NORTH CAROLINA REPORTS

Vol. 255

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1961
FALL TERM, 1961

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1961

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

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1 Murphey	"	5	"	1 " Eq.	"	36	"
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3 & 4 " "	"	20	"	6 " "	"	51	"
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2 " "	"	24	"	2 " "	"	55	"
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4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Eq.	"	62	"

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

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

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

JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1961.
FALL TERM, 1961.

CHIEF JUSTICE:
J. WALLACE WINBORNE.

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICE:
M. V. BARNHILL.

ATTORNEY-GENERAL:
THOMAS WADE BRUTON.

ASSISTANT ATTORNEYS-GENERAL:

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RALPH MOODY,
F. KENT BURNS,
G. ANDREW JONES, JR.
LUCIUS W. PULLEN,
H. HORTON ROUNTREE,
THOMAS L. YOUNG[1]
HARRISON LEWIS

SUPREME COURT REPORTER:
JOHN M. STRONG.

CLERK OF SUPREME COURT:
ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:
DILLARD S. GARDNER.

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:
BERT M. MONTAGUE.

[1] Resigned 15 November 1961. Succeeded by Charles D. Barham, Jr.

JUDGES
OF THE
SUPERIOR COURTS OF NORTH CAROLINA

FIRST DIVISION

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

SECOND DIVISION

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

THIRD DIVISION

ALLEN H. GWYN	Seventeenth	Reidsville.
WALTER E. CRISSMAN	Eighteenth-B	High Point.
L. RICHARDSON PREYER [1]	Eighteenth-A	Greensboro.
FRANK M. ARMSTRONG	Nineteenth	Troy.
F. DONALD PHILLIPS	Twentieth	Rockingham.
WALTER E. JOHNSTON, JR.	Twenty-First	Winston-Salem.
HUBERT E. OLIVE	Twenty-Second	Lexington.
ROBERT M. GAMBILL	Twenty-Third	North Wilkesboro.

FOURTH DIVISION

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

SPECIAL JUDGES.

GEORGE M. FOUNTAIN..Tarboro.
SUSIE SHARP.....Reidsville.
J. B. CRAVEN, JR. [2].....Morganton.
W. JACK HOOKS.....Kenly.
H. L. RIDDLE, JR. [3].....Morganton.
HAL HAMMER WALKER [4]..Asheboro.
J. WILLIAM COPELAND [5]....Murfreesboro.
JOHN D. MCCONNELL [5].....Southern Pines.
EDWARD B. CLARK [6].....Elizabethtown.

EMERGENCY JUDGES.

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

[1] Resigned 21 October 1961, to accept appointment to the Federal Court. Succeeded by Eugene G. Shaw, Greensboro.
[2] Resigned 23 August 1961, to accept appointment to the Federal Court.
[3] Appointed 6 July 1961.
[4] Appointed 7 July 1961.
[5] Appointed 20 July 1961.
[6] Appointed 23 August 1961.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
HUBERT E. MAY	Second	Nashville.
W. H. S. BURGWYN, JR.	Third	Woodland.
ARCHIE TAYLOR	Fourth	Lillington.
ROBERT D. ROUSE, JR.	Fifth	Farmville.
WALTER T. BRITT	Sixth	Clinton.
LESTER V. CHALMERS, JR.	Seventh	Raleigh.
JOHN J. BURNEY, JR.	Eighth	Wilmington.
MAURICE BRASWELL	Ninth	Fayetteville.
JOHN B. REGAN	Ninth-A	St. Pauls.
WILLIAM H. MURDOCK [1]	Tenth	Durham.
IKE F. ANDREWS [2]	Tenth-A	Siler City.

WESTERN DIVISION

HARVEY A. LUPTON	Eleventh	Winston-Salem.
EDWARD K. WASHINGTON	Twelfth	Jamestown.
M. G. BOYETTE	Thirteenth	Carthage.
MAX L. CHILDERS	Fourteenth	Mount Holly.
KENNETH R. DOWNS	Fourteenth-A	Charlotte.
ZEB. A. MORRIS	Fifteenth	Concord.
B. T. FALLS, JR.	Sixteenth	Shelby.
J. ALLIE HAYES	Seventeenth	North Wilkesboro.
LEONARD LOWE	Eighteenth	Caroleen.
ROBERT S. SWAIN	Nineteenth	Asheville.
GLENN W. BROWN	Twentieth	Waynesville.
CHARLES M. NEAVES	Twenty-first	Elkin.

[1] Resigned 28 September 1961. Succeeded by Dan K. Edwards, Durham, N. C.

[2] Appointed 1 July 1961.

FIRST DIVISION

FIRST DISTRICT
Judge Mintz

Camden—Sept. 25.
Chowan—Sept. 11; Nov. 27.
Currituck—Sept. 4.
Dare—Oct. 23.
Gates—Oct. 16(A).
Pasquotank—Sept. 18†; Oct. 16†; Nov. 13*; Dec. 4†.
Perquimans—Oct. 30.

SECOND DISTRICT
Judge Parker

Beaufort—Sept. 4†; Sept. 18*; Oct. 16†; Nov. 6*; Dec. 4†.
Hyde—Oct. 9; Oct. 30†.
Martin—Aug. 7†; Sept. 25*; Nov. 20†(2); Dec. 11.
Tyrrell—Aug. 28†; Oct. 2.
Washington—Sept. 11*; Nov. 13†.

THIRD DISTRICT
Judge Bone

Carteret—Aug. 28†(A)(2); Oct. 16†; Nov. 6.
Craven—Sept. 4(2); Oct. 2†(2); Oct. 30†(A); Nov. 13; Nov. 27†(2).
Pamlico—Aug. 7(2).
Pitt—Aug. 20(2); Sept. 18†(2); Oct. 9(A); Oct. 23†; Oct. 30; Nov. 20; Dec. 11.

FOURTH DISTRICT
Judge Cowper

Duplin—Aug. 28; Sept. 4†; Oct. 9*; Nov. 6*; Dec. 4†(2).
Jones—Sept. 25; Oct. 30†; Nov. 27.
Onslow—July 17‡(A); Oct. 2; Oct. 16†(A)(2); Nov. 13†(2).
Sampson—Aug. 7(2); Sept. 11†(2); Oct. 16*; Oct. 23†; Nov. 20*(A).

FIFTH DISTRICT
Judge Morris

New Hanover—July 31*; Aug. 7†; Aug. 21*; Sept. 11†(2); Oct. 2*; Oct. 9†(2); Oct. 30*(2); Nov. 20†(2); Dec. 4*(2).
Pender—Sept. 4†; Sept. 25; Oct. 23†; Nov. 13.

SIXTH DISTRICT
Judge Paul

Bertie—Aug. 28(2); Nov. 20(2).
Halifax—Aug. 14(2); Oct. 2†(2); Oct. 23*; Dec. 4(2).
Hertford—July 24(A); Sept. 11; Sept. 18†; Oct. 16.
Northhampton—Aug. 7; Oct. 30(2).

SEVENTH DISTRICT
Judge Bundy

Edgecombe—Sept. 4†(A); Sept. 18*; Oct. 9*(2); Nov. 6†(2).
Nash—Aug. 21*; Sept. 11†; Sept. 25†; Oct. 2*; Oct. 23†(2); Nov. 20*(2); Dec. 4†(A).
Wilson—July 17*; Aug. 28*(2); Sept. 25†(A)(2); Oct. 23*(A)(2); Dec. 4†(2).

EIGHTH DISTRICT
Judge Stevens

Greene—Oct. 9†(A); Oct. 16*(A); Dec. 4.
Lenoir—Aug. 21*; Sept. 11†(2); Oct. 9†(2); Oct. 23*(2); Nov. 20†(2); Dec. 11.
Wayne—Aug. 14*; Aug. 28†(2); Sept. 25†(2); Nov. 6(2); Dec. 4†(A).

SECOND DIVISION

NINTH DIVISION
Judge Mallard

Franklin—Sept. 18†(2); Oct. 16*; Nov. 27†(2).
Granville—July 17; Oct. 9†; Nov. 13(2).
Person—Sept. 11; Oct. 2†(A)(2); Oct. 30.
Vance—Oct. 2*; Nov. 6†; Dec. 11†.
Warren—Sept. 4*; Oct. 23†.

TENTH DISTRICT
Judge Hall

Wake—July 10*(A)(2); July 24†#(A); July 31*(A); Aug. 7†; Aug. 14*(2); Aug. 21†#(A); Aug. 27†; Sept. 4*(2); Sept. 4†(A)(2); Sept. 17†#; Sept. 25†; Oct. 2*(A)(2); Oct. 9†(2); Oct. 16*(A); Oct. 22†(2); Oct. 22†#(A); Oct. 30*(A)(2); Nov. 6†(2); Nov. 13†#(A); Nov. 20*(2); Nov. 20†(A)(2); Dec. 11*; Dec. 11†(A).

ELEVENTH DISTRICT
Judge Carr

Harnett—Aug. 14†; Aug. 28*(A); Sept. 11†(A)(2); Oct. 9†(2); Nov. 13*(A)(2).
Johnston—Aug. 21; Sept. 25†(2); Oct. 23; Nov. 6†(2); Dec. 4(2).
Lee—July 31*; Aug. 7†; Sept. 11*†; Sept. 18†; Oct. 30*; Nov. 27†.

TWELFTH DISTRICT
Judge McKinnon

Cumberland—Aug. 7†; Aug. 14*; Aug. 28*(2); Sept. 11†; Sept. 25*(2); Sept. 22†(A)(2); Oct. 9†(2); Oct. 16*(A); Oct. 23†(2); Nov. 6*(2); Nov. 6†(A)(2); Nov. 27†(2); Dec. 11*.
Hoke—Aug. 21; Nov. 20.

