 239 N.C. 25, 79 S.E. 2d 359; *S. v. Porter*, 238 N.C. 735, 78 S.E. 2d 910; *S. v. Smith*, 238 N.C. 82, 76 S.E. 2d 363; *S. v. Hill*, 237 N.C. 764, 75 S.E. 2d 915; *Dowdy v. R. R. and Burns v. R. R.*, 237 N.C. 519, 75 S.E. 2d 639; *Karpf v. Adams and Runyon v. Adams*, 237 N.C. 106, 74 S.E. 2d 325; *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785; *S. v. Avery*, 236 N.C. 276, 72 S.E. 2d 670; *S. v. Roman*, 235 N.C. 627, 70 S.E. 2d, 857; *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *Thompson v. Thompson*, 235 N.C. 416, 70 S.E. 2d 495; *In re Will of McGowan*, 235 N.C. 404, 70 S.E. 2d 189; *Dillingham v. Kligerman*, 235 N.C. 298, 69 S.E. 2d 500; *S. v. Carter*, 233 N.C. 581,

65 S.E. 2d 9; *Scenic Stages v. Lowther,* 233 N.C. 555, 64 S.E. 2d 846; *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99; *Williams v. Williams,* 231 N.C. 33, 56 S.E. 2d 20; *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916; *S. v. Liles,* 232 N.C. 622, 61 S.E. 2d 603; *S. v. Wiggins,* 232 N.C. 619, 61 S.E. 2d 611; *S. v. Shackleford,* 232 N.C. 299, 59 S.E. 2d 825; *S. v. Reid,* 230 N.C. 561, 53 S.E. 2d 849; *S. v. Muse,* 230 N.C. 495, 53 S.E. 2d 529; *S. v. Stallings,* 230 N.C. 252, 52 S.E. 2d 901; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *Penny v. Stone,* 228 N.C. 295, 45 S.E. 2d 362; *S. v. Randolph,* 228 N.C. 228, 45 S.E. 2d 132; *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; *S. v. Brown,* 227 N.C. 383, 42 S.E. 2d 402; *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92; *S. v. Fairley,* 227 N.C. 134, 41 S.E. 2d 88; *S. v. Jones,* 227 N.C. 94, 40 S.E. 2d 700; *S. v. Cogdale,* 227 N.C. 59, 40 S.E. 2d 467; *S. v. McKnight,* 226 N.C. 766, 40 S.E. 2d 419; *S. v. Malpass,* 226 N.C. 403, 38 S.E. 2d 156; *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688; *Clark v. Cagle,* 226 N.C. 230, 37 S.E. 2d 672; *S. v. Hart,* 226 N.C. 200, 37 S.E. 2d 487; *S. v. Stone,* 226 N.C. 97, 36 S.E. 2d 704; *S. v. Hightower,* 226 N.C. 62, 36 S.E. 2d 649; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *S. v. Sutton,* 225 N.C. 332, 34 S.E. 2d 195; *S. v. Hill,* 225 N.C. 74, 33 S.E. 2d 470; *S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *Bailey v. Inman,* 224 N.C. 571, 31 S.E. 2d 769; *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217; *Hopkins v. Colonial Stores, Inc.,* 224 N.C. 137, 29 S.E. 2d 455; *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576; *S. v. Epps,* 223 N.C. 741, 28 S.E. 2d 219; *Gillis v. Tea Co.,* 223 N.C. 470, 27 S.E. 2d 283; *S. v. Smith,* 223 N.C. 457, 27 S.E. 2d 114; *Higgins v. Higgins,* 223 N.C. 453, 27 S.E. 2d 128; *S. v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *Wingler v. Miller,* 223 N.C. 15, 25 S.E. 2d 160; *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *Manufacturing Co. v. R. R.,* 222 N.C. 330, 23 S.E. 2d 32; *Moyle v. Hopkins,* 222 N.C. 33; 21 S.E. 2d 826; *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324; *Bank v. Snow,* 221 N.C. 14, 18 S.E. 2d 711; *S. v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Miller,* 219 N.C. 514, 14 S.E. 2d 522; *Maynard v. Holder,* 219 N.C. 470, 14 S.E. 2d 415; *Rose v. Bank,* 217 N.C. 600, 9 S.E. 2d 2; *S. v. Howie,* 213 N.C. 782, 197 S.E. 611; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *In re Beard,* 202 N.C. 661, 163 S.E. 748; *In re Fuller,* 189 N.C. 509, 127 S.E.

549; *S. v. Godette,* 188 N.C. 497, 125 S.E. 24; *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531; *Byrd v. Southerland,* 186 N.C. 384, 119 S.E. 2; *Gray v. Cartwright,* 174 N.C. 49, 93 S.E. 432; *S. v. Bryson,* 173 N.C. 803, 92 S.E. 698; *Campbell v. Sigmon,* 170 N.C. 348, 87 S.E. 116; *Watkins v. Lawson,* 166 N.C. 216, 81 S.E. 623; *S. v. Smith,* 164 N.C. 475, 79 S.E. 979.

FAILURE TO FILE BRIEF: *S. v. Graham,* 239 N.C. 119, 79 S.E. 2d 258; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468; *S. v. Moody,* 222 N.C. 763, 24 S.E. 2d 530; *S. v. Pelley,* 222 N.C. 684, 24 S.E. 2d 635.

TEXT OF BRIEF SHOULD SHOW VOLUME AND PAGE OF CASES CITED: *Weaver v. Morgan,* 232 N.C. 642, 61 S.E. 2d 916.

BRIEF MUST CONTAIN, PROPERLY NUMBERED, THE SEVERAL GROUNDS OF EXCEPTION AND ASSIGNMENTS OF ERROR WITH REFERENCE TO PRINTED PAGES OF TRANSCRIPT: *S. v. Morgan,* 225 N.C. 549, 35 S.E. 2d 621; *S. v. Murdock,* 225 N.C. 224, 34 S.E. 2d 69.

CAPITAL CASE DISMISSED FOR FAILURE TO COMPLY ONLY AFTER INSPECTION OF RECORD FAILS TO SHOW ERROR: *S. v. Roman,* 235 N.C. 627, 70 S.E. 2d 857.

RULES MANDATORY: *Cudworth v. Insurance Co.,* 243 N.C. 584, 91 S.E. 2d 580; *Shepard v. Oil & Fuel Co.,* 242 N.C. 762, 89 S.E. 2d 464.

BRIEF MUST REFER TO PAGES OF THE TRANSCRIPT WHERE EXCEPTIONS AND ASSIGNMENTS OF ERROR APPEAR: *Cudworth v. Insurance Co.,* 243 N.C. 584, 91 S.E. 2d 580; *Shepard v. Oil & Fuel Co.,* 242 N.C. 762, 89 S.E. 2d 464; *S. v. Floyd,* 241 N.C. 79, 84 S.E. 2d 299.

BRIEF LIMITED TO EXCEPTIVE ASSIGNMENTS OF ERROR: *S. v. Exum,* 213 N.C. 16, 195 S.E. 7; *Coon v. R. R.,* 171 N.C. 759, 88 S.E. 510; *Rawls v. Lupton,* 193 N.C. 428, 137 S.E. 175.

FAILURE TO FILE IN TIME: *S. v. Floyd,* 241 N.C. 79, 84 S.E. 2d 299; *S. v. Evans,* 237 N.C. 761, 75 S.E. 2d 919; *S. v. Harrell,* 226 N.C. 743, 40 S.E. 2d 205; *S. v. Sturdivant,* 220 N.C. 535, 17 S.E. 2d 661; *S. v. Hadley,* 213 N.C. 427, 196 S.E. 361; *Wolf v. Galloway,* 211 N.C. 361, 190 S.E. 213; *In re Bailey,* 180 N.C. 30, 103 S.E. 986; *Phillips v. Junior Order,* 175 N.C. 133, 95 S.E. 91; *Rosamond v. McPherson,* 156 N.C. 593, 72 S.E. 570.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED: *Taylor v. Plummer,* 105 N.C. 56, 11 S.E. 266.

PAUPER APPEALS: *S. v. Hopkins,* 217 N.C. 324, 7 S.E. 2d 566; *Covington v. Hosiery Mills,* 195 N.C. 478, 142 S.E. 705; *Estes v. Rash,* 170 N.C. 341, 87 S.E. 109.

"PASS BRIEFS" DISAPPROVED: *Jones v. R. R.,* 164 N.C. 392, 80 S.E. 408.

29. Appellee's Brief.

The appellee shall file typewritten copies for mimeographing or 25 printed copies of his brief 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 the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

APPELLEE'S BRIEF DISMISSED: *Phillips v. Junior Order,* 175 N.C. 133, 95 S.E. 91.

30. Arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court so as to avoid tedious and useless repetition.

31. Rearguments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

MAY ORDER REARGUMENT: *Fleming v. R. R.*, 132 N.C. 714, 44 S.E. 541; *Lenoir v. Mining Co.*, 104 N.C. 490, 10 S.E. 669.

32. Agreement of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

VERBAL AGREEMENTS INEFFECTUAL IF DENIED: *Rogers v. Asheville*, 182 N.C. 596, 109 S.E. 865; *McNeill v. R. R.*, 173 N.C. 729, 92 S.E. 848; *S. v. Black*, 162 N.C. 637, 78 S.E. 210; *Mirror Co. v. Casualty Co.*, 157 N.C. 28, 72 S.E. 826; *Graham v. Edwards*, 114 N.C. 229, 19 S.E. 639.

AN AGREEMENT AS TO THE CASE ON APPEAL MUST BE SIGNED BY THE PARTIES OR THEIR COUNSEL AND APPEAR OF RECORD: *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari.

(1) *When Applied For.* Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari*, and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly

defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

WHEN APPLICATIONS SHOULD BE MADE: *Pruitt v. Wood,* 199 N.C. 788, 165 S.E. 126; *S. v. Harris,* 199 N.C. 377, 154 S.E. 628; *S. v. Crowder,* 195 N.C. 335, 142 S.E. 222; *Pentuff v. Park,* 195 N.C. 609, 143 S.E. 139; *Baker v. Hare,* 192 N.C. 788, 136 S.E. 113; *S. v. Ledbetter,* 191 N.C. 777, 133 S.E. 162; *Finch v. Commissioners,* 190 N.C. 154, 129 S.E. 195; *Hardy v. Heath,* 188 N.C. 271, 124 S.E. 564; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562; *S. v. Dalton,* 185 N.C. 606, 115 S.E. 881; *S. v. Butner,* 185 N.C. 731, 117 S.E. 163; *Cox v. Lumber Co.,* 177 N.C. 227, 98 S.E. 704; *McNeill v. R. R.,* 173 N.C. 729, 92 S.E. 484; *Todd v. Mackie,* 160 N.C. 352, 76 S.E. 245.

WITHIN COURT'S DISCRETION: *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *Womble v. Gin Co.,* 194 N.C. 577, 140 S.E. 230; *Waller v. Dudley,* 193 N.C. 354, 137 S.E. 149; *S. v. Surety Co.,* 192 N.C. 52, 133 S.E. 177; *Trust Co. v. Parks,* 191 N.C. 263, 131 S.E. 637; *S. v. Butner,* 185 N.C. 731, 117 S.E. 163; *Mimms v. R. R.,* 183 N.C. 436, 111 S.E. 778; *S. v. Johnson,* 183 N.C. 731, 110 S.E. 782.

MUST DOCKET TRANSCRIPT: *Hinnant v Ins. Co.,* 204 N.C. 306, 168 S.E. 199; *S. v. Freeman,* 114 N.C. 872, 19 S.E. 630; *Brock v. Ellis,* 193 N.C. 540, 137 S.E. 585; *Baker v. Hare,* 192 N.C. 788, 136 S.E. 113; *Hardy v. Heath,* 188 N.C. 271, 124 S.E. 564; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562; *Motor Co. v. Reep,* 186 N.C. 509, 119 S.E. 821; *S. v. Dalton,* 185 N.C. 606, 115 S.E. 881; *S. v. Butner,* 185 N.C. 731, 117 S.E. 163; *S. v. Johnson,* 183 N.C. 730, 110 S.E. 782; *Lindley v. Knights of Honor,* 172 N.C. 818, 90 S.E. 1013; *Murphy v. Electric Co.,* 174 N.C. 782, 93 S.E. 456; *Trans. Co. v. Lumber Co.,* 168 N.C. 60, 84 S.E. 54; *Caudle v. Morris,* 158 N.C. 594, 74 S.E. 98; *Critz v. Sparger,* 121 N.C. 283, 28 S.E. 365.

APPLICANT MUST NEGATIVE LACHES AND SHOW MERIT: *S. v. Moore,* 210 N.C. 686, 188 S.E. 421; *S. v. Angel,* 194 N.C. 715, 140 S.E. 727; *S. v. Farmer,* 188 N.C. 243, 124 S.E. 562.

35. Additional Issues.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the court.

ONLY WRITTEN MOTIONS CONSIDERED: *McCoy v. Lassiter,* 94 N.C. 131.

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court; *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

Simmons v. Rogers, 247 N.C. 340, 100 S.E. 2d 849; *Peterson v. McLamb,* 221 N.C. 538, 19 S.E. 2d 488; *Redden v. Toms,* 211 N.C. 312, 190 S.E. 490; *Bank v. Toxey,* 210 N.C. 470, 187 S.E. 553; *Myers v. Foreman,* 202 N.C. 246, 162 S.E. 549.

38. Certification of Decisions.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Court, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. G.S. 7-16. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

See G.S. 7-12 and G.S. 7-16.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, and its number on the docket of the Court When it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition

of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval endorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Librarian.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause seven typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. Executions.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the cost of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

See G.S. 1-302, *et seq.*

44. Petition to Rehear.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

See G.S. 7-18, and annotations thereunder.

RULE MANDATORY: *Cooper v. Commissioners,* 184 N.C. 615, 113 S.E. 569.

FILING AND DOCKETING: *McGeorge v. Nicola,* 173 N.C. 733, 92 S.E. 610; *Byrd v. Gilliam,* 123 N.C. 63, 31 S.E. 267.

NOT ALLOWED AFTER TIME FOR FILING HAS EXPIRED: *Cooper v. Commissioners,* 184 N.C. 615, 113 S.E. 569.

NOT ALLOWED IN CRIMINAL CASES: *S. v. Council*, 129 N.C. 511, 39 S.E. 814.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

FAILURE TO FILE CERTIFICATES: *Teeter v. Express Co.*, 172 N.C. 620, 90 S.E. 927.

(3) *Two Copies to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been three dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to Be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by

them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed or mimeographed. If not printed or mimeographed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

Montgomery v. Blades, 223 N.C. 331, 26 S.E. 2d 567.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

See G.S. 7-18, and annotations thereunder.

WHEN REHEARING ALLOWED: *Minnis v. Sharpe,* 203 N.C. 110, 164 S.E. 625; *Battle v. Mercer,* 188 N.C. 116, 123 S.E. 258; *S. v. Martin,* 188 N.C. 119, 123 S.E. 631; *Green v. Lyles,* 187 N.C. 598, 122 S.E. 297; *Weston v. Lumber Co.,* 168 N.C. 98, 83 S.E. 693; *Weisel v. Cobb,* 122 N.C. 67, 30 S.E. 312; *Mullen v. Canal Co.,* 115 N.C. 16, 20 S.E. 164; *Haywood v. Davis,* 81 N.C. 8.

NOT ALLOWED IN CRIMINAL CASES: *S. v. Council,* 129 N.C. 511, 39 S.E. 314; *S. v. Jones,* 69 N.C. 16.

REHEARING MATTER OF DISCRETION: *Moore v. Harkins,* 179 N.C. 525, 103 S.E. 12.

REHEARING BY MEANS OF SECOND APPEAL NOT ALLOWED: *Strunks v. R. R.,* 188 N.C. 567, 125 S.E. 182; *Ray v. Veneer Co.,* 188 N.C. 414, 124 S.E. 756; *R. R. v. Story,* 187 N.C. 184, 121 S.E. 433; *LaRoque v. Kennedy,* 161 N.C. 459, 77 S.E. 695; *Hospital v. R. R.,* 157 N.C. 460, 73 S.E. 243.

NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE IN CIVIL CASES: *Moore v. Todwell,* 194 N.C. 186, 138 S.E. 541; *Smith v. Moore,* 150 N.C. 158, 63 S.E. 735; *Black v. Black,* 111 N.C. 300, 16 S.E. 412.

COSTS TAXED AGAINST MOVANT: *Herndon v. R. R.,* 121 N.C. 498, 28 S.E. 144.

REQUIREMENTS STATED: *S. v. Casey,* 201 N.C. 620, 161 S.E. 81; *Johnson v. R. R.,* 163 N.C. 431, 79 S.E. 690.

MOTION IN SUPERIOR COURT AFTER AFFIRMANCE ON APPEAL: *Allen v. Gooding,* 174 N.C. 271, 93 S.E. 740.

NEWLY DISCOVERED EVIDENCE NOT CONSIDERED IN CRIMINAL CASES: *S. v. Griffin,* 190 N.C. 133, 129 S.E. 410; *S. v. Lilliston,* 141 N.C. 857, 54 S.E. 427.

COURT CAN CORRECT AN INADVERTENCE IN FORMER DECISION: *Cotton Co. v. Henrietta Mills,* 219 N.C. 279, 13 S.E. 2d 557.

45. Sittings of the Court.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports.

Inasmuch as all the volumes of 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	"
2 "	"	9	"	5 " "	"	40	"
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	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Equity	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal *(i.e., the original)* paging, except 20 N. C., which is repaged throughout, without marginal paging.

47. Court Reconvened.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

WORD AND PHRASE INDEX

Abatement of Nuisance—See Nuisance.

Abbreviations—Use of in court records disapproved, *S. v. Maides*, 223.

Abortion—Death resulting from performance of illegal abortion, *S. v. Stroud*, 765.

Accessory—Accessory before the fact is included in the charge of the principal crime and court must instruct thereon when presented by evidence, *S. v. Jones*, 450.

Accident or Misadventure—As defense to homicide, *S. v. Faust*, 101.

"Accidental Death"—Within purview of accident policy, *Gray v. Insurance Co.*, 286.

Accomplice—*S. v. Bailey*, 380.

Acknowledgments—It will be presumed that person acting as deputy clerk over a number of years was duly appointed and qualified, *Baker v. Murphrey*, 506.

Actions—Particular actions see particular titles of actions; trial of actions see Trial; actions against the State, *Insurance Co. v. Gold, Commr. of Insurance*, 168; no action lies against public official for damages for manner in which he performed duties, *Gillikin v. Guaranty Co.*, 247; no civil action for perjury, *Gillikin v. Springle*, 240.

Actual Damage—Court must charge jury on rule for admeasurement of damages, *Godwin v. Vinson*, 582...

Administrative Law—Where statute gives right of appeal, exhaustion of administrative remedies is not required. *Bazemore v. Board of Elections*, 398. Administrative board may not pass on constitutionality of statute. Ins. Co. v. Gold, 168. Administrative interpretation in conflict with that of courts cannot prevail, *Faizan v. Ins. Co.*, 47. Administrative agency should not reverse its own interpretation in absence of error. *Utilities Com. v. McKinnon*, 1.

Administration—See Executors and Administrators.

Admission—Admission of authenticity of record of inferior court is not admission that defendant had theretofore been convicted on similar offenses, *S. v. Powell*, 231; declaration or admission against interest, *Wagner v. Bauman*, 594; *Gray v. Ins. Co.*, 286; of each defendant held properly admitted when restricted to defendant making the admission, *S. v. Stroud*, 765.

Adverse Possession—Evidence of adverse possession under color held sufficient to be submitted to jury. *Wagner v. Bauman*, 594.

Affidavit—Party may waive right of cross-examination, *In re Hughes*, 434.

Affirmative Defense—Court may not direct verdict in favor of defendant upon affirmative defense, *Rhinehardt v. Insurance Co.*, 671.

Agency—See Principal and Agent.

Aiders and Abettors—*S. v. Stroud*, 756.

Airplane—Liability for damage to plane when roof of hanger caved in from weight of snow, *Flying Club v. Flying Service*, 775.

Alibi—Instructions on alibi held erroneous, *S. v. Foye*, 704.

Alimony—See Divorce and Alimony.

Allegata—Variance between allegation and proof, *Smith v. Trust Co.*, 588; *Buick Co. v. Motor Corp.*, 117.

Alterations—Evidence held insufficient to raise the issue of alterations of will, *In re Will of Sessoms*, 369.

Amendment to Pleadings—See Pleadings.

"And/Or" — Disapproved, *Utilities Comm. v. McKinnon*, 1.

Answer—See Pleadings.

Anticipation—Of negligence of others, *Rouse v. Jones*, 575.

Anticipation of Injury—Foreseeability is an essential element of proximate cause, *Priest v. Thompson*, 673; *Herring v. Humphrey*, 741.

Appeal and Error—Right to appeal from administrative ruling, *Bazemore v. Board of Elections*, 398; appeal in criminal cases see Criminal Law; Appellate jurisdiction of Supreme Court, *Utilities Com. v. McKinnon*, 1; *Carringer v. Alverson*, 204; *Chadwick v. Salter*, 389; *Caudell v. Blair*, 438; *Greene v. Laboratories*, 680; judgments appealable, *Rudisill v. Hoyle*, 33; *Pritchard v. Scott*, 277; objections, exceptions and assignments of error, *Darden v. Bone*, 599; *McArthur v. Stanfield*, 627; *Sanitary District v. Canoy*, 630; *Collins v. Simms*, 148; *Utilities Com. v. Gas Co.*, 734; *In re Orr*, 723; record on appeal, *Jones v. Mathis*, 421; *Elliott v. Goss*, 508; the brief, *Power Co. v. Currie*, 17; harmless and prejudicial error, *Menzel v. Menzel*, 353; *Stockwell v. Brown*, 662; *Elliott v. Goss*, 509; *Jenkins v. Electric Co.*, 553; *Adams v. Godwin*, 632; *Smith v. Moore*, 186; *Darden v. Bone*, 599; *Reeves v. Taylor-Colquitt Co.*, 342; review of discretionary matters, *Adler v. Curle*, 502; *Brittain v. Aviation*, 697; review of findings or judgments on findings, *Menzel v. Menzel*, 353; *Walker v. Elkin*, 85; *Abernethy v. Hospital Care Asso.*, 346; *Caudell v. Blair*, 438; *Howard v. Boyce*, 255; *Moss v. Winston-Salem*, 480; *Greitzer v. Eastman*, 752; review of injunction proceedings, *Coach Lines v. Brotherhood*, 60; partial new trial, *Godwin v. Vinson*, 582; remand, *Howard v. Boyce*, 255; *Utilities Com. v. Coach Co.*, 668; *interpretation of decision*, *Howard v. Boyce*, 255.

Appearance — General appearance waives irregularities in warrant, *S. v. Maides*, 223; waives defects in application for service by publication, *Menzel v. Menzel*, 353.

Appurtenant—Easements by, *Smith v. Moore*, 187.

Arbitration and Award—*Coach Lines v. Brotherhood*, 60.

Argument—Argument of solicitor to jury held improper, *S. v. Wyatt*, 220.

Armory—Aid in construction of armory is public municipal purpose, *Morgan v. Spindale*, 304.

Arrest of Judgment—Motion in arrest must be based on matters appearing on face of record, *S. v. Reel*, 778.

Arrest and Bail—Right to arrest without warrant, *S. v. Giles*, 499; right to have physician called, *S. v. Reel*, 778; right to bail, *S. v. Reel*, 788.

Assignments of Error—Exceptions and assignments of error not brought forward in the brief deemed abandoned. *Power Co. v. Currie*, 17; *S. v. Strickland*, 658; assignment of error must be supported by exceptions duly noted, *Darden v. Bone*, 599; *S. v. Strickland*, 658; broadside exceptions and assignment of error to charge, *S. v. Haddock*, 162; must present alleged error within itself, *Darden v. Bone*, 599; *Toomes v. Toomes*, 624; *Sanitary District v. Canoy*, 630; *S. v. Reel*, 778; sole exception to judgment, *Collins v. Simms*, 148.

Athletic Teams—Board of Education has the right to contract with intracity carrier for transportation of athletic teams to scheduled events, *Utilities Comm. v. McKinnon*, 1.

Attachment—*Godwin v. Vinson*, 582.

Attorney and Client—Attorney's admission of authenticity of record of inferior court is not admission that defendant had theretofore been convicted of similar offenses, *S. v. Powell*, 231; attorney has no implied authority to surrender sub-

stantial right, *S. v. Barney*, 463; *Howard v. Boyce*, 255.

Attractive Nuisance — That child would play upon bulldozer and start it in motion held not foreseeable, *Herring v. Humphrey*, 741.

Automobiles—Common carrier by bus, see Carriers; automobile insurance, see Insurance; power of municipality to use public park for parking lots, *Wishart v. Lumberton*, 94; dealer contracts, *Buick Co. v. Motors Corp.*, 117; accident at railroad crossing, *Jarrett v. R.R.*, 493; licenses, *Honeycutt v. Scheidt*, 607; safety statutes, *Stockwell v. Brown*, 662; lookout, *Hutchins v. Southard*, 428; *Rhyne v. Bailey*, 467; *Hines v. Brown*, 447; following vehicles, *Rouse v. Jones*, 575; intersections, *Rhyne v. Bailey*, 467; *Peeden v. Tait*, 489; *Stockwell v. Brown*, 662; oversize vehicles, *Furr v. Overcash*, 611; speed, *Rouse v. Jones*, 575; *Hutchins v. Southard*, 428; leaving dirt on highway by construction company, *Hueay v. Construction Co.*, 252; pleadings, *Nix v. English*, 414; *Jones v. Mathis*, 421. *Rhyne v. Bailey*, 467; *Bullard v. Oil Co.*, 756; no presumption of negligence from fact of accident, *Brewer v. Green*, 615; physical facts, *Rouse v. Watts*, 575; sufficiency of evidence and nonsuit, *Darden v. Bone*, 599; *Peeden v. Tait*, 489; *Rouse v. Jones*, 575; *Rhyne v. Bailey*, 467; *Stockwell v. Brown*, 662; *Jones v. Mathis*, 421; *Hutchins v. Southard*, 428; *Brewer v. Green*, 615; evidence of identity of driver, *Pridgen v. Uzzell*, 292; *Johnson v. Fox*, 454; nonsuit for contributory negligence, *Hines v. Brown*, 447; *Furr v. Overcash*, 611; *Stockwell v. Brown*, 662; guests and passengers, *Nix v. English*, 414; *Hines v. Brown*, 447; respondeat superior, *Taylor v. Parks*, 266; *Johnson v. Fox*, 454; *Darden v. Bone*, 599; family purpose doctrine, *Rhyne v. Bailey*, 467; right of owner to recover damages while car driven by agent, *Jones v. Mathis*, 421; drunken driving, *S. v. Haddock*, 162; *S. v. Powell*, 231.

Aviation—Injury to passenger in flight, *Brittain v. Aviation*, 697.

Bail—See Arrest and Bail.

Baptist Church—Right of governing body of congregational church to fire minister, *Collins v. Simms*, 148.

Bar of Prior Judgment—See Judgments.

Bastards—Willful refusal to support, *S. v. Jones*, 351; *S. v. Aldridge*, 297.

Bias—Court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101.

Bicyclist—Evidence of defendant's negligence in striking bicyclist held sufficient, *Hutchens v. Southard*, 428.

Bill of Discovery—*Helton v. Stevens*, 321; *Diocese v. Sale*, 218.

Bills and Notes—Tax on installment paper dealers held not discriminatory, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Blade—Injury from broken-off fan blade of automobile held not foreseeable, *Priest v. Thompson*, 673.

Blazed Trees—Blazed trees are natural objects controlling courses and distances, *Green v. Barker*, 603.

Board of Education—Board of Education has the right to contract with intracity carrier for transportation of school bands and athletic teams to scheduled events, *Utilities Comm. v. McKinnon*, 1.

Boating—Family purpose doctrine does not apply to son's operation of boat, *Grindstaff v. Watts*, 568.

Bondsman—Charge of excessive fee, *S. v. Parrish*, 301.

Bottles—No implied warranty of safety of bottle containing soft drink, *Prince v. Smith*, 768.

Boundaries—Blazed trees, *Green v. Barker*, 603; pointing out natural objects, *Wagner v. Bauman*, 594; processioning proceedings, *Green v.*

Barker, 603; *Wagner v. Bauman*, 594.

Brain Injury—Defendant held entitled to examination of plaintiff by expert to determine extent of brain injury, *Helton v. Stevens Co.*, 321.

Brief—Abandonment of exception by failing to discuss same in the brief, *Power Co. v. Currie*, 17; S. v. *Strickland*, 658.

Broadside Exceptions—to charge, *S. v. Haddock*, 162.

Brokers—Evidence held insufficient to show brokerage contract, *Daniel v. Lumber Co.*, 504.

Bulldozer—Leaving bulldozer unattended on vacant lot held not negligence, *Herring v. Humphrey*, 741.

Burden of Proof—Rule for determining party who has burden of proof, *Blount-Midyette v. Aeroglide Corp.*, 484; is upon intervenor, *Williams v. Williams*, 729; burden of proving that action was not barred by Statute of Limitation, *Willets v. Willetts*, 136; is on claimants to prove they are bonafide purchasers, *Waters v. Pittman*, 191; in action in ejectment—See Ejectments; in actions of insurance policy, see Insurance; of proving non-delivery of deed, *Jones v. Saunders*, 644; instructions on alibi held erroneous, *S. v. Foye*, 704.

Burden on Interstate Commerce—Evidence held not to show that formula for allocation of income of unitary utility for taxation by this State was burden on interstate Commerce, *Power Co. v. Currie*, 17.

Burden of Showing Error—*S. v. Bright*, 226; *Jenkins v. Electric Co.*, 553.

Buses—Common carrier by bus, see Carriers.

Businesses—Classification of businesses for taxation, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Cancellation of Instruments—See Insurance; cancellation of deed, *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644.

Carnal Knowledge—See Rape.

Carriers—Franchise, *Utilities Com. v. McKinnon*, 1; *Utilities Com. v. Coach Co.*, 668; *Utilities Com. v. R. R.*, 73; *Utilities Com. v. Coach Co.*, 319; injury to passengers, *Brittain v. Aviation*, 697.

Cartways—*Smith v. Moore*, 187; *Pritchard v. Scott*, 277.

Case on Appeal—Absence of statement does not require dismissal, *S. v. Maides*, 223.

Cattle—Statute providing for confiscation of cattle remaining on portion of the Outer Banks held unconstitutional, *Chadwick v. Salter*, 389.

Caveat—See Wills.

Character Evidence—Instructions on character evidence held erroneous, *S. v. Guss*, 349.

Children—Jurisdiction of juvenile court, *S. v. Frazier*, 226; habeas corpus to determine custody of, *In re Orr*, 723; negligence in striking child on highway, *Brewer v. Green*, 615; child between 7 and 14 is presumed incapable of contributory negligence, *Hutchens v. Southard*, 428; child may kill in defense of parent, *S. v. Carter*, 475; that child would play upon bulldozer and start it in motion held not foreseeable, *Herring v. Humphrey*, 741.

Churches—Exempt carriers may contract for charter trips to or from religious services, *Utilities Comm. v. McKinnon*, 1; right of governing body of congregational church to fire minister, *Collins v. Simms*, 148; whether designated church could continue operation of denominational college, *Church v. College*, 717.

Circumstantial Evidence—That defendant, being intoxicated, was the driver of vehicle, *S. v. Haddock*, 162; of premeditation and deliberation, *S. v. Faust*, 101; of identity of driver of motor vehicle, *Pridgen v. Uzzell*, 292; negligence may be proved by, *Jenkins v. Electric Co.*, 553.

City Board of Education—Board of Education has the right to contract with intracity carrier for transportation of school bands and athletic teams to scheduled events, *Utilities Comm. v. McKinnon*, 1.

Clerk—It will be presumed that person acting as deputy clerk over a number of years was duly appointed and qualified, *Baker v. Murphrey*, 506; probate jurisdiction of clerk see Wills.

Coca Cola—No implied warranty of safety of bottle containing soft drink, *Prince v. Smith*, 768.

Collective Bargaining Agreement—See Master and Servant.

Colleges—Consolidation, *Church v. College*, 717.

Combinations and Agreement of Restraint of Trade, *Buick Co. v. Motors Corp.*, 117.

Commerce—Evidence held not to show that formula for allocation of income of unitary utility for taxation by this State was burden on interstate commerce, *Power Co. v. Currie*, 17.

"Commercial Automobile" — Within exclusion clause of liability insurance, *Kirk v. Insurance Co.*, 651.

Common Carriers—see Carriers.

Common Knowledge—Court may take notice of facts within common knowledge even though case is submitted on facts agreed, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Common Law—In force in this State, *Gillikin v. Bell*, 244.

Common Source of Title—Proof of prior title from common source makes a *prima facie* case, *Waters v. Pittman*, 191.

Communications—Whether physician should be compelled to disclose communications from patient rests in discretion of court, *Brittain v. Aviation, Inc.*, 697.

Compensatory Damage—Court must charge jury on rule for admeasurement of damages, *Godwin v. Vinson*, 582.

Compulsory Reference—See References.

Condemnation—See Eminent Domain.

Confessions—Evidence of *corpus delicti aliunde* the confession held sufficient, *S. v. Foye*, 704; court's finding that confession was voluntary is conclusive when supported by evidence, *S. v. Stroud*, 765.

Conflict of Law—What law governs transitory cause arising in another State, *Nix v. English*, 414.

Congregational Church — Right of governing body of congregational church to fire minister, *Collins v. Simms*, 148.

Consent Judgment—See Judgments.

Consideration—Recital in deed of consideration is not conclusive, *Waters v. Pittman*, 191.

Conspiracy—*S. v. Stroud*, 765; testimony of co-conspirator, *S. v. Foye*, 704.