THIRTEENTH DISTRICT
Judge Hobgood

Bladen—Oct. 16*; Nov. 13†.
Brunswick—Sept. 18; Oct. 23†.
Columbus—Sept. 4*(2); Sept. 25†(2); Oct. 9*; Oct. 30†(2); Nov. 20*(2).

FOURTEENTH DISTRICT
Judge Bickett

Durham—July 10*(A)(2); July 31(2); Aug. 28*; Sept. 4†; Sept. 11*(2); Oct. 2*(2); Oct. 16†(2); Oct. 30*(2); Nov. 13†(2); Nov. 27(2); Dec. 11*.

FIFTEENTH DISTRICT
Judge Williams

Alamance—July 17†(A); July 31†; Aug. 14*(2); Sept. 11†(2); Oct. 16*(2); Nov. 13†(2); Dec. 4*.
Chatham—Aug. 28†; Oct. 9; Oct. 30†; Nov. 6†; Nov. 27.
Orange—Aug. 7*; Sept. 25†(2); Dec. 11.

SIXTEENTH DISTRICT
Judge Clark

Robeson—July 10†(A); Aug. 14*; Aug. 28†; Sept. 4*(2); Sept. 18†(2); Oct. 9†(2); Oct. 23*(2); Nov. 13†(2); Nov. 27*.
Scotland—July 24†; Aug. 21; Oct. 2†; Nov. 6†; Dec. 4(2).

THIRD DIVISION

SEVENTEENTH DISTRICT
Judge Phillips

Caswell—Nov. 13*(A); Dec. 4†.
Rockingham—Sept. 4*(2); Sept. 25†(A)(2); Oct. 16†; Oct. 23*(2); Nov. 20†(2); Dec. 11*.
Stokes—Oct. 2*; Oct. 9†.
Surry—July 10†(2); Sept. 18*(2); Nov. 6†(2); Dec. 4(A).

EIGHTEENTH DISTRICT
Schedule A—Judge Johnston

Guil. Gr.—July 10*; July 24*; Aug. 28*; Sept. 4†; Sept. 11†(2); Oct. 2*; Oct. 2†#(A); Oct. 9†(2); Oct. 23*; Nov. 6*; Nov. 6†#(A); Nov. 13†(2); Nov. 27*; Dec. 4*.
Guil. H. P.—July 17*; Sept. 25*; Oct. 30*; Dec. 4*.

Schedule B—Judge Olive

Guil. Gr.—Aug. 28†#; Sept. 11*(2); Sept. 25†(2); Oct. 9*(2); Oct. 23†(2); Nov. 20†(2); Dec. 11†#.
Guil. H. P.—Sept. 11†; Oct. 16†(A); Nov. 6†(2).

NINETEENTH DISTRICT
Judge Gambill

Cabarrus—Aug. 21*; Aug. 28†; Oct. 9(2); Nov. 6†(A)(2).
Montgomery—July 10(A); Sept. 25†; Oct. 2; Oct. 30(A).
Randolph—July 17†(A)(2); Sept. 4*; Sept. 25†(A)(2); Nov. 6†(2); Nov. 27†; Dec. 4*(2).
Rowan—Sept. 11(2); Sept. 25†(A); Oct. 23†(2); Nov. 27*(A); Dec. 4†(A).

TWENTIETH DISTRICT
Judge Gwyn

Anson—Sept. 18*; Sept. 25†; Nov. 20†.
Moore—Aug. 14*(A); Sept. 4†(2); Nov. 13.
Richmond—July 17*; July 24†; Oct. 2*; Oct. 9†; Dec. 4†(2).
Stanly—July 10; Oct. 16†(2); Nov. 27.
Union—Aug. 21†(A); Aug. 28; Oct. 30(2).

TWENTY-FIRST DISTRICT
Judge Preyer

Forsyth—July 10†(2); July 24(2); Aug. 28†#; Sept. 4(3); Sept. 11†(A)(2); Sept. 25†(2); Oct. 9†#(A); Oct. 9(2); Oct. 23†(A)(2); Oct. 30(3); Nov. 13†#(A); Nov. 20†(2); Dec. 4†(A)(2); Dec. 4(2).

TWENTY-SECOND DISTRICT
Judge Crissman

Alexander—Sept. 25.
Davidson—July 17†(A); Aug. 21; Sept. 11†(2); Oct. 9†; Oct. 16†(A); Nov. 13(2); Dec. 11†.
Davie—July 31; Oct. 2†; Nov. 6.
Iredell—Aug. 28; Sept. 4†; Oct. 16†; Oct. 23(2); Nov. 27†(2).

TWENTY-THIRD DISTRICT
Judge Armstrong

Alleghany—Aug. 28; Oct. 2.
Ashe—July 17*; Sept. 11†; Oct. 23*.
Wilkes—July 24; Aug. 14(2); Sept. 18†(2); Oct. 9; Oct. 30†(2); Nov. 13(A); Dec. 4.
Yadkin—Sept. 4*; Nov. 13†(2); Nov. 27.

FOURTH DIVISION

TWENTY-FOURTH DISTRICT
Judge Froneberger

Avery—July (A)(2); Oct. 16(2).
Madison—July 24*; Aug. 28†(2); Oct. 2*; Oct. 30†; Dec. 4*; Dec. 11†.
Mitchell—July 31†(A); Sept. 11(2).
Watauga—Sept. 25*; Nov. 6†(2).
Yancey—Aug. 7; Aug. 14†(2); Nov. 20(2).

TWENTY-FIFTH DISTRICT
Judge McLean

Burke—Aug. 14; Oct. 2(2); Nov. 20.
Caldwell—Aug. 21(2); Sept. 18†(2); Oct. 23†(2); Dec. 4(2).
Catawba—July 31(2); Sept. 4†(2); Nov. 6(2); Nov. 27†.

TWENTY-SIXTH DISTRICT
Schedule A—Judge Pless

Mecklenburg—July 10†(A); July 24†#(A); July 31*(2); Aug. 14†(A)(2); Aug. 28†(2); Sept. 11†; Sept. 18†(2); Oct. 2*(2); Oct. 16†; Oct. 23†(2); Nov. 6†; Nov. 13†(2); Nov. 27†; Dec. 4*(2).

Schedule B—Judge Patton

Mecklenburg—Aug. 14†(3); Sept. 4*(2); Sept. 18*†(2); Oct. 2†(2); Oct. 16†(2); Oct. 30*(2); Nov. 13†(2); Nov. 27†; Dec. 4†(2).

TWENTY-SEVENTH DISTRICT
Judge Huskins

Cleveland—July 10(2); Sept. 25†(2); Oct. 23*; Nov. 27†(A)(2)
Gaston—July 24†#(A); July 24*; Aug. 7†(A)(2); Aug. 14*(A)(2); Sept. 11†(A)(3); Sept. 18*; Oct. 9†(2); Oct. 9*(A)(2); Oct. 30†(2); Nov. 13*(2); Nov. 13†#(A); Dec. 4†; Dec. 11*.
Lincoln—Sept. 4(2).

TWENTY-EIGHTH DISTRICT
Judge Farthing

Buncombe—July 10*(A)(2); July 24†(A); July 31†(3); Aug. 21*(2); Sept. 4†(3); Sept. 18*(A)(2); Sept. 25†(3); Oct. 16*(2); Oct. 30†(3); Nov. 20*(A)(2); Nov. 20†; Nov. 27†(3).

TWENTY-NINTH DISTRICT
Judge Campbell

Henderson—Aug. 14†(2); Oct. 16.
McDowell—Sept. 4(2); Oct. 2†(2).
Polk—Aug. 28.
Rutherford—Aug. 14*†(A); Sept. 18†*(2); Nov. 6*†(2).
Transylvania—July 10(2); Oct. 23(2).

THIRTIETH DISTRICT
Judge Campbell

Cherokee—July 24; Nov. 6(2).
Clay—Oct. 2.
Graham—Sept. 4.
Haywood—July 10, Sept. 18†(2); Nov. 20(2).
Jackson—Oct. 9(2).
Macon—July 31; Dec. 4(2).
Swain—July 17; Oct. 23.

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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.
‡ Indicates jail and civil cases.

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Chief Judge

ALGERNON L. BUTLER, CLINTON, N. C.

Judge

JOHN D. LARKINS, JR., TRENTON, N. C.

U. S. Attorney

ROBERT H. COWEN, RALEIGH, N. C.

Assistant U. S. Attorneys

WELDON A. HOLLOWELL, RALEIGH, N. C.
ALTON T. CUMMINGS, RALEIGH, N. C.
WILLIAM M. CAMERON, JR., RALEIGH, N. C.
HAROLD W. GAVIN, RALEIGH, N. C.

U. S. Marshall

HUGH SALTER, RALEIGH, N. C.

Clerk U. S. District Court

SAMUEL A. HOWARD, RALEIGH, N. C.

Deputy Clerks

KEEN JONES, RALEIGH, N. C.
MRS. MAUDE S. STEWART, RALEIGH, N. C.
MRS. BETTY CARTER JONES, RALEIGH, N. C.
MRS. BONNIE BUNN PERDUE, RALEIGH, N. C.
MISS NORMA GREY BLACKMON, RALEIGH, N. C.
LLOYD S. SAWYER, ELIZABETH, CITY, N. C.
MRS. NANCY H. COOLIDGE, FAYETTEVILLE, N. C.
MRS. ELEANOR G. HOWARD, NEW BERN, N. C.
MRS. JEANETTE H. ATTMORE, WASHINGTON, N. C.
R. EDMON LEWIS, WILMINGTON, N. C.

MIDDLE DISTRICT

Judges

EDWIN M. STANLEY, GREENSBORO, N. C.
L. RICHARDSON PREYER, WINSTON-SALEM, N. C.

Senior Judge

JOHNSON J. HAYES, WILKESBORO, N. C.

U. S. Attorney

WILLIAM H. MURDOCK, GREENSBORO, N. C.

Assistant U. S. Attorney

R. ROY MITCHELL, JR., GREENSBORO, N. C.

U. S. Marshall

E. HERMAN BURROWS, GREENSBORO, N. C.

Clerk U. S. District Court

HERMAN AMASA SMITH, GREENSBORO, N. C.

Deputy Clerks

MRS. MYRTLE D. COBB, GREENSBORO, N. C.
JAMES M. NEWMAN, GREENSBORO, N. C.
MRS. JOAN E. BELK, GREENSBORO, N. C.
MRS. SUE L. BUMGARNER, WILKESBORO, N. C.
MRS. RUTH R. MITCHELL, GREENSBORO, N. C.
MRS. RUTH W. STARR, GREENSBORO, N. C.
MRS. RUTH M. TRUITT, GREENSBORO, N. C.

WESTERN DISTRICT

Chief Judge

WILSON WARLICK, NEWTON, N. C.

Judge

J. B. CRAVEN, JR., MORGANTON, N. C.

U. S. Attorney

WILLIAM MEDFORD, ASHEVILLE, N. C.

U. S. Marshall

PAUL D. SOSSAMON, ASHEVILLE, N. C.

Clerk U. S. District Court

THOMAS E. RHODES, ASHEVILLE, N. C.

Deputy Clerks

WILLIAM A. LYTLE, ASHEVILLE, N. C.
VERNE E. BARTLETT, ASHEVILLE, N. C.
MISS M. LOUISE MORISON, ASHEVILLE, N. C.
MISS ELVA McKNIGHT, CHARLOTTE, N. C.
MRS. GLENIS S. GAMM, CHARLOTTE, N. C.
MISS ANNIE ADERHOLDT, STATESVILLE, N. C.

LICENSED ATTORNEYS

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 5th day of August, 1961, and said persons have, as of this date, been issued certificates of this Board.

JOHN PATRICK ADAMS ..... Greensboro
WAVERLY FRANCIS AKINS ..... Varina
OLIVER WENDELL ALPHIN ..... Mount Olive
JERRY SHUMATE ALVIS ..... Angier
CADE LEE AUSTIN ..... Granite Falls
GEORGE BAILEY AUTRY ..... Wilmington
WILLIAM WALLACE AYCOCK, JR., ... Tarboro
ROBERT FLOWERS BAKER ..... Durham
HENSON PERRYMOORE BARNES ..... Elizabethtown
JOHN MACFARLAND BARNHARDT ..... Concord
PLATO COLLINS BARWICK, JR. ..... Kinston
LLOYD FRANKLIN BAUCOM ..... Marshville
PAUL LYNN BECK ..... Lenoir
ROBERT BREVARD BLYTHE ..... Huntersville
MARVIN VERNON BONDURANT ..... Chapel Hill
WILLIAM LEDOUX BONDURANT ..... Winston-Salem
DONALD LEE BOONE ..... High Point
SAMUEL MASLON BOOTH ..... Graham
WILEY FURMAN BOWEN ..... Hoffman
ROBERT LEIGH BRADLEY, JR. ..... Lenoir
ERNEST RAY BRIGGS ..... Sanford
CALVIN LEE BROWN ..... Roanoke Rapids
FRANKLIN ROOSEVELT BROWN ..... Tarboro
THEODORE CECIL BROWN ..... Raleigh
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The Board of Law Examiners of
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1961

CAROLINA MILK PRODUCERS ASSOCIATION CO-OPERATIVE, INC. v. MELVILLE DAIRY, INC.

(Filed 16 June, 1961.)

1. Agriculture § 16: Contracts § 13½—

The fact that a milk processor, pursuant to directions of its producer and the terms of a certified copy of the membership agreement between the producer and his marketing association, deducts membership dues from payment for milk purchased directly from the producer and remits such dues to the association, does not make the processor a party to the contract between the producer and his association, and the deduction of such dues, in the absence of legal obligation, remains a matter of courtesy on the part of the processor.

2. Agriculture § 16: Contracts § 31— Evidence held insufficient to show that processor induced producers to breach their contract with marketing association.

The evidence disclosed that a milk processor notified its producers of a proposed increase in hauling charges to take effect simultaneously with an increase allowed by the Milk Commission in the wholesale price of milk, that the producers and their marketing association objected to the increase, and the association initiated plans to haul the milk itself, which plan entailed the purchase by each producer of refrigerating equipment, and that the processor thereafter rescinded the increase upon agreement that the producers should improve the side roads into their points of delivery. The evidence further tended to show that many of the producers thereafter became dissatisfied with the association be-

cause of its plan entailing the purchase of additional equipment, and that they verbally notified the processor to cease deducting dues from their checks, and that the processor, after advice from the Milk Commission to obtain written authority before ceasing to deduct membership dues, sent to each producer a blank form for this purpose, which each producer was to execute if he so elected. The producers who testified stated that they terminated their membership because of their dissatisfaction with the association over its plan to haul the milk. *Held:* The evidence is insufficient to show that the processor wrongfully induced or attempted to induce any member to breach his marketing contract with the association. G.S. 54-157.

3. Penalties—

Statutes imposing a penalty are to be strictly construed and a party suing to recover a penalty under a statute must bring himself clearly within its purview.

4. Agriculture § 16—

Where a milk processor, purchasing directly from producers, deducts dues from its payments for milk so purchased and remits such dues to the producers' marketing association, but discontinues making such deductions pursuant to written instructions of the producers, and thereafter pays the producers in full for the milk purchased, the processor may not be held liable by the association for the dues of such producers, the processor not being a party to the contract between the association and its members and not being liable for the dues after it had paid the producers in full for the milk purchased from them.

5. Appeal and Error § 49—

While the findings of fact of the trial court are conclusive on appeal when supported by any substantial evidence, the trial court's inferences of fact which are not based upon direct evidence but upon other inferences, are not conclusive, and its conclusions which involve legal questions are subject to review.

6. Fraud § 11—

When the facts admitted or proved are consistent with good faith and honest intent, they should be so construed, since fraud is not presumed.

APPEAL by defendant from *Preyer, J.*, May 2, 1960, Civil Term, GUILFORD Superior Court — Greensboro Division.

Carolina Milk Producers Association Co-operative, Inc., hereafter called the Association, alleged two causes of action against Melville Dairy, Inc., hereafter called Melville. By its first cause of action the Association seeks to recover $42,500 penalties upon the ground Melville knowingly attempted to induce members of the Association to breach their membership and marketing agreements. By its second cause of action, the Association seeks to recover $84,360.96, total value of all milk sold and delivered to Melville by the members of the Association for the months of March, April, May, and June, 1958.

The defendant filed a demurrer to the complaint upon the ground it failed to allege a cause of action in either particular. The court entered an order overruling the demurrer and allowing the defendant time to answer. In answer to the first cause of action the defendant denied it had induced or attempted to induce any member to breach his contract with the Association. In answer to the second cause of action the defendant denied it had entered into any contract with or had purchased any milk from the Association or that it was due the plaintiff anything on any account. The parties waived jury trial and consented that the judge should try the case.

The plaintiff Association was incorporated in 1952 with its principal office in Greensboro. It was to act as a co-operative for dairy farmers in "the Piedmont and Southeastern part of the State." Farmers who produced raw milk for sale to processors were admitted to membership in the Association by signing a marketing contract. The membership contract A contained, among others, the following provisions:

> "The undersigned milk producer, hereinafter called the Member, and the undersigned co-operative, hereinafter called the Association, in consideration of their mutual promises, agree as follows:
>
> "1. The Member hereby appoints the Association his agent for the purpose of marketing, either directly or through its authorized representative, all of the milk produced by the Member, except such as he retains for family use, during the period set out in paragraph 2 hereof; and the Member agrees that during that period he will deliver to the Association or its nominees, at such place or places as the Association or its authorized representative, may direct, all such milk so produced by him.
>
> "2. This agreement shall be effective for a period of one (1) year from the date hereof and thereafter for successive periods of one year therefrom subject, however, to the following provisions: Either the Member or the Association may terminate this contract on any yearly anniversary date hereof after the first by written notice of such termination given not more than forty-five (45) days and not less than thirty (30) days before such anniversary date.
>
> "4. . . . A copy of this agreement certified to by an authorized agent of the Association shall constitute authority and direction to any dealer to whom such milk is sold to pay therefor directly to the Association or otherwise as the Association may from time to time direct.
>
> "7. The Association or its authorized representative will market

milk delivered to it by the Member, together with milk delivered to it by other members of the Association, at such price or prices as it may deem to be most advantageous, and, after making such deductions as are authorized by this contract, will pay to, or cause to be paid to, the Member his proportion of the total receipts therefor.

"8. (a) The Association shall make deductions from the proceeds of the sale of milk delivered by the Member as follows: (1) All costs and expenses of the Association in marketing the milk and the fair part of the general operating costs and expenses of the Association, including valuation or operating reserves, interest on capital of not to exceed six per cent per annum, and twenty-five cents ($.25) each year for the official publication of the Association; and (2) Such amounts at regular intervals as the board of directors may deem necessary or advisable for the purpose of providing adequate capital and capital reserves and for the purpose of revolving such capital.