Constitutional Law—States may impose reasonable restrictions on right to vote, *Bazemore v. Board of Education*, 398; enjoining enforcement of statute, *Ins. Co. v. Gold*, 168; *Chadwick v. Salter*, 389; *McIntyre v. Clarkson*, 510; *Legislative* powers, *McIntyre v. Clarkson*, 510; *Grindstaff v. Watts*, 568; *judicial* powers, *Finance Co. v. Currie*, 129; *Ins. Co. v. Gold*, 168; police power, *Carringer v. Alverson*, 204; equal protections and application of law, *S. v. Fox*, 98; *Stiles v. Currie*, 197; due process, *S. v. Parrish*, 301; *Power Co. v. Currie*, 17; *Finance Co. v. Currie*, 129; *Moss v. Winston-Salem*, 480; *S. v. Parrish*, 301; *In re Hughes*, 434; *Rhyne v. Bailey*, 467; full faith and credit, *In re Hughes*, 434; interstate commerce, *Power Co. v. Currie*, 17; constitutional guarantees of persons accused of crime, *S. v. Frazier*, 226.

Constructive Fraud—In transactions by fiduciary, *Willetts v. Willetts*, 136.

Contemporary Survey—Where parties go upon land and point out natural

objects contemporaneously with execution of the deed, the natural objects control boundaries; but when this is done after execution of the deed, it amounts only to admission against interest, *Wagner v. Bauman*, 594.

Contempt of Court—Defendant may be confined for contempt in refusing to pay alimony as ordered, *Riddle v. Riddle*, 780.

Contentions—It is error for the court to submit contentions not supported by evidence, *Green v. Barker*, 603.

Continuance—Motion for continuance rests in discretion of court, *In re Orr*, 723; *S. v. Stroud*, 765.

Contracts—Insurance contracts see Insurance; contracts in restraint of trade, *Buick Co. v. Motors Corp.*, 117; destruction of subject of contract by fire, *Blount-Midyette v. Aeroglide Corp.*, 484.

Contribution—Right of contribution among joint tort-feasors, see Torts.

Contributory Negligence—Need not be pled *eo nomine*, *Jones v. Mathis*, 421; nonsuit on ground of contributory negligence, *Hines v. Brown*, 447; *Furr v. Overcash*, 611; child between 7 and 14 is presumed incapable of contributory negligence, *Hutchens v. Southard*, 428.

Controversy without Action—*Finance Co. v. Currie*, 129.

"Cool State of Blood'—In connection with premeditation and deliberation in homicide, *S. v. Faust*, 101.

Coroners—*Gillikin v. Guaranty Co.*, 247.

Corporations—Allocation of income of power company from its operations within this State, *Power Co. v. Currie*, 17; service of process on foreign corporation, *Moss v. Winston-Salem*, 480.

Corpus Delicti—Evidence of corpus delicti aliunde the confession held sufficient, *S. v. Foye*, 704.

Counterclaim—See Pleadings.

County Board of Education—Board of Education has the right to contract with intracity carrier for transportation of school bands and athletic teams to scheduled events, *Utilities Comm. v. McKinnon*, 1.

Courts—Transfer of cause from inferior court to Superior Court, *S. v. Frazier*, 226 (in criminal prosecutions see criminal law); recorders courts, *S. v. Lowe*, 631; juvenile court, *S. v. Frazier*, 226; justices of the peace, *McIntyre v. Clarkson*, 510; transitory cause arising in another state, *Nix v. English*, 414; acquisition of jurisdiction by Superior Court in those counties in which recorders court has exclusive jurisdiction of misdemeanor, *S. v. Perry*, 772; contempt of, defendant may be confined for contempt in refusing to pay alimony as ordered, *Riddle v. Riddle*, 780; jurisdiction to determine right of custody of minors, *In re Orr*, 723; findings held insufficient to support conclusions that Federal Court had exclusive jurisdiction of prosecution, *S. v. Burell*, 317; jurisdiction of Utilities Commission, see Utilities Commission; expression of opinion of evidence by court in examining witness, *S. v. Strickland*, 658; remarks of court to defendant's counsel held not to disparage defendant, *S. v. Faust*, 101; whether physician should be compelled to disclose communications from patient rests in discretion of the court, *Brittain v. Aviation, Inc.*, 697; motion for continuance rests in discretion of court, *In re Orr*, 723; defendant held to have waived right to have motion for removal heard before amendment obviating ground for removal, *Casstevens v. Membership Corp.*, 746.

Covenant Not to Sue—*Ramsey v. Camp*, 443.

Covenant of Seizin—*Smith v. Trust Co.*, 588.

Criminal Law—Commitment of delinquent children to training school

is not criminal proceeding and jury trial is not required, *S. v. Frazier*, 226; prosecutions for particular crimes see particular titles of crimes; indictment and warrant see Indictment and Warrant; aiders and abettors, *S. v. Bailey*, 380; *S. v. Stroud*, 765; accessories before the fact, *S. v. Bailey*, 380; *S. v. Jones*, 450; jurisdiction of State and Federal Courts, *S. v. Burell*, 317; transfer of cause to Superior Court on demand for jury trial, *S. v. Perry*, 772; plea of guilty, *S. v. Barney*, 463; articles connected with commission of crime, *S. v. Stroud*, 765; lie detector test, *S. v. Foye*, 704; hearsay in general, *S. v. Frizzelle*, 457; confessions, *S. v. Stroud*, 765; self-serving declaration, *S. v. Frizzelle*, 457; necessity for search warrant, *S. v. Giles*, 499; character evidence, *S. v. Guss*, 349; testimony of accomplice, *S. v. Bailey*, 380; cross-examination, *S. v. Wyatt*, 220; rule that party is bound by witness' testimony, *S. v. Carter*, 475; continuance and severance, *S. v. Stroud*, 765; stipulations and admissions, *S. v. Powell*, 231; evidence competent for restricted purpose, *S. v. Stroud*, 765; withdrawal of evidence, *S. v. Aldridge*, 297; *S. v. Frizzelle*, 457; remarks and questions of court during trial, *S. v. Faust*, 101; *S. v. Strickland*, 658; argument, *S. v. Wyatt*, 220; sufficiency of evidence and nonsuit, *S. v. Faust*, 101; *S. v. Haddock*, 162; *S. v. Tessnear*, 211; *S. v. Carter*, 475; *S. v. Foye*, 704; *S. v. Wyatt*, 220; withdrawal of court from jury, *S. v. Haddock*, 162; instructions, *S. v. Foye*, 704; *S. v. Faust*, 101; *S. v. Jones*, 450; *S. v. Powell*, 231; *S. v. Guss*, 349; *S. v. Bailey*, 380; arrest of judgment, *S. v. Barefoot*, 308; *S. v. Reel*, 778; identity of judgment, *S. v. Jennings*, 760; must be based on verdict, *S. v. Parrish*, 301; sentence for repeated offenses, *S. v. Powell*, 231; time of execution of sentence, *S. v. Jennings*, 760; appeal, *S. v. Maides*, 223; *S. v. Powell*, 231; *S. v. Strickland*, 658; *S. v. Reel*, 778; *S. v. Haddock*, 162; *S. v. Frizzelle*, 457; *S. v. Bright*, 226; *S. v. Aldridge*, 297; *S. v. Foye*, 704; *S. v. Perry*, 772; *S. v. Burell*, 317.

Cross-examination—Questions asked on cross-examination held prejudicial, *S. v. Wyatt*, 220; right to cross-examine witness is absolute, *Templeton v. Highway Comm.*, 337; party may waive right of cross-examination, *In re Hughes*, 434.

Crossing—Accident at railroad crossing, *Jarrett v. R.R.*, 493.

Damages—For taking of land by condemnation, see Eminent Domain; compensatory damages, *Godwin v. Vinson*, 582; instructions on damages, *Ibid.*

"Death by Accident"—Within purview of accident policy, *Gray v. Insurance Co.*, 286.

Declaration—Declaration or admission against interest, *Wagner v. Bauman*, 594.

Dead Bodies—Wrongful acts to, *Gillikin v. Bell*, 244.

Declaratory Judgment Act—*Ins. Co. v. Gold*, 168; *Carrington v. Alverson*, 204; *Chadwick v. Salter*, 389; *Gregory v. Godfrey*, 215.

Deeds—Grantor may not establish parol trust upon his fee simple deed, *Willetts v. Willetts*, 136; acknowledgement, *Baker v. Murphrey*, 506; delivery, *Jones v. Saunders*, 644; covenant of seizin, *Smith v. Trust Co.*, 588; ascertainment of boundaries—See Boundaries; reformation of instruments, see Reformation of Instruments; cancellation for fraud, *Jones v. Saunders*, 644.

De Facto Officer—*Carringer v. Alverson*, 204.

Default Judgment—See Judgments.

Defense of Others—Child may kill in defense of parent, *S. v. Carter*, 475; wife may kill in defense of husband, *S. v. Cloud*, 313.

De Jure Officer—*Carringer v. Alverson*, 204.

Deliberation—See Homicide.

Delinquent Children—*S. v. Frazier*, 226.

Delivery—Probate and registration of deed raises presumption of delivery, *Jones v. Saunders*, 644.

Demurrer—See Pleadings; judgment sustaining demurrer as res judicata, *Jones v. Mathis*, 421.

Denominational Colleges — Whether designated church could continue operation of denominational college, *Church v. College*, 717.

Deputy Clerk—It will be presumed that person acting as deputy clerk over a number of years was duly appointed and qualified, *Baker v. Murphrey*, 506.

Directed Verdict—Court may not direct verdict in favor of defendant upon affirmative defense, *Rhinehardt v. Insurance Co.*, 671.

Disability—Disability within employer's pension plan, *Bradley v. Pritchard*, 175.

Discovery—See Bill of Discovery.

Discretion of Court—Issuance of preliminary mandatory injunction rests in discretion of court, *Creel v. Gas. Co.*, 325; whether physician should be compelled to disclose communications from patient rests in discretion of the court, *Brittain v. Aviation, Inc.*, 697; motion for continuance rests in discretion of court, *In re Orr*, 723.

Discrimination—Owner of private property may discriminate on basis of race as to those he will serve at lunch counter, *S. v. Fox*, 97; in classification of business for taxation, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Divorce and Alimony—Divorce vests in wife one-half interest in lands theretofore held by entireties, *Waters v. Pittman*, 191; enforcement of alimony, *Riddle v. Riddle*, 780.

Doctrine of Attractive Nuisance—That child would play upon bulldozer and start it in motion held not foreseeable, *Herring v. Humphrey*, 741.

Doctrine of Last Clear Chance—Does not apply as between defendants, *Greene v. Laboratories, Inc.*, 680.

Doctrine of Sudden Emergency—*Rouse v. Jones*, 575.

Domicile—*In re Orr*, 723.

Dominant Highway—See Automobiles.

Dower—Claim of second wife, *Williams v. Williams*, 729.

Drainage — Disposition of surplus funds, *In re Drainage District*, 155.

Driver's License—Revocation of driver's license for repeated conviction of speeding, *Honeycutt v. Scheidt*, 607.

Due Process of Law—Evidence held not to show that formula for allocation of income of unitary utility for taxation would deprive defendant of property without due process of law, *Power Co. v. Currie*, 17; precluding non-resident from making personal deductions in computing income taxable by this State does not deprive him of property without due process of law, *Stiles v. Currie, Comr. of Revenue*, 197; is synonymous with "Law of the Land," *S. v. Parrish*, 301; requirement for service on foreign corporation, *Moss v. Winston-Salem*, 480.

Drunken Driving—*S. v. Haddock*, 162.

Easements—*Smith v. Moore*, 186; *Pritchard v. Scott*, 277.

Ejectment—*Waters v. Pittman*, 191.

Elections—Qualification of electors, *Bazemore v. Board of Elections*, 398.

Electricity—Fire from wiring, *Jenkins v. Electric Co.*, 553.

Electric Company—Allocation of income of power company from its operations within this State, *Power Co. v. Currie*, 17.

Embezzlement—*S. v. Wyatt*, 220.

Emergency—*Rouse v. Jones*, 575.

Eminent Domain — Compensation, *Templeton v. Highway Com.*, 337; proceedings, *Jacobs v. Highway Com.*, 200.

Entireties—Divorce vests in wife one-half interest in lands theretofore held by entireties, *Waters v. Pittman*, 191.

Equity—Laches barring motion to set aside judgment, *Howard v. Boyce*, 255; *Menzel v. Menzel*, 353.

Estate by Entireties—Divorce vests in wife one-half interest in lands theretofore held by entireties, *Waters v. Pittman*, 191.

Estates—Life estates and remainders, *Menzel v. Menzel*, 353.

Estoppel—Estoppel of right to attack consent judgment, *Howard v. Boyce*, 255.

Evidence—Evidence in particular actions see particular titles of action; evidence in criminal prosecutions see Criminal Law and particular titles of crime; burden of proof, *Blount-Midyette v. Aeroglide Corp.*, 484; *Williams v. Williams*, 729; communications between physcian and patient, *Brittain v. Aviation*, 697; *res inter alios acta*, *Waters v. Pittman*, 191; admissions against interest, *Gray v. Ins. Co.*, 286; cross-examination, *Templeton v. Highway Com.*, 337; *In re Hughes*, 434; bill of discovery, see Bill of Discovery; expression of opinion on evidence by court in examining witness, *S. v. Strickland*, 658; remarks of court to defendant's counsel held not to disparage defendant, *S. v. Faust*, 101; harmless and prejudicial error in admission or exclusion of evidence, *Reeves v. Taylor-Colquitt Co.*, 342; *Menzel v. Menzel*, 352; *S. v. Frizzelle*, 457; *Elliott v. Goss*, 508; *Stockwell v. Brown*, 662; *S. v. Foye*, 704.

Exceptions—Exceptions and assignment of error not brought forward in the brief deemed abandoned, *Power Co. v. Currie*, 17; *S. v. Strickland*, 658; assignment of error must be supported by exceptions duly noted, *Darden v. Bone*, 599; *S. v. Strickland*, 658; must present alleged error within itself, *Darden v. Bone*, 599; *Toomes v. Toomes*, 624; *Sanitary District v. Canoy*, 630; broadside exceptions and assignment of error to charge, *S. v. Haddock*, 162; sole exception to judgment, *Collins v. Simms*, 148.

Executors and Administrators—Complaint held sufficient to disclose that action was against defendant in his representative capacity, *Lynn v. Clark*, 460; title to personalty, *Allen v. Currie*, 636; actions against personal representative to recover assets, *Rudisill v. Hoyle*, 33; limitations of action, *Rutherford v. Harbison*, 236.

Excusable Neglect—Motion to set aside default judgment for surprise and excusable neglect, *Greitzer v. Eastham*, 752.

Expert—Defendant held entitled to examination of plaintiff by expert to determine extent of brain injury, *Helton v. Stevens Co.*, 321.

Expression of Opinion—Expression of opinion on evidence by court in examining witness, *S. v. Strickland*, 658.

Facts Agreed—See Controversy Without Action.

Facts Within Common Knowledge—Court may take notice of facts within common knowledge even though case is submitted on facts agreed, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Family Purpose Doctrine—See Automobiles; Boating.

Fan Blade—Injury from broken off fan blade of automobile held not foreseeable, *Priest v. Thompson*, 673.

Federal Court—Findings held insufficient to support conclusions that Federal Court had exclusive

jurisdiction of prosecution, *S. v. Burell*, 317.

Fiduciaries—Relation of parent and child does not raise presumption of fraud in deed from parent to child, *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644; executor acts in fiduciary capacity, *Allen v. Currie*, 636; court properly orders fiduciary to exhibit papers relating to contract with its principal, *Diocese v. Sale*, 218; the fact that same insurer issued liability policies on both cars involved in collision does not constitute insurer fiduciary, *Gillikin v. Indemnity Co.*, 250.

Findings of Fact—While the court may not make additional findings in submission of controversy, legal effect of evidence is conclusion of law and not findings, *Rutherford v. Harrison*, 236; where movant makes no request for findings, it will be presumed the court found facts supporting its rulings, *Grietzer v. Eastham*, 752; are conclusive in absence of exceptions, *Moss v. Winston-Salem*, 480; conclusive when supported by evidence, *Abernethy v. Hospital Care Assoc.*, 346; *Menzel v. Menzel*, 353; *Caudell v. Blair*, 438; of Utilities Commission, conclusive when supported by evidence, *Utilities Comm. v. Coach Co.*, 319; remand for failure to find facts necessary to support judgment, *Howard v. Boyce*, 255.

Finger—Loss of use of finger is loss of finger within meaning of accident policy, *Richardson v. Insurance Co.*, 711.

Fire—Destruction of res by fire as effecting contractual rights, *Blount-Midyette v. Aeroglide Corp.*, 484; from defective wiring, *Jenkins v. Electric Co.*, 553.

Firemen's Pension Fund Act—*Ins. Co. v. Gold*, 168.

Food—Bursting of coca-cola bottle, *Prince v. Smith*, 768.

Foreign Corporations—Allocation of income of power company from its operations within this State, *Power Co. v. Currie*, 17; service of process on foreign corporation, *Moss v. Winston-Salem*, 480.

Foreseeability—Foreseeability is an essential element of proximate cause, *Priest v. Thompson*, 673; *Herring v. Humphrey*, 741.

Franchise of Common Carrier—See Carriers.

Fraud—Setting aside judgment for, see Judgments; cancellation of instruments for, see Cancellation and Rescission of Instruments; cancellation of insurance for, see Insurance; reformation of instruments for, see Reformation of Instruments; no presumptive fraud in deed from parent to child, *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644; reliance on misrepresentation, *Willetts v. Willetts*, 136.

Full Faith and Credit—To foreign judgments, *In re Hughes*, 434.

Gas—Rates, *Utilities Com. v. Gas Co.*, 536; *Utilities Com. v. Gas Co.*, 734.

General Appearance—General appearance waives irregularities in warrant, *S. v. Maides*, 223.

General Assembly—General Assembly has all legislative powers unless limited by constitution, *McIntyre v. Clarkson*, 511; public policy is within exclusive province of General Assembly, *Grindstaff v. Watts*, 568; the General Assembly may regulate automobile drivers' licenses in exercise of police power, *Honeycutt v. Scheidt*, 607.

Grade Crossing—Accident at railroad crossing, *Jarrett v. R.R.*, 493.

Gross Negligence—Is required under Georgia law for recovery by the passenger against the driver, *Nix v. English*, 414.

Guardian *ad litem*—Appointment of, *Menzel v. Menzel*, 353.

Guilty—Court should not refuse to allow withdrawal of plea of guilty without finding whether attorney

was authorized to enter plea, *S. v. Barney*, 463.

Habeas Corpus—To determine right of custody of minor, *In re Hughes*, 434; *In re Orr*, 723.

Hangar—Liability for damage to plane when roof of hangar caved in from weight of snow, *Flying Club v. Flying Service*, 775.

Harmless and Prejudicial Error—In admission or exclusion of evidence, *S. v. Aldridge*, 207; *Reeves v. Taylor-Colquitt, Co.*, 342; *Menzel v. Menzel*, 353; *S. v. Frizzelle*, 457; *Elliott v. Goss*, 508; *Stockwell v. Brown*, 662; *S. v. Foye*, 704; in instructions, *Smith v. Moore*, 186; invited error, *Darden v. Bone*, 599.

Health—Statute creating Housing Authority held statute relating to health, *Carringer v. Alverson*, 204.

Hearsay Evidence—General rule, *S. v. Frizzelle*, 457; admission against interest, *Gray v. Insurance Co.*, 286; *Wagner v. Bauman*, 594.

Highway Commission—See Eminent Domain.

Highways — Neighborhood public roads, *Smith v. Moore*, 186; cartways, *Pritchard v. Scott*, 277.

Homicide—Murder in first degree, *S. v. Faust*, 101; *S. v. Bailey*, 380; self-defense, *S. v. Guss*, 349; defense of others, *S. v. Cloud*, 313; *S. v. Carter*, 475; death by accident or misadventure, *S. v. Faust*, 101; presumptions, *S. v. Carter*, 475; evidence of premeditation and deliberation, *S. v. Faust*, 101; Sufficiency of evidence, *S. v. Faust*, 101; *S. v. Carter*, 475; *S. v. Foye*, 704; *S. v. Stroud*, 765; accessory before the fact, *S. v. Jones*, 351.

Hospital Insurance, *Abernethy v. Hospital Care Assoc.*, 346.

Housing Authority—Statute creating Housing Authority held statute relating to health, *Carringer v. Alverson*, 204.

Husband and Wife—Wife incompetent to testify as to non-access of husband, *S. v. Aldridge*, 297; wife may kill in defense of her husband, *S. v. Cloud*, 313; divorce terminates estate by entireties, *Waters v. Pittman*, 191; abandonment and nonsupport, *S. v. Lowe*, 631; enforcement of payment of alimony, *Riddle v. Riddle*, 780; habeas corpus to determine custody of minor children, *In re Orr*, 723; burden of proving legal termination of prior marriage, *Williams v. Williams*, 729.

Identity—Circumstantial evidence of identity of driver of motor vehicle, *Pridgen v. Uzzell*, 292; *Johnson v. Fox*, 454.

Illegitimate Children—See Bastards.

Impeachment—Court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101.

Implied Warranty—No implied warranty of safety of bottle containing soft drink, *Prince v. Smith*, 768.

Imprisonment—Constitutional guarantee against imprisonment except by law of the land does not protect trespassor from prosecution, *S. v. Fox*, 97.

Imputed Negligence—Negligence of driver imputed to passenger, *Hines v. Brown*, 447.

Income Taxes—Allocation of income of power company from its operations within this State, *Power Co. v. Currie*, 17; non-resident may not make personal deductions in computing income earned in this State, *Stiles v. Currie, Com. of Revenue*, 197.

Indemnity—*Greene v. Laboratories*, 680.

Indexing—Of old-age assistance liens, *Cuthrell v. Camden County*, 181.

Indictment — For receiving stolen goods, see Receiving Stolen Goods; issuance of warrant, *S. v. Bell*, 778; charge of crime, *S. v. Tessnear*, 211; *S. v. Barefoot*, 308;

amendment, *S. v. Maides*, 223; variance, *S. v. Wyatt*, 220; less degrees of crime, *S. v. Jones*, 450.

Infants—Child between 7 and 14 is presumed incapable of contributory negligence, *Hutchens v. Southard*, 428; relationship of parent and child, see Parent and Child; appointment and duties of guardian *ad litem*, *Menzel v. Menzel*, 353; custody, *In re Hughes*, 434; *In re Orr*, 723; delinquent children, *S. v. Frazier*, 226.

"Inherited"—Held to have been used in will in its general and nontechnical sense, *Maxwell v. Grantham*, 208.

Injunctions—Preliminary mandatory, *Creel v. Gas Co.*, 324; enjoining enforcement of statute, *Chadwick v. Salter*, 389; *McIntyre v. Clarkson*, 510; *Ins. Co. v. Gold*, 168; enjoining governmental agencies, *Wishart v. Lumberton*, 94; continuance and dissolution of temporary orders, *Coach Lines v. Brotherhood*, 60; *Wishart v. Lumberton*, 94; *Church v. College*, 717.

Installment Paper Dealers—Tax on installment paper dealers held not discriminatory, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Instructions—Court must explain law on all essential features arising on evidence, *S. v. Jones*, 450; *Byrnes v. Ryck*, 496; *S. v. Faust*, 101; court must charge jury on rule for admeasurement of damages, *Godwin v. Vinson*, 582; court may not assume as true any material fact in issue, *S. v. Powell*, 231; inadvertence in stating material fact not shown in evidence is prejudicial, *S. v. Frizzelle*, 457; it is error for the court to submit contentions not supported by evidence, *Green v. Barker*, 603; instructions on character evidence held erroneous, *S. v. Guss*, 349; instructions on alibi held erroneous, *S. v. Foye*, 704; conflicting held prejudicial error, *Smith v. Moore*, 186; request for instructions, *S. v. Faust*, 101; *S. v. Bailey*, 380; exceptions and assignments of error to charge, *S. v. Haddock*, 162; *Darden v. Bone*, 599; where charge is not in record it will be presumed correct, *S. v. Strickland*, 658; instructions in particular actions and prosecutions see Negligence, Wills, Homicide, etc.

Insulating Negligence — *Rouse v. Jones*, 575; *Stockwell v. Brown*, 662.

Insulin Shock—Pleading of negligence in driving while subject to, *Nix v. English*, 414.

Insurance—Firemen's Pension Fund, *Ins. Co. v. Gold*, 168; construction of policies in general, *Kirk v. Ins. Co.*, 651; *Richardson v. Ins. Co.*, 711; life insurance, *Rhinehardt v. Ins. Co.*, 671; *Jones v. Ins. Co.*, 407; disability, *Bradley v. Pritchard*, 175; hospital insurance, *Abernethy v. Hospital Care Asso.*, 346; accident insurance, *Gray v. Ins. Co.*, 286; *Richardson v. Ins. Co.*, 711; *Kirk v. Ins. Co.*, 651; auto insurance, *Faizan v. Ins. Co.*, 47; *Gillikin v. Indemnity Co.*, 250; *Henderson v. Ins. Co.*, 329; evidence of existance of liability insurance is incompetent, *Greene v. Laboratories*, 680; but evidence of liability insurance held not prejudicial in this case, *Adams v. Godwin*, 632.

Intangibles Tax—Fact that distributee is nonresident does not exempt personalty of estate from intangibles tax, *Allen v. Currie, Commissioner of Revenue*, 636.

Interested Parties—Rule that testimony of an accomplice should be scrutinized, *S. v. Bailey*, 380.

Interlocutory Orders—Judgments appealable, see Appeal and Error.

Interlocutory Injunction—See Injunctions.

Intersection—See Automobiles.

Interstate Commerce—Evidence held not to show that formula for allocation of income of unitary utility for taxation by this State was bur-

den on interstate commerce, *Power Co. v. Currie*, 17.

Intervenor—Burden of proof is upon intervenor, *Williams v. Williams*, 729.

Intervening Negligence — *Rouse v. Jones*, 575; *Stockwell v. Brown*, 662.

Intracity Carrier—Is common carrier, *Utilities Comm. v. McKinnon*, 1.

Intoxicating liquor—Manufacturer or sale of intoxicating liquor containing foreign properties or ingredients poisonous to humans, *S. v. Barefoot*, 308; service of warrant not necessary for seizure of liquor seen in car by officer, *S. v. Giles*, 499.

Intoxication—Driving while under the influence of intoxicating liquor, *S. v. Haddock*, 162.

Intrinsic Fraud—Setting aside judgment for, *Gillikin v. Springle*, 240.

Invited Error—*Darden v. Bone*, 599.

Irregular Judgment—Attack of, see Judgments.

Irreparable Injury—*Coach Lines v. Brotherhood*, 60.

Joint Tort-feasors—Right of contribution among joint tort-feasors, see Torts.

Judges—Remarks of court to defendant's counsel held not to disparage defendant, *S. v. Faust*, 101; one Superior Court judge may not reverse orders of another, *Greene v. Laboratories, Inc.*, 680; discretionary powers see Discretion of Court.

Judgments — Judgments appealable, see Appeal and Error; sole exception to judgment, *Collins v. Simms*, 148; judgment and sentence upon repeated conviction for similar offense, *S. v. Powell*, 231; motion for judgment on pleadings, see Pleadings; arrest of judgment, *S. v. Barefoot* and *S. v. Brantley*, 308; *S. v. Reel*, 778; sale of land under provisions of judgment, see Judicial Sales; right of *tort-feasor* to have judgment credited with consideration for covenant not to sue another party, *Ramsey v. Camp*, 443; personal service supports judgment in personam, *In re Orr*, 723; time and place of rendition, *Menzel v. Menzel*, 353; consent judgments, *Howard v. Boyce*, 255; default, *Collins v. Sims*, 148; attack of judgments, *In re Will of Cox*, 90; *Howard v. Boyce*, 255; *Menzel v. Menzel*, 354; *Toomes v. Toomes*, 624; *Collins v. Simms*, 148; *Grietzer v. Eastham*, 752; *Gillikin v. Springle*, 240; *res judicata*, *Jones v. Mathis*, 421.

Judicial Notice—Court may take notice of facts within common knowledge even though case is submitted on facts agreed, *Finance Co. v. Currie, Comr. of Revenue*, 129.

Judicial Sales—*Menzel v. Menzel*, 353.

Jury—Sufficiency of evidence to be submitted to jury, see Nonsuit; commitment of delinquent children to training school is not criminal proceeding and jury trial is not required, *S. v. Frazier*, 226; small claims court, *Rhyne v. Bailey*, 467;

Verdict recommending mercy not the correct form, *S. v. Foye*, 704.

Justice of the Peace—Art. 14A of G.S. 7 held unconstitutional as local statute relating to appointment of justice of peace, *McIntyre v. Clarkson*, 511.

Juvenile Court—Jurisdiction of juvenile court, *S. v. Frazier*, 226.

Juvenile Delinquent—Commitment of a minor as a juvenile delinquent, *S. v. Frazier*, 226.

Labor Unions—See Master and Servant.

Laches—Laches barring motion to set aside judgment, *Howard v. Boyce*, 255; *Menzel v. Menzel*, 355.

Landlord and Tenant—Injury to plane in hangar from caving in of roof, *Flying Club v. Flying Service*, 775; proceeding to recover compensation for condemnation of leasehold estate, *Jacobs v. Highway* Com., 200.

Larceny—Receiving stolen goods with knowledge, see Receiving Stolen Goods.

Last Clear Chance—Does not apply as between defendants, *Greene v. Laboratories, Inc.*, 680.

Lauderettes—Evidence held insufficient to support special rates for launderettes, *Utilities Comm. v. Gas Co.*, 734.

Law of the Land—Constitutional guarantee against imprisonment except by law of the land does not protect trespassor from prosecution, *S. v. Fox*, 97; is synonymous with "due process of law," *S. v. Parrish*, 301.

Lawn Mower — Manufacturer not amenable to service solely from fact of manufacture, *Moss v. Winston-Salem*, 480.

Leasehold Estate—Proceedings to recover compensation for leasehold estate condemned, *Jacobs v. Highway Comm.*, 200.

Legal Fraud—In transaction by fiduciary, *Willetts v. Willetts*, 136.

Legislature—See General Assembly.

Less Degree of Crime—Accessory before the fact is included in the charge of the principal crime and court must instruct thereon when presented by evidence, *S. v. Jones*, 450.

Liability Insurance—See Insurance; existance of liability insurance incompetent in action for negligence, *Greene v. Laboratories, Inc.*, 680; evidence of liability insurance held not prejudicial under the facts, *Adams v. Godwin*, 632.

Libel and Slander—*Gillikin v. Bell*, 244.

Liberty — Constitutional guarantee against imprisonment except by law of the land does not protect trespassor from prosecution, *S. v. Fox*, 97.

License—Revocation of driver's license for repeated conviction of speeding, *Honeycutt v. Scheidt*, 607.

Lie Detector Test—Incompetent in this State, *S. v. Foye*, 704.

Liens—For old-age assistance, *Cuthrell v. Camden County*, 181.

Life Insurance—See Insurance.

Limitations of Actions—Limitation of actions for taking derogatory pictures of deceased, *Gillikin v. Bell*, 244; limitation of claims against estate, see Executors and Administrators; running of statute against remainderman during lifetime of life tenant, *Menzel v. Menzel*, 353; of action to set aside deed for fraud, *Willetts v. Willetts*, 136.

Liquor—Driving while under the influence of intoxicating liquor, *S. v. Haddock*, 162; prosecutions for possession see Intoxicating liquor.

Literacy—Literacy test for electors is constitutional but elector may not be required to write from dictation, *Bazemore v. Board of Elections*, 398.

Loan Companies—Tax on installment paper dealers held not discriminatory, *Finance Co. v. Currie*, 129.

Local Statute — Statute creating Housing Authority held statute relating to health, *Carringer v. Alverson*, 204; Art. 14A of G.S. 7 held unconstitutional as local statute relating to appointment of justice of peace, *McIntyre v. Clarkson*, 511; statute providing for confiscation of cattle remaining on portion of the Outer Banks held unconstitutional, *Chadwick v. Salter*, 389.

Loss of Finger—Loss of use of finger is loss of finger within meaning of accident policy, *Richardson v. Insurance Co.*, 711.

Lumber Yard—Injury to employee in unloading lumber truck, *Reeves v. Taylor-Colquitt Co.*, 342.

Lunch Counter—Owner of private property may discriminate on basis of race as to those he will serve at lunch counter, *S. v. Fox*, 97.

Magistrate—Art. 14A of G.S. 7 held unconstitutional as local statute re-

lating to appointment of justice of peace, *McIntyre v. Clarkson*, 511.

Mandatory Injunction—Issuance of preliminary mandatory injunction rests in discretion of court, *Creel v. Gas Co.*, 325.

Manufacturer—Not amenable to service solely from fact of manufacture, *Moss v. Winston-Salem*, 480.

Marriage—Attack of validity, *Williams v. Williams*, 729; divorce see Divorce and Alimony.

Married Women—See Husband and Wife.

Master and Servant—Disability within employer's pension plan, *Bradley v. Pritchard*, 175; liability under Doctrine of Respondeat Superior for driving of motor vehicle, see Automobiles; labor contract, *Coach Lines v. Brotherhood*, 60; common law liability of employer to employee, *Reeves v. Taylor-Colquitt Co.*, 342; liability of employer for injury to third person, *Adler v. Curle*, 502.

Mercy—Verdict recommending mercy not the correct form, *S. v. Foye*, 704.

Meritorious Defense—Motion to set aside default judgment for surprise and excusable neglect, *Greitzer v. Eastham*, 752.

Militia—Aid in construction of armory is public municipal purpose, *Morgan v. Spindale*, 304.

Ministers—Right of governing body of congregational church to fire minister, *Collins v. Simms*, 148.

Minors—See Infants.

Misdemeanor—Acquisition of jurisdiction by Superior Court in those counties in which recorder's court has exclusive jurisdiction of misdemeanor, *S. v. Perry*, 772.

Misjoinder of Parties and Causes—See Pleadings.

Monopolies—*Buick Co. v. Motors Corp.*, 117.

Motion for Continuance—Addressed to discretion of court, *S. v. Stroud*, 765; *In re Orr*, 723.

Motions—For judgment on pleadings, see Pleadings; to set aside judgment, see Judgments; in arrest of judgment, *S. v. Barefoot* and *S. v. Brantley*, 308; *S. v. Reel*, 778; to strike allegations from pleadings, see Pleadings; for nonsuit see Nonsuit.

Motor Boat—Family purpose doctrine does not apply to operation of motor boats, *Grindstaff v. Watts*, 568.

Motor Vehicles—See Automobiles.

Motor Vehicle Safety-Responsibility Act—*Faizan v. Insurance Co.*, 47.

Mower—Manufacturer not amenable to service solely from fact of manufacture, *Moss v. Winston-Salem*, 480.

Municipal Corporations—Aid in construction of armory is public municipal purpose, *Morgan v. Spindale*, 304; city may not abandon park, *Wishart v. Lumberton*, 94; zoning regulations, *Walker v. Elkin*, 85.

Municipal Housing Authority—Statute creating Housing Authority held statute relating to health, *Carringer v. Alverson*, 204.

Murder—See Homicide.

National Electrical Code—Has effect of law, *Jenkins v. Electric Co.*, 553.

Natural Gas—Evidence held insufficient to support special rates for launderettes, *Utilities Comm. v. Gas Co.*, 734.

Natural Objects—Where parties go upon land and point out natural objects contemporaneously with execution of the deed, the natural objects control boundaries; but when this is done after execution of the deed, it amounts only to admission against interest. *Wagner v. Bauman*, 594; blazed trees are natural objects controlling courses and distances, *Green v. Barker*, 603.

Negligence—In operation of automobile, see Automobiles; of common carrier by air, *Brittain v. Aviation, Inc.*, 697; in installing electrical wiring and handling electricity, see Electricity; in causing accident at grade crossing, *Jarrett v. R.R.*, 493; sudden emergency, *Rouse v. Jones*, 575; proximate cause and foreseeability, *Jenkins v. Electric Co.*, 553; *Rouse v. Jones*, 575; *Priest v. Thompson*, 673; *Herring v. Humphrey*, 741; concurring and intervening negligence, *Rouse v. Jones*, 575; *Stockwell v. Brown*, 662; primary and secondary liability, *Greene v. Laboratories*, 680; last clear chance, *Greene v. Laboratories*, 680; contributory negligence of minors, *Hutchens v. Southard*, 428; pleadings, *Greene v. Laboratories*, 680; *Bullard v. Oil Co.*, 756; presumptions and burden of proof, *Heuay v. Construction Co.*, 252; *Brewer v. Green*, 615; sufficiency of evidence and nonsuit, *Heuay v. Construction Co.*, 252; *Jenkins v. Electric Co.*, 553; *Herring v. Humphrey*, 741; contributory negligence, *Hines v. Brown*, 447; *Furr v. Overcash*, 611; *Peeden v. Tait*, 489; instructions, *Rouse v. Jones*, 575; only one recovery for single negligent injury, *Ramsey v. Camp*, 443; liability of tort-feasors for contribution see torts.

Negroes—Owner of private property may discriminate on basis of race as to those he will serve at lunch counter, *S. v. Fox*, 97; court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101.

Necessity—Easements by, *Smith v. Moore*, 187.

Neighborhood Public Roads—*Smith v. Moore*, 187.

New Trial—Supreme Court may grant partial new trial, *Godwin v. Vinson*, 582.

Non-Resident—Non-resident may not make personal deductions in computing income earned in this State, *Stiles v. Currie, Comr. of Revenue*, 197; fact that distributee is non-resident does not exempt personalty of estate from intangibles tax, *Allen v. Currie, Commissioner of Revenue*, 636; service on non-resident see process.

Nonsuit—Evidence to be considered in light most favorable to the State, *S. v. Faust*, 101; *S. v. Haddock*, 162; *S. v. Tessnear*, 211; evidence to be considered in light most favorable to plaintiff, *Pridgen v. Uzzell*, 292; *Hutchens v. Southard*, 428; *Rhyne v. Bailey*, 467; *Blount-Midyette v. Aeroglide Corp.* 484; *Jarrett v. R.R.*, 493; *Brittain v. Aviation, Inc.*, 697; *Jenkins v. Electric Co.*, 553; *Rouse v. Jones*, 575; rule that defendant's evidence favorable to plaintiff may be considered is subject to limitations that such evidence supports allegations in plaintiff's pleadings, *Nix v. English*, 414; sufficiency of evidence is question of law, *Heuay v. Construction Co.*, 252; sufficiency of evidence to overrule non-suit in general, *S. v. Tessnear*, 211; *Heuay v. Construction Co.*, 252; *Johnson v. Fox*, 454; *Brewer v. Green*, 615; plaintiff may not be nonsuited upon affirmative defense unless plaintiff's own evidence establishes defense, *Rhinehardt v. Insurance Co.*, 671; for failure of proof of estoppel of admitted defense, *Jones v. Insurance Co.*, 407; for exculpatory evidence of State, *S. v. Carter*, 475; for contributory negligence, *Hines v. Brown*, 447; *Peeden v. Tait*, 489; *Furr v. Overcash*, 611; for insulating negligence, *Stockwell v. Brown*, 662.

Notice—Of cancellation of policy under Vehicle Financial Responsibility Act, *Faizan v. Insurance Co.*, 47.

Notice and Opportunity to Defend, *S. v. Parrish*, 301; *In re Drainage District*, 155.

Nuisance—Private act abating, *Chadwick v. Salter*, 389.

Officers—No action lies against public official for damages in manner in which he performs duties, *Gillikin v. Guaranty Co.*, 247.

Ordinances—see Municipal Corporations.

Outer Banks—Statute providing for confiscation of cattle remaining on portion of the Outer Banks held unconstitutional, *Chadwick v. Salter*, 389.

Parent and Child—No presumption of fraud in execution of deed by parent to child, *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644; child may kill in defense of parent, *S. v. Carter*, 475; presumption of legitimacy, *S. v. Aldridge*, 297; right to custody, *In re Hughes*, 434; liability for torts, *Grindstaff v. Watts*, 568.

Park—Power of municipality to abandon public park, *Wishart v. Lumberton*, 94.

Parking Lots—Power of municipality to use public park for parking lot, *Wishart v. Lumberton*, 94.

Parol Trust—See Trusts.

Partial New Trial—Supreme Court may grant partial new trial, *Godwin v. Vinson*, 582.

Parties—Proper parties, *Adler v. Curle*, 502; *Church v. College*, 717; additional parties, *Bullard v. Oil Co.*, 756; parties to action against personal representative to surcharge and falsify accounts see Executors and Administrators; right of contribution among joint tort-feasors, see Torts.

Passenger—In automobile, see Automobiles.

Penalties—*Chadwick v. Salter*, 389.

Pensions—Disability within employer's pension plan, *Bradley v. Pritchard*, 175.

Perjury—No civil action for perjury, *Gillikin v. Sprinkle*, 240.

Photography—Limitation of actions for taking derogatory pictures of deceased, *Gillikin v. Bell*, 244.

Physician and Patient—Whether physician should be compelled to disclose communications from patient rests in discretion of the court, *Brittain v. Aviation, Inc.*, 697.

Pictures—Limitation of actions for taking derogatory pictures of deceased, *Gillikin v. Bell*, 244.

Plea of Guilty—Court should not refuse to allow withdrawal of plea of guilt without finding whether attorney was authorized to enter the plea, *S. v. Barney*, 463.

Pleadings—Pleadings in particular action see particular titles of actions; answer, *Construction Co. v. Board of Education*, 311; *Greene v. Laboratories*, 680; counterclaims and cross-actions, *Greene v. Laboratories*, 680; *Bullard v. Oil Co.*, 756; reply, *Nix v. English*, 414; demurrer, *Rudisill v. Hoyle*, 33; *Jacobs v. Highway Com.*, 200; *Lynn v. Clark*, 460; *Rhyne v. Bailey*, 467; *Coach Lines v. Brotherhood*, 60; *Toomes v. Toomes*, 624; *Elliott v. Goss*, 508; *Jacobs v. Highway Com.*, 200; *Gillikin v. Sprinkle*, 240; *Smith v. Trust Co.*, 588; amendment, *Casstevens v. Membership Corp.*, 746; variance, *Buick Co. v. Motors Corp.*, 117; *Smith v. Trust Co.*, 588; *Mason v. Brevoort*, 619; *Rhyne v. Bailey*, 467; judgment on pleadings, *Gillikin v. Sprinkle*, 240; motion to strike, *Construction Co. v. Board of Education*, 311; *Greene v. Laboratories*, 680.

Poison—Poison in liquor, *S. v. Barefoot*, 308.

Police Officers—Court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101.

"Point System"—Revocation of driver's license for repeated conviction of speeding, *Honeycutt v. Scheidt*, 607.

Police Power—The General Assembly

may regulate automobile drivers' licenses in exercise of police power, *Honeycutt v. Scheidt*, 607.

Post-conviction Hearing Act—*S. v. Burell*, 317.

Power Company—Allocation of income of power company from its operations within this State, *Power Co. v. Currie*, 17.

Preliminary Mandatory Injunction—Issuance of preliminary mandatory injunction rests in discretion of court, *Creel v. Gas Co.*, 325.

Premature Appeals—Appeal from order of compulsory reference in a case within purview of the statute is premature, *Rudisill v. Hoyle*, 35.

Premeditation—See Homicide.

Presbyteries — Whether designated church could continue operation of denominational college, *Church v. College*, 717.

Presumptions—Of fraud in transaction by fiduciary, *Willetts v. Willetts*, 136; no presumption of fraud in deed from parent to child, *Jones v. Saunders*, 644; *Willetts v. Willetts*, 136; no presumption of negligence from fact of injury, *Heuay v. Construction Co.*, 252; *Brewer v. Green*, 615; presumption of agency from registration of motor vehicle does not apply when action is not brought within two years of accident, *Darden v. Bone*, 599; of agency from ownership or registration of vehicle, *Taylor v. Parks*, 266; G.S. 20-71.1 raises no presumption that owner was driving, *Johnson v. Fox*, 454; it will be presumed that person acting as deputy clerk over a number of years was duly appointed and qualified, *Baker v. Murphrey*, 506; probate and registration of deed raises presumption of delivery, *Jones v. Saunders*, 644; child between 7 and 14 is presumed incapable of contributory negligence, *Hutchens v. Southard*, 428; where charge is not in record it will be presumed correct, *S. v. Strickland*, 658.

Principal and Agent—Relationship must exist in respect to transaction in question in order for agent's acquisition of property to be presumed fraudulent, *Willetts v. Willetts*, 136; evidence held insufficient to establish brokerage contract, *Daniel v. Lumber Co.*, 504; liability under Doctrine of Respondeat Superior for driving motor vehicle, see Automobiles.

Principal and Surety—Surety's liability cannot exceed that of principal, *Gillikin v. Guaranty Co.*, 247.

Privileged Communications—Whether physician should be compelled to disclose communications from patient rests in discretion of the court, *Brittain v. Aviation, Inc.*, 697.

Probata—Variance between allegation and proof, *Smith v. Trust Co.*, 588.

Probate—Of wills see Wills; probate and registration of deed raises presumption of delivery, *Jones v.* Saunders, 644.

Process—Service by publication, *Menzel v. Menzel*, 353; service on foreign corporations, *Moss v. Winston-Salem*, 480.

Processioning Proceeding — See Boundaries.

Professional Bondsman—Charge of excessive fee, *S. v. Parrish*, 301.

Proper Parties—*Church v. College*, 717.

Proximate Cause—See Negligence.

Public Nuisance—See Nuisance.

Public Officers—Coroners are public officers, *Gillikin v. Guaranty Co.*, 247; if statute creating office is void incumbent is neither *de jure nor de facto* officer, *Carringer v. Alverson*, 204; not civilly liable for manner he performs duties, *Gillikin v. Guaranty Co.*, 247; it will be presumed that person acting as deputy clerk over a number of years was duly appointed and qualified, *Baker v. Murphrey*, 506.

Public Park—Power of municipality

to abandon public park, *Wishart v. Lumberton*, 94.

Public Policy—Public policy is within exclusive province of General Assembly, *Grindstaff v. Watts*, 568.

Public Purpose—Aid in construction of armory is public municipal purpose, *Morgan v. Spindale*, 304.

Public Utilities—See Utilities Commission, Carriers.

Public Welfare—Indexing of lien for old age assistance, *Cuthrell v. Camden County*, 181.

Publication—Service of summons by, see Process.

Question of Law—Sufficiency of evidence is question of law, *Heuay v. Construction Co.*, 252.

Quieting Title—*Waters v. Pittman*, 191.

Races—Owner of private property may discriminate on basis of race as to those he will serve at lunch counter, *S. v. Fox*, 97; court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101.

Railroads—As carriers, see Carriers; crossing accidents, *Jarrett v. R.R.*, 493.

Rape—Carnal knowledge of female, *S. v. Strickland*, 658.

Receiving Stolen Goods, *S. v. Tessnear*, 211.

Reciprocal Enforcement of Support Act, *S. v. Lowe*, 631.

Rescission of Instruments—See Cancellation and Rescission of Instruments.

Recommendation of Mercy—Verdict recommending mercy not the correct form, *S. v. Foye*, 704.

Record—On appeal, see Appeal and Error.

Recorder's Court—Has jurisdiction of proceedings under Uniform Reciprocal Enforcement of Support Act, *S. v. Lowe*, 631; acquisition of jurisdiction by Superior Court in those counties in which recorders court has exclusive jurisdiction of misdemeanor, *S. v. Perry*, 772.

Reference — Compulsory reference, *Rudisill v. Hoyle*, 33; *Caudell v. Blair*, 438.

Registration—Of voters, see Elections; probate and registration of deed raises presumption of delivery, *Jones v. Saunders*, 644; sufficiency of registration, *Cuthrell v. Camden County*, 181; purchasers for value, *Waters v. Pittman*, 191.

Reformation of Instruments—*Mason v. Brevoort*, 619.

Release—From liability for tort, see Torts.

Religious Organizations — Whether designated church could continue operation of denominational college, *Church v. College*, 717.

Religious Societies—Enjoining pastor from asserting right to act as pastor of particular Church, *Collins v. Simms*, 148; right to possession of assets of church college, *Church v. College*, 717.

Religious Services—Exempt carriers may contract for charter trips to or from religious services, *Utilities Comm. v. McKinnon*, 1.

Remand—Remand for failure to find facts necessary to support judgment, *Howard v. Boyce*, 255; where case is heard under misapprehension of law case will be remanded, *Utilities Commission v. Coach Co.*, 668.

Repeated Offense — Judgment and sentence upon repeated conviction for similar offense, *S. v. Powell*, 231.

Replacement Costs—Is factor in determining capital investment of utility, *Utilities Commission v. Gas Co.*, 536.

Reply—Must be consistent with complaint, *Nix v. English*, 414.

Request for Instructions, *S. v. Faust*, 101.

Rescission of Instruments—see Can-

cellation and Rescission of Instruments.

Res Inter Alios Acta — Waters v. Pittman, 191.

Res Judicata—See Judgments.

Respondeat Superior—Liability under Doctrine of Respondeat Superior for driving motor vehicles, see Automobiles.

Restraining Orders—See Injunctions.

Restraint of Trade, Contracts in, *Buick Co. v. Motors Corp.*, 117.

Resulting Trust—See Trusts.

Retraxit—Motion to set aside judgment in retraxit, *Howard v. Boyce*, 255.

Roof—Liability for damage to plane when roof of hangar caved in from weight of snow, *Flying Club v. Flying Service*, 775.

Safe Place to Work—*Reeves v. Taylor-Colquitt Co.*, 342.

Sales—No implied warranty of safety of bottle containing soft drink, *Prince v. Smith*, 768.

Searches and Seizures—Necessity for warrant, *S. v. Giles*, 499.

Sentence—Time when sentence should be carried into effect is not part of judgment and provision that commitment should issue at pleasure of the court is not a suspended sentence, *S. v. Jennings*, 760.

Shackleford Banks—Statute providing for confiscation of cattle remaining on portion of the Outer Banks held unconstitutional, *Chadwick v. Salter*, 389.

Schools—Board of Education has the right to contract with intracity carrier for transportation of school bands and athletic teams to scheduled events, *Utilities Comm. v. McKinnon*, 1.

Scrutiny—Rule that testimony of an accomplice should be scrutinized, *S. v. Bailey*, 380.

Seizin—*Smith v. Trust Co.*, 588.

Self-Defense—See Homicide.

Self-Serving Declaration—*S. v. Frizzelle*, 457.

Sentence—Judgment and sentence upon repeated conviction for similar offense, *S. v. Powell*, 231.

Servient Highway—See Automobiles.

Similar Offense—Judgment and sentence upon repeated convictions for similar offense, *S. v. Powell*, 231.

Small Claims—Trial without jury, *Rhyne v. Bailey*, 467;

Snow—Liability for damage to plane when roof of hangar caved in from weight of snow, *Flying Club v. Flying Service*, 775.

Solicitor—Argument of solicitor to jury held improper, *S. v. Wyatt*, 220; questions asked on cross-examination held prejudicial, *S. v. Wyatt*, 220.

"Speaking" Demurrer — *Elliott v. Goss*, 508; *Toomes v. Toomes*, 624.

Special Statute — Statute creating Housing Authority held statute relating to health, *Carringer v. Alverson*, 204; Art. 14A of G.S. 7 held unconstitutional as local statute relating to appointment of justice of peace, *McIntyre v. Clarkson*, 511; statute providing for confiscation of cattle remaining on portion of Outer Banks held unconstitutional, *Chadwick v. Salter*, 389.

"Spot Zoning"—*Walker v. Elkin*, 85.

State—Governmental branches see Constitutional Law; claims against the State, *Ins. Co. v. Gold*, 168; what law governs transitory cause arising in another State, *Nix v. English*, 414.

Uniform Reciprocal Enforcement of Support Act, *S. v. Lowe*, 631.

State Highway Commission — See Eminent Domain.

Statutes—Restrictions on passage of local acts, *Carringer v. Alverson*, 204; *Chadwick v. Salter*, 389; *Rhyne v. Bailey*, 467; *McIntyre v. Clarkson*, 510; administrative interpretation, *Faizan v. Ins. Co.*, 47; statutes in *pari materia*, *Coach Lines v. Brotherhood*, 60.

Statutes of Limitation—See Limitation of Actions.

Stipulations—Admission of authenticity of record of inferior court is not admission that defendant had theretofore been convicted of similar offenses, *S. v. Powell*, 231.

Sudden Emergency—*Rouse v. Jones*, 575.

Submission of Controversy—See Controversy without Action.

Summons—See Process.

Supreme Court—Supreme Court may affirm order to prevent unnecessary delay, *Greene v. Laboratories, Inc.*, 680; may grant partial new trial, *Godwin v. Vinson*, 582; review of judgments see Appeal and Error.

Surprise and Excusable Neglect—Motion to set aside default judgment for surprise and excusable neglect, *Greitzer v. Eastham*, 752.

Survey—Where parties go upon land and point out natural objects contemporaneously with execution of the deed, the natural objects control boundaries; but when this is done after execution of the deed, it amounts only to admission against interest, *Wagner v. Bauman*, 594.

Suspended Sentence—Time when sentence should be carried into effect is not part of judgment and provision that commitment should issue at pleasure of the court is not a suspended sentence, *S. v. Jennings*, 760.

Taxation—Power to tax in general, *Finance Co. v. Currie*, 129; classification for taxation, *Finance Co. v. Currie*, 129; public purpose, *Morgan v. Spindale*, 304; income taxes, *Power Co. v. Currie*, 17; *Stiles v. Currie*, 197; intangibles tax, *Allen v. Currie*, 636; recovery of tax paid under protest, *Power Co. v. Currie*, 17; *Ins. Co. v. Gold*, 168.

Temporary Restraining Orders—See Injunctions.

"Through Service"—Authority of carrier to provide, *Utilities Commission v. Coach Co.*, 668.

Timber—Injury to employee in unloading lumber truck, *Reeves v. Taylor-Colquitt Co.*, 342.

Torts—Particular torts see particular titles of torts; liability of parent for tort committed by child, *Grindstaff v. Watts*, 568; joint tort feasors, *Ramsey v. Camp*, 443; *Jones v. Aircraft Co.*, 323; *Greene v. Laboratories*, 680; covenant not to sue, *Ramsey v. Camp*, 443.

Training School—Commitment of delinquent children to training school is not criminal proceeding and jury trial is not required, *S. v. Frazier*, 226.

Transitory Cause—What law governs transitory cause arising in another State, *Nix v. English*, 414.

Trees—Blazed trees are natural objects controlling courses and distances, *Green v. Barker*, 603.

Trespass—*S. v. Fox*, 97.

Trial—Trial of particular actions see particular titles of actions; trial of criminal actions see Criminal Law and particular titles of crimes; continuance, *In re Orr*, 723; nonsuit, *Pridgen v. Uzzell*, 292; *Hutchens v. Southard*, 428; *Rhyne v. Bailey*, 467; *Peeden v. Tait*, 489; *Jarrett v. R.R.*, 493; *Rouse v. Jones*, 575; *Jenkins v. Electric Co.*, 553; *Nix v. English*, 414; *Johnson v. Fox*, 454; *Brewer v. Green*, 615; *Jones v. Construction Co.*, 407; directed verdict, *Rhinehardt v. Ins. Co.*, 671; instructions, *Byrnes v. Ryck*, 496; *Green v. Barker*, 603; trial by court by agreement, *Rutherford v. Harrison*, 236.

Trusts—Fact that distributee is nonresident does not exempt personalty of estate from intangibles tax, *Allen v. Currie, Commissioner of Revenue*, 636; constructive trust, *Willetts v. Willetts*, 136.

Uniform Reciprocal Enforcement of Support Act, *S. v. Lowe*, 631.

Unions—See Master and Servant.

United States—Findings held insuf-

ficient to support conclusions that Federal Court had exclusive jurisdiction of prosecution, *S. v. Burell*, 317.

Utilities Commission—*Utilities Com. v. Gas Co.*, 536; *Utilities Com. v. McKinnon*, 1; *Utilities Com. v. R.R.*, 73; *Utilities Com. v. Coach Co.*, 668; *Utilities Com. v. Gas Co.*, 734.

Variance—*Buick Co. v. Motors Corp.*, 117; *Smith v. Trust Co.*, 588; *S. v. Wyatt*, 220.

Vehicle Financial Responsibility Act —*Faizan v. Insurance Co.*, 47.

Venue—*Casstevens v. Membership Corp.*, 746.

Verdict—Court may not direct verdict in favor of defendant upon affirmative defense, *Rhinehardt v. Insurance Co.*, 671; verdict recommending mercy not the correct form, *S. v. Foye*, 704.

Voters—Literacy test for electors constitutional but elector may not be required to write from dictation, *Bazemore v. Board of Elections*, 398.

Waiver—*Joncs v. Ins. Co.*, 407; defendant held to have waived right to have motion for removal heard before amendment obviating ground for removal, *Casstevens v. Membership Corp.*, 746.

Warrant—See Indictment and Warrants; search warrant not necessary for seizure of liquor seen in car by officer, *S. v. Giles*, 499.

Warranty—Of title, *Smith v. Trust Co.*, 588; no implied warranty of safety of bottle containing soft drink, *Prince v. Smith*, 768.

Wills—Signature of testator, *In re Will of Sessoms*, 369; caveat, *In re Will of Cox*, 90; *In re Will of Sessoms*, 369; construction of wills, *Maxwell v. Grantham*, 208; *Rudisill v. Hoyle*, 33; *Gregory v. Godfrey*, 215.

Withdrawal of Evidence — Cannot cure admission of highly prejudicial evidence, *S. v. Frizzelle*, 457; *S. v. Aldridge*, 297.

Witnesses—Court properly instructs jury to scrutinize testimony of members of crowd in sympathy with defendant's interference with arrest by police officers, *S. v. Faust*, 101; rule that testimony of an accomplice should be scrutinized, *S. v. Bailey*, 380; right to cross-examine witness is absolute, *Templeton v. Highway Comm.*, 337; party may waive right of cross-examination, *In re Hughes*, 434; expression of opinion on evidence by court in examining witness, *S. v. Strickland*, 658; *S. v. Wyatt*, 220; defendant held entitled to examination of plaintiff by expert to determine extent of brain injury, *Helton v. Stevens Co.*, 321; wife incompetent to testify as to non-access of husband, *S. v. Aldridge*, 297.

Zoning Ordinances—See Municipal Corporations.

ANALYTICAL INDEX

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Administrative Remedy.

While a person must exhaust his administrative remedies before applying to the courts, on an appeal to the county board of elections by a person refused registration, such person is within her rights in refusing to submit to a literacy test not sanctioned by G.S. 163-28, and is given the statutory right to appeal from the refusal of such board to determine her right to registration until she should submit to and pass the unauthorized tests. *Bazemore v. Board of Elections*, 398.

§ 3. Duties and Authority of Administrative Boards and Agencies in General.

An administrative board has only such authority as is properly conferred upon it by statute, and the question of the constitutionality of a statute is for the judicial branch of the government. *Ins. Co. v. Gold*, 168.

§ 4. Appeal, Certiorari and Review.

The interpretation placed on a statute by the agency charged with the administration of the statute will be given due consideration by the courts, but an administrative interpretation in conflict with that of the courts cannot prevail. *Faizan v. Ins. Co.*, 47.

ADVERSE POSSESSION

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence tending to show that plaintiffs' predecessor in title purchased the land more than seven years prior to the institution of the action, that upon controversy then arising with the adjoining land owners, the parties went upon the land and agreed to certain natural objects as marking the true boundary, that plaintiffs' predecessor in title built a fence along this boundary, and that plaintiffs and plaintiffs' predecessor in title had been in possession up to this boundary continuously thereafter, *is held* sufficient to be submitted to the jury upon claim of title up to such boundary by seven years possession under color. *Wagner v. Bauman*, 594.

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction.

The Supreme Court will not ordinarily pass upon a question not presented by the record. *Utilities Com. v. McKinnon*, 1.

The Supreme Court will not pass upon the constitutionality of a statute unless the question is squarely presented by a party whose rights are directly involved. *Carringer v. Alverson*, 204; *Chadwick v. Salter*, 389.

Where it is determined that defendant is entitled to recover nothing on his cross action, it is not necessary to determine whether the cross action is barred by plaintiff's plea of the statute of limitations. *Caudell v. Blair*, 438.

Where motion to strike certain allegations from a pleading is erroneously denied by one Superior Court judge but later allowed by another Superior Court judge, the Supreme Court, in the exercise of its super-

visory jurisdiction, may permit the second order to stand notwithstanding it was entered without authority, in order that the case may be tried on the correct theory without unnecessary delay. *Greene v. Laboratories*, 680.

§ 3. Right to Appeal and Judgments Appealable.

An appeal from an order of compulsory reference in a case within the purview of the reference statute is premature and fragmentary, and must be dismissed. *Rudisill v. Hoyle*, 33.

Judgment that appellant's land was subject to easement for cartway is final judgment and appealable even before jury of view has located the cartway and might not locate it over appellant's land. *Pritchard v. Scott*, 277.

§ 19. Form and Requisition of Objections, Exceptions and Assignments of Error in General.

An assignment of error to the denial of motion to nonsuit will not be considered when the record fails to show that defendant took exception to the ruling of the court, since an assignment of the error must be supported by an exception duly noted. *Darden v. Bone*, 599.

An assignment of error should present the asserted error without the necessity of going beyond the assignment itself. *McArthur v. Stanfield*, 627; *Sanitary District v. Canoy*, 630.

§ 21. Exception and Assignment of Error to Judgment or to Signing of Judgment.

A sole exception to the judgment presents only the face of the record for review. *Collins v. Simms*, 148; *Utilities Com. v. Gas Co.*, 734.

An exception to the judgment does not challenge the sufficiency of the evidence to support the court's findings of fact, exceptions directed to the specific findings appellant wishes to controvert being necessary for such purpose. *In re Orr*, 723.

§ 23. Objections, Exceptions and Assignments of Error to Evidence.

An assignment of error to the admission or exclusion of evidence must set forth so much of the testimony or record as to enable the Court to understand what questions are sought to be presented without a voyage of discovery through the record. *Darden v. Bone*, 599.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge must point out specifically the asserted error so that the question sought to be presented can be ascertained without the necessity of going beyond the assignment itself. *Darden v. Bone*, 599.

§ 35. Conclusiveness and Effect of Record and Presumption in Regard to Matters Omitted from Record.

Where the charge is not the record, it will be presumed that the court instructed the jury correctly on every principle of law applicable to the facts. *Jones v. Mathis*, 421.

An instrument which does not appear in the record on appeal will not be considered. *Elliott v. Goss*, 508.

APPEAL AND ERROR—*Continued.*

§ 38. The Brief.

An exception not brought forward and discussed in the brief is deemed abandoned. *Power Co. v. Currie*, 17.

§ 41. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence.

Appellant may not assert the admission of certain evidence as error when he himself has introduced evidence of the same import. *Menzel v. Menzel*, 353.

The admission of evidence over objections cannot be held prejudicial when testimony of the same import had theretofore been admitted without objection. *Stockwell v. Brown*, 662.

Where only evidence objected to appears in the record, and the charge of the court is not included in the record, admission of the evidence will not be held prejudicial, it being impossible to determine from the record where the admission of the evidence was error, or, if so, whether its admission was harmful. *Elliott v. Goss*, 509.

The burden is upon appellant not only to show error in the admission of evidence but also that the alleged error was prejudicial. *Jenkins v. Electric Co.*, 553.

It will not be held for error that the court refused to withdraw a juror and order a mistrial upon the intimation to the jury that defendant was protected by liability insurance when such fact is brought out by defendant's own counsel upon cross-examination of plaintiff, and substantially the same information is brought out on other occasions without objection, and any prejudicial effect being further obviated by common knowledge that liability insurance is required by law. *Adams v. Godwin*, 632.

Where, in an employee's action against his superior, the evidence is insufficient to be submitted to the jury on the issue of negligence, the exclusion of evidence that the superior was not an independent contractor, offered for the purpose of holding the corporate defendant liable under the doctrine of *respondeat superior*, cannot be prejudicial. *Reeves v. Taylor-Colquitt Co.*, 342.

§ 42. Harmless and Prejudicial Error in Instructions.

Conflicting instructions upon a material aspect of a case must be held prejudicial. *Smith v. Moore*, 186.

§ 44. Invited Error.

Appellant may not object that the court prejudiced his case by allowing another party to remain in the action when appellant himself had agreed to the consolidation of the action against such additional party. *Darden v. Bone*, 599.

§ 46: Review of Discretionary Matters.

Refusal of motion for joinder of a proper party will not be disturbed in the absence of abuse of discretion. *Adler v. Curle*, 502.

Where the court assigns no reason for a ruling upon a matter resting in its discretion, it will be assumed that the court made the ruling in the exercise of its discreton, it being incumbent upon the objecting party to request the court to make the record show that the ruling was made as a matter of law, if this be the case. *Brittain v. Aviation*, 697.

APPEAL AND ERROR—*Continued.*

§ 49. Review of Findings or Judgments on Findings.

Findings of fact by the trial court are conclusive on appeal when supported by competent evidence. *Menzel v. Menzel*, 353.

Findings of the court in respect to publication of notice in regard to zoning regulations of a municipalty are conclusive when supported by evidence. *Walker v. Elkin*, 85.

The findings of facts by the court in a trial by the court under an agreement of the parties are conclusive when conflicting evidence raises such issues of fact. *Abernethy v. Hospital Care Asso.*, 346.

Findings of fact by the referee approved by the trial judge are conclusive on appeal when supported by any competent evidence. *Caudill v. Blair*, 438.

Where the lower court fails to find the facts necessary to support its judgment, the cause must be remanded. *Howard v. Boyce*, 255.

Where there are no exceptions to the findings of fact, the findings are conclusive. *Moss v. Winston-Salem*, 480.

Where movant makes no request that the court find the facts upon his motion to set aside a judgment for surprise and excusable neglect, it will be presumed that the court found facts from the evidence supporting its ruling upon the motion. *Greitzer v. Eastman*, 752.

§ 50. Review of Injunctive Proceedings.

Upon review of an order continuing an interlocutory injunction to the final hearing, the Supreme Court is not bound by the findings of fact by the trial court, but may review and weigh the evidence and find the facts for itself, although the findings of the trial court will be presumed correct if supported by competent evidence. *Coach Lines v. Brotherhood*, 60.

§ 54. Partial New Trial.

Where error in proceedings in the lower court relates solely to the issue of damages, the Supreme Court, in the exercise of its discretion, may award a partial new trial limited to the issue of damages. *Godwin v. Vinson*, 582.

§ 55. Remand.

When the lower court fails to find facts sufficient to support its judgment, the cause must be remanded. *Howard v. Boyce*, 255.

Where the cause has been determined under a misapprehension of the applicable law it must be remanded. *Utilities Com. v. Coach Co.*, 668.

§ 59. Force and Effect of Decisions of Supreme Court in General.

A decision of the Supreme Court must be interpreted within the frame work of the facts of that particular case. *Howard v. Boyce*, 255.

APPEARANCE

§ 2. Effect of General Appearance.

Where a party appears and defends the action he waives any defect in the application for service by publication. *Menzel v. Menzel*, 353.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements.

An agreement to arbitrate is a contract and is to be construed as other contracts to ascertain the intent of the parties as gathered from the in-

ARBITRATION AND AWARD—*Continued.*

strument as a whole and not by detached fragments. *Coach Lines v. Brotherhood*, 60.

§ 2. Agreements to Arbitrate as Bar to Action.

Construing G.S. 95-36.6 and G.S. 95-36.9(b) *in pari materia*, it is held that G.S. 95-36.6, giving arbitrators the power to decide the arbitrability of the dispute if there is no agreement to the contrary, is modified by G.S. 95-36.9(b), giving the courts and not the arbitrators power to decide whether or not party has agreed to the arbitration of the controversy involved. *Coach Lines v. Brotherhood*, 60.

Party must follow procedure prescribed by the contract in order to be entitled to demand arbitration. *Ibid.*

ARREST AND BAIL

§ 3. Right of Officers to Arrest without Warrant.