"10. The Member agrees that, in the event of any breach or threatened breach by him of this contract, the Association shall be entitled to an injunction to prevent the further breach of this contract and to a decree of specific performance hereof.

"11. If the Association shall adopt a revised marketing contract for execution by other members differing in terms from those contained herein, such revised contract shall not invalidate this contract, but the undersigned Member shall have the privilege of executing such revised contract and of substituting it for this contract."

Thirty-seven producers signed contract A. Copies of this contract were certified by the Association to Melville with a request that six cents (6¢) per hundredweight of milk delivered be deducted from each producer's check and transmitted to the Association.

Beginning with payments for the month of December, 1953, and continuing through November, 1957, Melville deducted dues from all members and transmitted them to the Association. On October 24, 1954, Mr. Lytle, Manager of the Association, wrote to Mr. Scott, President and Manager of Melville, "We certainly appreciate your cooperation in making the dues deductions for members of this Association upon the authorization and request of the Association. As you know, some of the companies refuse to make deductions without some additional authority."

The Association changed the substance of the membership agreement by contract B, giving the Association a larger measure of con-

trol over the marketing of milk products by the members. However, only five members signed, three of whom were under contract A, and two new members. To the agreement was attached a notation for the member to sign, authorizing Melville to remit dues to the Association. The new marketing agreement (B) did not change Melville's legal position either with the producers or with the Association.

Effective September 16, 1957, the North Carolina Milk Commission ordered into effect a thirty cents per hundredweight increase in price of Class One Milk. The Association opposed the increase. On September 17, 1957, the defendant wrote the following letter to each producer:

> "As you know, effective September 16th the price of Class One Milk advances 30¢ per hundred. On the same date we are advancing the hauling charges 10¢ per hundred. The Milk Commission is allowing 15 cents per hundred for the whole month of September rather than for us to have to figure two payrolls. We will calculate the hauling on the same basis—that is it will show as 5 cents per hundred for all of September. Our business is continuing to show improvement but our production is gaining also. I might say that we are not planning to go to bulk tanks at present and you will have plenty of notice in advance before we make any changes. I do hope you will have plenty of refrigeration for your milk. That is most important. Any time you are in town, I would like for you to stop by and see me and discuss the progress we are making and also some of the problems we are having."

After the receipt of the foregoing letter, a committee of producers conferred with the defendant with respect to increasing the hauling charge. In the meantime, the Association reported the proposed increase to the North Carolina Milk Commission which conducted a hearing but made no order in the case. Melville contended the expenses of hauling had increased. Many of the side roads were in bad repair. The increased operating expense and truck upkeep justified a ten-cent hauling increase. After another meeting some of the producers offered to improve the side roads and drives into their points of delivery. Mr. Scott, for the defendant, promised to re-examine his hauling costs and arrange for further conference.

As an aftermath of the defendant's proposal to increase the hauling charges, the Association sought to have the producers install refrigeration so that the Association, by the purchase of tank trucks, could take over all the hauling. Many of the producers objected to the transfer to tank operation since this would require each producer to make an outlay of from $1,800 to $2,300 for the change over. After the defendant made a re-examination of its hauling costs and the producers

had promised to improve their roads and drives, Melville canceled the proposed increase. The plan of the Association to go to tank trucks did not meet with the approval of the defendant nor many of the producers. The Melville Dairy had its hauling equipment. It had purchased hauling routes from a former transporter. Its contact with the producers was direct and established and maintained good will and assured it a steady and reliable milk supply. The producers did not like the initial investment incident to the transfer to tanks. The result was dissatisfaction not only between the producers who were customers of the defendant, but between other processors and their customers. Producers began to notify the defendant they were no longer willing for the defendant to deduct dues. In fact, Southern Dairies, which operated in the same territory, never did make any dues deduction, though many of its producers were members of the plaintiff Association.

On account of the complaints from producers over the deduction of dues, Mr. Whitaker, Executive Secretary of the North Carolina Milk Commission, took notice of the situation. On October 3, 1957, he sent to the plaintiff Association a proposed order of the Milk Commission, stating in part:

> "The State Milk Commission has been informed recently by several distributors that they have received written notice from certain producers to discontinue deductions which have been previously made each month. . . . The Association having filed with the distributor a certified copy of the contract with each producer. The distributors seek advice as to what procedure should be followed in such cases."

(There followed a full quotation of G.S. 106-266.12.) The Association objected to the proposal and asked to be heard before its adoption. Nothing thereafter seems to have been done by the Commission. Mr. Whitaker, however, testified as a witness: "I said to Mr. Scott as I have to many other distributors in North Carolina that he should make the dues deduction, or rather that he should have something in writing from the producers before he stopped making these deductions."

Thereafter, defendant sent the following to its producers: "We have had numerous requests to discontinue taking out dues for the Carolina Milk Producers Association. If you want this done please sign below and either drop it in the mail or give it to your hauler to give us. Sincerely, Melville Dairy, Inc., Ralph H. Scott." Attached to the above was the following: "December 1957. TO MELVILLE DAIRY, INC.: PLEASE DISCONTINUE DEDUCTING THE 6¢ PER HUN-

DRED POUNDS OF MILK FROM MY CHECK FOR THE CAROLINA MILK PRODUCERS ASSOC. AS OF DEC. 1, 1957, Signed _____. Can No. _____."

On December 30, 1957, the defendant received from the attorney for the Association a letter of which the following is a part:

> "Mr. R. G. Lytle has furnished me a form letter from you to your producers which was delivered a few days ago at the farm of one of your producers who is also a member of the Association. Mr. Lytle told me also that he had been informed that a similar letter was delivered at the farm of each of the other members of the Association whose milk is sold to you. I am enclosing herewith a copy of the form letter referred to.
>
> "I am of the opinion that the distribution of this letter to members of the Association whose milk is sold to you constitutes an attempt to induce such members of the Association, to breach their marketing contracts with the Association, and that that is a matter for which the court will furnish adequate civil relief. In this connection I call your attention to Sec. 54-157 of the North Carolina General Statutes which provides for a $500.00 penalty to be recovered in a civil action by an Association in any case where a member is induced to breach his marketing contract with the Association.
>
> "I am of the opinion that the Association has valid marketing contracts with the members hereinbefore referred to, and the purpose of this letter is to request you to do either one of two things:
>
> "(1) Remit to the Association at the proper times the amount of the deductions authorized by these members, or
>
> "(2) Remit to the Association all of the money which may become due to such members for their milk sold and delivered to you.
>
> "In connection with the latter, I call attention to the provision of the marketing contracts which provides that the Association has full power and authority —
>
> "'(e) To collect in its own name all or any part of the money which may become due to the member (1) for milk sold by the Association for the member—'
>
> "If the full purchase price of the milk is remitted to the Association, the Association will, of course, make the proper deductions therefrom and will remit the balance directly to the members."

On April 14, 1958, at the All-Jersey Meeting of Milk Producers in Graham, at which 50 to 100 producers were present, including many of

Melville's suppliers of milk, Mr. Scott, at the end of the meeting, made a statement: "He told the Carolina Milk Producers Association members . . . that there was a controversy about the dues deductions and that he had been authorized to send the money to the office, . . . and he wanted an authorization from each individual, that he was in the middle, that somebody could be sued and he didn't want one of his producers suing him for not sending the money to them . . . and for all who wanted their milk check money . . . submitted to the producers' Association office, that he wished they would sign . . . to that effect." As a result of the April 14th meeting, only three members of the Association, and one of these was a director, signified their willingness by written request to have the defendant send their milk checks to the Association.

In the trial the plaintiff called as witnesses most of the 37 members and former members of the Association who identified their membership contracts which Mr. Lytle had certified to the defendant. Not one, however, testified to any act or deed on the part of the defendant or any of its agents which caused or tended to cause any member to breach his membership and marketing contract with the Association. There was in fact no evidence of a breach by any producer.

Mr Scott, the present President and Manager of the defendant, testified in substance that he began operating the defendant in 1927 as an individually owned business, changed to co-partnership in 1934, and incorporated in October, 1953. "We have always done the hauling of milk for the producer to our plant. We bought the routes — from those who did the hauling and made arrangements with the producers to do the hauling ourselves. We bought their trucks and their routes also. When we received the November 25, 1953, letter with enclosures (membership contracts) we checked with them and then passed them on to our bookkeeping department and they made the deductions." The defendant as a courtsey to the plaintiff deducted dues until producers began to complain. Its President, Mr. Scott, contacted the Milk Commission and was advised to get something in writing from the producers and for this purpose he sent the memo dated December, 1957. Later, at the April 14th meeting in Graham, he distributed slips so that the producers might indicate their wishes with respect to payments for milk. Only three producers authorized payment to the Association. These payments were made as authorized. Mr. Scott further testified neither he nor any agent of the defendant, to his knowledge, influenced or attempted to influence any producer to breach his marketing agreement with the Association.

D. Grady Perry testified: "I have been selling milk to Melville Dairy ten or twelve years. . . . I became a member of the Carolina

Milk Producers Association. There was not any difference in the procedure I followed after I became a member of the Association . . . I terminated my membership in June of 1958. . . . I went up to the Association office to get my release, and I asked Mr. Lytle if I was supposed to pay up my dues and he said, no, he'd get it out of Ralph Scott . . . I did speak to Mr. Scott to stop taking out my dues. At that time I told Mr. Scott I wanted to discontinue taking out my dues for the reason that I hadn't received any benefit whatsoever from the Association, and I felt like they were taking my money and not giving me anything in return."