Where officers follow and "clock" a motorist travelling in excess of 55 miles per hour in a 30 mile per hour zone, the officers have a right to pursue and arrest the motorist without a warrant. *S. v. Giles*, 499.

§ 7. Right of Person Arrested to Communicate with Friends or Physician.

While it is a better practice to call a physician when requested by a person in custody, the evidence in this case that defendant was highly intoxicated when arrested during the early evening and that he was released from custody the next day, *is held* not to show the deprivation of a substantial right in failing to accede to his request that a physician be called. *S. v. Reel*, 778.

§ 8. Right to Bail.

Defendant was arrested in a highly intoxicated condition early in the evening and was released under bond the next day. *Held:* Defendant was not detained for an unreasonable period of time before being allowed to fix bail. *S. v. Reel*, 778.

ATTACHMENT

§ 10. Wrongful Attachment and Liabilities on Plaintiff's Bond.

Where plaintiff in attachment fails to recover judgment, defendant may proceed against plaintiff's bond by motion in the cause. *Godwin v. Vinson*, 582.

Where plaintiff's attachment is wrongful, defendant is entitled to recover on plaintiff's bond the actual damages sustained by him by reason of the attachment. *Ibid.*

Where it is determined that plaintiff's attachment of defendant's property was unlawful, plaintiff is a wrongdoer *ab initio*, and if such attachment results in defendant's loss of his equity of redemption in the chattel, defendant is entitled to recover as actual damages the cash value of his equity at the time and place of the seizure of the chattel, with lawful interest on such value from the time of the seizure to the time of the rendition of the judgment. *Ibid.*

ATTORNEY AND CLIENT

§ 3. Scope of Authority of Attorney.

An attorney has no right, in the absence of expressed authority, to waive

ATTORNEY AND CLIENT—*Continued.*

or surrender by agreement or otherwise the substantial rights of his client. *S. v. Barney*, 463.

An attorney has no inherent or imputed power or authority to compromise his client's cause or consent to a judgment which gives away the whole *corpus* of the controversy. *Howard v. Boyce*, 255.

Attorney will be presumed to have authority to sign judgment in retraxit, but when his authority is questioned, court should not deny motion to set aside judgment for want of authority without finding facts. *Ibid.*

AUTOMOBILES

§ 1. Authority to License Drivers and to Suspend or Revoke Licenses.

The General Assembly has authority under the police power to prescribe the conditions upon which licenses to operate motor vehicles shall be issued, suspended, or revoked, and it has designated the State Department of Motor Vehicles as the agency for the administration of its rules in regard thereto. *Honeycutt v. Scheidt*, 607.

§ 2. Grounds for and Proceedings for Suspension or Revocation of Licenses.

The right to operate a motor vehicle upon the highways of this State is a conditional privilege and not a contractual or constitutional right, and the revocation or suspension of a license is an exercise of the police power in the interest of public safety and the safety of the licensee, and while such revocation or suspension has as one of its purposes to impress upon the licensee the duty and necessity of obeying the traffic laws, it is not punishment for violation of such laws. *Honeycutt v. Scheidt*, 607.

The Department of Motor Vehicles properly suspends a motor vehicle operator's license upon proof that the licensee had been convicted of speeding 60 miles per hour in a 50 mile per hour zone on two separate occasions within a twelve month period even though one of the occasions had theretofore been used as the basis for a prior suspension of the license. *Ibid.*

§ 6. Safety Statutes in General.

The standards of care prescribed by statute for the operation of motor vehicles on the State highways is absolute. *Stockwell v. Brown*, 662.

§ 7. Attention to Road, Lookout, and Due Care in General.

A motorist is under duty to keep a continuous lookout in the direction of travel and will be held to the duty of seeing what he ought to see. *Hutchens v. Southard*, 428; *Rhyne v. Bailey*, 467.

The operator of a motor vehicle is under duty to exercise due care for his own safety and to keep a continuous lookout in the direction of travel, and to increase vigilance when darkness or other conditions increase the danger. *Hines v. Brown*, 447.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

A motorist is forbidden by statute to attempt to pass another vehicle travelling in the same direction unless the left side of the highway is clearly visible and is free of oncoming traffic for a sufficient distance to permit him to pass the other vehicle in safety, and the violation of this statutory provision is negligence. *Rouse v. Jones*, 575.

AUTOMOBILES—*Continued.*

It is negligence *per se* for a motorist to increase the speed of his vehicle while another motorist, travelling in the same direction, is attempting to pass. *Ibid.*

§ 17. Instructions.

Where two vehicles approach an intersection at which no stop sign has been erected on either street, the vehicle on the right has the right-of-way when the vehicles approach the intersection at approximately the same time, while if one vehicle is already within the intersection when the other vehicle approaches, the vehicle first in the intersection has the right-of-way. G.S. 20-155 (a) (b). This rule does not apply to a vehicle making a turn in the intersection. *Rhyne v. Bailey*, 467.

Even though a motorist travelling along a dominant highway is not under duty to anticipate that another motorist will enter the highway from a crossover or intersection without stopping and yielding the right-of-way, he is nevertheless under duty not to drive at a speed greater than that which is reasonable and prudent under the circumstances, to keep his vehicle under control, to keep a reasonably careful lookout, and to exercise ordinary care to avoid collision with persons or vehicles which he sees, or, in the exercise of due care should see, upon the highway. *Peeden v. Tait*, 489; *Stockwell v. Brown*, 662.

§ 24. Protruding Objects and Size and Width of Vehicles.

Defendant's evidence that the width of the combine pulled by plaintiff's tractor along the highway exceeded 10 feet does not bring the vehicle within the purview of G.S. 20-116 (j) when plaintiff's uncontradicted evidence tends to show that the combine, as adjusted by him for travel upon the highway, had a width of only 9 feet 11 inches. *Furr v. Overcash*, 611.

§ 25. Speed in General.

It is negligence to drive a motor vehicle upon a public highway at a speed that is greater than is reasonable and prudent under the existing circumstances. *Rouse v. Jones*, 575.

§ 27. Speed in Approaching Intersections.

Even though speed is within the statutory maximum, a motorist is required to reduce speed when approaching an intersection, and failure to do so amounts to negligence *per se*. *Hutchens v. Southard*, 428.

§ 34a. Creation of Dangerous Condition on Highway.

Evidence tending to show that defendant moved some dirt from an area adjacent to a highway in connection with a construction project, that defendant's car skidded on some mud and clay on the highway during a rain storm some two days after defendant had performed some work at the place, that no mud or dirt was on the highway earlier on the day of the accident, and that the kind and quantity of the mud and dirt on the highway and the way it was distributed indicated it could have been brought upon the highway by automobiles, *is held* insufficient to show that defendant construction company was responsible for the dangerous condition. *Hueay v. Construction Co.*, 252.

§ 35. Pleadings in Auto Accident Cases.

Where the complaint is predicated upon wrongful acts and omissions of

defendant while in full possession of her faculties, it is error for the court to permit plaintiff to file a reply and to submit the cause to the jury upon allegations of the reply predicated upon plaintiff's loss of control of the vehicle because of loss of consciousness by reason of an attack of insulin shock, and alleging that defendant was grossly negligent in attempting to operate the vehicle when defendant knew or should have known she was likely to suffer such an attack. *Nix v. English*, 414.

Where the complaint sufficiently alleges negligence on the part of the defendant, and plaintiff's reply to defendant's counterclaim alleges that the collision was proximately caused by the negligence of defendant as set forth in the complaint, the reply sufficiently sets up contributory negligence of defendant as a bar to the counterclaim, even though it fails to plead contributory negligence *eo nomine*. *Jones v. Mathis*, 421.

Allegations in regard to careless and reckless driving will not be held fatally defective in citing G.S. 20-140, even though the evidence discloses that the accident occurred within a campus of a university within the purview of G.S. 20-140.1, since a pleading will be liberally construed with a view to substantial justice between the parties. *Rhyne v. Bailey*, 467.

Defendant driver is entitled to file a counterclaim against plaintiff driver and a cross-action against the plaintiff's employer upon his contention that the accident was the result of plaintiff driver's negligence, and may have the employer joined as a party upon the cross-action. *Bullard v. Oil Co.*, 756.

§ 36. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact of an accident and injury. *Brewer v. Green*, 615.

§ 37. Relevancy and Competency of Evidence in General.

Evidence that plaintiff's passenger was intoxicated and asleep on the front seat at the time of the accident in suit, without any evidence that plaintiff had drunk any intoxicant, would seem without relevance to the issue of plaintiff's negligence, and the exclusion of such evidence is held not prejudicial. *Jones v. Mathis*, 421.

§ 39. Physical Facts at Scene.

Evidence that a motorist, after sideswipping a car travelling in the same direction, ran off the pavement, down an enbankment, and through a swampy area 375 feet, struck a tree which knocked off one of the doors of the vehicle, *is held* to warrant a finding of excessive speed. *Rouse v. Watts*, 575.

§ 41a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Where the conflicting evidence is such that reasonable men may draw different conclusions as to the existence of actionable negligence, the issue must be submitted to the jury. *Darden v. Bone*, 599.

§ 41b. Sufficiency of Evidence of Negligence in Failing to Use Due Care in General.

Whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger, is ordinarily an issue of fact for the determination of the jury. *Peeden v. Tait*, 489.

AUTOMOBILES—*Continued.*

§ 41d. Sufficiency of Evidence of Negligence in Passing Vehicles Traveling in Same Direction or in Failing to Permit Vehicle to Pass.

Evidence held for jury on issue of negligence in attempting to pass before ascertaining the movement could be made in safety. *Rouse v. Jones*, 575.

Evidence that one motorist, while another motorist travelling in the same direction was abreast in attempting to pass, increased his speed, even though he saw, or in the exercise of due care should have seen, a third vehicle approaching from the opposite direction, *is held* sufficient to be submitted to the jury on the issue of negligence, even though the attempt by the second motorist to pass was, under the circumstances, in violation of statute and negligent. *Ibid.*

§ 41f. Sufficiency of Evidence of Negligence in Hitting Vehicle Stopped or Parked on Highway.

Evidence tending to show that plaintiff, traveling north, in attempting to reverse her direction on a four-lane highway separated by a median, entered the cross-over at a slow speed, that her motor stalled causing her brakes to fail, that the car rolled onto the south bound lanes, that defendant's car, travelling south along the straight highway, was then some five hundred feet away with headlights burning, that it continued on and struck plaintiff's car, knocking it some ninety to one hundred feet, *is held* sufficient to be submitted to the jury on the question of whether defendant was negligent in travelling at excessive speed and in failing to keep a proper lookout. *Peeden v. Tait*, 489.

§ 41g. Sufficiency of Negligence in Failing to Use Due Care and in Failing to Yield Right of Way at Intersections.

Plaintiffs' evidence in this case is held sufficient to raise an issue of fact as to the negligence of the driver of each of the vehicles colliding at an intersection in failing to operate their respective vehicles with due caution and circumspection and in failing to maintain a proper lookout, and as to one driver failing to yield the right-of-way at the intersection to the vehicle on his right, and that, as a proximate result of the collision, one of the vehicles was knocked or pushed against plaintiffs' parked car causing the damage in suit. *Rhyne v. Bailey*, 467.

Evidence tending to show that defendant, travelling along a dominant highway, approached an intersection with a dirt road at a speed of 60 to 70 miles per hour, that he did not see a car approaching from the opposite direction until after he had struck a car entering the intersection from his right and had been forced or knocked to his left in the path of the oncoming vehicle, *is held* sufficient to be submitted to the jury on the issue of such defendant's actionable negligence. *Stockwell v. Brown*, 662.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Evidence supported by allegations tending to show that defendant entered the highway without warning from a driveway as plaintiff's car was approaching, that in the emergency plaintiff swerved to the left, and that defendant, in about two hundred feet thereafter, turned to his left to enter his private driveway, resulting in the collision in suit, *is held* sufficient to be submitted to the jury on the issue of negligence. *Jones v. Mathis*, 421.

AUTOMOBILES—*Continued.*

§ 41m. Sufficiency of Evidence of Negligence in Striking Children on Highway.

Evidence of defendant's negligence in striking bicyclist at intersection held sufficient to be submitted to jury. *Hutchens v. Southard*, 428.

Evidence held insufficient to be submitted to jury on issue of negligence in striking child on highway. *Brewer v. Green*, 615.

§ 41p. Sufficiency of Evidence of Identity of Driver.

It is not required that the identity of the driver of an automobile at the time of an accident be established by direct evidence but such identity may be established by circumstantial evidence, either alone or in combination with direct evidence. *Pridgen v. Uzzell*, 292.

But such evidence must establish the identity as a logical inference and not merely raise a guess or choice of possibilities. *Johnson v. Fox*, 454.

Circumstantial evidence of identity of driver of car held sufficient to be submitted to the jury. *Pridgen v. Uzzell*, 292.

Circumstantial evidence of identity of driver of car held insufficient to be submitted to the jury. *Johnson v. Fox*, 454.

G.S. 20-71.1 raises no presumption that the owner was driving the vehicle at any particular time. *Ibid.*

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that defendant's vehicle was parked during the nighttime in plaintiff's lane of travel without lights, except for a flashlight by which a passenger was examining a road map, that the driver of the car in which plaintiff was riding saw this light when he was some fifty feet away, but did not apply his brakes until he was within fifteen or twenty feet away and too close to stop or turn either to the right or left, that the road was straight and unobstructed with room to pass the parked vehicle on either side, and that plaintiff's vehicle was in good condition with good lights and brakes, *is held* to disclose contributory negligence as a matter of law on the part of plaintiff's driver. *Hines v. Brown*, 447.

§ 42f. Nonsuit for Contributory Negligence in Failing to Keep Vehicle to Right and in Passing Vehicles traveling in Opposite Direction.

Evidence tending to show that plaintiff was driving a tractor pulling a grain combine along the highway after sundown but before dark, that headlights were burning on the tractor and its tail light shining on the combine, that plaintiff, upon seeing defendant's car approaching down the center of the highway, pulled his machine to the right as far as possible with the right wheels of the tractor in the ditch, but leaving the left side of the combine some six inches to the left of the center of the 25 foot highway, *is held* insufficient to show contributory negligence as a mater of law on the part of plaintiff in causing a collision of the car with the combine. *Furr v. Overcash*, 611.

§ 43. Nonsuit for Intervening Negligence.

Evidence held not to warrant nonsuit on the ground of insulating negligence. *Stockwell v. Brown*, 662.

AUTOMOBILES—*Continued.*

§ 47. Liability of Driver to Guests and Passengers.

In an action instituted in this State to recover for injuries received by plaintiff passenger in an automobile accident occurring in the State of Georgia, plaintiff must allege and prove gross negligence as required by the law of Georgia as a prerequisite to recovery. *Nix v. English*, 414.

§ 50. Negligence of Driver Imputed to Guest or Passenger.

Where an automobile is being driven by an employee under the direction and control of the owner-passenger, any negligence of the driver is imputed to the owner. *Hines v. Brown*, 447.

§ 54f. Presumption of Agency from Ownership or Registration, and Sufficiency of Evidence on Issue of Respondeat Superior.

Admission by defendant in his verified answer that he was, at the time of the collision, the owner of one of the vehicles involved in the accident, entitles plaintiff to the benefit of G.S. 20-71.1(a) when the action is brought within one year of the accident, and constitutes *prima facie* evidence that at the time of the collision the vehicle was being operated with the authority, consent, and knowledge of defendant. *Taylor v. Parks*, 266.

Where plaintiff neither alleges or offers proof as to the registration of a vehicle involved in the collision in suit, G.S. 20-71.1(b) is not applicable. *Ibid.*

Where defendant admits that at the time of the accident he was the owner of one of the vehicles involved in the collision, but plaintiff elicits testimony from her own witnesses of declarations made by defendant to the effect that at the time in question the driver had taken defendant's automobile without defendant's authorization, knowledge, or consent, and was not at the time defendant's agent or employee or acting in the course and scope of any employment by defendant, plaintiff's own evidence rebuts the presumption created by G.S. 20-71.1(a), and, such evidence not being contradicted by any other evidence of either plaintiff or defendant, nonsuit on the issue of agency is proper. *Ibid.*

G.S. 20-71.1 raises no presumption or inference that the owner of a vehicle was driving at the time of the accident in question. *Johnson v. Fox*, 454.

Where an additional defendant, joined upon the original defendant's cross-action, is not served with summons until more than two years after the accident in suit, the original defendant is not entitled to the presumption created by G.S. 20-71.1, and when there is no evidence that the driver was operating the vehicle of the additional defendant in the course of his employment as an agent or employee of the additional defendant, nonsuit of the cross-action based upon the doctrine of *respondeat superior* is proper. *Darden v. Bone*, 599.

§ 55. Family Purpose Doctrine.

If a son negligently operates an automobile owned and maintained by the father for the pleasure and convenience of the family, the father may be held liable for the resulting damage under the family purpose doctrine which obtains in North Carolina. *Rhyne v. Bailey*, 467.

§ 55½. Right of Owner to Recover for Damages to Car While Being Driven by Another.

The owner may not recover for damages to his car as the result of the collision when the driver of his car is guilty of negligence constituting a

AUTOMOBILES—*Continued.*

proximate cause of the collision, and such negligence is imputed to the owner under the doctrine of agency. *Jones v. Mathis*, 421.

§ 66. Elements of Offense of Violating G.S. 20-138.

The elements of the offense defined by G.S. 20-138 are the driving of a vehicle upon a highway within the State while under the influence of intoxicating liquor or narcotic drugs. *S. v. Haddock*, 162.

§ 72. Sufficiency of Evidence and Nonsuit in Prosecutions under G.S. 20-138.

Circumstantial evidence that defendant, being intoxicated, drove a vehicle upon a State highway, is held sufficient to be submitted to jury. *S. v. Haddock*, 162.

§ 75. Punishment for Drunken Driving.

The admission of the authenticity of the record of an inferior court introduced by the solicitor is not an admission by the defendant that he had been therefore convicted of a similar offense, even though the record shows a conviction of a similar offense, G.S. 15-147, there being no admission by defendant that he was the person referred to in the record, and an instruction assuming that defendant had made such admission must be held for error. *S. v. Powell*, 231.

AVIATION

§ 3. Injury to Persons in Flight.

A common carrier by aircraft is not an insurer of the safety of its passengers, but is under duty to exercise the highest degree of care for their safety as is consistent with the practical operation and conduct of its business. *Brittain v. Aviation*, 697.

Evidence of negligence of common carrier by air resulting in injury to passenger, held for jury. *Ibid.*

BASTARDS

§ 4. Burden of Proof in Prosecutions for Willful Refusal to Support Illegitimate Child.

In a prosecution for willful failure of defendant to support his illegitimate child, the burden is upon the State to show beyond a reasonable doubt the element of paternity and the element of willfulness of the refusal to furnish support, and an instruction which places such burden of proof solely upon the element of paternity is prejudicial. *S. v. Jones*, 351.

§ 5. Competency and Relevancy of Evidence in Prosecutions for Willful Refusal to Support Illegitimate Child.

In a prosecution of defendant for willful refusal to support his illegitimate child by a marired woman, the woman is incompetent to testify as to the nonaccess of her husband. *S. v. Aldridge*, 297.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to be submitted to the jury in this prosecution for willful refusal to support illegitimate child by a married woman. *S. v. Aldridge*, 297.

BASTARDS—*Continued.*

Testimony of prosecutrix that defendant was the father of her child, that he admitted paternity, that he had contributed monies to prosecutrix for a short time and then continuously refused further support, notwithstanding that he was gainfully employed, is sufficient to be submitted to the jury on a charge of willful failure to support an illegitimate child. *S. v. Jones*, 351.

BILL OF DISCOVERY

§ 3. Examination of Adverse Party.

Where plaintiff sues to recover for brain injury received in the accident in suit, the court has inherent and discretionary power to grant defendants' application for order requiring plaintiff to submit to an examination by a specialist to obtain evidence as to the extent of plaintiff's injury, plaintiff having denied defendants' request for such medical information. *Helton v. Stevens Co.*, 321.

In granting defendants' application for an examination of plaintiff by an expert to determine the extent of plaintiff's brain injury, the court should make the selection of the expert independently of either party, and where the court selects the expert requested by the one and opposed by the other, the cause will be remanded. *Ibid.*

§ 5. Inspection of Writings.

G.S. 8-89 which gives Superior Court judges discretionary power to order parties to produce for inspection and copying, books, records and documents relating to the merits of an action pending in the Superior Court, is remedial and should be liberally construed. *Diocese v. Sale*, 218.

In an action to compel an executor to account for certain stock of the estate which plaintiffs alleged he had purchased before the death of testatrix with her money under a power of attorney, the executor contended that he purchased the stock with funds of the executrix and with his own funds and that the stock was issued to them as joint tenants with right of survivorship under a valid contract between themselves. *Held:* The court has the discretionary power to order the executor to exhibit to plaintiffs or their counsel all paper writings relied upon by him as a basis of the asserted contract. *Ibid.*

BOATING

The Family Purpose Doctirne will not be extended by the courts to cover motor-boats, and the owner of such boat will not be held liable for an injury inflicted by negligent operation of the boat by his son, even though the son was operating the boat with the owner's consent, in the absence of evidence of any structural or mechanical defect in the boat or that the son was inexperienced or had theretofore been guilty of recklessness or irresponsibility in the operation of the boat, or was engaged at the time in a mission for the owner. *Grindstaff v. Watts*, 568.

BOUNDARIES

§ 2. Course and Distance and Calls to Natural Objects.

Marked trees are sufficient natural objects to control course and distance. *Green v. Barker*, 603.

The boundary between fixed corners will ordinarily be run as a straight line but when the description calls for the line along natural objects, such

BOUNDARIES—*Continued.*

as a stream of a line of marked trees, the line must be run in accordance with the natural objects. *Ibid.*

Where the description calls for natural objects as the boundary between fixed corners, such as a line of blazed trees, such line must follow the natural objects, and thus may be a straight line or a deviation from a straight line, depending upon the facts. *Ibid.*

Where the description of the boundary between fixed corners calls for a line of blazed trees, the party claiming a deviation from a straight line to follow the natural objects must locate the trees and show that the blazes appearing thereon were in existence at the time the description was drawn, and when he fails to do so, he may not claim a deviation from a straight line between the fixed corners. *Ibid.*

§ 4. Contemporaneous Surveys.

Where the parties go upon the land and point out the boundaries by material objects when the deed is drawn, the boundaries so established are conclusive as between the parties; but the pointing out of such boundary after the deed has been executed and controversy subsequently arises amounts to nothing more than an admission against interest. *Wagner v. Bauman*, 594.

§ 7. Nature and Essentials of Processioning Proceedings.

In a processioning proceeding the line dividing the property should be located, and nonsuit is inapposite. *Green v. Barker*, 603.

§ 11. Declarations against Interest.

Where, after the purchase of property and the execution of deed therefor, a dispute arises with the owners of the adjoining land as to the location of the true dividing line, and the *feme* adjoining owner goes upon the land and points out the natural objects which she agrees determines the true boundary line, her declarations are competent as an admission against interest, but cannot change the boundaries called for in the deed, and an instruction giving her declarations the effect of establishing the boundary line between the contiguous tracts must be held for prejudicial error. *Wagner v. Bauman*, 594.

BROKERS AND FACTORS

§ 6. Actions to Recover Commissions.

Plaintiff's evidence is held insufficient to show that defendant or any authorized agent of defendant contracted with plaintiff to pay him a commission on the purchase price of any timber suitable to the needs of defendant which plaintiff should locate. *Daniel v. Lumber Co.*, 504.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. For Fraud or Mistake Induced by Fraud.

The mere relationship of parent and child is not such a confidential and fiduciary relationship as to invoke a presumption of fraud in the execution of a deed by the parent to the child. *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644.

Evidence tending to show that upon the payment of a mortgage debt, presumably by the mortgagor, the mortgage was assigned to the mortgagor's

son, without any evidence that the son at any time had or asserted any claim against the mortgagor, is insufficient to establish the relationship of mortgagor and mortgagee so as to raise the presumption of fraud in the later conveyance of the land by warranty deed to the son. *Willetts v. Willetts*, 136.

Evidence tending to show that the owner conveyed a part of his land to his grandson and a part to his daughter, to the exclusion of other grandchildren and another daughter, that the grantees had lived with grantor continuously since the death of grantor's wife, that the daughter knew nothing of the deed until her father delivered it to her, without evidence that the father relied on the daughter for advice or guidance or that she exercised any dominating influence over him, *is held* in sufficient to be submitted to the jury on the issue of whether the daughter procured the execution of the deed by fraud or duress, notwithstanding evidence of mutual trust and confidence between them. *Jones v. Saunders*, 644.

§ 7. Parties.

The right of devisees to maintain an action to cancel a deed executed by their testator is derived from and limited by the right of action vested in the testator at the time of his death. *Willetts v. Willetts*, 136.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

An action to rescind a deed for fraudulent misrepresentations made by the grantee to the grantor at the time of the execution of the instrument is properly nonsuited when plaintiff fails to introduce any evidence of misrepresentations made at the time of the execution of the deed. *Willetts v. Willetts*, 136.

Evidence held insufficient to show agency under circumstances rendering the agent a fiduciary in regard to the transaction in question. *Ibid.*

CARRIERS

§ 1. State and Federal Regulations and Control.

An intracity carrier, even though exempt from regulation by the Utilities Commission, is a common carrier. *Utilities Com. v. McKinnon*, 1.

§ 2. State License and Franchise.

Intracity carrier may contract for charter trips with school authorities for trips outside its territory in transporting school bands and athletic teams for scheduled events, and may use buses from its regular fleet for such purposes. *Utilities Com. v. McKinnon*, 1.

Provision of a franchise that a carrier's failure to provide an authorized service for a period of 30 days or longer should be cause for cancellation of the authority to furnish such service is not self-executing and the authority subsists until duly cancelled. *Utilities Com. v. Coach Co.*, 668.

§ 4. Duty to Operate and Maintain Facilities and Applications to Discontinue Services or Facilities.

Whether a carrier should be allowed to discontinue or reduce a particular service must be determined upon the basis of whether the advantage of the public convenience and necessity outweighs the disadvantage of the loss sustained by the carrier in maintaining such service when considered in

CARRIERS—*Continued.*

connection with the carrier's revenues from its entire operations and each case must be determined in accordance with its particular facts. *Utilities Com. v. R. R.*, 73.

Order denying petition to abandon service between designated points, affirmed. *Utilities Com. v. Coach.*, 319.

§ 18. Liability for Injury to Passengers.

A common carrier by aircraft is not an insurer of the safety of its passengers, but is under duty to exercise the highest degree of care for their safety as is consistent with the practical operation and conduct of its business. *Brittain v. Aviation*, 697.

Evidence of negligence of common carrier by air, resulting in injury to passenger, held for jury. *Ibid.*

COLLEGES AND UNIVERSITIES

Where, in the creation of a successor corporation to own and operate a denominational educational institution, it is expressly provided in the articles of incorporation that the operation of the institution should not be interrupted until opportunity had been given a particular church and Presbyteries of the denomination to resume control of the institution, and there is grave controversy as to whether the power to resume control was joint in the specified Presbyteries and the church, or whether the church alone, the Presbyteries having waived their right to resume control, could exercise such right, a temporary injunction is properly continued to the hearing upon the merits. *Church v. College*, 717.

COMMON LAW

The common law, except as modified by statute, is in force in this State. G.S. 4-1. *Gillikin v. Bell*, 244.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy.

Criminal conspiracy is complete as to each participant from the time he enters into the unlawful agreement with knowledge of its unlawful objective, while the commission of an unlawful act pursuant to the agreement is a separate, substantive offense, and indictment will lie for either or both. *S. v. Stroud*, 765.

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution and Reserve Powers of the States.

The States have broad powers to determine the conditions under which the right of suffrage may be exercised, and the literacy test prescribed by G.S. 163-28 is a constitutional qualification of the right to be registered as a voter in this State. *Bazemore v. Board of Elections*, 398.

§ 4. Persons Entitled to Raise Constitutional Questions and Waiver.

A party may not attack the constitutionality of a taxing statute by suit

for injunction when the statutory remedy provides adequate relief. *Ins. Co. v. Gold*, 168.

A party may enjoin the enforcement of a statute on the grounds of its unconstitutionality when his personal or property rights are directly and immediately affected, but not otherwise. *Chadwick v. Salter*, 389.

A taxpayer may enjoin proceedings under a statute authorizing the appointment of justices of the peace and the payment of the salaries of the appointees. *McIntyre v. Clarkson*, 510.

The courts will not pass upon the constitutionality of a statute unless the question is squarely presented by a party whose rights are directly involved. *Carringer v. Alverson*, 204.

§ 6. Legislative Powers in General.

All legislative powers of the State are vested in the General Assembly and it may exercise all such powers unless specifically prohibited or limited by some provision of the Constitution, the wisdom and expediency of legislation being exclusively within its province. *McIntyre v. Clarkson*, 510.

The General Assembly is the policy making division of the State government, and whether the public safety and welfare demand the extension of the Family Purpose Doctrine to cover motorboats lies within its province. *Grindstaff v. Watts*, 568.

§ 10. Judicial Powers.

The formulation of classifications for taxation and the determination of the amount of taxes each class should bear are matters of public policy within the exclusive province of the Legislature, and the courts have the duty to determine only whether the classifications set up by statute are based upon differences in fact. *Finance Co. v. Currie*, 129.

An administrative board has only such authority as is properly conferred upon it by statute, and the question of the constitutionality of a statute is for the judicial branch of the government. *Ins. Co. v. Gold*, 168.

While all doubt as to the constitutionality of a statute will be resolved in favor of the lawful exercise of their powers by the representatives of the people, it is the duty of the courts to declare a statute unconstitutional in proper cases when the statute clearly transgresses constitutional limitations. *McIntyre v. Clarkson*, 510.

§ 13. Police Power — Safety, Sanitation and Health.

Statute authorizing creation of municipal housing authorities is statute relating to health within purview of Art. II, sec. 29 of the State Constitution. *Carringer v. Alverson*, 204.

§ 20. Equal Protection, Application and Enforcement of Laws.

The operator of a privately owned department store has the right to discriminate on the basis of race as to those he will serve at the lunch counter in such store, and a Negro who, with knowledge of the policy of the store not to serve Negroes at the lunch counter, seats himself at the lunch counter and refuses to leave after request, is guilty of trespass. *S. v. Fox*, 98.

The constitutional guarantee against imprisonment except by the law of land does not protect a trespasser from prosecution or prohibit a private property owner from selecting his guests or customers. *Ibid.*

Fact that personal exemptions are not allowed to nonresident taxpayer

in computing income taxable by this State is not unlawful discrimination in favor of resident taxpayer allowed such deduction. *Stiles v. Currie*, 197.

§ 23. Rights and Interests Protected by Due Process Clause.

A license to engage in a business or practice a profession is a property right that cannot be suspended or revoked without due process of law. *S. v. Parrish*, 301.

§ 24. What Constitutes Due Process.

Formula for allocations that part of income of unitary utility taxable by this State held not to deprive it of property without due process of law. *Power Co. v. Currie*, 17.

A tax that meets the requirements of uniformity imposed by the State Constitution meets the requirements of the Fourteenth Amendment to the Federal Constitution. *Finance Co. v. Currie*, 129.

Foreign corporation cannot be made amenable to service of process solely because it manufactured article causing injury as result of alleged defect or absence of safety device. *Moss v. Winston-Salem*, 480.

The term "law of the land" as used in the State Constitution is synonymous with "due process of law" as used in the Federal Constitution, and requires notice and opportunity to be heard. *S. v. Parrish*, 301.

It includes the right to cross-examine witness for the opposing party, but this right may be waived by failure to object to the introduction of affidavits in evidence or demand the right to cross-examine affidavits. *In re Hughes*, 434.

Right to jury trial on small claim may be waived by failure to follow statutory procedure. *Rhyne v. Bailey*, 467.

§ 26. Full Faith and Credit to Foreign Judgments.

A decree of divorce awarding the custody of the children of the marriage to their mother, entered in another state while the children of the marriage were resident in this state, does not deprive the courts of this state of jurisdiction to hear a subsequent proceeding for the custody of the children who continue to be residents here, the residence and not the domicile of the children being controlling. *In re Hughes*, 434.

§ 27. Burden of Interstate Commerce.

Formula for allocating that part of income of unitary utility taxable by this State held not unconstitutional burden on interstate commerce. *Power Co. v. Currie*, 17.

§ 29. Right to Jury Trial in Criminal Proceedings.

The commitment of a minor to a training school upon findings that such minor is a delinquent within the intent and meaning of G.S. 110-21 is not punishment and the proceeding is not penal in nature, and therefore such delinquent is not entitled to trial by jury upon his appeal from the order of the juvenile court committing him to a training school. *S. v. Frazier*, 226.

CONTRACTS

§ 7. Contracts in Restraint of Trade.

Contracts in partial restraint of trade will be upheld when they are founded upon valuable consideration, are reasonably necessary to protect the interests

CONTRACTS—*Continued.*

of the parties, and are sufficiently limited in time and territory so that they do not adversely affect the interest of the public. *Buick Co. v. Motor Corp.*, 117.

A contract between an automobile manufacturer and a dealer which gives the dealer for a period of less than two years the exclusive agency for the sale of the particular make of automobile within dealer's municipality and its environs, in consideration of the dealer's contractual obligation to maintain its salesroom, staff of salesmen, and working capital up to prescribed standards and to contribute to the advertising fund for that make of car, will not be held an unlawful restraint of trade, the contract being limited in time and territory to that reasonably necessary for the protection of the dealer without adversely affecting the public interest, and being supported by valuable consideration. *Ibid.*

§ 20. Destruction of Property or Impossibility of Performance.

Where the contractor for the installation of machinery has exclusive possession of the realty during the progress of the work, and the building is destroyed by fire after the work had been begun, rendering the completion of the contract impossible, the burden is upon the contractor, in the owner's action to rescind the contract and recover the amount of consideration theretofore paid, to prove that the fire resulting in the destruction of the property occurred without any fault on the part of the contractor. *Blount-Midyette v. Aeroglide Corp.*, 484.