Ralph Woody testified: "Some time during 1953 I was informed by Mr. Scott that the Association had asked him to take my dues out. I did not make any objection to it at that time. I think I first registered an objection with Melville Dairy about taking out my dues when the tank subject probably came up and I wasn't financially able to go into it at that time if I could wait a while longer. . . . As to what led up to the decision on my part to notify Melville to discontinue paying my dues — the Producers Association wanted us to go to tank and I felt like we couldn't go right then. . . . I received and read a copy of the letter dated October 12, 1957 . . . I did not consider what was said in here in arriving at my decision to discontinue the payment of my dues. . . . I just wasn't ready to go to tanks and I felt like probably the distributor in it is the one to do the hauling and the one to have the final say-so. . . . I know for certain I signed a dues discontinuance form. . . . As to the question of whether I ever offered to pay my dues up to the time my membership terminated, . . . I told Mr. Lytle . . . that after my contract expired I wasn't going to pay any dues any more and he said it didn't make a damn to him whether I paid them or not. He said, 'I am going to collect them out of Ralph Scott.'"

J. F. Huey testified: "I had been selling milk to Melville Dairy for about 12 years . . . I thought I was going to benefit by it (membership in the Association) and that is the reason I signed it. . . . The early part of 1958 I went to Melville Dairy and told them not to take out my dues. My reason . . . was that we had a meeting at Mr. Hargrove's (a director of the Association) and all that they talked about was going to bulk tank and I wasn't financially able . . . That was my reason for cancelling. Neither Mr. Scott nor anyone representing Melville Dairy had anything to do with my decision to cancel with the organization."

Charles Shore testified: "I have been selling to Melville since 1939 . . . I signed the contract. . . . In the Fall of 1957, I received this document (vote to discontinue dues deductions). I was not induced

to sign this by anyone. I made up my mind myself to sign it. . . . Prior to the time I signed this document I had a conversation with Mr. Scott, the President of Melville Dairy . . . I went to his office one day and asked him to discontinue taking my dues out. That was before I signed this document, . . . I received in the mail from Melville Dairy some time in October the ballot . . . my wishes on hauling. I voted 'I do not want to install a milk tank.' "

G. A. Payne testified: "The decision to tell Mr. Scott not to take out any milk dues was my own decision. I made up my mind about that myself. He said, 'If that is what you ask us to do, I'll do it.' I said, 'That is what I want you to do.' "

The defendant tendered seven witnesses to corroborate Ralph Woody. None was cross-examined. "It was ascertained that all seven attended the April 14, 1958 All-Jersey meeting; also that none of them at the time of the trial were (sic) members of the Association." Brief reference will be made in the opinion to other evidence offered.

At the conclusion of the testimony, the trial judge found, among other things, the following: (1) The plaintiff is a co-operative marketing association made up of milk producers. (2) The defendant is a corporation operating a milk processing plant. (3) During the period from September, 1957, through June, 1958, thirty-four farmers who were under contract A to the Association sold and delivered milk to the defendant. Five dairy farmers who were by contract B members of the Association sold milk to the defendant. Of these, three were also included in the 34 because of their execution of both contracts. (4) Certified copies of contract A have been delivered by the Association to the defendant. (5) The marketing contracts were valid and binding between the Association and the members. In addition to the above, the court made these findings which are quoted in full:

> "(9) Prior to December, 1957, the defendant had continuously recognized the validity of the aforesaid contracts and agreements from the time that the defendant was first furnished by the Association with certified copies thereof, the defendant having for several years prior to December, 1957, regularly deducted each month from the proceeds of its purchases of milk from each of its producers who were members of the Association and remitted to the Association the dues deductions of 6¢ per hundredweight of milk purchased by the defendant which was produced by said producers who were members of the Association.
>
> "(10) Because the officials of the plaintiff Association undertook to have the defendant revoke and rescind a 10¢ per hundredweight increase in the hauling charge made by the defendant for

transportation of the milk produced by the members of the plaintiff Association (which hauling charge increase was announced by the defendant on September 17, 1957, effective September 16, 1957), and because the plaintiff Association brought the matter of the hauling increase to the attention of the North Carolina Milk Commission when the defendant declined to rescind the hauling charge increase, the defendant decided to embark upon a course of conduct designed to induce, or to attempt to induce, the aforesaid thirty-nine members of the plaintiff Association to breach their contracts with the Association.

"(11) On December 24, 1957, the defendant delivered to all producers whose milk was being purchased by the defendant, including each of the aforesaid thirty-nine members of the Association, a mimeographed letter as follows: 'December, 1957 TO OUR PRODUCERS: We have had numerous requests to discontinue taking out dues for the Carolina Milk Producers Association. If you want this done please sign below and either drop it in the mail or give to your hauler to give us. Sincerely, MELVILLE DAIRY, INC., Ralph H. Scott.' 'December 1957 TO MELVILLE DAIRY, INC.; Please discontinue deducting the 6¢ per hundred pounds of milk from my check for the Carolina Milk Producers Assoc. as of Dec. 1, 1957. Signed _____ Can No. _____.' Beginning with the payments made on or about January 15, 1958, (being the payments for the milk delivered to the defendant in the month of December, 1957, Melville Dairy stopped deducting and remitting to the Association the 6¢ per cwt. which it had previously been deducting from the amounts due by Melville Dairy to the members of the Association for their milk delivered to Melville Dairy, and no such deductions have been made by Melville Dairy for the Association from that time up to the commencement of this action. On or about April 1, 1958, the defendant received from the plaintiff the letter hereinafter referred to in Finding of Fact Number (13). During the month of April, 1958, the defendant notified all its producers, including each of the thirty-nine members of the Association whose milk was being delivered to Melville Dairy, these being the members listed in paragraphs (3) and (4) hereof, to attend a meeting to be held in the County Courthouse at Graham, North Carolina, on April 14, 1958. Such meeting was held at that time and was attended by most of the Association's members whose milk was being sold to the defendant. At this meeting the defendant's President and General Manager, Mr. Ralph H. Scott, and the defendant's attorney both spoke to the members of the

Association attending the meeting, and the members were advised that mimeographed or typed slips had been prepared by the defendant for the signatures of those members who desired that payments for their milk be made directly to the Association. Only three of the Association's members signed the slips which had been prepared by the defendant for use at this meeting, and one of these members subsequently repudiated his signing of the same. Thereafter, the defendant did remit to the Association the total proceeds of the milk received by the defendant from N. R. Hargrove and George S. Woody, the two members who did sign the slips hereinabove referred to.

"(12) By its conduct during the period from December of 1957 through the month of April, 1958, including its actions hereinabove set forth in paragraph (11) hereof, the defendant, acting through its officers and agents, including particularly its President and General Manager, Ralph H. Scott, knowingly induced, or attempted to induce, the aforesaid thirty-nine members of the plaintiff Association to breach their respective milk marketing contracts and membership and marketing agreements with the Association which were then in full force and effect between the Association and its said members. The defendant's conduct in knowingly inducing or attempting to induce, the aforesaid members of the Association to breach their contracts and agreements with the Association was a course of conduct which was without just cause and which was not privileged."

(13) In addition to the above, the court found that the plaintiff had demanded of the defendant to remit to it all amounts due its members for milk which they had delivered to the defendant.

(14) The plaintiff was entitled to recover under (13) above a total for March, April, May and June, 1958, the aggregate sum of $74,553.73.

Findings Nos. 15 and 16 are here quoted in full:

"(15) Not only did the defendant fail to remit to the plaintiff the entire proceeds of the sale of the milk received by the defendant from the aforesaid producers who were members of the plaintiff during the months of March through June, 1958, but the defendant also failed and refused to remit to the Association the dues of 6¢ per cwt., which the plaintiff Association was entitled to receive for the months of December, 1957, through June, 1958.

"(16) The Court observed the demeanor of the witnesses when they testified upon the witness stand. The success of the defendant's efforts to bring about a termination of contractual and other

relations between said members of the Association and the Association is demonstrated by the fact that at the time of the trial the evidence disclosed that only ten of the aforesaid thirty-nine members were still members of the Association."

Upon the foregoing findings, the court concluded:

"(1) The milk marketing contracts referred to in paragraphs (3), (4) and (6) above were valid, subsisting and enforceable contracts.

"(2) The defendant recognized the validity and enforceability of said contracts by its making the dues deductions and the remittance of same to the plaintiff for a period of several years.

"(3) By its conduct during the period from and including December 1957, through April, 1958, the defendant violated G.S. 54-157, in that the defendant, acting through its officers and agents, knowingly induced, or attempted to induce, the aforesaid thirty-nine members of the plaintiff Association to breach their respective milk marketing contracts and agreements with the Association, and therefore the defendant is liable to the plaintiff in the penal sum of $500.00 for its inducing, or attempting to induce, each of said members to breach each of said contracts; and the plaintiff is entitled to have judgment against the defendant for the recovery of the penal sum of $19,500.00. While it is alleged in the complaint that the defendant's conduct consisted of two separate and distinct inducements, or attempts to induce, the breaches of said contracts and agreements, the Court finds that the defendant's course of conduct was a continuing act which constituted one over-all inducement, or attempt to induce, a breach as to each of said contracts and agreements within the meaning of G.S. 54-157.

"(4) The conduct of the defendant in inducing or attempting to induce the aforesaid breaches of the contracts between the plaintiff Association and its said thirty-nine members was without any justification in fact or in law and was not privileged.