CONTROVERSY WITHOUT ACTION

§ 2. Statement of Facts, Hearings and Judgment.

An agreed statement of facts with stipulation that no facts other than those stated are material or necessary to the decision of the case, does not preclude the courts from taking notice of pertinent public laws and facts within common knowledge. *Finance Co. v. Currie*, 129.

CORONERS

Coroners are public officers, and a coroner may not be held civilly liable for the manner in which he performs his duties. *Gillikin v. Guaranty Co.*, 247.

A coroner is under duty to make an investigation as to the cause of the death of a person only when it appears that the deceased probably came to his death by criminal act, and he is required to summon a jury only if such investigation satisfies him of this fact, G.S. 152-7, and a death resulting from negligence is not the result of a criminal act unless the negligence is culpable. *Ibid.*

COURTS

§ 3. Original Jurisdiction of Superior Court in General.

Any carrier whose operations are adversely affected by operations of another carrier in violation of law may institute an action in the Superior Court against such carrier. *Utilities Com. v. McKinnon*, 1.

COURTS—*Continued.*

§ 7. Appeals and Transfers of Causes from Inferior Court to Superior Court.

Where, upon appeal from the order of a juvenile court committing a minor to a training school as a delinquent, the record discloses the order of the juvenile court with its specific findings of fact and that the court had jurisdiction, the fact that the petition has been misplaced and was not produced on the appeal if not a fatal defect. *S. v. Fraizer*, 226.

Whether such appeal requires trial *de novo*, quaere? *Ibid.*

§ 14. Jurisdiction of Recorder's Courts.

A recorder's court established under G.S. 7-218 has jurisdiction of all criminal offenses below the grade of felony, G.S. 7-222, and therefore has jurisdiction of a proceeding under the Uniform Reciprocal Enforcement of Support Act to enforce an award of alimony rendered by a court of competent jurisdiction of another State. G.S. 52A-9. *S. v. Lowe*, 631.

§ 15. Jurisdiction of Juvenile and Domestic Relations Courts.

The juvenile court of a county has jurisdiction of a proceeding to determine whether a minor resident of the county is a delinquent child within the purview of G.S. 110-21. *S. v. Frazier*, 226.

§ 17. Justices of the Peace.

G.S. 7, Art. 14a, authorizing certain counties to adopt its machinery for the appointment, tenure and payment of justices of the peace is indivisible and is void as being a local statute relating to their appointment. *McIntyre v. Clarkson*, 510.

§ 20. What Law Governs — Laws of This or Other States.

An action on a transitory cause arising in another State is governed as to the substantive law by the law of such other State, but procedural matters, including the sufficiency of the evidence to require its submission to the jury, is to be determined by the laws of this State. *Nix v. English*, 414.

CRIMINAL LAW

§ 9. Principals and Aiders and Abettors.

An accomplice is one who knowingly unites with the principal offender in the commission of the crime either as a principal, as an aider and abettor, or as an accessory before the fact. *S. v. Bailey*, 380.

Criminal conspiracy is complete as to each participant from the time he enters into the unlawful agreement with knowledge of its unlawful objective, while the commission of an unlawful act pursuant to the agreement is a separate, substantive offense, and indictment will lie for either or both. *S. v. Stroud*, 765.

§ 10. Accessories before the Fact.

An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact. *S. v. Bailey*, 380.

The crime of being an accessory before the fact is a less degree of the principal crime. *S. v. Jones*, 450.

CRIMINAL LAW—*Continued.*

§ 17. Jurisdiction of State and Federal Courts.

Findings *held* insufficient to support conclusion that offense committed in area under Federal control was within exclusive jurisdiction of Federal Courts, *S. v. Burrell*, 317.

§ 19. Transfer of Cause to Superior Court upon Demand for Jury Trial.

In a county in which G.S. 7-64 is not applicable and in which the courts inferior to the Superior Court therefore have exclusive original jurisdiction of general misdemeanors, the Superior Court can acquire original jurisdiction and try defendant upon an indictment only when defendant, in the recorder's court, demands a jury trial pursuant to statute (Chapter 115, Public Laws of 1919), and the Superior Court can acquire derivative jurisdiction only when defendant appeals from a conviction in the recorder's court. *S. v. Perry*, 772.

In a county in which courts inferior to the Superior Court have exclusive original jurisdiction of general misdemeanors, the demand in the recorder's court of a trial by jury on a warrant charging a particular assault gives the Superior Court original jurisdiction of the assault charged, but the Superior Court can acquire no jurisdiction of a separate assault committed some hours after the first, even though committed by the same defendant upon the same person, and it is error for the Superior Court in its charge to submit to the jury evidence of defendant's guilt of such other assault. *Ibid.*

§ 23. Plea of Guilty.

Where an attorney of record enters a plea of guilty and thereafter advises the court that he entered the plea in good faith but that the client says that he does not now and never intended to enter a plea of guilty, and had decided to employ other counsel, it is error for the court to refuse to allow such other counsel to withdraw the plea of guilty without findings of fact in regard to whether the first attorney was authorized to enter such plea. *S. v. Barney*, 463.

§ 42. Articles Connected with Commission of Crime.

Articles which the evidence shows were used in connection with the commission of the crime charged are properly admitted in evidence. *S. v. Stroud*, 765.,

§ 61½. Lie Detector Tests.

Testimony as to the result of a lie detector test is incompetent in this State to prove the guilt or innocence of a defendant charged with crime. *S. v. Foye*, 704.

Where the testimony of a co-conspirator has implicated the defendant in the commission of the crime charged, the admission in evidence of the results of a lie detector test submitted to by the co-conspirator, which thus tends indirectly to establish the guilt of defendant, is incompetent and highly prejudicial. *Ibid.*

§ 70. Hearsay Evidence in General.

Evidence, written or oral, is incompetent to prove the existence of a particular fact when its probative force is dependent upon the competency and credibility of a person not a witness. *S. v. Frizzelle*, 457.

§ 71. Confessions.

The court's admission of confessions in evidence, after hearing and findings,

supported by evidence, that the confessions were voluntary, will not be disturbed. *S. v. Stroud*, 765.

§ 72. Admissions and Declarations.

In a trial upon indictment, the admission in evidence of the warrant for the purpose of showing that a certain officer was listed as a witness for the State, introduced by the solicitor for the purpose of showing that such officer, had he been a witness, would have denied making a certain exculpatory statement at the time of the accident in question, *is held* prejudicial, the warrant being at best a self-serving declaration on the part of the State and of no greater dignity than hearsay. *S. v. Frizzelle*, 457.

§ 79. Evidence Obtained by Unlawful Means.

Liquor seen by officers while arresting defendant for speeding is competent notwithstanding officers had no search warrant. *S. v. Giles*, 499.

§ 80. Evidence of Character of Defendant.

Where defendant testifies in his own behalf, evidence of good character introduced by him is competent as substantive evidence and also as affecting his credibility as a witness. *S. v. Guss*, 349.

§ 81. Credibility of Defendant and Parties Interested.

The testimony of an accomplice, whether supported or unsupported is subject to the rule of scrutiny, since an accomplice is generally regarded as interested in the event. *S. v. Bailey*, 380.

§ 83. Cross-Examination.

Questions asked defendant's witnesses on cross-examination *held* prejudicial under the rule laid down in *State v. Phillips*, 240 N.C. 516. *S. v. Wyatt*, 220.

§ 85. Rule that Party is Bound by Testimony of Own Witness.

When the State introduces in evidence exculpatory statements of defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence the State is bound thereby. *S. v. Carter*, 475.

§ 86. Time of Trial and Continuance.

Motion for continuance is addressed to discretion of trial court. *S. v. Stroud*, 765.

§ 87. Motions for Severance.

Motion for severance held properly denied. *S. v. Stroud*, 765.

§ 87½. Stipulations and Admissions.

While no proof is necessary of a fact stipulated or admitted, and no particular form is required of a stipulation, a stipulation must be definite and certain. *S. v. Powell*, 231.

Agreement of defense counsel that the record introduced by the solicitor was the official record of an inferior court is not an admission by defendant that defendant had theretofore been convicted of a similar offense, nor will the silence of defendant in the face of the subsequent remark of the solicitor that such record showed that defendant had theretofore been convicted of a similar offense, bind defendant, since the remark of the solicitor does not

contain a statement that the defendant admitted the truth of the fact therein stated. *Ibid.*

§ 90. Admission of Evidence Competent for Restricted Purpose.

In the trial of two defendants for a crime, the admissions made by each, when properly restricted to the defendant making them, are competent. *S. v. Stroud*, 765.

§ 91. Withdrawal of Evidence.

Error in admission of incompetent evidence is not cured by its withdrawal when the prejudicial effect of the evidence cannot be erased. *S. v. Aldridge*, 297; *S. v. Frizzelle*, 457.

§ 94. Conduct and Acts of Court and Expression of Opinion on Evidence by Court.

Whether remarks of the court to counsel during the progress of the trial tend to discredit or prejudice the accused or his cause must be determined on the basis of the probable effect of the court's language on the jury, considering the remarks in the light of the circumstances under which they were made, and it will be presumed that the trial court properly discharged its duty to control the procedure in the interests of an orderly trial, with the burden upon defendant to show prejudice. *S. v. Faust*, 101.

The record disclosed that defendant's counsel requested that defendant be permitted to complete his answer on cross-examination, that the court readily acceded to this request, and that defendant's counsel then interrupted the cross-examination to suggest to the witness what had been said before, and thus examine the witness out of turn. *Held:* The single admonition of the court that counsel be quiet or the court would have to use some means against him, is not shown to be prejudicial, the remark of the court being considered in the light of the circumstances under which it was made. *Ibid.*

The interrogation by the court during the direct examination of the nine-year old prosecutrix as to whether she remembered whether defendant said anything when he hit her with a belt, made simply in the effort to persuade the child to answer a proper question asked by the solicitor, *is held* a question asked to obtain a proper understanding and clarification of the witness' testimony and did not constitute an expression of opinion by the court as to the weight and sufficiency of the evidence, or tend to prejudice defendant in the eyes of the jury under the attendant circumstances. *S. v. Strickland*, 658.

§ 97. Argument and Conduct of Solicitor.

While wide lattitude is allowed in the argument to the jury, the defendant should not be subjected to unwarranted abuse by the solicitor, and the action of the trial court in overruling objection to the solicitor's characterization of defendant as one of "the slickest confidence men we have had in this court for a long time" must be held for prejudicial error. *S. v. Wyatt*, 220.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State, giving it the benefit of every reasonable inference which may fairly be drawn therefrom. *S. v. Faust*, 101; *S. v. Haddock*, 162.

On motion to nonsuit, the evidence is to be taken in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence is not to be considered

except insofar as it is not in conflict with that of the State, but tends to explain or make clear the State's evidence. *S. v. Tessnear*, 211.

Contradictions and discrepancies in the State's evidence are to be resolved by the jury and do not justify nonsuit. *S. v. Faust*, 101.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

In a case in which the State relies upon circumstantial evidence, it is not the function of the court upon motion to nonsuit to determine whether the evidence excludes every reasonable hypothesis of innocence but only whether there is competent evidence tending to prove the fact in issue, or which reasonably conduces to such conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjection of guilt. *S. v. Haddock*, 162.

As a general rule, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to that conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture, the case should be submitted to the jury. *S. v. Tessnear*, 211.

When the State introduces in evidence exculpatory statements constituting a complete defense, and such statements are not contradicted by any other evidence, defendant may avail himself thereof on motion for judgment as of nonsuit. S. *v. Carter*, 475.

Proof of *corpus delicti aliunde* the confession of defendant held to take case to the jury. *S. v. Foye*, 704.

§ 102. Nonsuit for Variance.

An indictment for embezzlement of property of "Pestroy Exterminating Co." and proof of embezzlement from "Pestroy Exterminating Corp." held not fatal variance. *S. v. Wyatt*, 220.

§ 103. Withdrawal of Court or Degree of Crime from Jury.

The trial judge's election not to submit to the jury one of the counts contained in the indictment will be treated as the equivalent of a verdict of not guilty on that count. *S. v. Haddock*, 162.

§ 106. Instructions on Alibi.

An instruction upon defendant's evidence of alibi, that if the jury were satisfied from the evidence that defendant was not at the place when the crime charged was committed, to return a verdict of not guilty, is erroneous, the correct rule being that defendant's evidence of an alibi should be considered only in determining whether the evidence for the State is sufficient to satisfy the jury beyond a reasonable doubt of the fact of guilt. *S. v. Foye*, 704.

§ 107. Instructions — Statement of Evidence and Application of Law Thereto.

The court must give the jury instructions as to the law upon all substantial features of the case arising upon the evidence, including all defenses presented by defendant's evidence, even in the absence of request for instructions. *S. v. Faust*, 101.

The requirement that the trial court declare and explain the law arising on the evidence is a substantial right, and the failure of the court to do so constitutes prejudicial error. *S. v. Jones*, 450.

CRIMINAL LAW—*Continued.*

§ 108. Expression of Opinion on Evidence by Court in its Charge.

An instruction to the jury may not assume as true the existence or nonexistence of any material fact in issue. *S. v. Powell*, 231.

§ 109. Instructions on Less Degrees of Crime.

Court should instruct jury on law of accessory before the fact arising on defendant's evidence. *S. v. Jones*, 450.

§ 111. Charge on Character Evidence and Credibility of Witnesses.

Where the State's evidence tends to show that defendant was one of a crowd which assaulted police officers and interfered with the performance of their duty in attempting to arrest persons engaged in an affray, the court correctly instructs the jury to scrutinize the testimony of the defendant and those closely related to him, notwithstanding the absence of evidence that any of the witnesses were related to defendant by blood or marriage, since relationships which may be the cause of bias are not limited to blood or marriage, and the possibility of a relationship of sympathy between the members of the crowd disapproving and resisting the arrest of persons by the officers is a sufficient basis for the instruction. *S. v. Faust*, 101.

Where defendant testifies in his own behalf and produces evidence of his good character, such character evidence is to be considered not only upon his credibility as a witness but also as substantive evidence on the question of his guilt or innocence, and an instruction limiting its substantive character to a consideration of defendant's evidence is prejudicial. *S. v. Guss*, 349.

Where one witness has testified to facts establishing that he was an accomplice and there is testimony to the effect that two other witnesses were also accomplices, it is the duty of the court, upon apt request for special instructions, to charge the jury upon the rule requiring them to scrutinize the testimony of the admitted accomplice, and to scrutinize the testimony of the other two witnesses, if the jury should find them to be accomplices, and the failure of the court to give proper instructions upon the rule of scrutiny must be held for prejudicial error. *S. v. Bailey*, 380.

It is not error for the court to recite the testimony of the defendant in stating the contentions of the parties, since the contentions arise upon the evidence and the reasonable inferences therefrom. *S. v. Powell*, 231.

§ 113. Requests for Instructions.

Where special instructions requested are not supported by the evidence, the court is not required to give such instructions either verbatim or in substance. *S. v. Bailey*, 380.

The court is not required to give special instructions requested in the language of the request even though the principle of law embodied therein arises upon the evidence, but the court is required to give the requested instructions in substance insofar as they arise upon the evidence and contain a correct statement of the applicable law. *Ibid.*

§ 118. Sufficiency and Effect of Verdict.

A verdict of guilty of a capital crime with recommendation of mercy is not in the correct form, the proper verdict being guilty with recommendation of life imprisonment. *S. v. Foye*, 704.

CRIMINAL LAW—*Continued.*

§ 121. Arrest of Judgment.

The arrest of judgment for fatal defect in the indictment does not preclude a subsequent prosecution upon a valid bill. *S. v. Barefoot*, 308.

Motion in arrest of judgment must be based on matters appearing on the face of the record proper and cannot present any question relative to the evidence. *S. v. Reel*, 778.

§ 127. Form and Requisites of Judgment in General.

Where, upon conviction of defendant of a criminal offense the court orders that defendant be forthwith taken into custody to serve a sentence imposed by a previous judgment, the order of commitment must be definite as to the judgment under which the commitment is issued, but when both judgments are entered by the same court, the reference to the prior judgment by case number of that court identifies with sufficient certainty the sentence for which the commitment is ordered. *S. v. Jennings*, 760.

§ 130. Conformity of Judgment to Indictment, Verdict or Plea.

Judgment against a defendant convicted of collecting fees in excess of those allowed by Chapter 673, Session Laws of 1945, while acting as an attorney in fact for a professional bondsman may not include a provision suspending the license of the bondsman who had no notice of the entry of the provision suspending his license, was given no hearing and was not present in court in person or by attorney, since such provision is void as being in violation of Article I, § 17 of the State Constitution. *S. v. Parrish*, 301.

§ 134. Sentence for Repeated Offenses.

Admission of authenticity of record of inferior court introduced by solicitor held not admission by defendant that he had theretofore been convicted of similar offense. *S. v. Powell*, 231.

In order to sustain the imposition of a higher penalty on ground that defendant had theretofore been convicted of a similar offense, the indictment must allege the prior conviction, and in the absence of admission of such guilt, the fact must be established by the verdict of a jury, even though the record of a prior conviction is introduced in evidence. *Ibid.*

§ 135. Time of Execution of Sentence and Suspended Executions and Sentences.

The time at which a sentence shall be carried into execution forms no part of the judgment of the court. *S. v. Jennings*, 760.

Where definite sentence is imposed upon conviction of defendant of a criminal offense, but the judgment provides that commitment should issue at the pleasure of the court at any time within the succeeding five years, *held*, the sentence is not a suspended sentence and the phrase "at the pleasure of the court" is unnecessary and surplusage, and, upon conviction of defendant of another offense less than seven months thereafter, the court may properly order commitment of defendant for service of the prior sentence. *Ibid.*

§ 138. Costs and Fines.

Payment of costs upon conviction is required by statute, but the payment of costs constitutes no part of the punishment. *S. v. Jennings*, 760.

§ 147. Case on Appeal.

Where the record is sufficient to infer an appeal from the Superior Court

to the Supreme Court, the appeal will not be dismissed for absence of statement of case on appeal, but in such instance only the face of the record is presented for review. *S. v. Maides*, 223.

§ 151. Conclusiveness of Record.

The record imports verity and the Supreme Court is bound thereby. *S. v. Powell*, 231.

Where the charge of the court is not in the record, it will be presumed that the court correctly charged the jury as to the law arising upon the evidence. *S. v. Strickland*, 658.

§ 154. Necessity for and Requisites of Exceptions and Assignments of Error in General.

An assignment of error must be based upon an exception duly taken in apt time and preserved as required by the Rules. *S. v. Strickland*, 658.

An assignment of error should disclose the question of law sought to be presented without the necessity of going beyond the assignment itself. *S. v. Reel*, 778.

§ 156. Exceptions and Assignments of Error to the Charge.

Assignment of error to the charge which fails to point out specifically the part of the charge challenged is ineffectual. *S. v. Haddock*, 162.

Where the court inadvertently charges on a material fact not shown in evidence, it is not required that the inadvertence should have been brought to the court's attention. *S. v. Frizzelle*, 457.

§ 159. The Brief.

Exceptions not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned. *S. v. Strickland*, 658.

§ 160. Presumptions and Burden of Showing Error.

Appellant has the burden of showing prejudicial error presented by a proper assignment of error. *S. v. Bright*, 226.

The burden is on defendant to show error. *S. v. Reel*, 778.

§ 161. Harmless and Prejudicial Error in Instructions.

An instruction by the court which erroneously assumes that defendant admitted he had theretofore been convicted of a similar offense cannot be held harmless even though the evidence is amply sufficient to support conviction of the offense charged, since the jury might have considered defendant's purported stipulation or admission of a former conviction as bearing upon his credibility. *S. v. Powell*, 231.

Where the court in the instructions to the jury charges that a certain person had made an incriminating statement in the presence of defendant, and it appears that the person referred to did not testify at the trial but that the instruction was based upon incompetent hearsay evidence as to what such person had stated, the inadvertence relates to a material fact not shown in evidence and must be held prejudicial notwithstanding the failure to bring it to the trial court's attention in apt time. *S. v. Frizzelle*, 457.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The act of the court in withdrawing incompetent testimony theretofore ad-

mitted and in instructing the jury not to consider such testimony cannot be held to cure the error when the nature of the incompetent testimony is such that it is virtually impossible to erase the prejudicial effect from the minds of the jurors. *S. v. Aldridge*, 297.

Where the prejudicial effect of testimony erroneously admitted for the State is such that error in its admission is not cured by the subsequent withdrawal of the testimony, the cross-examination of the witness by the defendant relative to the matter in an effort to discredit the credibility of the witness in regard thereto, will not be held to waive defendant's objection to the admission of the testimony. *Ibid.*

Where incompetent evidence is highly prejudicial and it is apparent that its prejudicial effect could not be removed from the minds of the jurors, error in its admission is not corrected by a subsequent withdrawal of the incompetent evidence in the charge of the court. *S. v. Frizzelle*, 457.

Where incompetent evidence of such highly prejudicial nature that its effect cannot be erased from the minds of the jurors is admitted, the error in its admission cannot be cured by instructions of the court that such evidence should not be considered against the defendant. *S. v. Foye*, 704.

§ 164. Whether Error Relating to One Count is Prejudicial.

Where the court correctly submits the question of defendant's guilt of the assault charged, but erroneously instructs the jury on the evidence of another assault over which the court had no jurisdiction, the conviction of defendant cannot be held harmless since it cannot be ascertained whether or not the jury in reaching its verdict considered the evidence relating to the assault over which the court had no jurisdiction. *S. v. Perry*, 772.

§ 173. Post-Conviction Hearing Act.

In a hearing under the Post-conviction Hearing Act the court should make findings of fact sufficient to support its order. *S. v. Burell*, 317.

Findings held insufficient to support conclusion that Federal Court had exclusive jurisdiction of offense, and cause is remanded. *Ibid.*

DAMAGES

§ 2. Compensatory Damages in General.

Actual damages means compensation for injury and losses which are the direct and proximate result of the wrong. *Godwin v. Vinson*, 582.

§ 15. Instructions on Measure of Damages.

Where, upon defendant's motion in the cause to assess damages resulting from wrongful attachment, defendant contends that his equity of redemption, which he lost by reason of such wrongful attachment, was in a certain sum, an instruction of the court that the jury might answer the issue of such damages in any amount from one dollar up to the amount claimed by defendant, must be held for prejudicial error, since it is the duty of the court to instruct the jury as to the rule for the admeasurement of damages upon the issue. *Godwin v. Vinson*, 582.

DEAD BODIES

§ 3. Mutilation or Wrongful Acts to Dead Body.

An action for a wrongful act done to a body is governed by the three-year statute of limitations, G.S. 1-52 (5). *Gillikin v. Bell*, 244.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

The Declaratory Judgment Act does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. *Ins. Co. v. Gold*, 168.

A stipulation by the parties that the action is a proper case for a declaratory judgment involves a question of law, and is not binding on the courts. *Carringer v. Alverson*, 204.

An action may not be maintained under the Declaratory Judgment Act to determine rights, status or other relations unless the action involves a present actual controversy between the parties. *Chadwick v. Salter*, 389.

A proceeding may be maintained under the Declaratory Judgment Act to determine the persons who will be entitled to the remainder after a life estate in lands under the terms of a will, there being a *bona fide* controversy as to the construction of the will in this respect. *Gregory v. Godfrey*, 215.

DEEDS

§ 6. Acknowledgment.

It will be presumed that a person undertaking over a period of years to take acknowledgments in the capacity of a deputy clerk is a duly appointed and qualified deputy clerk, nothing else appearing. *Baker v. Murphrey*, 506.

§ 7. Delivery, Acceptance and Registration.

The probate and registration of a deed raise the rebuttable presumption that the instrument had been signed, sealed, and delivered, and the burden is on the party asserting the invalidity of the deed for want of delivery to prove non-delivery. *Jones v. Saunders*, 644.

The requisite of delivery of a deed, essential to its validity, are an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor, the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control, and the acquiescence by the grantee in such intention. *Ibid.*

Evidence tending to show the owner of land had it surveyed and caused a deed to be prepared conveying a part thereof to his daughter, that he signed the deed and manually delivered it to her and permitted her to put it with her other valuable papers, is sufficient evidence of delivery, notwithstanding the repository was accessible to, and used by, both. *Ibid.*

§ 21. Covenants of Seizin.

A covenant by the grantor that the premises are free and clear of encumbrances and that it will forever warrant and defend title to same against the lawful claims of all persons arising out of any act or deed by it, is, considered in the light most favorable the grantee, a covenant of seizin and not a covenant of warranty. *Smith v. Trust Co.*, 588.

A covenant of seizin does not run with the land and is breached immediately when the deed is delivered if the grantor is not then seized of title according to his covenant; a covenant of warranty is prospective and is not breached until the grantee or his successors are ousted or evicted by the owner of a paramount title. *Ibid.*

Allegations that some thirteen years after the delivery of the deed and the taking of possession by the grantee thereunder, judgment was entered that a stranger owned a fee simple title to an undivided interest in the land,

without allegation that the grantor was a party to the action, is insufficient to state a cause of action for breach of covenant of seizin, since such decree is not determinative that the grantor was not seized in fee as to the entire interest in the land at the time the deed was executed. *Ibid.*

DIVORCE AND ALIMONY

§ 21. Enforcing Payment of Alimony.

The court may properly order defendant to be confined for contempt upon findings, supported by evidence, that defendant had wilfully refused to pay his wife alimony or support as ordered by a prior decree of the court in the action. *Riddle v. Riddle*, 780.

DOMICILE

§ 2. Domicile of Wife.

Evidence that, after their separation, the wife advised friends that she was considering making her home in North Carolina, and that thereafter she returned to this State and definitely decided to make her home in a city of this State, and thereafter resided here, corroborated by affidavits of her friends, is sufficient to support a finding that she had made her domicile here. *In re Orr*, 723.

DOWER

§ 8. Allotment of Dower.

Where, in proceedings for the allotment of dower, a party intervenes, admits the prior marriage of petitioner but proves a second marriage to herself, the burden is upon intervenor to prove that the first marriage had been teminated by divorce so as to establish the legality of the second marriage, and in the absence of such evidence nonsuit of the intervenor's claim is proper. Distinction is noted where the first spouse is dead at the time of the hearing. *Williams v. Williams*, 729.

DRAINAGE

§ 4. Drainage Commissioners and Officers, Powers and Authority.

Where, upon motion to divert surplus funds of a drainage district to provide access to the canals for maintenance purposes, the record shows only that the bid for the right-of-way and the construction of the drainage canals in accordance with the original plan was less than the estimated cost, the record fails to show that the funds of the district are in excess of those necessary to pay the annual installments of principal and interest of the drainage bonds, if any, and the annual cost of maintenance of the drainage works, and therefore fails to show any surplus funds within the purview of G.S. 156-116 (3), and the clerk's order for the application of an assumed surplus can not be allowed to stand. *In re Drainage District*, 155.

The disposition of funds of a drainage district is a matter of statutory regulation in North Carolina. *Ibid.*

EASEMENTS

§ 3. Easements by Implication and Necessity.

A deed to lands and the privileges appurtenant conveys not only the lands

described but also easements existent at the time of the conveyance which are so apparent and beneficial to the use of the land conveyed as to lead to the conclusion that the parties contemplated that such easements should continue as reasonably necessary to the fair and convenient enjoyment of the land. *Smith v. Moore*, 186.

An easement appurtenant is not dependent upon the complete absence of other ingress and egree and it is not required that it be absolutely necessary to the enjoyment of the land, but the existence of another way may be material if such other way affords such convenient access to the property as to permit a reasonable inference that the grantor did not intend that the asserted easement appurtenant should remain open for the fair and convenient enjoyment of the property. *Ibid.*

If lands conveyed by the grantor are entirely shut off from access to a public way by other lands retained by the grantor, the law will assume that the grantor intended for his grantee to enjoy the land conveyed and will imply an easement by necessity, which may be established pursuant to G.S. 136-69. *Ibid.*

An easement appurtenant, based upon a visible way of access to a public road existing across other lands of grantor or testator at the time of the severance of title, is distinct from a way of necessity, which is created by operation of law whenever land conveyed or devised is shut off from access to a public way by other lands of the grantor. *Pritchard v. Scott*, 277.

Party entitled to easement by necessity is not relegated to statutory procedure to condemn a cartway. *Ibid.*

EJECTMENT

§ 9. Competency and Relevancy of Evidence.

Recital of consideration in a deed executed by the common source of title to a stranger to plaintiff's claim of title is incompetent to prove the consideration as against plaintiff. *Waters v. Pittman*, 191.

§ 10. Sufficiency of Evidence and Nonsuit.

The introduction by plaintiff of a prior executed but subsequently registered deed from the common source of title makes out a *prima facie* case, the burden being upon defendant to prove that his deed was supported by a valuable consideration so as to bring his instrument within the protection of the registration laws. *Waters v. Pittman*, 191.

ELECTIONS

§ 2. Qualification of Electors and Registration.

G.S. 163-28 requires only a reasonable proficiency in reading and writing any section of the State Constitution in the English language; under the statute neither execessive reading and writing nor writing from dictation may be required. *Bazemore v. Board of Elections*, 398.

G.S. 163-28 does not require that literacy tests be administered to all applicants for registration, and the registrar need not require the test of those whom he knows to have the requisite ability, but the test must be administered without discrimination in those instances where uncertainty of ability exists. *Ibid.*

A party is not required to submit to an unauthorized literacy test and

ELECTIONS—*Continued.*

wait until his right to register has been denied before appealing to the Superior Court, since the statute gives the right to immediate appeal. *Ibid.*

ELECTRICITY

§ 1. Operation, Control and Regulation in General.

The National Electrical Code, as approved by the American Standards Association on 5 August 1959, and filed in the office of the Secretary of the State of North Carolina, has the force and effect of law in this State. G.S. 143-138. *Jenkins v. Electric Co.*, 553.

§ 4. Care Required of Electric Companies in General.

The rule that the highest degree of care commensurate with the practical operation of the business must be exercised by those who manufacture and distribute electrical current applies also to those who install electric wiring and equipment, and the rule is applicable not only in actions to recover for death or injury to persons but also to actions to recover for damage to property. *Jenkins v. Electric Co.*, 553.

§ 7. Connections, Disconnections and Fire on Premises of Customer.

Questions of negligence and proximate cause held for jury in this action to recover for fire from defective wiring. *Jenkins v. Electric Co.*, 553.

EMBEZZLEMENT

§ 7. Nonsuit for Variance.

Where an indictment for embezzlement alleges ownership in the "Pestroy Exterminating Co." and the bill of particulars lays the ownership in "Pestroy Exterminators Inc." and the witnesses use both terms and "Pestroy Exterminating Corporation" interchangeably, but it is apparent that all the witnesses were referring to the same corporation, there is no fatal variance between allegation and proof, defendant having been informed of the corporation which was the victim of the embezzlement. *S. v. Wyatt*, 220.

EMINENT DOMAIN

§ 5. Amount of Compensation.

The measure of compensation for the taking of a part of a tract of land for highway purposes is the difference in the fair market value of the entire track before the taking and the fair market value of that remaining immediately after the taking, ascertained by adding the fair market value of the land taken to any diminution in value of the remaining land, and subtracting any general and special benefits resulting to the remaining land. *Templeton v. Highway Com.*, 337.

§ 6. Evidence of Value.

In proceedings to assess compensation for the taking of a part of a tract of land, any evidence which aids the jury in fixing the fair market value of the land taken and the diminution in value of the remaining land is competent, but evidence having only a conjectural or speculative bearing upon this question is incompetent. *Templeton v. Highway Com.*, 337.

Where there is no evidence from which the jury could find the amount,

EMINENT DOMAIN—*Continued.*

if any, of mud and silt which flowed into petitioners' lake as the result of the taking of a part of petitioners' land for highway purposes, evidence in regard thereto is incompetent. *Ibid.*

Where the taking of a part of petitioners' land for highway purposes results in the flow of mud and silt into petitioner's lake on their remaining lands, petitioners are entitled to recover any resulting diminution in value, but are not entitled to recover the costs of removing the mud and silt from the lake, and evidence of such costs is relevant only as a circumstance tending to show any diminution in value of the remaining land. *Ibid.*

If mud and silt, adversely affecting fishing in petitioners lake, flows into the lake as a result of respondent's taking a part of petitioners' land for highway purposes, petitioners are not entitled to recover loss of revenue from fishing as a separate item of damage but such loss may be considered only insofar as it affects the fair market value of the land remaining after the taking. *Ibid.*

Where the record discloses that petitioners' witnesses considered the value of other property in the area in arriving at the value of petitioners' property, respondents are entitled to cross-examine the witnesses for the purpose of testing the witnesses' knowledge of values and for the purpose of impeachment. *Ibid.*

In proceedings to assess compensation for the taking of a part of petitioners' land for highway purposes, respondent is entitled to have the testimony of his witnesses as to the increase in value of the land in the area, including petitioners' land, resulting from the construction of the highway, admitted upon the question of general and special benefits. *Ibid.*

§ 8. Petition for appointment of Appraisers.

A petition alleging the ownership of a leasehold interest in real estate, the taking of the property by respondent under statutory authority, the authority of respondent to maintain the proceedings, and damage, with request that the damages be appraised in accordance with law, states a good cause of action, G.S. 40-12, and the fact that the petition refers to the public register for a more complete description of the property does not make petitioner's title to depend upon the nature of the instrument referred to. *Jacobs v. Highway Com.*, 200.

While a petition under G.S. 40-12 must state the names of all parties who own or claim any interest in the land, the failure of petitioner-leasee to name such others is a defect which does not go to the substance of the action, and constitutes a defective statement of a good cause of action. *Ibid.*

ESTATES

§ 3. Life Estates and Remainders.

While the statute of limitation does not begin to run against a remainderman until the death of the life tenant, a remainderman may attack a judgment adjudicating title in a stranger at any time after the rendition of such judgment, and the failure of the remanderman to do so may be imputed to him as laches, in proper instances, even during the life time of the life tenant. *Menzel v. Menzel*, 353.

§ 7. Sale of Estates for Division or Reinvestment.

A judgment that a named person owned a life estate in the lands in suit

ESTATES—*Continued.*

with remainder over to others, and directing that the lands be sold for reinvestment and that the value of the life estate be ascertained, contemplates the sale of the fee simple and not merely the life estate for reinvestment. *Menzel v. Menzel*, 353.

EVIDENCE

§ 5. Burden of Proof in General.

The burden of proof in any particular case depends upon the circumstances in which the claim arises. *Blount-Midyette v. Aeroglide Corp.*, 484.

§ 10. Burden of Proof in Respect to Intervenors.

A party voluntarily intervening has the burden of proving his case and establishing the rights claimed. *Williams v. Williams*, 729.

§ 14. Communications between Physician and Patient.

Communications between physician and patient are privileged, and while the court may compel disclosure of such communications if in the court's opinion its is necessary to a proper administration of justice, whether the court should do so rests in its sound discretion. *Brittain v. Aviation*, 697.

§ 15. Res Inter Alios Acta.

Recitals in a deed executed by the common source of title to a stranger to plaintiff's chain of title does not establish the truth of the matter recited as against plaintiff, since the recitals are, as to plaintiff, *res inter alios acta*. *Waters v. Pittman*, 191.

§ 29. Admissions against Interest.

Declaration by insured tending to establish nonliability under the policy to insured's possible dertiment is competent as declaration against interest even though not competent as a part of the *res gestae*, and even though admitted against beneficiary in action to recover on the policy for the death of insured. *Gray v. Ins. Co.*, 286.

§ 58. Cross-Examanation.

The right to cross-examine a witness upon every phase of his examination-in-chief is an absolute right and not a mere privilege. *Templeton v. Highway Com.*, 337.

A party waives his right to cross-examination when he does not object to the admission of affidavits or demand his right to cross-examine the affiant. *In re Hughes*, 434.

EXECUTORS AND ADMINISTRATORS

§ 6. Title to and Control of Assets.

The personal property of a person vests in his executor upon his death, but the executor takes title in trust for the payment of debts and the distribution of the assets in accordance with the terms of the will or in conformity with the rules of distribution. *Allen v. Currie*, 636.

§ 36. Actions Against Personal Representative and the Surities on His Bond.

In an action by an administrator, c.t.a, d.b.n., against the personal repre-

EXECUTORS AND ADMINISTRATORS—*Continued.*

sentative of the deceased executrix to recover assets of the estate, the demurrer of an additional defendant, upon failure of allegation that such additional defendant had ever received or accepted any funds of the estate from the executrix, is properly allowed. *Rudisill v. Hoyle*, 33.

Where an executrix, who is also a beneficiary under the will, dies without filing a final account, an action by the administrator, c.t.a, d.b.n., against the personal representative of the deceased executrix, alleging that the executrix squandered and misapplied a large part of the estate, failed to properly account threfor, and filed no final accounting, is in the nature of an action to surcharge and falsify the account, and the Superior Court has concurrent original jurisdiction with the clerk. *Ibid.*

Allegations to the effect that the executrix of the estate, who was also a beneficiary, squandered and misapplied the assets of the estate and died without making final settlement and that the executrix, as beneficiary under the will, did not take the property of the estate absolutely or in fee, with demand for accounting, states but a single cause of action, a construction of the will being necessary solely to determine whether an accounting is necessary and, if so, the course and extent of the accounting. *Ibid.*

An action against the personal representative of a deceased executrix upon allegations that the executrix had squandered and misapplied the assets of the estate and had failed to file a final account, is properly brought by the administrator, c.t.a., d.b.n., and while the ultimate beneficiaries of the estate are not necessary parties, they are proper parties, and their joinder is not a defect. *Ibid.*

Where, in an action by an administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix of the estate, upon allegations that the executrix has squandered and misapplied assets of the estate, there is no demand against the executrix' transferees, such transferees are not necessary parties, even though the transfer was attempted by the will of the executrix *Ibid.*

In an action against a personal representative for an accounting, the trial court has authority to order a compulsory reference, a long and complicated account being involved. *Ibid.*

§ 28½. Limitation of Actions on Claims Against the Estate.

The rejection of a claim against an estate must be absolute and unequivocal in order to start the running of the six months statute of limitation, G.S. 28-112. *Rutherford v. Harbison*, 236.

The attorney for the estate notified claimant in writing that the claim for compensation for services rendered the deceased by claimant was rejected, but added that the claim was excessive, and offered to discuss the matter at a later date. Thereafter the attorney offered to settle the claim for a smaller amount. *Held:* The rejection was only as to the amount and was insufficient to start the running of the statute of limitations. That the rejection was not considered unqualified is borne out by the later offer of compromise. *Ibid.*

FIDUCIARIES

An executor acts in a fiduciary capacity. *Allen v. Currie*, 636.

FIREMEN'S PENSION FUND ACT

The Board of Trustees of the North Carolina Firemen's Pension Fund, un-

FIREMEN'S PENSION FUND ACT—*Continued.*

der S.L. 1959, c. 1212, purports to be an agency of the State charged with the duty, among others, of administering moneys appropriated from the general fund of the State. *Ins. Co. v. Gold*, 168.

A suit to restrain the officials from carrying into effect the provisions of the Act is a suit against the State and may not be maintained. *Ibid.*

§ 1. Liability of Food Manufacturer to Consumer.

The implied warranty of wholesomeness for human consumption in the sale of food in a sealed container usually obtains only between the parties to the contract of sale, and ordinarily a consumer may hold the manufacturer liable only on the ground of negligence, subject to certain exceptions. *Prince v. Smith*, 768.

§ 2. Liability of Retailer to Consumer.

The implied warranty that a bottled beverage is fit for human consumption will not be extended to include the safety of the container when the evidence shows that the bottle burst in the hands of the purchaser some 18 hours after it had been purchased from defendant retailer, during which time it had been subjected to cold during its transportation to plaintiff's apartment, and then to heat during its storage in plaintiff's apartment. *Prince v. Smith*, 768.

FRAUD

§ 1. Nature and Elements of Fraud in General.

There can be no recovery for fraud in procuring a judgment unless and until the judgment is set aside. *Gillikin v. Springle*, 240.

§ 2. Constructive or Legal Fraud.

The mere relationship of parent and child is not such a confidential relationship as to invoke a presumption of fraud in the execution of a deed by the parent to the child. *Willetts v. Willetts*, 136; *Jones v. Saunders*, 644.

§ 5. Reliance on Misrepresentation and Deception.

A party who signs an instrument without reading it may not thereafter assert his ignorance of its contents as fraud on the part of the other contracting party unless he is prevented from reading the instrument by some trick, artifice or misrepresentation. *Willetts v. Willetts*, 136.

GAS

§ 3. Regulation and Rates.

Replacement costs must be given consideration in computing rate base. *Utilities Com. v. Gas Co.*, 536.

Reasonableness of promotional costs must be determined upon the particular circumstances of the utility. *Ibid.*

Evidence held not to support finding that launderettes should be given rate classification different from that of other commercial users. *Utilities Com. v. Gas Co.*, 734.

HABEAS CORPUS

§ 3. To Determine Right to Custody of Infants.

A decree of divorce awarding the custody of the children of the marriage

to their mother, entered in another state while the children of the marriage were resident in this state, does not deprive the courts of this State of jurisdiction to hear a subsequent proceeding for the custody of the children who continue to be residents here, the residence and not the domicile of the children being controlling. *In re Hughes*, 434.

Where a wife, separated from her husband, has made her home in this State and has the minor children of the marriage residing with her here, the courts of this State have jurisdiction of a controversy as to the right of custody of the children, even though the husband is domiciled in another state, the residence of the children here being sufficient to confer jurisdiction upon our courts. *In re Orr*, 723.

When, at the time of filing petition in *habeas corpus* for the custody of minor children, the petitioning wife is domiciled here and the children are resident in this State, the jurisdiction of the court cannot thereafter be defeated by the wrongful act of the nonresident husband in removing the children from this State in violation of lawful order theretofore issued by the court in the proceeding. *Ibid.*

§ 4. Certiorari and Review.

In *habeas corpus* proceedings to determine the right to custody of minors, the findings of fact of the court are conclusive when supported by competent evidence. *In re Orr*, 723.

HIGHWAYS

§ 11. Neighborhood Public Roads.

If a road was existent as a public way, the fact that it was not taken over and maintained by the State Highway Commission, would not constitute it a private way. *Smith v. Moore*, 186.

Evidence that prior to 1929 a road existed across certain lands from a river to another highway, that such way was used by the public at large, at its convenience, in going to fishing camps located on the river, but that the road was not taken over for maintenance by the State Highway Commission, is sufficient to be submitted to the jury as to whether such road remained a neighborhood public road. *Ibid.*

§ 12. Nature and Grounds of Remedy to Establish a Cartway.

The statutory procedure for the condemnation of a cartway, G.S. 136-67 and G.S. 136-69, is separate and distinct from the right to establish an easement by necessity, and the grantee or devisee of a tract of land which is cut off from access to a public way by other lands of the grantor or testator is not relegated to the statutory procedure to establish his easement by necessity. *Pritchard v. Scott*, 277.

A petitioner is not entitled to condemn a cartway if she presently has reasonable access to a public road, but in proceedings to establish a cartway under the statute, the respondent has the burden of proving the existence of such other way. *Ibid.*

Where the owner of a tract of land devises that part thereof having access to a public road to his son and devises the other part thereof to his widow, the widow is not entitled to condemn a cartway over the land of strangers to the title, since she can have no better right than her testator, and he, having access to a public way, was not entitled to condemn an additional right-of-way. *Ibid.*

HIGHWAYS—*Continued.*

§ 14. Appeal and Review of Proceedings to Establish Cartway.

Judgment that petitioner is entitled to have a cartway laid off in accordance with G.S. 136-69 across the lands owned by one group of respondents or across the lands owned by another group, and remanding the cause to the clerk with directions that a jury of view be appointed to lay off the cartway, is final in that it adjudicates that the land of the appealing respondents is subject to the easement, and they have the right of immediate appeal from the judgment without waiting to see where the jury of view may locate the cartway. *Pritchard v. Scott*, 277.

HOMICIDE

§ 4. Murder in the First Degree.

"Cool state of blood" as used in connection with premeditation and deliberation in homicide cases does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time. *S. v. Faust*, 101.

Murder in the perpetration or the attempt to perpetrate a robbery from the person is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. *S. v. Bailey*, 380.

§ 9. Self-Defense.

Evidence tending to show that defendant was at the place he had a right to be, was without fault in bringing on and entering into the difficulty, that deceased had ill will against him, and was advancing upon him at a distance of ten or twelve feet with an open knife, presents the principle that a person upon whom an assault with murderous intent is made is not under obligation to flee but may stand his ground and kill his adversary if necessary in his self-defense. *S. v. Guss*, 349.

§ 10. Defense of Others.

A wife has the right to kill in defense of her husband. *S. v. Cloud*, 313.

A child has the right to kill in defense of her mother. *S. v. Carter*, 475.

§ 10½. Death by Accident or Misadventure.

The defense that the death of the deceased was the result of an accident or misadventure must be predicated upon the absence of wrongful purpose on the part of the defendant while engaged in a lawful enterprise and the absence of culpable negligence on his part. *S. v. Faust*, 101.

§ 13. Presumptions and Burden of Proof.

While the intentional killing of another with a deadly weapon raises the presumptions that the killing was unlawful and that it was done with malice, the presumption that the killing was unlawful does not shift the burden of proof and cannot obtain when the State's evidence tends to show that defendant killed deceased in the lawful defense of her mother, and the State's evidence tending to establish such defense is not contradicted by other evidence. *S. v. Carter*, 475.

§ 17. Evidence of Premeditation and Deliberation.

Ordinarily, premeditation and deliberation are susceptible to proof only by proof of circumstances from which they may be inferred. *S. v. Faust*, 101.

Circumstances which may be properly considered upon the question of premeditation and deliberation are want of provocation on the part of the deceased, the conduct of defendant before and after the killing, threats and declarations of the defendant before and during the *corpus delicti*, and the dealing of lethal blows by the defendant after deceased had been felled and rendered helpless. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence of premeditation and deliberation held sufficient to be submitted to the jury. *S. v. Faust*, 101.

Where the State introduces testimony of statements tending to show that defendant killed her father in the lawful defense of her mother, and there is no evidence from which the jury could reasonably find that either defendant or her mother was at fault in starting the affray, and there is no evidence in the record tending to contradict or impeach the statements offered by the State, nonsuit should be granted. *S. v. Carter*, 475.

Evidence that the body of a person was found with marks of violence upon it, or under circumstances indicating that such person came to his death by violent means, is proof of the *corpus delicti aliunde* the confession of defendant, so that such evidence, together with evidence that defendant entered into an agreement with another to rob the deceased and admitted that he met his co-conspirator and was present at the time of the commission of the murder in the perpetration of the robbery, is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Foye*, 704.

Evidence that one defendant took the deceased to a place for the performance of an illegal abortion which caused her death and carried her body away after the operation, and that the other defendant actually performed the illegal operation, is sufficient to sustain the conviction of each of the offense of manslaughter, each being a participant in the commission of crime. *S. v. Stroud*, 765.

§ 24. Instructions on Murder in the First Degree.

Where the court correctly defines premeditation and deliberation and instructs the jury that if the purpose to kill is formed simultaneously with the killing there could be no premeditation and deliberation, it is not an error for the court to refuse to give *verbatim* requested instructions that if defendant did not decide to kill the deceased before he fired the fatal shot the defendant could not be guilty of murder in the first degree. *S. v. Faust*, 101.

The evidence tended to show that defendant killed one of the two officers who were attacked by a crowd as they were attempting to make an arrest. The court, in giving full and correct instructions on premeditation and deliberation, charged that in order to convict defendant of murder in the first degree the jury would have to find from the evidence beyond a reasonable doubt that defendant killed the deceased in furtherance of a fixed design for revenge or other unlawful purpose, and not because he was under the influence of violent passion suddenly aroused by some lawful cause or legal provocation. *Held:* It was not error for the court to refuse to give requested instructions predicated upon rage and anger incited by deceased mistreatment of a designated person involved in the riot. *Ibid.*

§ 27. Instructions on Defenses.

Where the court fully and correctly instructs the jury upon the law of self-

HOMICIDE—*Continued.*

defense, it is not error for the court to refuse to give verbatim defendant's requested instructions on this aspect. *S. v. Faust*, 101.

Defendant's evidence held not to present defense of a killing by accident or misadventure and it was not error for the court to refuse to give instructions thereon. *Ibid.*

Where defendant's evidence is to the effect that deceased had knocked her husband down with a table leg and was further threatening both defendant and her husband when defendant shot him, the error of the court in refusing to give the jury defendant's requested instructions upon her right to kill in defense of her husband is not cured by a reference to this principle near the end of the charge when in the main portion of the charge the right to kill was repeatedly related solely to the right to do so in self-defense. *S. v. Cloud*, 313.

§ 28. Submission of Question of Guilt of Less Degrees of the Crime.

Where, in a prosecution under a statutory indictment for murder, G.S. 15-144, the state's evidence tends to show that the offense was committed in the perpetration of a robbery and one defendant admits that he aided and abetted the others in obtaining a pistol and that he loaned his automobile to the others in order that they might commit a robbery, but that he got out of the car and waited beside the road while the other three committed the offense, and contends that he was not guilty of anything more than being an accessory before the fact, it is error for the court to fail to explain the legal meaning of accessory before the fact and instruct the jury that they might return such a verdict, and the mere statement of such defendant's contention in this regard is insufficient. *S. v. Jones*, 450.

§ 30. Verdict and Sentence.

A verdict of guilty of murder in the first degree with recommendation of mercy is not in accord with law, the proper verdict being, in such instance, guilty of murder in the first degree with recommendation of imprisonment for life in the State prison. *S. v. Foye*, 704.

HUSBAND AND WIFE

§ 17. Termination of Estates by Entireties.

A decree of divorce vests in the wife a one-half interest in lands theretofore held by her and her husband by entireties. *Waters v. Pittman*, 191.

§ 18. Abandonment and Nonsupport.

The willful failure of a husband to support his wife is a misdemeanor. G.S. 14-322 and G.S. 14-325. *S. v. Lowe*, 631.

INDEMNITY

§ 3. Actions on Indemnity Agreements.

In the injured person's action, one defendant may not set up against the other such other's indemnity by agreement, since it has no relevance to plaintiff's action. *Greene v. Laboratories*, 680.

An indemnity agreement precludes the application of the doctrine of primary and secondary liability. *Ibid.*

INDICTMENT AND WARRANT

§ 6. Issuance of Warrant.

The evidence in this case is held not to show that defendant was kept in custody for more than 12 hours before the issuance of a warrant. *S. v. Bell*, 778.

§ 9. Charge of Crime.

Where time is not of the essence of the crime charged, the failure of the indictment to aver the date the offense was committed is not a fatal defect. *S. v. Tessnear*, 211.

An indictment for a statutory offense should follow the language of the statute or specifically set forth the facts constituting the offense with such certainty as to advise defendant of the offense of which he is charged, prevent him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment. *S. v. Barefoot*, 308.

§ 12. Amendments and Waiver of Defects.

A general appearance waives objections predicated upon a mere irregularity in the warrant. The use of abbreviations in the record of proceedings of a court of record is disapproved. *S. v. Maides*, 223.

§ 17. Variance between Averment and Proof.

Where an indictment for embezzlement alleges ownership in the "Pestroy Exterminating Co." and the bill of particulars lays the ownership in "Pestroy Exterminators, Inc." and the witnesses use both terms and "Pestroy Exterminating Corporation" interchangeably, but it is apparent that all the witnesses were referring to the same corporation, there is no fatal variance between allegation and proof, defendant having been informed of the corporation which was the victim of the embezzlement. *S. v. Wyatt*, 220.

§ 18. Sufficiency of Indictment to Support Conviction of Less Degrees of the Crime.

An indictment will support a conviction of the crime charged or a less degree of the same crime, and the crime of accessory before the fact is included in the charge of the principal crime, G.S. 15-170. The crime of accessory after the fact is not included in the charge of the principal crime. *S. v. Jones*, 450.

INFANTS

§ 6. Appointment and Duties of Guardian ad Litem.

Where it is ordered that by consent of the parties a cause should be heard and judgment rendered in another county of the district, such order does not remove the cause from the county in which it was instituted, and the clerk of the court of that county has authority to appoint a guardian *ad litem* for minor defendants in the action and to accept and file such guardian's verified answer, and the guardian's appearance in the adjoining county and participation in the hearing waives any objection to the hearing outside the county. *Menzel v. Menzel*, 353.

An order for the appointment of a guardian *ad litem* which finds that a named person was a proper and suitable person to represent the minors, but leaves blank the space provided for naming the appointed person, is irregular,

but when the person named as a suitable person files verified answer and represents the minors at the hearing no prejudice results, and the judgment is at most voidable for irregularity and not void. *Ibid.*

§ 8. Jurisdiction to Award Custody of Minor.

A decree of divorce awarding the custody of the children of the marriage to their mother, entered in another state while the children of the marriage were resident in this state, does not deprive the courts of this state of jurisdiction to hear a subsequent proceeding for the custody of the children who continue to be residents here, the residence and not the domicile of the children being controlling. *In re Hughes*, 434.

Where a wife, separated from her husband, has made her home in this State and has the minor children of the marriage residing with her here, the courts of this State have jurisdiction of a controversy as to the right of custody of the children, even though the husband is domiciled in another state, the residence of the children here being sufficient to confer jurisdiction upon our courts. *In re Orr*, 723.

When, at the time of filing petition in *habeas corpus* for the custody of minor children, the petitioning wife is domiciled here and the children are resident in this State, the jurisdiction of the court cannot thereafter be defeated by the wrongful act of the nonresident husband in removing the children from this State in violation of lawful order theretofore issued by the court in the proceeding. *Ibid.*

§ 10. Delinquent Children.

The commitment of a minor to a training school upon findings that such minor is a delinquent within the intent and meaning of G.S. 110-21 is not punishment and the proceeding is not penal in nature, and therefore such delinquent is not entitled to trial by jury upon his appeal from the order of the juvenile court committing him to a training school. *S. v. Frazier*, 226.

Whether hearing in Superior Court is *de novo*, quaere? *Ibid.*

INJUNCTIONS

§ 1. Preliminary Mandatory Injunctions.

The issuance of a preliminary mandatory injunction rests in the sound discretion of the trial court, and its order denying the relief will not be disturbed unless contrary to some rule of equity or abuse of discretion is made to appear. *Creel v. Gas Co.*, 324.

§ 3. Inadequacy of Legal Remedy and Irreparable Injury.

Carrier may enjoin unauthorized arbitration which might result in forcing it to breach its duty to public. *Coach Lines v. Brotherhood*, 60.

§ 5. Injunction to Restrain Enforcement of Statute.

Injunction will lie to restrain the enforcement of a statute when direct and immediate threat to constitutional rights is involved, but not otherwise. *Chadwick v. Salter*, 389; *McIntyre v. Clarkson*, 510.

Taxing statute may not be enjoined. *Ins. Co. v. Gold*, 168.

§ 8. Injunctions against Public Board, Officers or Agencies.

Injunction will lie to prevent a municipal corporation from putting public property to an unauthorized use. *Whishart v. Lumberton*, 94.

INJUNCTIONS—*Continued.*

Parties subject to the tax on certain insurance policies levied by G.S. 105-228.1 may not maintain that the enforcement of the act would result in irreparable injury to them, since, if the statute is unconstitutional such parties may recover the tax paid with interest by following the statutory procedure, G.S. 105-267, and if the statute is valid, no rate increase which could affect the volume of such parties' business would go into effect pending the final determination of the validity of the statute. *Ins. Co. v. Gold*, 168.

§ 13. Issuance of Temporary Orders upon Hearing and Continuance and Dissolution of Temporary Orders.

Where on the hearing of the motion to show cause why the temporary order restraining arbitration of the discharge of plaintiff's driver for defective vision, plaintiff makes it appear that it is a common carrier, that the procedure prerequisite to the right to demand arbitration had not been followed by or on behalf of the employee, and that the employee's eyes were in fact defective within the provisions of the contract authorizing discharge, plaintiff has established his *prima facie* right to the equity of injunction, warranting the continuance of the temporary order to the hearing. *Coach Line v. Brotherhood*, 60.

When there is a *bona fide* controversy as to a legal or equitable right, a temporary restraining order will ordinarily be continued to the hearing to preserve the *status quo*, especially when the principal relief sought is in itself an injunction, since to dissolve the interlocutory order would virtually decide the case upon its merits. *Ibid.*

Where there is *bona fide* controversy as to whether a municipality had acquired land for a public park or, after the acquisition of the land, had permanently dedicated it to such use, a temporary order restraining the municipality from using such land for a public automobile parking lot is properly continued to the hearing upon the merits. *Whishart v. Lumberton*, 94.

Where plaintiff seeks injunctive relief upon allegations disclosing a grave controversy in regard to the subject matter, and it appears that if the matter is not held in *statu quo* plaintiff's primary equity, even though established upon the hearing, would be lost or irreparably impaired, while continuance of the status to the hearing would result in no injury to defendant which could not be compensated in money, the temporary order will be continued until the hearing upon the merits, since to do otherwise would be to determine the merits upon the hearing of the order to show cause. *Church v. College*, 717.

INSURANCE

§ 1. Control and Regulation in General.

The Commissioner of Insurance is a constitutional officer of the State with authority to levy and collect certain taxes for general State purposes. *Ins. Co. v. Gold*, 168.

§ 3. Construction and Operation of Policies in General.

An insurance contract is to be construed in accordance with the intention of the parties and must be enforced according to the terms of the agreement. *Kirk v. Ins. Co.*, 651.

Where a term is defined in a contract of insurance, such definition will be applied to all other clauses of the contract, including coverage and exclusion

INSURANCE—*Continued.*

clauses, unless made inapplicable by the express language of the contract or unless inconsistent with and repugnant to the purpose and intent of the particular clause. *Ibid.*

An endorsement is an integral part of the policy contract. *Ibid.*

While the court must construe a contract of insurance as written, when the language of the policy is susceptible to two constructions, the court will adopt that construction which is favorable to insured. *Richardson v. Ins. Co.*, 711.

§ 17. Avoidance of Policy for Misrepresentations or Fraud.

Questions in an application for life insurance relating to the physical condition of applicant and her life expectancy are material to the risk, and warrant avoidance or cancellation of the policy when they are false, G.S. 58-20, even though the policy is written without a medical examination. G.S. 58-200, requiring proof of fraud to entitle insurer to cancel such policy was repealed by the Act of 1945. *Jones v. Ins. Co.*, 407.

Written answers to written questions relating to health in an application for life insurance are material as a matter of law, and entitle insurer to avoid the policy regardless of whether such answers are fraudulently or innocently made, and therefore it is error for the court to submit to the jury whether such answers were material, the sole inquiry being whether such statements were made and whether or not they were false. *Rhinehardt v. Ins. Co.*, 671.

§ 18. Knowledge of Local Agent and Waiver of Right to Declare Forfeiture of Life Policy.

Where an application for life insurance signed by insured stated that applicant had read the questions therein contained carefully and that the answers thereto were complete and true, the law will presume, in the absence of fraud or mistake, that the applicant had knowledge of any misrepresentations in the answers even though the answers were written by insurer's agent, and insurer may not be held to have waived such misrepresentations in the asence of evidence that insurer or its agent had actual or constructive knowledge that the answers appearing in the application were false in fact. *Jones v. Ins. Co.*, 407.

Even though the evidence be sufficient to show an insurer's agent wrote the answers in insured's application for a life policy with total indifference to their truth or falsity, insurer will not be estopped to rely upon their falsity as ground for forfeiture or cancellation unless insurer had actual or constructive knowledge of the falsity of the answers entered on the application by the agent. *Ibid.*

§ 26. Actions on Life Policies.

Where insurer admits plaintiff's *prima facie* case in an action on the life policy but alleges that the policy was issued upon false and material answers in the application and seeks cancellation of the policy, plaintiff's reply setting up estoppel of the insurer to assert the defense must allege facts constituting such estoppel, and when palintiff's allegations or evidence is insufficient to defeat the cross action for cancellation, nonsuit of the action may be entered. *Jones v. Ins. Co.*, 407.

Where the evidence and admissions establish the execution and delivery of the policy of life insurance sued on, the payment of premiums and the

death of insured, plaintiff makes out a *prima facie* case precluding nonsuit or a directed verdict for insurer, since the burden is on insurer to establish misrepresentations relied on by it, and nonsuit on such defense cannot be allowed even though insurer's evidence in regard thereto is uncontradicted, nonsuit being proper in such instance only when plaintiff's evidence establishes such defense. *Rhinehardt v. Ins. Co.*, 671.

Where insurer relies upon misrepresentations as to health and insurability, the court should submit to the jury only whether the representations were made and whether they were false, such representations being material as a matter of law. *Ibid.*

§ 27. Total and Permanent Disability.

Evidence tending to show that plaintiff was discharged because of his failure to turn out work with sufficient speed to make him a profitable employee, that after his discharge he attempted other employment but was discharged therefrom after a very short time because he was not able to do the simple duties of the employment, together with expert testimony that at the time of his original discharge plaintiff was totally and permanently disabled by reason of anemia, low blood pressure, and neurasthenia, *is held* sufficient to be submitted to the jury in plaintiff's action to recover benefits provided in the employer's pension plan for employees whose termination of employment is due to total and permanent disability to perform the "job for which he is employed or similar work." *Bradley v. Pritchard*, 175.

§ 30. Provisions Limiting Liability for Disability or Sickness.

In an action on a policy of hospital insurance, evidence that pain felt by insured prior to the issuance of the policy was consistent with but not diagnostic of the existence at that time of the disease necessitating an operation some eighteen months after the issuance of the policy, raises an issue of fact for the jury, or for the court when jury trial is waived. *Abernethy v. Hospital Care Asso.*, 346.

§ 33. Actions on Disability and Health Insurance.

In an action on a policy of hospital insurance, the burden is on the plaintiff to show coverage and on the insurer to show that the claim fell within the exclusions from liability, if relied on by insurer. *Abernethy v. Hospital Care Asso.*, 346.

§ 34. Death or Injury by Accidental Means.

"Accidental death" relates to the causation of death while death produced by "accidental means" relates to the occurrence or happening which produces the death, so that death resulting directly from insured's voluntary act and aggressive misconduct is not death by accidental means even though the death be the result of an accidental injury. *Gray v. Ins. Co.*, 286.

Evidence tending to show that insured was attempting to break into a store at nightime and that operator of the store, living on the premises and hearing noises, went on the outside of the building with a gun, and that insured brushed past him while his finger was on the trigger, causing the gun to discharge, inflicting fatal injury, is held to disclose that the death resulted through the means of insured's voluntary act and aggressive misconduct and therefore that his death was not solely the result of external, violent and accidental means within coverage of the policy in suit. *Ibid.*

INSURANCE—*Continued.*

§ 37½. Loss of Member of Body.

Loss of use of member of body will be construed as loss of such member in absence of restrictive language. *Richardson v. Ins. Co.*, 711.

§ 46. Actions on Accident Policies.

In an action by the beneficiary on an accident policy providing, in addition to death benefits, benefits for hospital and surgical fees and compensation for hospital confinement, and reserving the right to insured to change the beneficiary, a declaration of insured to an officer some time after the fatal injury that insured was shot in an attempt to break in a store, while not competent as a part of the *res gestae, is held* competent as an admission against interest, since the insured and not the beneficiary had a vested interest in the policy at the time the declaration was made. *Gray v. Ins. Co.*, 286.

In an action on an insurance contract, the burden is upon plaintiff to show coverage under the policy and upon insurer to prove an asserted defense under the exclusion clauses, but when plaintiff's own evidence establishes that his claim falls within a clause excluding liability, nonsuit is proper. *Kirk v. Ins. Co.*, 651.

Vehicle held "commercial automobile" excluded from coverage under indemnity endorsement. *Ibid.*

§ 54. Vehicles Insured under Liability Policies.

The Motor Vehicle Safety-Responsibility Act of 1953 (G.S. 20-279.1 to G.S. 20-279.39) applies to drivers whose licenses have been suspended and relates to the restoration of drivers' licenses, while The Vehicle Financial Responsibility Act of 1957 (G.S. 20-309 to G.S. 20-319) applies to all motor vehicle owners and relates to the registration of motor vehicles, and the two Acts are complementary and the latter does not repeal or modify the former, but incorporates portions of the former by reference, and the two Acts are to be construed *in pari materia* so as to harmonize them and give effect to both. *Faizan v. Ins. Co.*, 47.

§ 61. Whether Liability Policy is in Force at Time of Accident.

Since The Vehicle Financial Responsibility Act of 1957 has specific provision for notice of cancellation, G.S. 20-310, provision for notice of cancellation under The Motor Vehicle-Safety Responsibility Act of 1953, G.S. 20-279.22, had no application to the cancellation of a policy issued pursuant to the 1957 Act. *Faizin v. Ins. Co.*, 47.

A policy of insurance issued pursuant to The Vehicle Financial Responsibility Act of 1957 may be canceled. pursuant to its contractual provisions, 15 days after notice of cancellation has been mailed to insured, and it is not required that notice of cancellation should be given the Commissioner of Motor Vehicles 20 days before termination, but only that such notice be given the Commissioner within 15 days after cancellation. *Ibid.*

Where, more than 15 days prior to the expiration date of a policy issued pursuant to The Vehicle Financial Responsibility Act of 1957, insurer sends insured notice of the expiration date with offer to renew the policy if payment of premium is made by the premium due date, no further notice to insured is required, and the fact that insurer thereafter sends notice of cancellation which, through clerical error, states an erroneous expiration date transpiring after the accident imposing liability on insured, is immaterial and does not impose liability on insurer, insured having failed to accept the offer of renewal by paying the premium on or before the due date. *Ibid.*

INSURANCE—*Continued.*

§ 61½. Compromise and Settlement of Claim by Insurer.

The fact that an insurer has issued liability policies on both vehicles involved in a collision does not create such a fiduciary relationship with insureds as to prohibit insurer from making such investigation as it deems necessary to determine whose negligence proximately caused the collision and resulting injuries. *Gillikin v. Indemnity Co.*, 250.

§ 62. Cooperation of Insured in Defense of Action.

Conditions in a policy of automobile liability insurance that insured should give notice and cooperate in the defense of any action which might result in a judgment against the insured is, in the absence of statutory provision to the contrary, binding on the parties and enforceable. *Henderson v. Ins. Co.*, 329.

The cooperation clause in a policy of liability insurance must be given a reasonable interpretation to accomplish the purpose intended, which is to put the insurer on notice and afford it opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and insured's violations of the clause which do not affect this purpose but which are merely technical or immaterial and do not prejudice insurer, will not prevent recovery on the policy. *Ibid.*

Whether insurer was prejudiced by false statements of insured, corrected years before the trial, held question of fact upon the evidence. *Ibid.*

§ 63. Defense of Action by Injured Party Against Insured.

Where plaintiff does not allege damages resulting from his insurer's failure to discharge its contractual obligations to provide counsel to represent him in an action instituted against him by the owner of the other vehicle involved in the collision, but only that insurer conspired to defeat, by perjured testimony, insured's right of action against the owner of the other vehicle and failed to provide counsel for such suit, dismissal is proper, since the complaint fails to state a cause of action on the policy contract and no right of action exists for conspiracy to suborn perjury. *Gillikin v. Indemnity Co.*, 250.

JUDGMENTS

§ 1. Nature and Requisites of Judgments in General.

Where writ in *habeas corpus* to determine the right of custody of minor children of the marriage is personally served on the nonresident husband, the court issuing the writ has jurisdiction to render an *in personam* judgment against the husband. *In re Orr*, 723.

§ 2. Time and Place of Rendition.

The recitals in an order of the judge presiding at the term that the parties consented to the hearing of the case out of term and in a designated county, and the recital in the judgment of the judge thereafter hearing the case in the designated county that the case came on for hearing in that county by consent decree and that all parties were then before the court, are sufficient to support a finding that the hearing out of the county and out of term was by consent. *Menzel v. Menzel*, 353.