"(5) Under the terms of the milk marketing contracts hereinbefore set out, the plaintiff had the right to collect in its own name all the money owed by the defendant for the milk delivered by the thirty-nine members of the Association who are named in Paragraphs (3) and (4) above for the months of March, April, May, and June, 1958. The plaintiff received only the proceeds of the Neal R. Hargrove and George S. Woody milk. Therefore the plaintiff Association is entitled to recover of the defendant the sum of $74,553.73, being the entire proceeds payable for the milk

delivered by the remaining thirty-seven producers (excluding N. R. Hargrove and George S. Woody) to the defendant during the months of March, April, May, and June of 1958. However, since the defendant has heretofore paid these amounts directly to the producers, as a matter of equity the defendant should not be compelled to pay the sums twice. Since a judgment for the entire proceeds of the milk delivered by said thirty-seven producers would result in an unjust enrichment of the aforesaid members at the expense of the defendant, if the defendant were required to pay the same, and since it would, therefore, be necessary to provide in such a judgment that the plaintiff should hold the proceeds thereof as an equitable trustee for the defendant, subject only to the deduction of the dues of 6¢ per cwt., to which the plaintiff is entitled upon the milk delivered by said thirty-seven members to the defendant during the period from March, 1958, through June, 1958, both inclusive, less the amounts of such dues as have been paid directly to the plaintiff by some of said members, the monetary recovery to be had by the plaintiff against the defendant should be only in the amounts of said dues which the plaintiff would have been entitled to deduct from the proceeds of said milk payments if the same had been remitted by the defendant to the Association, which amounts are as follows: March, 1958, $120.75; April, 1958, $121.96; May, 1958, $140.89; June, 1958, $155.82."

The court rendered Judgment:

"(1) That the plaintiff shall have and recover of the defendant the penal sum of $19,500.00;

"(2) That the plaintiff shall have and recover of the defendant the sum of $120.75, together with interest thereon from April 15, 1958, until paid, the sum of $121.96, together with interest thereon from May 15, 1958, until paid, the sum of $140.89, together with interest thereon from June 15, 1958, until paid, and the sum of $155.82, together with interest thereon from July 15, 1958, until paid; and

"(3) That the costs of this action to be taxed by the Clerk shall be paid by the defendant."

The defendant filed detailed exceptions to all findings of fact and conclusions, and appealed.

Robert F. Moseley, and Jordan, Wright, Henson & Nichols, for plaintiff, appellee.

McLendon, Brim, Holderness & Brooks, By: Hubert Humphrey for defendant, appellant.

HIGGINS, J. The evidence in this case is voluminous. The record and briefs comprise more than 700 pages. Actually, however, there is little material conflict in the testimony. The disagreement arises over (1) the permissible deductions and inferences which may be drawn from the evidence, and (2) the rights of the respective parties under the marketing contract and the law applicable thereto.

The plaintiff is a co-operative association made up of milk producers in Piedmont and Southeastern North Carolina. It was organized in 1953 with its principal office in the city of Greensboro. At the times here involved its membership was approximately 1,000. A number of distributors or processing plants operate in the territory. Prior to the organization, many of the milk producers had been selling to these processing plants. Membership in the Association was established by contract described in the factual statement as A. The members appointed the Association their agent for the purpose of marketing milk and they agreed to deliver milk to the Association or its nominee. The Association agreed to account to the member (after deductions) for all milk which it sells for the members and retain such costs as are considered a fair part of the Association's operating expenses. No provision is made for other membership dues. The directors fixed 6¢ per hundred pounds of raw milk as a membership fee. Subsequently a revised contract designated as B was executed. By B the member authorized the Association to sell milk in its own name and deal with it as its own; to authorize the purchaser to pay in whole or in part to the producer; or to collect in its own name for all or any part of the purchase price for all milk owned or controlled by the member. In accounting to the member, contract B provides for a deduction of 6¢ per 100 pounds as Association dues, and with certain other small incidentals, the Association was required to account to the member for the remainder. While a valid distinction may be drawn as to the Association's rights under each contract, however it is not necessary for us to distinguish these rights, hence we construe the two contracts together, giving the Association its rights under both.

Both contracts determined rights and liabilities of the member and the Association. Neither Melville, the processor here involved, nor any other dairy was a party to the contract. The right of the Association, in this case, to recover against Melville arises, if at all, by operation of law and not upon the membership contract. The plaintiff seeks to invoke the penal provision of G.S. 54-157 which provides:

> "Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach

> his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100), and not more than one thousand ($1,000) dollars, for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense:"

The statute makes it a criminal offense if a processor induces or attemps to induce a member of the Association to breach his contract of membership. It also provides a penalty of $500.00 payable to the Association for inducing or attempting to induce a breach. In view of our decision, it is unnecessary to decide whether the statute contemplates a separate penalty as to each member, or whether it is proper to charge only one penalty for the offense.

The Melville Dairy began operation as a milk processing plant in 1927, first as a proprietorship owned by Ralph Scott, converted in 1934 into a partnership, and incorporated in 1953. Ralph H. Scott has been in charge from the beginning. He is now President and General Manager. Many of the members of the Association have been his customers over the years. In the early days raw milk was carried in cans by independent truck operators from the producer's home to the processing plant. However, in order to establish closer contact with the producer and thereby assure a steady supply, Scott "bought up the truck routes and the trucking equipment and thereafter operated the trucks from the producer's home to the plant." As a part of the operation, Scott, and later the corporation, sold to producers certain supplies and equipment useful in carrying on their dairy operations.

The evidence disclosed that the relationship between the producer and Melville Dairy continued along the same lines and did not materially change because of producer membership in the Association, except in one particular. After the Association certified the membership contract to Melville, Scott checked with the members and upon their approval deducted the monthly dues fixed by the Association and transmitted them to the Association. After the request for the deduction by the Association and before compliance, Melville obtained the approval of each producer. The plaintiff contended and the court found that Melville thus recognized the validity of the membership contract. However, there is a fundamental distinction between recognizing the contract as valid between the Association and the producer, and consenting to be a party to and bound by it. The record is bare of evidence that Melville acted other

than as a courtesy both to the Association and to its members. The Association manager, Mr. Lytle, evidently held this view and by letter expressly thanked Melville for deducting and transmitting dues — at the same time stating that other processors had refused to do so. The letter indicates Mr. Lytle was not asserting any claim of right to have the dues deducted. From the evidence presented, it appears that Melville deducted and transmitted dues in the main as a favor to and for the convenience of its customers, each of whom was thus spared the necessity of sending a separate check each month. The evidence discloses that Melville did not rely on the contract but obtained the personal approval of each producer before it actually began the deduction of dues. The collection in so far as the Association was concerned was a task Melville voluntarily assumed, and which it had a right voluntarily to abandon. Ordinarily, a courtesy, even if continued, does not ripen into a legal right. "The law declares that 'everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent.' " *Iselin & Co. v. Saunders,* 231 N.C. 642, 58 S.E. 2d 614.

In September, 1957, the North Carolina Milk Commission ordered an increase of 30¢ per 100 pounds in the price of Grade One Milk. For some reason undisclosed the Association opposed the increase. Melville at the time decided to put into effect a 10¢ per 100 pounds increase in its hauling charge. A committee of producers headed by Mr. Hargrove, plaintiff's director for District No. 2, called on and conferred with Mr. Scott with reference to the proposed increase. Mr. Scott, for the defendant, said that he would recheck the transportation costs and would confer further with the committee. In the meantime, without notifying Melville, the Association filed a protest to the increase with the North Carolina Milk Commission. The differences with respect to the proposed increase were adjusted by an agreement that the producers would improve the side roads and entrances to their milk houses and Melville would cancel its proposed increase. In the meantime, the Milk Commission held a hearing but made no disposition of the protest. The Commission never exercised the authority to order a processor to deduct membership dues as authorized by G.S. 106-266.12. *State ex rel Milk Commission v. Galloway,* 249 N.C. 658, 107 S.E. 2d 631; Milk Control in the United States, 38 N.C.L.R. 420.

As an outgrowth of Melville's proposed increase in the hauling charge, officers of the Association initiated a drive to have its members switch from cans to refrigeration tanks. The Association discussed plans to purchase tank trucks and take over the hauling. When

it became known to the members that the switch would require each producer to make an additional investment of $1,800 to $2,500, dissatisfaction developed.

From the evidence of the members who testified at the hearing, the proposed switch to refrigeration and the cost thereof precipitated the trouble between the Association and its members. Melville's producers began notifying Scott to cease deducting Association dues. Scott, for Melville, sought the advice of the Milk Commission. He was told that similar requests were being made by other producers. The secretary gave this advice: "Have something in writing." Thereafter Melville sent out this memo and ballot: "We have had numerous requests to discontinue taking out dues for the North Carolina Milk Producers Association. If you want this done sign below and either drop it in the mail or give it to your hauler to give to us." Enclosed with the memo was the following: "To Melville Dairies, Inc.: Please discontinue deducting 6¢ per 100 pounds from my check for the North Carolina Milk Producers Association as of December 1, 1957." At the time, the deductions were being made. A change required an affirmative vote. Such seems to be in accordance with the proper statement of an issue. After the returns were in Melville ceased to make the deductions and paid in full to the producers.

Thereafter the Association's attorney made demand upon Melville either to deduct and transmit the dues or, as an alternative, to send to the Association the check for all milk sold by all members of the Association. The letter cited the memo and ballot as a threat or an attempt to have the member breach his contract with the Association "for which the court will furnish adequate civil relief." As a result of this demand, Melville called a meeting of its producers (to coincide with another producer meeting) to be held at the Courthouse in Graham on April 14. After the All-Jersey program was concluded, Mr. Scott stated to the members, "someone is likely to get sued. I am in the middle and I don't want my customers suing me." Slips or ballots were furnished and the members were invited to sign and make their wishes known. The memorandum provided: "This is to authorize Melville Dairy, Inc., to send my check (less my N. C. Milk Commission dues) to the Carolina Milk producers Association." This ballot also required an affirmative answer to signify a change. Only three members authorized the sending of their milk checks to the Association. One later withdrew his authorization. The requests of the two were followed.