The hearing of a cause by consent in the adjoining county does not transfer the cause, and the judgment properly appears in the judgment roll of the

county in which the action is instituted and not the county in which the judgment was actually rendered. *Ibid.*

§ 9. Jurisdiction to Enter Consent Judgments or Judgments in Retraxit.

It will be presumed that the attorney signing a compromise or consent judgment had authority from his client to do so, and the burden is upon the party asserting absence of consent and want of authority in the attorney to so prove to the satisfaction of the court. *Howard v. Boyce*, 255.

§ 13. Judgments by Default in General.

The failure of defendant to plead within the statutory time after service of summons and verified complaint upon him in an action within the jurisdiction of the court, admits the allegations of fact and entitles plaintiffs to that relief to which the facts alleged in the verified complaint entitle them, and default judgment for such relief is properly entered. *Collins v. Simms*, 148.

§ 15. Effect and Form of Default Judgments.

A judgment by default must strictly conform to, and be supported by, the allegations of fact in the verified complaint. *Collins v. Simms*, 148.

A judgment by default precludes defendant from denying the truth of the facts properly set forth in the verified complaint but does not preclude him from objecting to the judgment on the grounds that it does not strictly conform to, and is not supported by, the allegations. *Ibid.*

§ 18. Direct and Collaterial Attack in General.

Judgment probating a will in solemn form is a judicial decree which is subject to attack as other judgments; if it does not appear from the record that all necessary parties were not before the court, it may be attached by motion in the cause on the ground that parties named were not in fact parties, which motion raises questions of fact for the court and not issues of fact for the jury. *In re Will of Cox*, 90.

Unless procured by fraud or mistake, a judgment which is regular and valid on the face of the record may be set aside only by motion in the cause in the court wherein it was rendered, and such motion is addressed to the court, and if a jury verdict is returned it is advisory only. *Howard v. Boyce*, 255.

Upon the hearing of a motion in the cause to set aside a judgment for irregularity, evidence that the judgment had been obtained by extrinsic fraud is properly excluded, since the sole remedy to set aside a final judgment for fraud is by independent action. *Menzel v. Menzel*, 354.

If a pleading attacks the validity of a judgment on grounds available only upon motion in the cause, the court has the discretionary power to treat the pleading as a motion in the cause and thus avoid delay. *Toomes v. Toomes*, 624.

§ 19. Attack of Judgments on Ground of Want of Jurisdiction or on Ground that Judgment was Void.

If a judgment is regular and valid on its face, an attack thereon on the ground that the court did not have jurisdiction in that it was a judgment by retraxit or consent and a party thereto did not consent to the judgment, must be made by motion in the cause, but a showing of a meritorious cause of action or defense is not required. *Howard v. Boyce*, 255.

JUDGMENTS—*Continued.*

§ 21. Attack and Setting Aside Irregular Judgments.

A default judgment which grants plaintiffs relief in excess of that to which they are entitled upon the facts alleged in the verified complaint is irregular, but is not void, and the proper procedure for relief against such judgment is by motion in the cause. *Collins v. Simms*, 148.

An irregular judgment may be attacked at any time, but the court may refuse to do so when movant has been guilty of unwarranted laches, particularly when the rights of *bona fide* purchasers are involved. *Menzel v. Menzel*, 353. Therefore a recorded deed and deeds of trust executed by the person acquiring title under a sale pursuant to the judgment are competent to show knowledge on the part of movant in determining the question of laches. *Ibid.*

An order finding that a named person was a suitable person to represent minors, but failing to name such person as the appointee, is irregular but not void. *Ibid.*

§ 22. Attack and Setting Aside Default Judgments.

A defendant is not entitled to have a judgment by default set aside in the absence of a showing by him and a finding by the court that his neglect was excusable and that he has a meritorius defense, and in the absence of a finding of excusable neglect, the question of meritorius defense is immaterial. *Greitzer v. Eastham*, 752.

Where defendant promptly reports the accident to the agent of his insurance carrier and thereafter delivers the summons and complaint to the agent, and relies upon the assurance that insurer would look after the matter, defendant makes his insurer and its agent his agents, and their inexcusable neglect to defend the action will be imputed to defendant and preclude his right to have the judgment by default entered in the case set aside. *Ibid.*

§ 24. Attack of Judgments for Fraud.

The obtaining of a judgment by perjured testimony is intrinsic fraud and the judgment cannot be set aside on this gorund unless the party charged with perjury has been convicted or has passed beyond the jurisdiction of the court, and therefore is not amenable to criminal process. *Gillikin v. Springle*, 240.

The sole remedy to attack a final judgment for extrinsic fraud is by motion in the cause. *Menzel v. Menzel*, 353.

§ 25. Attack of Consent Judgments and Judgments of Retraxit.

Movants seeking to set aside a judgment regular upon the face of the record on the ground of want of jurisdiction, or on the ground that it was a consent judgment and was entered without movant's consent, are not required to show a meritorious defense or cause of action. *Howard v. Boyce*, 255.

Mere lapse of time alone will not amount to laches barring a motion in the cause to set aside a compromise or consent judgment on the ground that movants did not in fact consent thereto, although positive acts amounting to ratification, or unreasonable delay after notice, resulting in prejudice to innocent parties may, under certain circumstances, work an estoppel. *Ibid.*

Upon the hearing of plaintiffs' motion to set aside a judgment in retraxit

on the ground that the attorney of record compromised and settled their rights without their knowledge, authority, or consent, the court should make specific findings of fact in regard to the authority of the attorney and laches, and where the court fails to find such predicate facts the cause must be remanded. *Ibid.*

§ 27. Hearing and Determination of Proceedings Attacking Judgments.

While the judgment roll alone is to be considered in determining a motion to set aside a judgment for irregularity, a recorded deed and deeds of trust executed by the person acquiring title under the judgment may be considered by the court for the purpose of showing knowledge of the claim of fee simple title by virtue of the judgment in determining the question of laches. *Menzel v. Menzel*, 353.

The hearing of the cause and the rendition of judgment out of term and out of county by consent does not transfer the cause to the county in which judgment is actually entered, and such judgment properly appears on the judgment roll in the county in which the action was instituted, and that judgment roll and judgment signed by the judge holding the term in the county in which the action was heard establish the rendition of the judgment notwithstanding nothing appears in the judgment roll in the county in which the judgment was actually rendered. *Ibid.*

§ 28. Conclusiveness of Judgments and Bar in General.

In an action by one driver against the other driver and the owner of the other vehicle, an unappealed judgment sustaining a demurrer is a bar to a cross action by the first driver in a subsequent action instituted by the second driver to recover for injuries sustained in the same collision. *Jones v. Mathis*, 421.

§ 35. Judgments of Retraxit and Dismissal as Bar.

A judgment sustaining a demurrer is as much a bar as if the issuable matters had been established by a verdict. *Jones v. Mathis*, 421.

§ 38. Plea of Bar, Hearing and Determination.

It is within the discretion of the trial court to determine whether a plea of *res judicata* should be determined prior to the trial on the merits. *Jones v. Mathis*, 421.

Whether a judgment dismissing an action upon demurrer will support a plea of *res judicata* is to be determined from the judgment roll. *Ibid.*

JUDICIAL SALES

4. Confirmation.

A judgment of confirmation of a judicial sale is a final judgment. *Menzel v. Menzel*, 353.

§ 5. Validity and Attack of Sale and Title of Purchaser.

In the absence of fraud or the knowledge of fraud, the purchaser at a judicial sale is required only to ascertain from the record that the court had jurisdiction of the parties and the subject matter and that the judgment authorized the sale, and when the record is regular on its face in these respects, the *bona fide* purchaser acquires good title. *Menzel v. Menzel*, 353.

JUDICIAL SALES—*Continued.*

Where the commissioner's deed identifies the lands as those owned by a certain person and more particularly described in designated registered deeds, and it further appears that a map of the lands had been recorded, the description in the commissioner's deed is sufficient, since that is certain which can be made certain. *Ibid.*

Lands in which minors owned a remainder were ordered sold for reinvestment and judgment confirming the sale was duly entered. Irregularities appeared on the face of the record of the proceedings which rendered the judgment voidable but not void. The *bona fide* purchaser at the sale had been in possession for some forty-five years after the execution of commissioner's deed to him and thirty-one years elapsed after movant became of age. *Held:* The record discloses laches warranting the refusal of the court to set aside the judgment for irregularity. *Ibid.*

JURY

§ 5. Right to Jury Trial.

The statutory provisions for the trial of actions for small claims in the Superior Court without a jury, unless jury trial is demanded pursuant to the procedure therein provided, is not a special act relating to the establishment of courts inferior to the Superior Court, and is valid. Constitution of North Carolina, Art. 2 § 29. *Rhyne v. Bailey*, 467.

LANDLORD AND TENANT

§ 7. Duty to Repair and Liabilities for Disrepair.

Plaintiff rented hangar space for its planes from defendant. Plaintiff's planes were damaged when the roof of the hangar caved in after a heavy snow. The evidence tended to show that defendant had no authority with reference to the use, removal or replacement of plaintiff's planes in the hangar and that on the late afternoon before the accident plaintiff's agent and defendant's agent together inspected the hangar and observed no condition indicating that the roof was sagging or was otherwise unsafe. *Held:* The evidence is insufficient to show negligence on the part of defendant in failing to remove the snow from the roof of the hangar, in failing to remove the aircraft to a place of safety, or in failing to provide additional support to the roof of the hangar. *Flying Club v. Flying Service*, 775.

LIBEL AND SLANDER

§ 1. Nature and Essentials of Cause of Action in General.

The publication of defamatory pictures of the body of a dead person with the malevolent purpose of injuring his family is a misdemeanor at common law, but the common law recognized no right of civil action for damages for defamation of a dead person, and since no such right of action is given by statute, it does not exist in this State. *Gillikin v. Bell*, 244.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run in General.

Ordinarily the time at which the right to institute action arises determines

LIMITATION OF ACTIONS—*Continued.*

when the applicable statute of limitations begins to run. *Willetts v. Willetts*, 136.

§ 7. Fraud, Mistake and Ignorance of Cause of Action.

An action for fraud in procuring the execution of a deed by misrepresentation that the grantee therein agreed to reconvey to grantor is barred as a matter of law by the three-year statute of limitations, G.S. 1-25(9), when plaintiff's own evidence discloses that the grantee claimed the absolute fee simple title to the knowledge of the grantor more than three years prior to the institution of the action. *Willetts v. Willetts*, 136.

§ 17. Burden of Proof.

Defendant's plea of the applicable statute of limitations puts upon plaintiff the burden of showing that the action was instituted within the prescribed period. *Willetts v. Willetts*, 136.

§ 18. Hearing and Determination of Plea of the Statute.

When it appears from plaintiff's pleading that the cause alleged is barred by the applicable statute of limitations, the court may properly dismiss the action. *Gillikin v. Bell*, 244.

MARRIAGE

§ 2. Validity and Attack of Marriage.

Where, in proceedings for the allotment of dower, a party intervenes, admits the prior marriage of petitioner but proves a second marriage to herself, the burden is upon intervenor to prove that the first marriage had been terminated by divorce so as to establish the legality of the second marriage, and in the absence of such evidence nonsuit of the intervenor's claim is proper. Distinction is noted where the first spouse is dead at the time of the hearing. *Williams v. Williams*, 729.

MASTER AND SERVANT

§ 15. Construction of Labor Contracts.

Where a collective bargaining agreement provides specific procedure as to grievances before a party should be entitled to demand arbitration of the dispute, such procedure must ordinarily be followed, in the absence of facts excusing or waiving such procedure, and in order for a party to assert waiver, he must allege the facts relied on as constituting waiver. *Coach Lines v. Brotherhood*, 60.

§ 22. Liability of Employer for Injuries to Employee at Common Law.

Where plaintiff employees' testimony tends to show that he had used the same equipment for more than two years in loading, transporting, and unloading timber, that the accident in suit was not the result of the failure to provide his truck with safety chains for holding the logs, and there is no evidence that safety chains were approved and in general use in hauling timber, the evidence fails to disclose negligence on the part of the employer in this respect. *Reeves v. Taylor-Colquitt Co.*, 342.

Plaintiff's evidence tended to show that he had been engaged in the same work with the same equipment for over two years in hauling timber to a

MASTER AND SERVANT—*Continued.*

lumber plant, that he apparently fixed his own hours, that he was unloading timber at night, and that after he had gotten under the truck to knock out the standards so that the timber would fall and was getting out from under the truck on the opposite side, his foot slipped on a stick or piece of wood, throwing his leg under the falling timber. *Held:* The employer was not under duty to furnish lights that would illuminate under the truck, and the presence of the stick or piece of wood under the truck was not an unusual circumstance and was more easily discoverable by the employee than by the employer, and nonsuit was correctly entered. *Ibid.*

§ 32. Liability of Employer for Injuries to Third Persons.

The injured third person may sue the employer without the joinder of the employee, the employee being a proper but not a necessary party. *Adler v. Curle*, 502.

MONOPOLIES

§ 2. Agreements and Combinations Unlawful.

Evidence tending to show only that an automobile manufacturer executed contracts with two dealers, giving each the exclusive agency for the make of car in their respective municipalities, some fourteen miles apart, that plaintiff dealer solicited sales in the municipality in which defendant dealer was located, that defendant dealer protested to the manufacturer, and that the manufacturer advised plaintiff dealer to desist from soliciting customers in defendant's territory, *is held* insufficient to show that the manufacturer and defendant dealor entered into an unlawful agreement or combination in restraint of trade, since defendant dealer was merely protecting his valid contractual rights. *Buick Co. v. Motors Corp.*, 117.

MUNICIPAL CORPORATIONS

§ 17. Municipal Control, Sale and Use of Property.

Where a muncipal corporation purchases or acquires property by gift for a specified use, or acquires property without any limitation on its use and thereafter dedicates the property to a particular use, it may not, without legislative authority, thereafter dispose of the property or put it to an entirely different and inconsistent use. *Wishart v. Lumberton*, 94.

The power given municipalities to establish and regulate parks does not authorize a municipality to abandon an established park. *Ibid.*

Where there is *bona fide* controversy as to whether a municipality had acquired land for a public park or, after the acquisition of the land, had permanently dedicated it to such use, a temporary order restraining the municipality from using such land for a public automobile parking lot is properly continued to the hearing upon the merits. *Ibid.*

§ 25. Zoning Ordinances and Building Permits.

Notice and an opportunity to be heard are prerequisite to the validity of a modification of municipal zoning regulations, but notice published in a newspaper of general circulation in the municipality and county advising that changes in the zoning of described property and proposed change in the zoning ordinance of the municipality would be discussed, and inviting all persons interested in the proposed changes to be present, is sufficient to sustain

a finding that notice of both change in the zoning regulations and in zone lines had been given. *Walker v. Elkin*, 85.

Zoning regulations must be uniform in all the areas of a defined district, but it is not required that all areas of a defined class be contiguous, it being sufficient if all areas in each class be subject to the same restrictions. *Ibid.*

Amendment to a zoning regulation reclassifying an area containing 3.56 acres from a residential zone to a neighborhood business zone will not be held invalid on the ground that it is arbitrary or capricious, or constituted "spot zoning", when the evidence discloses that this particular area, by reason of peculiar topography or other valid considerations, is unfit for residential purposes, and such conditions existing at the time of the change are such which would have originally justified the new classification. *Ibid.*

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Even though a person is not under duty to anticipate negligence on the part of another, when such other has created a perilous condtion by his negligence, the first is under duty to take such action as an ordinarily prudent person would take in order to avoid injury after he discovers, or should discover in the exercise of ordinary care, the impending danger. *Rouse v. Jones*, 575.

§ 3. Sudden Peril or Emergency as Affecting Question of Negligence.

The question of whether defendant used due care in an emergency is ordinarily for the jury. *Rouse v. Jones*, 575.

A defendant may not invoke the doctrine of sudden emergency if his own negligence brings on such emergency. *Ibid.*

§ 7. Proximate Cause and Foreseeability of Injury.

Negligence must be the proximate cause of injury or damage in order to constitute the basis for a cause of action. *Jenkins v. Electric Co.*, 553.

Proximate cause 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 of the facts then existing. *Ibid.*

Proximate cause is an inference of fact drawn from other facts and circumstances, and is ordinarily a question for the jury. *Rouse v. Jones*, 575.

There may be more than one proximate cause of an injury, and if the negligent acts of two persons join and concur in producing an injury, each is jointly and separately liable therefor, even though they act independently of each other. *Ibid.*

Nonsuit held proper in this action to recover for injuries resulting when plaintiff was struck by the blade of the fan which broke off and struck plaintiff while he was looking under the hood of defendant's car to locate mechanical trouble as defendant, after having accelerated the engine, turned off the switch, since such result was not reasonably foreseeable. *Priest v. Thompson*, 673.

Foreseeability is an element of proximate cause, but the law requires only reasonable foresight, judged from the circumstances prior to the occurrence, and does not require that the unusual, unlikely or remotely probable be anticipated. *Herring v. Humphrey*, 741.

NEGLIGENCE—*Continued.*

§ 8. Concurring and Intervening Negligence.

The doctrine of intervening negligence relates to proximate cause, and the negligence of one party cannot insulate that of another when the injury from the perilous condition created by the acts of the first is reasonably foreseeable and the negligence of the second remains active to the very moment of the injury. *Rouse v. Jones*, 575.

Insulating negligence relates to proximate cause, and in order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party as one of the proximate causes of the injury. *Stockwell v. Brown*, 662.

§ 9. Primary and Secondary Liability.

Where one *tort-feasor* is passively negligent and the other is guilty of positive acts of negligence, both are liable to the person injured if the negligence of each is a contributing cause of the injury, but as between themselves, the party exposed to liability by reason of the active negligence of another may recover of such other under the doctrine of primary and secondary liability, and such defense is germane to plaintiff's cause of action and defendants are entitled to an adjudication of their rights *inter se* in plaintiff's action. *Greene v. Laboratories*, 680.

But primary and secondary liability does not apply when there is an express indemnity by contract between the defendants. *Ibid.*

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance may be asserted only by a plaintiff against the defendant and may not be asserted as between defendants sought to be held liable as joint *tort-feasors*. *Greene v. Laboratories*, 680.

§ 16. Contributory Negligence of Minors.

A child between the ages of 7 and 14 is presumed incapable of contributory negligence, and therefore nonsuit on the ground of contributory negligence of such minor cannot be entered. *Hutchens v. Southard*, 428.

§ 20. Pleadings in Negligence Actions.

One defendant's motion to strike from answer of codefendant allegations setting up contract requiring movant to provide liability insurance and to indemnity first, and alleging cross-action for contribution, held properly allowed. *Greene v. Laboratories*, 680. But allegation of contract showing first defendant's control of premises were properly allowed to stand. *Greene v. Laboratories*, 680.

While, ordinarily, one defendant is entitled to set up primary and secondary liability as to the other, he may not do so when there is an indemnity agreement between them. *Ibid.*

In plaintiff's action to recover for personal injuries received in an automobile accident, defendant asserted that the accident was caused by the negligence of plaintiff driver, had plaintiff's principal joined as a party and sought to recover damages to its vehicle against plaintiff and against the principal under the doctrine of *respondeat superior*. *Held:* Defendant was entitled to file in plaintiff's action the counterclaim against plaintiff and the cross-action against the principal. *Bullard v. Oil Co.*, 756.

NEGLIGENCE—*Continued.*

§ 21. Presumptions and Burden of Proof.

Negligence is not presumed from the mere fact of injury, but plaintiff is required to offer legal evidence tending to establish a failure on the part of the defendant to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances, that such negligent breach of duty produced injury in continuous sequence and without which it would not have occurred, and that a man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Heuay v. Construction Co.*, 252; *Brewer v. Green*, 615.

§ 23. Questions of Law and of Fact.

Whether there is sufficient evidence to support the issue of negligence is a question of law for the court. *Heuay v. Construction Co.*, 252.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

Evidence which raises a mere conjecture or surmise as to the existence of negligence is insufficient to be submitted to the jury. *Heauy v. Construction Co.*, 252.

The existence of negligence and proximate cause may be proved by circumstantial evidence which establishes these factors as a more reasonable probability and not as a mere possibility or conjecture. *Jenkins v. Electric Co.*, 553.

Evidence held insufficient to show negligence in leaving bulldozer unattended on vacant lot. *Herring v. Humphrey*, 741.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit may not be entered on ground of contributory negligence of child under 14 years of age. *Hutchens v. Southard*, 428.

Nonsuit on the ground of contributory negligence may be allowed only if the evidence establishes such contributory negligence as the sole reasonable inference that may be drawn from the evidence. *Hines v. Brown*, 447; *Furr v. Overcash*, 611.

Even though plaintiff's own evidence raises an inference of contributory negligence in certain aspects, nonsuit for contributory negligence may not be allowed unless contributory negligence is established by plaintiff's evidence as the sole reasonable conclusion that may be drawn therefrom. *Peeden v. Tait*, 489.

§ 28. Instructions in Negligence Actions.

Where the court fully charges upon proximate cause, it is not ordinarily required that the court elaborate its definition thereof by charging in regard to insulating negligence unless there is an apt request therefor supported by evidence. *Rouse v. Jones*, 575.

§ 36. Attractive Nuisance and Injury to Children.

The doctrine of attractive nuisance applies only in an action to recover for injury to a child and the doctrine is not a predicate for liability on the part of the owner for injuries resulting when a child sets in motion a dangerous instrumentality which causes damage to the property of a third person. *Herring v. Humphrey*, 741.

NOTICE

§ 1. Necessity for Notice.

An *ex parte* order of the clerk in regard to a drainage district which order is entered without notice to the interested parties is irregular. *In re Drainage District*, 155.

NUISANCE

§ 10. Abatement of Public Nuisances.

If statute providing for confiscation of cattle found on designated portion of Outer Banks after July 1, 1959, is a statute for abatement of a public nuisance, it is unconstitutional as a local statute relating thereto. *Chadwick v. Salter*, 389.

PARENT AND CHILD

§ 1. The Relationship.

The presumption of the legitimacy of a child born during wedlock cannot be refuted by testimony of the wife as to nonaccess of the husband. *S. v. Aldridge*, 297.

§ 5. Right to Custody.

The right of a parent to custody of his child is not absolute and must yield to the welfare of the child, and where a parent neglects the welfare of his child, he waives his usual right of custody. *In re Hughes*, 434.

§ 7. Liability of Parent for Torts of Child.

Ordinarily a parent may not be held liable for a tort committed by his child solely by reason of the relationship. *Grindstaff v. Watts*, 568.

PARTIES

§ 1. Necessary Parties in General.

Demurrer for defect of parties for that the action could be maintained against the defendant only in his representative capacity and for that the complaint failed to allege that the action was brought against defendant in such capacity, cannot be sustained when the entire record discloses that the action was against defendant in such capacity, the complaint being liberally construed. *Lynn v. Clark*, 460.

§ 4. Proper Parties.

In an action against an employer for a negligent injury inflicted by the employee, the employee is a proper but not a necessary party, and when the employee is not made a party originally, later motion to make him a party is addressed to the discretion of the trial court, and the refusal of the motion will not be disturbed on appeal in the absence of abuse of discretion. *Adler v. Curle*, 502.

In an action between two denominational educational corporations to determine which has the right to operate a particular college and control its assets, the Board of Trustees of plaintiff is a proper party, since order authorizing such Board to continue control may be issued, and therefore motion of defendant to dismiss the action as to such Board is properly denied. The Synod controlling defendant is not a necessary party, and therefore motion

PARTIES—*Continued.*

of defendant that it be made a party is addressed to the discretion of the court. *Church v. College*, 717.

§ 8. Joinder of Additional Parties.

In plaintiff's action to recover for personal injuries received in an automobile accident, defendant asserted that the accident was caused by the negligence of plaintiff driver, had plaintiff's principal joined as a party and sought to recover damages to its vehicle against plaintiff and against the principal under the doctrine of *respondeat superior*. *Held:* Defendant was entitled to file in plaintiff's action the counterclaim against plaintiff and the cross-action against the principal. *Bullard v. Oil Co.*, 756.

PENALTIES

A penalty is predicated upon a conviction or prosecution for violation of law, and therefore the statute providing for the confiscation of animals remaining on a portion of the Outer Banks after 1 July 1959 cannot be upheld as providing for a penalty. *Chadwick v. Salter*, 389.

PERJURY

§ 6. Civil Actions for Perjury.

Perjury and subornation of perjury are criminal offenses and a civil action will not lie for such offenses or conspiracy to commit them. *Gillikin v. Springle*, 240.

PLEADINGS

§ 7. Form and Contents of Answer.

The answer should contain an admission or denial of the allegations of the complaint together with the statement of any new matter relied on as an affirmative defense and, in regard to any counterclaim, should allege with the same clearness and conciseness as a complaint the utilimate facts constituting the basis for the demand for affirmative relief. *Construction Co. v. Board of Education*, 311.

A defendant may plead as many defenses as he has, and it is not required that the defenses be consistent with each other. *Greene v. Laboratories*, 681.

§ 8. Counterclaims and Cross-Actions.

One defendant is not entitled to file a cross-action against a co-defendant when such cross-action is independent of, and irrelevant to, the action stated in the complaint. *Greene v. Laboratories*, 680.

Where a permissible counterclaim will survive regardless of the determination of the issues raised by plaintiff's pleading, defendant at his election may assert his claim as a counterclaim or institute a separate action thereupon, but if the determination of the issues arising upon plaintiff's pleading will preclude defendant's claim, defendant must assert the matter, if at all, by counterclaim. *Bullard v. Oil Co.*, 756.

§ 11. Form and Contents of Reply.

A reply must be consistent with the complaint and plaintiff should not be permitted to file a reply which sets-up a cause of action in substitution for and inconsistent with the cause alleged in the complaint. *Nix v. English*, 414.

PLEADINGS—*Continued.*

§ 12. Office and Effect of Demurrer.

Upon demurrer, a pleading will be liberally construed with a view to substantial justice between the parties. *Rudisill v. Hoyle*, 33; *Jacobs v. Highway Com.*, 200; *Lynn v. Clark*, 460; *Rhyne v. Bailey*, 467.

While a demurrer does not admit legal inferences or conclusions of law, it does admit the truth of the factual averments well stated, and all relevant inferences of fact legitimately deducible therefrom. *Coach Lines v. Brotherhood*, 60.

The office of a demurrer is to test the sufficiency of a pleading, admitting for its purpose the truth of the facts alleged in the pleading. *Toomes v. Toomes*, 624.

§ 13. Time of Filing Demurrer and Waiver of Right to Demur.

After answer has been filed, a demurrer on the ground of misjoinder of parties and causes of action cannot be considered unless the answer is withdrawn by leave of court. *Rudisill v. Hoyle*, 33.

§ 15. Defects Appearing on Face of Pleading and "Speaking" Demurrers.

An exhibit attached to and made a part of the complaint may be considered upon demurrer. *Coach Lines v. Brotherhood*, 60.

A demurrer based upon matters *dehors* the pleadings is a "speaking" demurrer and will not be considered. *Elliott v. Goss*, 508.

Where intervenors in partition proceedings alleged that they owned an undivided interest in the land and that such interest had not been divested, demurrer to their pleading should be overruled, even though the assertion of intervenors' title is based upon the invalidity of the former decree entered in the proceedings because of the want of proper confirmation and want of service of summons on intervenors, since whether the validity of the prior decree could be thus attacked is not prevented by the demurrer, the judgment roll being referred to but not made a part of the pleading. *Toomes v. Toomes*, 624.

A demurrer based upon facts not appearing upon the face of the pleading is a speaking demurrer, and if the matter *dehors* conflicts with the facts alleged the demurrer must be resolved on the basis of the pleading, without considering the extraneous matters. *Ibid.*

§ 18. Demurrer for Defect of Parties or for Misjoinder of Parties and Causes.

Objection on the ground of misjoinder of parties and causes of action or on the ground of defect of parties must be raised by demurrer, and an attempt to raise the question in the prayer for relief contained in the answer may be disregarded. *Rudisill v. Hoyle*, 33.

Where the entire record discloses that the action was against the defendant in his representative and not his individual capacity, the caption denominating defendant the administrator for a named person and the complaint alleging that the named defendant's intestate died a resident of a specified county, the action is to be taken as one against the defendant in his representative capacity even though there is no expressed or specific averment thereof, and demurrer for defect of parties should be overruled. *Lynn v. Clark*, 460.

§ 19. Demurrer for Failure to State Cause of Action.

A demurrer to a pleading setting forth a defective statement of a good

cause of action may not be allowed prior to the expiration of the time for obtaining leave to amend. *Jacobs v. Highway Com.*, 200; *Gillikin v. Springle*, 240; *Smith v. Trust Co.*, 588.

But when the complaint is insufficient to state any cause of action, the action should be dismissed upon demurrer. *Gillikin v. Springle*, 240.

§ 25. Amendment of Pleadings.

The trial court has almost unlimited authority to permit amendments to pleadings, both before and after judgment. *Caestevens v. Membership Corp.*, 746.

§ 28. Variance between Proof and Allegation.

Plaintiff may recover only upon the case made out by his pleadings. *Buick Co. v. Motors Corp.*, 117; *Smith v. Trust Co.*, 588; *Mason v. Brevoort*, 619.

Allegation citing inapposite statute is not a fatal variance. *Rhyne v. Bailey*, 467.

§ 30. Motions for Judgment on the Pleadings.

An action should not be dismissed upon demurrer or judgment on the pleadings allowed in favor of defendant if the allegations of the complaint are sufficient to constitute a defective statement of a good cause of action, since in such instance plaintiff should be allowed to amend, but the action may be dismissed when the complaint fails to state any cause of action entitling plaintiff to relief. *Gillikin v. Springle*, 240.

The Superior Court is not required to specify the reasons for allowing motion for judgment on the pleadings, but on appeal the Supreme Court must examine the record to ascertain if there is error in the judgment appealed from. *Ibid.*

§ 34. Motions to Strike.

Where the answer contains allegations of evidentiary matter, conclusion and argument, an order striking much of the detail from the answer proper and all of the counterclaim, including material allegations, will not be disturbed on appeal when the order also allows defendant further pleading both as to the answer proper and the counterclaim. *Construction Co. v. Board of Education*, 311.

One defendant's motion to strike from answer of codefendant allegations setting up contract requiring movant to provide liability insurance and to indemnity first, and alleging cross-action for contribution, held properly allowed. *Greene v. Laboratories*, 680. But allegation of contract showing first defendant's control of premises were properly allowed to stand. *Greene v. Laboratories*, 680.

After one Superior Court judge has denied motion to strike, another judge may not allow motion to strike identical matter from awarded pleading. *Greene v. Laboratories*, 681.

POISON

§ 2. Prosecutions for Violating Statutes Relating to Poisons.

A bill of indictment under G.S. 14-329 which fails to charge that the spirituous liquors manufactured, sold, or dealt out by defendant were to be used as a drink or beverage, is fatally defective. Further, averment that the whiskey contained "foreign properties or poisonous ingredients to the human

POISON—*Continued.*

system" is defective, the proper charge being that the whiskey contained "foreign properties or ingredients poisonous to the human system." *S. v. Barefoot*, 308.

PRINCIPAL AND SURETY

§ 2. Liability or Surety Bonds in General.

If the principal is not liable in damages for the alleged malfeasance, the surety may not be held liable therefor. *Gillikin v. Guaranty Co.*, 247.

PROCESS

§ 9. Service by Publication.

Defects in the application for service of process by publication and in the order directing publication are rendered immaterial when the guardian *ad litem* for the minors sought to be served, appears and defends the action. *Menzel v. Menzel*, 353.

§ 18. Service on Foreign Corporation by Service on Secretary of State.

The mere fact that a foreign corporation was the manufacturer of an implement which caused injury to a resident of this State because of alleged defect or absence of safety device, is alone insufficient predicate for service of process upon such corporation under G.S. 55-145 (a) (3) (4), the implement having been purchased by a resident of this State from an independent contractor and distributor of another State. *Moss v. Winston-Salem*, 480.

PUBLIC OFFICERS

§ 1. Officers which are Public Officers.

Coroners are public officers. *Gillikin v. Guaranty Co.*, 247.

§ 7. De Facto Officers.

If a statute creating a public office is unconstitutional, persons purporting to fill the offices therein created are not public officers, either *de jure* or *de facto*, and therefore their right to hold the office cannot be adjudicated prior to the determination of the constitutionality of the statute. *Carringer v. Alverson*, 204.

§ 9. Civil Liability.

A public officer may not be held civilly liable for the manner in which he performs his official duties. *Gillikin v. Guaranty Co.*, 247.

PUBLIC WELFARE

An old age assistance lien is required to be recorded, and indexing is part of the registration; but an error as to the page of the book where the lien is recorded is not a fatal defect in the registration, the name of the lienor and the book in which recorded being correct. *Cuthrell v. Camden County*, 181.

QUIETING TITLE

§ 2. Proceedings to Quiet Title.

The introduction by plaintiff of a deed executed by the common source

QUIETING TITLE—*Continued.*

of title to a stranger, for the purpose of attack, does not, as against plaintiff, establish the truth of the recital in the deed of a valuable consideration, since such recital as to plaintiff is *res inter alios acta. Waters v. Pittman*, 191.

Plaintiff introduced in evidence a prior executed, but subsequently recorded, deed to herself and, for the purpose of attack, a subsequently executed but prior registered deed from the same grantor to defendants' predecessor in title. *Held:* Plaintiff's evidence establishing a prior deed from the common source makes out a *prima facie* case and the burden is upon defendants to establish that the subsequently executed deed was supported by valuable consideration so as to bring the instrument within the protection of the registration laws, and therefore it was error to nonsuit plaintiff's action to remove defendants' claim as a cloud in title. *Ibid.*

RAILROADS

§ 4. Accidents at Crossings.

At a crossing of four railroad tracks with a much traveled street in a populous city both the railroad company and the motorists using the crossing are required to use that degree of vigilance which is in proportion to the known danger of the hazardous crossing. *Jarrett v. R. R.*, 493.