The evidence indicates a studied effort on the part of the Association's manager, Mr. Lytle, to collect dues from Melville Dairy rather than from the members themselves. He stated the Association would

not sue the members. When Grady Perry terminated his contract in the manner provided, he offered to pay his back dues. Lytle said, "No, he would get it out of Ralph Scott." When Ralph Woody terminated his contract he told Lytle he wasn't going to pay any more dues. "He (Lytle) said it didn't make a damn to him. . . . 'I am going to collect them out of Ralph Scott.' "

A fair analysis of the evidence fails to show wherein Scott or Melville exceeded the bounds of business propriety and legitimate self-interest either in its dealings with the committee with respect to the increase in the hauling, or its request for written instructions, or its refusal to send each producer's milk check to the Association against the will and direction of the producer who sold the milk.

Great emphasis is placed on the time in which Melville sought to increase its hauling charge. Fairly appraised it would seem that if the facts justified an increase, the appropriate time to make it would be coincident with the advance in the price to the producer. At any rate the controversy over the proposed increase was amicably settled and adjusted by the cancellation of the increase by Melville and the improvement of the roads and driveways by the producers. Melville had purchased the routes and equipment from the former truckers in order to have direct contact with its customers. If the Association took over the transportation this contact would be lost. Melville, therefore, had an interest in continuing to haul raw milk. The plan of the Association to install refrigeration triggered the opposition of the members to tanks because of the initial cost. Members of the Association began notifying Melville to cease withholding Association dues. The evidence does not show a single instance where any producer actually violated the contract. The evidence shows that cancellation was in accordance with the provisions of the contract.

Both the Association and the trial judge realized the failure of the evidence to show a breach, but sought to hold Melville upon the ground that Scott, as President and Manager, knowingly attempted to induce members of the Association to breach their marketing agreements. In this connection it is worthy of note that not one member of the Association testified or suggested that Scott or any other person representing Melville attempted to induce him to breach his contract. Every member, or former member, who testified on the subject stated that he made up his own mind. The plaintiff's entire claim is based (1) on the memo and ballot sent to the producers in December, 1957, (2) the ballot offered at the April 14, 1958, meeting, and (3) the timing of Melville's proposed increase in its hauling charge to coincide with the 30¢ per hundred pounds increase in the price of Grade One Milk.

It must be remembered that during the entire controversy the Association did not sell or offer to sell, a single pound of milk. Not once did the Association confer with Melville with reference to any sale, or proposed sale. The producer in each instance made the sale of his own product in the customary manner. When Melville bought under these circumstances it is certainly understandable why it refused to pay the Association the full purchase price without specific authority from the producer. Melville's milk supply depended upon its amicable relationship with its producers. Neither common sense nor law required it to violate the producers' specific instructions respecting payment for their own products purchased in the usual course of business. In this respect the defendant sought the advice of the Milk Commission and followed that advice. By so doing its motives, without proof, cannot be presumed to be evil. A man who contemplates wrongdoing does not consult the police.

The plaintiff cites *Pure Milk Association v. Kraft,* 8 Ill. App. 2d 102, 130 N.E. 2d 765, as authority for contending the letters and ballots to the producers constituted an attempt to induce a breach of the membership contract. The letter in the *Kraft* case, after reciting demand of the Association and Kraft's refusal, contained this statement: "For over 40 years we at Stockton have valued the privilege of serving and working directly with our patrons, and we sincerely regret that this relationship must be changed in any respect." No such statement was ever made by Melville. The *Kraft* case was an equity proceeding to restrain the breach of contract. The decision, although by an intermediate appellate court, was against holding the processor for collecting dues. In *Rinnander v. Denver Milk Producers* (Colo. 1946) 166 P. 2d 984, the defendant offered a member 2¢ per pound more for his milk, thereby attempting to induce a breach.

Here we have a request by Melville for written instructions from its customers on a matter in which the private oral instructions conflicted with the claims advanced by the Association. The defendant made no attempt to influence the free expression of views. The request was merely an attempt to comply with Mr. Whitaker's advice that, in the dispute which was widespread between members and the Association, the processor should have directions in writing. After all, Melville had an arrangement to do the hauling before the Association was organized. Was it wrongful for it to insist on buying the milk and picking it up at the home of the producer?

When the evidence is analyzed, can it be said that there is anything of substance indicating an attempt to induce a breach of the membership contract? The statute involved is highly penal. The attempt to induce a breach is a criminal offense. The penalty provided

is in the nature of additional punishment. "That penal statutes must be construed strictly is a fundamental rule. The forbidden act must come clearly within the prohibition of the statute for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant." *State v. Mitchell,* 217 N.C. 244, 7 S.E. 2d 567; *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176. "One who seeks to recover a penalty imposed by statute must bring his case clearly within the terms of the statute." 70 C.J.S., Penalties, Construction of Statutes, p. 390. In the view we take of this case it is not necessary for us to determine whether a separate penalty may be assessed for each member or whether one penalty only may be assessed for the offense.

In the closing pages of its brief, the plaintiff makes this concession: "We have made no contention that the plaintiff had the legal right under the membership contract to require the defendant to make the 6¢ per cwt. deductions and to remit them to the plaintiff." This concession admits as unjustified the Association attorney's first demand in the letter of December 30, 1957, that the defendant deduct and transmit dues. The plaintiff, does, however, contend that the demand for the full payment of all milk was proper and required Melville to make payments to the Association regardless of the producer's wishes. The marketing contract authorizes the Association to collect from Melville for all milk sold by all producers. It permitted the Association to deduct membership dues and obligated it to pay the remainder to the respective producers. By this method of accounting the Association received membership dues and the producer received pay for his milk and credit for his dues.

The plaintiff realizes the producer is not entitled to be paid twice for his milk; and Melville should not be required to pay twice for it. However, the plaintiff contends that Melville should be required to honor the assignment in the contract and should pay in full to the Association; that the Association retain membership dues and account to the producer for the remaining amount due. Melville then has the legal right to call on the producer to return the price paid in the first instance for the milk for the reason that his keeping it would amount to unjust enrichment.

In the main the court seems to have adopted the plaintiff's theory of the case. The court found the plaintiff is entitled to recover $74,-553.73. Whereupon the plaintiff becomes liable to pay the producer the amount collected for his milk, less his membership dues. "But the defendant having paid that amount to the producers, as a matter of equity, the defendant should not be compelled to pay the same

twice . . . The monetary recovery to be had by the plaintiff against the defendant should be only the amount of said dues."

The evidence is undisputed that Melville paid the producer in full for all milk delivered. The producer has received the money out of which he is obligated to pay dues to the Association. That duty arose under his contract, for which he is primarily liable. He may or may not have paid the dues. On that question the finding is silent. A third party cannot be held for a payment without a finding that the party primarily liable has failed to meet the obligation. The court did find that Melville had not paid the dues but there is no finding the producer did not pay them. The court's judgment requires Melville to pay the dues after having paid in full for the milk. The judgment permits the producer to escape payment, or, if he has paid, then it permits the Association to collect twice: once from the member and once from Melville. The plaintiff insists the judgment for the dues should stand. To use a slang expression, this Court does not buy the argument.

The court sat as judge and jury. The findings of fact are conclusive on appeal if supported by any substantial evidence. However, the court's conclusions from the facts found involve legal questions which are subject to review on appeal. Actually, in this case many of the stated findings are inferences and conclusions from facts which are not in serious dispute. The rule in such cases is, "Every inference must stand upon some clear and direct evidence, and not upon some other inference." *Lane v. Bryan*, 246 N.C. 108, 97 S.E. 2d 411. However, when the actual evidence is carefully analyzed, when it is both weighed and measured, it is insufficient to support a finding the defendant attempted to induce any member of the Association to breach his marketing contract. "When the proved or admitted facts are consistent with any reasonable theory of good faith and honest intent, they should be so construed." 37 C.J.S., § 115, p. 438. The plaintiff has failed to show by facts, and the legitimate inferences from them, that on either of the alleged causes of action it is entitled to recover.

The judgment is

Reversed.

TULL *v.* DOCTORS BUILDING, INC.