Evidence held for jury on issues of negligence and contributory negligence in this action to recover for crossing accident. *Ibid.*

RAPE

§ 8. Carnal Knowledge of Female Under Twelve.

In a prosecution for carnal knowledge of a female child under the age of 12 years, neither force nor lack of consent need be alleged or proven, and evidence in this case is held abundantly sufficient to take the case to the jury and to support the verdict of rape within the purview of G.S. 14-21. *S. v. Strickland*, 658.

RECEIVING STOLEN GOODS

§ 1. Elements of the Offense.

That the value of stolen goods received with knowledge by defendant exceeded one hundred dollars is an essential element of the offense proscribed by G.S. 14-71. *S. v. Tessnear*, 211.

§ 3. Indictment.

The crime of receiving stolen goods is not one in which time is of the essence, and the failure of the indictment to aver the date the offense was committed is not fatal. *S. v. Tessnear*, 211.

§ 6. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that a defendant bought goods from persons responsible for the larceny of the goods, that at that time defendant made a remark inferring defendant's knowledge that the goods had been stolen, and that the value of the goods stolen was in excess of one hundred dollars is sufficient to be submitted to the jury in a prosecution under G.S. 14-71. *S. v. Tessnear*, 211.

RECEIVING STOLEN GOODS—*Continued.*

§ 7. Instructions.

In a prosecution for feloniously receiving stolen goods with knowledge that they had been stolen, the court must charge the jury that it must find beyond a reasonable doubt that the goods were of value in excess of one hundred dollars to support a verdict of guilty, particularly when the record fails to disclose that any of the goods were found in defendant's possession or that all of the goods stolen were received by defendant. *S. v. Tessnear*, 211.

REFERENCE

§ 3. Compulsory Reference.

In an action against a personal representative for an accounting, the trial court has authority to order a compulsory reference, a long and complicated account being involved. *Rudisill v. Hoyle*, 33.

A compulsory reference may be ordered in an action involving a course of dealing and accounting between the parties for a long period of time. *Caudell v. Blair*, 438.

§ 4. Pleas in Bar.

Where pleas in bar to plaintiff's demand for an accounting are determined adversely to defendant's demurrer, the court may proceed to order a compulsory reference, notwithstanding defendant's plea that he had made a final settlement, since this is not a plea in bar preventing a compulsory reference. *Rudisill v. Hoyle*, 33.

§ 13. Review of Referee's Report.

Upon the hearing on appeal from the report of a referee, the trial court may affirm, overrule, modify, or make different or additional findings of fact, and such action by the judge is not ground for exception unless there is error in receiving or rejecting evidence or the findings of the court are not supported by evidence. *Caudell v. Blair*, 438.

REGISTRATION

§ 1. Instruments Which May or Must be Recorded.

Both a deed of trust and an old age assistance lien are required by law to be recorded. *Cuthrell v. Camden County*, 181.

§ 2. Requisites and Sufficiency of Registration.

An instrument is not properly registered until it has been properly indexed. G.S. 161-22. *Cuthrell v. Camden County*, 181.

Where the wife, by survivorship, acquires sole ownership of lands theretofore held by the entireties, the indexing of a mortgage thereon, executed by herself and children, in the name of one of the children "et al." constitutes an effectual registration. *Ibid.*

Old age assistance liens should be indexed in the names of lienees, alphabetically, and the indexing should refer to the books and pages at which the liens are recorded, G.S. 108-30.1, G.S. 161-22, G.S. 2-42. *Ibid.*

The purpose of registering instruments and their indexing is to give notice, and parties will be held to notice of all matters which would have been discovered by a reasonably prudent examiner from an inspection of the records themselves. *Ibid.*

REGISTRATION—*Continued.*

In this case, the old age assistance lien was properly indexed in the name of the lienee, and the index referred to the proper lien book, but erroneously referred to page 120 of the book whereas the lien actually appeared on page 117. *Held:* The index was sufficient to give notice *Ibid.*

§ 3. Priorities.

A prior registered deed of trust was ineffectually indexed and the defect in the indexing was not cured until after the effective registration of the County's lien for old age assistance. *Held:* The lien for old age assistance has priority. *Cuthrell v. Camden County*, 181.

§ 5b. Purchasers for Value.

The burden is upon the parties claiming under a prior registered instrument to show that they are purchases for value so as to bring themselves within the protection of the registration laws. *Waters v. Pittman*, 191.

REFORMATION OF INSTRUMENTS

§ 10. Sufficiency of Evidence and Nonsuit.

Where plaintiff grantor's evidence tends to show that the reservation to himself of the timber upon the land conveyed was inserted by the draftsman in conformity with his instructions and that he read the reservation and approved it before he executed the deed, the evidence fails to establish a cause of action in grantor's behalf to reform the reservation either as to the extent of the boundary or the size of the timber to be reserved. *Mason v. Brevoort*, 619.

A deed may be reformed only for the mutual mistake of the parties or the mistake of one party induced by the fraud of the other, and the instrument may not be reformed merely because the language knowingly employed fails to express the intent of one of the parties when the mistake as to the purport of the language is not induced by the fraud of the other party. *Ibid.*

RELIGIOUS SOCIETIES

§ 2. Property, Government and Officers.

The Superior Court has jurisdiction of an action instituted by the governing authorities of a congregational church for an injunction upon allegations that at a regular annual meeting of the congregation, held after due notice in accordance with the customs and practices of the church, a majority of the members of the congregation had voted not to re-employ defendant as pastor for the ensuing year, and that defendant had thereafter appeared and disrupted orderly services by attempting to continue to act as the church's pastor, and had stated in his intentions to continue to do so. *Collins v. Simms*, 148.

Where the verified complaint in an action by the governing authorities of a congregational church alleges facts entitling plaintiffs to enjoin defendant from continuing to assert his right to act as pastor of the church after the expiration of his term, a judgment not only restraining defendant from continuing to attempt to act as pastor but further enjoining defendant from appearing at the church or going upon the church grounds, is in excess of the relief to which plaintiffs are entitled upon the facts alleged. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Necessity for Warrant.

Where officers, pursuing a speeding defendant, continue to pursue on foot after defendant had abandoned his car, apprehend defendant and return him to his car, where an officer smells some intoxicating beverage, and upon shining his light into the car, sees cases of liquor between the back seat, which had been pulled forward, and the "boot" of the car, the officers have a right to seize the liquor without a warrant, and the evidence obtained thereby is competent. *S. v. Giles*, 499.

STATE

§ 3a. Claims against the State.

An act to declare unconstitutional G.S. 105-228.5, levying a tax on certain contracts of insurance, and G.S. 118-18 *et seq.*, establishing the North Carolina Firemen's Pension Fund, and to prevent the collection of the tax and forestall expenditure by the Trustees of Funds made available by the tax, *is held* a suit against the State, since the act is to prevent a State official and agency from performing official duties. *Ins. Co. v. Gold*, 168.

The State is immune to suit except in instances in which it has expressly consented to be sued, and in those instances the statutory procedure authorizing suit must be followed and the remedies therein authorized are exclusive. *Ibid.*

STATUTES

§ 2. Constitutional Restrictions on Passage of Local Acts.

The statute authorizing the creation of municipal housing authorities is a statute relating to health and sanitation, G.S. 157-2, within the purview of Article II, § 29 of the State Constitution. *Carringer v. Alverson*, 204.

The provisions of Chapter 782, S.L. 1959, confiscating cattle and other designated animals remaining upon the designated area of the Outer Banks after July 1, 1959, may not be upheld as providing for a penalty or forfeiture since the seizure of animals designated in the statute is not predicated upon conviction or prosecution for violation of any law, and if the statute provides for confiscation to abate a public nuisance, it relates solely to a designated segment of the Outer Banks and is therefore void as a local act relating to the abatemnt of a public nuisance. *Chadwick v. Salter*, 389.

The statutory provisions for the trial of actions for small claims in the Superior Court without a jury, unless jury trial is demanded pursuant to the procedure therein provided, is not a special act relating to the establishment of courts inferior to the Superior Court, and is valid. Constitution of North Carolina, Art. 2 § 29. *Rhyne v. Bailey*, 467.

In regard to the limitations prescribed by Art. II, Sec. 29 of the Constitution of North Carolina, all statutes dealing with the subjects specified must be classified either as local, private, or special acts, which are void, or general laws, which the General Assembly has power to pass. *McIntyre v. Clarkson*, 510.

The test of whether a statute is local or general is not the amount of territory to which it applies, but whether it is of general state-wide applicaion as to all persons and localities coming within prescribed classifications, since the Constitution does not prohibit the Legislature from prescribing classifications provided such classifications are based upon rational differences

STATUTES—*Continued.*

of need, population, situation, or condition, and the statute operates uniformly as to all persons, things, or localities coming within each particular classification. *Ibid.*

A statute applicable only to a specified locality or localities will not be held to contravene Art. II, Sec. 29 of the State Constitution if the statute merely supplements general laws on the subject, or offers aid in administering or financing policies established by general law, especially when the administrative unit is local in nature. *Ibid.*

G.S. 7, Art. 14A authorizing certain counties to adopt its machinery for the appointment, tenure, and payment of justices of the peace is indivisible, since all of its provisions depend upon the exclusive power of appointment therein provided. *Ibid.*

G.S. 7, Art. 14A, is a local statute relating to the appointment of justices of the peace proscribed by Art. II, Sec. 29 of the Constitution, since the statute exempts from its coverage a large number of counties without any real or logical basis of classification either as to need, population, topography or otherwise. *Ibid.*

§ 4. Procedure to Text Validity.

A taxpayer may test by injunction the constitutionality of a statute relating to the appointment of and payment of compensation to justices of the peace in the county, since such statute involves the expenditure of public funds and also relates to an office which affects the business and social life of each citizen of the county. *McIntyre v. Clarkson*, 510.

See, also, Constitutional Law.

§ 5b. Administrative Interpretation.

The interpretation placed upon a statute by the officer or agency charged with its administration will be given due consideration by the courts, although if the administrative interpretation is in conflict with that of the courts, the latter will prevail. *Faizan v. Ins. Co.*, 47.

§ 5d. Statutes in Pari Materia.

Statutes dealing with the same subject matter must be construed together and harmonize to give effect to all the provisions of each, if possible, and the whole construed to ascertain the legislative intent. *Coach Lines v. Brotherhood*, 60.

TAXATION

§ 1a. Power to Tax in General.

The power to tax is limited only by constitutional restrictions. *Finance Co. v. Currie*, 129.

A tax statute which meets the requirement of uniformity imposed by the State Constitution meets the requirements of the Fourteenth Amendment to the Federal Constitution. *Ibid.*

§ 1c. Classification of Business, Trades and Professions for Taxation.

The constitutional requirement of uniformity in taxation extends not only to property taxes but also to license, franchise, and other forms of taxation. Constitution of N. C., Art. V § 3. *Finance Co. v. Currie*, 129.

The formulation of classifications for taxation and the determination of the amount of taxes each class should bear are matters of public policy with-

in the exclusive province of the Legislature, and the courts have the duty to determine only whether the classifications set up by statute are based upon differences in fact. *Ibid.*

While classifications based solely on nomenclature can not be allowed to stand, the courts are not required to treat things which are different in fact as the same in law. *Ibid.*

The imposition of taxes on installment paper dealers, G.S. 105-83 (a) (b) is not rendered discriminatory by the exemption from the tax of corporations organized under the State or national banking laws, G.S. 105-83 (d), even though banks, in addition to their regular banking business, carry on the identical business of discounting commercial paper, since the two businesses are distinct in fact and the one is subject to regulations and controls which are not applicable to the other. *Ibid.*

§ 5. Public Purpose.

Taxes may be levied only for a public purpose, and a public purpose is one for the support of the government or for any of the recognized objectives of government. Constitution of North Carolina, Article V, § 3. *Morgan v. Spindale*, 304.

A municipality may issue its bonds with approval of its voters to provide funds to aid in the construction of an armory, since the mobilization and training of a state militia is for a public purpose for which a municipality may be called upon to contribute. *Ibid.*

Where municipal bonds are issued to provide funds to aid in the construction of a facility to be used for the public purposes of an armory and the training of the municipality's law enforcement officers and for a public meeting place, the fact that the facility is to be constructed some half mile outside the municipality's corporate limits and the fact that the land is to revert to the county if it should cease to be used for an armory, do not affect the public character of the purposes for which the bonds are issued. *Ibid.*

§ 29. Levy and Assessment of Income Taxes.

In allocating for taxation by this State a part of the net income of a unitary business operating in several states, a statutory formula that results in an approximation rather than precision is sufficient in view of the administrative impossibility of allocating specifically the profits earned from the business within the State. *Power Co. v. Currie*, 17.

The formula used for fixing the rates which a unitary utility operating in several states may charge its customers in this state, and the formula used in allocating for income tax purposes the income of such utility from its operations within this State, relate to entirely different matters involving different factors, and the formula for rate making purposes is not material in determining the fairness of the formula used in the allocation of income. *Ibid.*

In allocating for taxation by this State a part of the net income of a unitary business operating in this State and several other states, it is not required that its equipment appropriately employed in this State be equally productive with that employed in the other states, but the mutual dependency of the interrelated activities in furtherance of the entire business sustains an appointment formula which results in a reasonable approximation of its income earned here, it being required only that the formula not be intrinsically arbitrary or produce an unreasonable result. *Ibid.*

TAXATION—*Continued.*

G.S. 105-147 (18) limiting the right of a nonresident taxpayer, in computing his net income taxable by this State, to claim only those deductions which are related to his business in this State, is valid and does not constitute an unlawful discrimination in that residents of this State are permitted personal deductions not allowed to the nonresident, since only the income of the nonresident earned within this State is subject to income taxes here. Article IV, § 2 and the Fourteenth Amendment to the Federal Constitution. *Stiles v. Currie*, 197.

§ 30½. Assessment of Intangibles Taxes.

The fact that a distributee of an estate is a nonresident does not warrant the exemption of a proportionate part of the intangibles of the estate from the State intangibles tax when the will does not bequeath the nonresident any specific property or set up a trust, since in such event the executor neither holds nor controls any specific intangible property for the benefit of such nonresident. *Allen v. Currie*, 636.

§ 38c. Actions to Recover Tax Paid Under Protest.

In an action by a corporation operating a unitary business in several states to recover a part of income tax paid by it to this State on the ground that the formula used in ascertaining its income attributable to its business in this State resulted in excessive taxation, the burden is on the corporation to show by clear and cogent evidence that the formula used resulted in excessive taxation. *Power Co. v. Currie*, 17.

Parties subject to the tax on certain insurance policies levied by G.S. 105-228.5 may not maintain an action to have the statute declared unconstitutional, the statutory remedy of recovery of the tax after payment under protest being exclusive. *Ins. Co. v. Gold*, 168.

TORTS

§ 5. Liabilities of Tort Feasors to Person Injured.

A person is entitled to but one recovery for his damages sustained as the result of a single wrong, regardless of the number of persons from whom he is entitled to recover for the tort. *Ramsey v. Camp*, 443.

§ 6. Joinder of Tort-Feasors for Contribution.

Where the original defendant settles the controversy between it and plaintiff by compromise judgment, and irrevocably assigns the judgment to a trustee to prosecute the action against the additional defendant for contribution, there is no case in court in which the claim for contribution in the name of the original defendant against the additional defendant may be prosecuted. *Jones v. Aircraft Co.*, 323.

In an action against two defendants to recover for negligent injury, it is not error for the court to strike from the answer of one defendant allegations that the other had the last clear chance and that therefore its negligent acts were the sole proximate cause of the injury. *Greene v. Laboratories*, 680.

Where there is an express contract between defendants that one should indemnify the other for any loss or damages arising out of the performance of the contract, the express contract precludes the application of the doctrine of primary and secondary liability, which is predicated upon an implied contract. *Ibid.*

Where plaintiff alleges that both defendants were actively negligent, neither is entitled to indemnity from the other, and the doctrine of primary and secondary liability does not arise, nor is the doctrine applicable when one defendant alleges sole responsibility on the part of his co-defendant, and in such instance order striking from the answer of one defendant allegations of primary and secondary liability will not be disturbed. *Ibid.*

Where plaintiff elects to sue both joint *tort-feasors* and alleges active negligence on the part of both which concurred in producing the injury, each is entitled to contribution from the other if there is a judgment of joint and several liability against them, but during the course of the trial each is a defendant as to the plaintiff only, and neither may preclude the dismissal of the action against the other if plaintiff fails to make out a *prima facie* case against the other, and allegations and prayer for contribution contained in the answer of one are properly striken on motion of the other. *Ibid.*

§ 9. Effect of Covenant not to Sue.

While a covenant not to sue procured by one of the persons liable for a tortious injury, as distinguished from a release from liability, does not release other persons liable for the tort, the remaining tort-feasors are entitled to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured person. *Ramsey v. Camp*, 443.

Parties against whom judgment is obtained for a wrong are entitled, upon motion at any time prior to execution upon the judgment, to have the judgment credited with a sum theretofore paid by another as consideration for a covenant not to sue such other for the same tort. *Ibid.*

The fact that the person who procures a covenant not to sue is found by the jury not to be a joint *tort-feasor* does not defeat the right of those against whom judgment is later rendered for the same tort to have the amount paid for the covenant credited to the judgment. *Ibid.*

TRESPASS

§ 9. Criminal Trespass.

The operator of a privately owned department store has the right to discriminate on the basis of race as to those he will serve at the lunch counter in such store, and a Negro who, with knowledge of the policy of the store not to serve Negroes at the lunch counter, seats himself at the lunch counter and refuses to leave after request, is guilty of trespass. *S. v. Fox*, 97.

TRIAL

§ 4. Time of Trial and Continuance.

Where, after denial of respondent's motion for continuance, both parties introduced evidence by affidavit without objection by either, and it appears that the evidence presented was adequate for the adjudication of the controversy, and there is nothing in the record to show that either party was deprived of adequate opportunity of presenting any evidence which he might wish to offer, the record fails to show that the refusal of the motion for continuance was arbitrary, and the discretionary refusal of the motion will not be disturbed. *In re Orr*, 723.

§ 22. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the evidence is to be considered in the light most

favorable to plaintiff, giving plaintiff the benefit of every reasonable inference therefrom. *Pridgen v. Uzzell*, 292; *Hutchens v. Southard*, 428; *Rhyne v. Bailey*, 467; *Peeden v. Tait*, 489; *Jarrett v. R. R.*, 493; *Rouse v. Jones*, 575.

Discrepancies and contradictions, even in plaintiffs evidence, are to be resolved by the jury, and do not justify nonsuit. *Rhyne v. Bailey*, 467.

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence which is favorable to plaintiff or which tends to clarify and explain plaintiff's evidence must also be considered, but defendant's evidence which is in conflict with that of plaintiff or which tends to contradict or impeach plaintiff's evidence is not to be considered. *Jenkins v. Electric Co.*, 553.

The rule that evidence offered by defendant which is favorable to plaintiff should be considered in determining whether plaintiff should be nonsuited is limited to such evidence offered by defendant which is relevant to the allegations in plaintiff's pleadings, and defendant's evidence favorable to plaintiff cannot warrant recovery on a theory of liability entirely foreign to plaintiff's allegations. *Nix v. English*, 414.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

In order to be sufficient to be submitted to the jury, plaintiff's evidence must take the case out of the realm of conjecture and into the field of legitimate inference from established facts. *Johnson v. Fox*, 454.

While the evidence must be considered in the light most favorable to plaintiff on defendant's motion to nonsuit, when the evidence, so considered, is insufficient to support the cause of action alleged in the complaint, judgment of nonsuit will be upheld. *Brewer v. Green*, 615.

§ 26. Time of Rendition of Judgment of Nonsuit.

When defendant pleads an affirmative defense, nonsuit may not ordinarily be entered until all the evidence has been introduced, but when defendant admits plaintiff's *prima facie* case, and plaintiff admits the facts constituting defendant's affirmative defense but pleads estoppel of defendant to assert such defense, the burden is on plaintiff to prove the estoppel, and upon failure of such proof, nonsuit is proper. *Jones v. Construction Co.*, 407.

§ 29. Directed Verdict in Favor of Party Having Burden of Proof.

A directed verdict may not be given in favor of the party having the burden of proof, even though such party's evidence is uncontradicted, since the weight and cerdibility of the evidence is for the jury, but in proper cases the court may give a peremptory instruction upon an affirmative defense, upon apt request, when the evidence in regard thereto is uncontradicted. *Rhinehardt v. Ins. Co.*, 671.

§ 31b. Instructions — Declaration and Explanation of Law Arising on Evidence.

Charge held for error in failing to explain law arising upon defendant's evidence. *Byrnes v. Ryck*, 496.

§ 31f. Instructions — Statement of Contentions.

It is error for the court to submit a contention of a party to the jury and permit a finding favorable to the party upon such contention when there is no evidence in the record to support the contention. *Green v. Barker*, 603.

TRIAL—*Continued.*

§ 53½. Trial by Court upon Stipulations.

Where the parties agree that the court may rule upon the legal effect of stipulated documentary evidence, the court has no authority to make additional findings of fact unless authorized by the stipulations, but the court's statements as to the legal effect of the instruments are conclusions of law and not findings of fact. *Rutherford v. Harrison*, 236.

TRUSTS

§ 5b. Transactions Creating Constructive Trusts.

A grantor may not establish a parol trust upon his deed conveying the absolute title. *Willetts v. Willetts*, 136.

A parol trust may not be set up in favor of the grantor in a deed absolute in form upon allegations that at the time of the execution of the instrument the grantor was indebted to a third person and conveyed the land to the grantee under an agreement that the grantee would borrow money with which to discharge the debt and reconvey to the grantor subject to the mortgage after the prior debt had been satisfied. *Ibid.*

UTILITIES COMMISSION

§ 1. Nature and Functions of Commission in General.

The purpose of regulation of public utilities is to protect the interest of the public to the end that adequate service is provided at reasonable rates, and in fixing such rates the Utilities Commission must be fair to both the producer and to the consumer. *Utilities Com. v. Gas Co.*, 536.

§ 2. Jurisdiction.

The Utilities Commission has jurisdiction upon complaint or *ex mero motu* to determine whether any motor carrier is operating in violation of statutory regulations, including whether or not a carrier exempt from its jurisdiction is actually operating within the exemptive provisions of the statute and, if not, to enter orders to enforce compliance. *Utilities Com. v. McKinnon*, 1.

The Utilities Commission has no authority over charter trips for school athletic events by intracity carrier. *Ibid.*

Any carrier whose operations are adversely affected by operations of another carrier in violation of law may institute an action in the Superior Court against such carrier. *Ibid.*

The Utilities Commission has power to require all transportation companies to establish and maintain all such public service facilities and conveniences as may be reasonable and just, G.S. 62-39, and a public service corporation has no legal right to discontinue an established service without authorization from the Commission. *Utilities Com. v. R. R.*, 73.

§ 3. Hearings and Orders.

The Utilities Commission should not reverse its interpretation of a statute, adhered to over a long period of years, unless it clearly appears that its original interpretation was in error. Whether the statute should be amended is a legislative and not a judicial question. *Utilities Com. v. McKinnon*, 1.

The denial of a petition of a carrier to be allowed to discontinue passenger service between designated points does not preclude it from thereafter pe-

titioning for like relief on the basis of its later experience in subsequent operations. *Utilities Com. v. R. R.*, 73.

In fixing the rate for a public utility, the Utilities Commission must first ascertain the value of the property used in providing the service, and it may then calculate the rate which will produce a fair return upon such rate base. *Utilities Com. v. Gas Co.*, 536.

In determining the value of the investment of a utility used in providing its services, the Utilities Commission must take into consideration replacement costs in order to determine the present value of the utility's facilities, and evidence of such trended costs deserves weight in proportion to the accuracy of the tests and their intelligent application. *Ibid.*

Where a utility introduces expert testimony as to replacement costs of its facilities based upon charts and indexes of other utilities of like classification in the same territory, the Utilities Commission must weigh such testimony in the light of the accuracy of the tests and their intelligent application, and it is error of law for the Commission to disregard such evidence or give it only a minimal consideration. *Ibid.*

It is error for the Utilities Commission to apply the national average of promotional costs as conclusive in determining the reasonableness or excessiveness of promotional expenditures by a gas company when the evidence discloses that the company had recently changed over from manufactured to natural gas and was in the process of expanding its facilities into new territory in competition with electricity and oil. *Ibid.*

Where a utility is currently investing large amounts of capital in expansion, the Utility Commission should determine the capital invested as of the time the rates fixed by it are to be effective, rather than the average net investment of the utility for the entire test year, since the rates fixed are prospective. *Ibid.*

In fixing the rate of a public utility, the Utilities Commission should find the fair value of the utility's facilities, its operating expenditures, including capital consumed, and should fix such rate of return on the investment as will enable the utility to pay a fair profit to its stockholders and to maintain and expand the facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise. *Ibid.*

Rule No. 9 of the Utilities Commission renders a carrier's failure, for a period of 30 days or longer, to provide an authorized service cause for cancellation of the right to furnish such service, but the rule is not self-executing, and where the controversy before the Commission is whether a carrier was authorized to provide through service between designated points by tacking previous authorities, and the Commission fails to determine the controversy because of its holding that the carrier had lost the authority by non-user, the cause must be remanded to the Commission. *Utilities Com. v. Coach Co.*, 668.

The reasonableness of classifications of customers of a utility depends upon a number of factors, such as quantity of energy used, the time of use, the manner of service, and the equipment which the utility must provide and maintain in order to take care of the requirements of a particular class of customers. *Utilities Com. v. Gas. Co.*, 734.

The fact that coin-operated washers and dryers in launderettes are substantially the same as those used in residences has no bearing upon whether this class of customers should be given the same rates as residential users or should be given rates other than the usual commercial classification, and a

classification of the Utilities Commission based upon evidence of such similarity of equipment is not supported by substantial and material evidence. *Ibid.*

Variances in the day to day use of gas by a particular classification of customers and the time of day when such customers consume their peak load may be sufficient in some instances to affect rates to such customers, since a utility must invest sufficient capital in plant and equipment to meet the peak demands. *Ibid.*

A utility must make no unreasonable discrimination in rates between customers receiving the same kind and degree of service. *Ibid.*

The fact that customers of a launderette participate by inserting coins in its washing and drying machines is immaterial to, and constitutes no basis for, a classification of such commercial users distinct from other commercial customers of the utility. *Ibid.*

Rates of different utilities are not competent or material in fixing the rates of another utility in the absence of evidence showing the comparative costs and conditions under which the respective utilities operate. *Ibid.*

§ 5. Appeal and Review.

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is *prima facie* just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. *Utilities Com. v. R. R.*, 73.

Order denying petition to abandon service between designated points, affirmed. *Utilities Com. v. Coach Co.*, 319.

Where the Utilities Commission fixes the rate base of a utility on the basis of original acquisition cost alone, without taking into consideration replacement costs or capital invested in new construction, the findings of the Commission as to the value of the property used in providing the service is not supported by competent, material and substantial evidence. *Utilities Com. v. Gas. Co.*, 536.

Where the Utilities Commission has determined a cause before it under a misapprehension of the applicable law, the cause must be remanded to the Commission for further consideration. *Utilities Com. v. Coach Co.*, 668.

Where an order of the Utilities Commission granting complainants a reduction in rates must be reversed because findings of the Utilities Commission are not supported by competent, material, and substantial evidence, the remand to the Commission should not ordinarily direct dismissal, but the Commission should be allowed to hear additional evidence in order to determine in the manner provided by law whether there is any unfair or unjust discrimination in the rates charged complainants. *Utilities Com. v. Gas Co.*, 734.

VENUE

§ 1. Nature of Venue.

Venue is not jurisdictional since the Superior Court is a Court having state-wide jurisdiction, and venue may be waived or changed by consent of the parties, express or implied. *Casstevens v. Membership Corp.*, 746.

VENUE—*Continued.*

§ 2a. Actions Involving Realty.

In an action on contract, an amendment which seeks to have plaintiff's claim declared a lien upon realty of defendant and the realty sold to satisfy the claim, constitutes the action on involving realty, and defendant is entitled to removal to the county in which the realty is situated upon his motion made in apt time. *Casstevens v. Membership Corp.*, 746.

§ 3. Waiver.

A motion for change of venue made before expiration of time for filing answer is made in apt time, and when the cause is one which is triable in another county under provisions of statute, the right to removal is a substantial right. *Casstevens v. Membership Corp.*, 746.

Plaintiff's complaint as amended stated a cause *ex contractu* and demanded that the recovery be declared a lien on defendant's realty. Defendant moved for change of venue from the county of plaintiff's residence to the county in which the land is situate. Plaintiff moved to strike from his complaint the allegations upon which he demanded the lien. The parties agreed that both motions be heard at the same time. *Held:* The agreement for hearing the motions together waived defendant's right to have the motion to remove heard first, and upon the allowance of plaintiff's motion to amend the action was no longer subject to removal. *Ibid.*

WAIVER

§ 2. Acts Constituting Waiver.

Waiver is the intentional relinquishment of a known right, and a party may not be held to have waived a matter of which he had no knowledge. *Jones v. Ins. Co.*, 407.

WILLS

§ 6. Signature of Testator.

Where a will is written on two separate sheets, it is not required that the sheets be physically attached or that the signature of the testator appear on each sheet, and if the signature of testator appears on the second page, it is sufficient, G.S. 31-3.3. *In re Will of Sessoms*, 369.

§ 17. Nature Caveat Proceedings.

A caveat is a proceeding *in rem*, and the will and not the property devised is the *res*. *In re Will of Cox*, 90.

§ 25. Instructions in Caveat Proceedings.

Where the evidence tends to show that the paper writing probated consisted of two sheets of paper, that the typewritten words thereon were typed at three separate times, but there is testimony that the instrument offered for probate was the paper which was witnessed and signed as a will in the presence of the witness, and that the same two pages were stapled together when delivered to the clerk for probate, there is sufficient credible proof of the identity of the sheets as one will, and it is not required that the court instruct the jury upon the rules of physical attachment or identification as one instrument by internal sense of coherence. *In re Will of Sessoms*, 369.

Where there is no evidence tending to show any alterations in the dispositive parts of the instrument offered for probate, the only material al-

teration being in the designation of the executor prior to the execution of the instrument by the testator, it is not prejudicial for the court to fail to charge on the principle of law in regard to alterations. *Ibid.*

The charge of the court in this case is held to have stated caveators' evidence in detail and to have instructed the jury upon what circumstances the issue should be answered in the negative, and caveators' contention that the jury was not given an opportunity to make a finding favorable to them is untenable. *Ibid.*

§ 26. Issues in Caveat Proceedings.

Where the only contention is as to whether the paper writing propounded was executed according to the formalities required by law, the answer of the jury to the issue directed to this question determines the answer to the issue as to whether the paper writing is a valid will, and the court properly instructs the jury that if they answer the first issue in the affirmative they should answer the second issue in the affirmative also, and that if they answer the first issue in the negative, the second issue should also be answered in the negative. *In re Will of Sessoms*, 369.

§ 30½. Validity and Attack of Decree in Caveat Proceedings.

Judgment probating a will in solemn form is a judicial decree and is binding and conclusive like any other judgment, and may be set aside only on the grounds and in accordance with the procedure applicable to the setting aside of judgments generally. *In re Will of Cox*, 90.

The correct procedure for parties named in a caveat proceeding to present their contention that they were not in fact parties thereto and had no knowledge of the prior proceedings, is by motion in the cause and not by filing a second caveat, and although the court may, in its discretion, treat the second caveat as a motion in the cause, it is error for the court to submit the issue of *res judicata* to the jury, since the motion raises issues of fact for the determination of the court and not questions of fact for the determination of a jury. *Ibid.*

§ 31. General Rules of Construction.

A will is to be construed as a whole, and meaning given to each clause, phrase, and word, if possible. *Maxwell v. Grantham*, 208.

§ 33a. Estates and Interests Created in General.

As a general rule, a general devise or bequest to a named person, with power of disposition, transfers the property in fee or absolutely, and a subsequent limitation over to another of "whatever is left" will be held void as repugnant to the absolute gift. *Rudisill v. Hoyle*, 33.

The will in suit devised and bequeathed all property of the estate to testator's wife "for and during the term of her natural life" with power to the wife to sell any portion of the property if in her opinion it was necessary for her proper support and maintenance, with limitation over to beneficiaries of the property remaining unused or unconsumed at the wife's death. *Held:* The wife took a life estate only in the property, and the power to dispose of any or all of the property was limited to the purpose of support and maintenance, and the ultimate beneficiaries took a vested remainder in any of the property undisposed of by the beneficiary during her lifetime. *Ibid.*

WILLS—*Continued.*

§ 33g. Life Estates and Remainders.

A devise of property to testatrix's sister for life, and at her death to testatrix's named nephew, and at the death of the named nephew "the property is to be inherited by his children" gives the nephew, after the death of testatrix's sister, a life estate only, with vested remainder in the children of the nephew, it being apparent that testatrix used the word "inherited" in its general and non-technical sense, and to construe the will as vesting the fee simple in the nephew would require that the later dispositive provisions of the will be ignored. *Maxwell v. Grantham*, 208.

The will devised lands to testator's children for life with provision that the life estate of any child dying without leaving lineal descendants should go to the surviving children for life, with further provision that if any child died leaving a child or children him surviving such grandchildren should take the fee after the life estate. *Held:* The remainder in the portion of any of testatrix's children leaving lineal descendants vests such descendants, while the portion of any child leaving no lineal descendants goes, after the termination of the life estate, to testatrix's descendants *per stirpes*. *Gregory v. Godfrey*, 215.

§ 39. Actions to Construe Wills.

Ordinarily the court will not construe a will on demurrer, but in an action by an administrator, c.t.a., d.b.n., against the personal representative of the deceased executrix alleging that the executrix had misapplied the funds of the estate with demand for accounting, and alleging that the executrix as beneficiary did not take property of the estate absolutely or in fee, a construction of the will is necessary to determine whether an accounting is necessary, and upon demurrer the court must construe the will in order to proceed in the action. *Rudisill v. Hoyle*, 33.