R. READ TULL AND WIFE, JULIA P. TULL; E. REED GASKIN AND WIFE, JEAN H. GASKIN; DEWITT D. PHILLIPS, JR., (SINGLE); L. HAMPTON SHORT AND WIFE, LOUISE SHORT; DAVID GOE WELTON AND WIFE, SYDNEY L. WELTON; SAM HILLER AND WIFE, EVELYN T. HILLER; GERALD P. SINKOE AND WIFE, FAITH SINKOE; MRS. BANNA B. KNAUFF (WIDOW); J.W. KNAUFF, JR., AND WIFE, MARGUERITE KNAUFF; LORRAINE G. WALLACE (SINGLE); FIRST UNION NATIONAL BANK OF NORTH CAROLINA (FORMERLY UNION NATIONAL BANK), TRUSTEE UNDER TRUST INDENTURE DATED DECEMBER 31, 1945, EXECUTED BY E. C. GRIFFITH AND FRANCES R. GRIFFITH; E. C. GRIFFITH COMPANY, AGENT FOR E. C. GRIFFITH AND WIFE, FRANCES R. GRIFFITH, PLAINTIFFS v. DOCTORS BUILDING, INC.; JOHN S. BROWN AND WIFE, LELIA BROWN; ERNEST K. BROWN (SINGLE); W. S. TAYLOR AND WIFE, AMBLER M. TAYLOR; MRS. RUTH G. BARR (WIDOW); EARLIE H. KEPLEY AND WIFE, ALICE S. KEPLEY; DR. ALBERT R. BLACK AND WIFE, JULIA W. BLACK; WILLIAM SYLVESTER SIMS AND WIFE, LOUISE S. SIMS; CLYDE HARRELLSON (WIDOWER); AMERICAN COMMERCIAL BANK, TRUSTEE; LEWIS M. AYER AND WIFE, IRENE T. AYER; MRS. LULA B. AUSTIN, (WIDOW); MABEL H. PITTLE (WIDOW); C. G. HUNGATE AND WIFE, BEULAH HUNGATE; ESTATE INVESTMENT COMPANY; HARRY SCHAFFER AND WIFE, MAYMIE SCHAFFER; ERNEST HINSON BROWN (SINGLE); JONES-BROWN REALTY COMPANY, INC.; J. A. JONES CONSTRUCTION COMPANY; RALPH A. CLEMMER AND WIFE, PEARL L. CLEMMER; F. TERRELL FRIDELL AND WIFE, HELEN J. FRIDELL; JOHNATHAN E. MCCACHREN AND WIFE, INDIA J. MCCACHREN; ARTHUR R. R. ANDREWS (SINGLE); SELENIA R. HENSON (WIDOW); MRS. ANNIE LOUISE COCHRANE (WIDOW); R. H. MARTIN AND WIFE, INEZ E. MARTIN; MRS. HELENE M. CHANTER (WIDOW); CASPER C. WARREN AND WIFE, LASSYE S. WARREN; ALFRED F. MALLUCK AND WIFE, HELEN B. MALLUCK; DWIGHT L. DAVIS AND WIFE, MILDRED W. DAVIS; E. T. ANDERSON AND WIFE, RUTH ANDERSON; H. V. JOHNSON AND SON, INC.; ROBERT M. DOWD, JR., AND WIFE, DOROTHY J. DOWD; MRS. MARIE C. ARBOR (WIDOW); VESTA O. SLAUGHTER (WIDOW); WILLIAM P. FARTHING AND WIFE, COLLEEN K. FARTHING; FRED STERN AND WIFE, EDNA T. STERN; THOMAS E. COLLINS AND WIFE, NELL J. COLLINS; IRA H. BLACK AND WIFE, MARGARET N. BLACK; HARRY F. SIMMONS AND WIFE, MARGARET F. SIMMONS; JAMES P. HINSON AND WIFE, CLARA B. HINSON; BEN J. BROADWAY, SR., AND WIFE, BONNIE G. BROADWAY; ROBERT M. HILL AND WIFE, MARTHA J. HILL; MRS. CLARA ASHCRAFT DEININGER (WIDOW); WILLIAM A. MCGHEE AND WIFE, DOROTHY L. MCGHEE; MARY C. HANFORD AND HUSBAND, JOHN VAN HANFORD; ROBERT H. PERCIVAL AND WIFE, KATHLEEN R. PERCIVAL; GEORGE N. HARRILL (SINGLE); RUTH W. HORTON AND HUSBAND, H. L. HORTON; EDGAR S. LANEY AND WIFE, HAZEL M. LANEY, DEFENDANTS.

(Filed 16 June, 1961.)

1. Deeds § 19—

Where the owner of a large tract of land subdivides it into numerous tracts and files a separate map as to each tract, which map shows a general plan of development for that tract, each tract is a separate subdivision for the purpose of construing the restrictive covenants.

2. Same—

Where the record discloses a map of a subdivision showing numbered lots restricted to use for residential purposes and also a portion of land marked "reserved unrestricted," the portion marked "reserved unrestricted" remains outside of the general scheme of development and the use of such portion for commercial purposes does not affect the validity of the restrictive covenants in regard to the numbered lots.

3. Same—

Restrictive covenants constitute negative easements running with the land, enforceable *inter se* by the grantees in the deeds containing such restrictions and also by all purchasers by *mesne* conveyances from such grantees, even though their immediate deeds contain no restrictions.

4. Same—

Changes in character of the use of land adjacent to but outside the area of a subdivision restricted to residential purposes does not affect the validity and enforceability of the residential restrictions, there being no change in use within the covenanted area.

5. Same—

The violation of covenants restricting the use of lots within a development to residential purposes, even though acquiesced in by the owners of other lots within the development, will not estop such other owners from enforcing the restrictions unless the violations of the restrictions amount to such a radical or fundamental change as to destroy for practical purposes the essential objects and purposes of the residential restrictions, and each case must be determined upon its particular facts.

6. Same—

The fact that several lots in a residential development are paved and used for parking in connection with an office building lying outside the area of the development, and that owners of other lots within the development have acquiesced in such use, will not estop such other owners from enforcing the restrictive covenants when they have objected to and refused to permit the erection of any commercial structure on any of the lots within the residential area.

7. Same—

The fact that a municipality opens up a street on a part of a lot in a subdivision in which all the lots are restricted to residential purposes does not violate or negate the residential restrictions.

8. Same—

Valid restrictions limiting the use of lots within a development to residential purposes are neither nullified nor superseded by a subsequent zoning ordinance of the municipality within which the subdivision lies.

9. Same—

Valid restrictive covenants constitute a species of incorporeal property right, and equity will not relieve a grantee of his contractual obligations in regard thereto merely because they have become burdensome, but must give effect to the covenants unless changed conditions within the covenanted area are so radical as to destroy the essential objects of the scheme of development and such changes have been acquiesced in by the owners of other lots so as to constitute a waiver or abandonment of their rights to enforce the restrictions.

10. Equity § 1—

Equity will not override the law or invalidate contracts or destroy property rights.

11. Deeds § 19—

In an action under the Declaratory Judgment Act to determine the enforceability of restrictive covenants in a residential development, judgment upholding the restrictions upon supporting findings of fact and conclusions of law will be upheld, but provision of the judgment retaining the cause for further proceedings will be striken out.

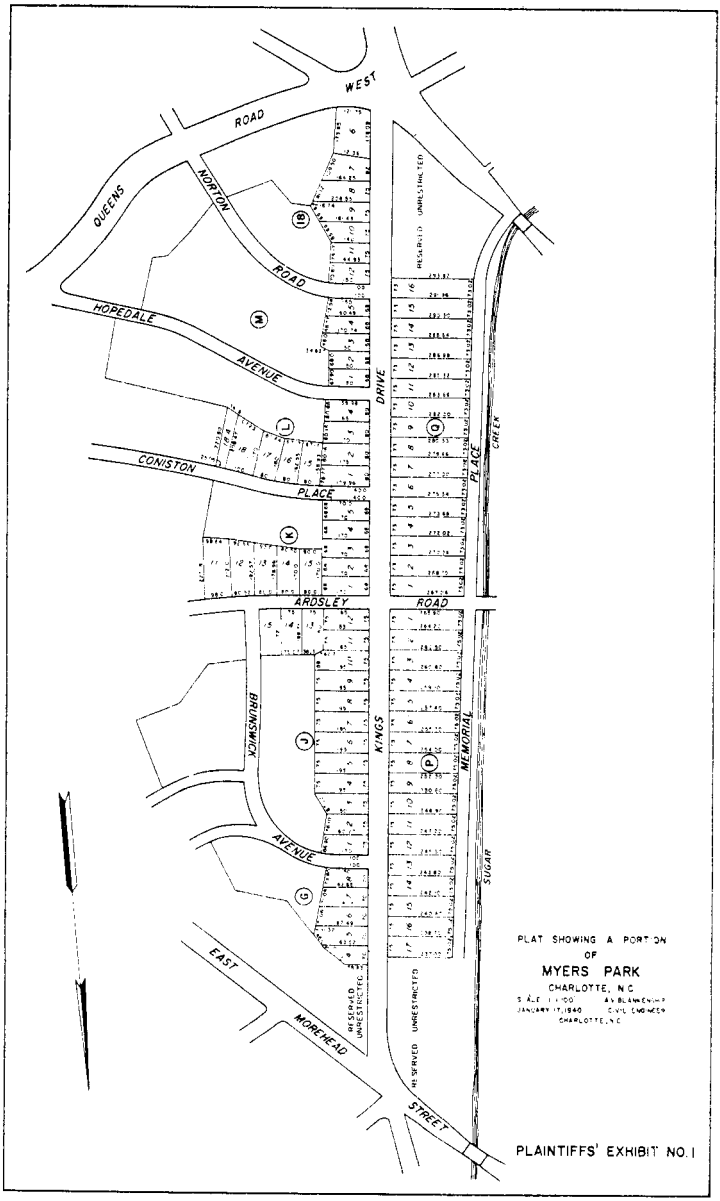
12. Judgments § 3—

The court properly refuses to grant relief prayed for by a plaintiff in an unverified motion, when such relief is not supported by plaintiff's complaint.

APPEAL by plaintiffs from *Craven, S. J.*, 6 February 1961, Special Civil Term of MECKLENBURG.

Action brought by plaintiffs pursuant to the provisions of our Declaratory Judgment Act, G.S. 1-253 *et seq.*, for a judicial determination as to their rights, if any, to use their lots in a subdivision in Myers Park in the city of Charlotte for other than residential purposes.

Plaintiffs and defendants constitute all of the persons who own any interest in the numbered lots shown on plaintiffs' Exhibit 1, except the owners of those numbered lots who have filed a release in the office of the register of deeds for Mecklenburg County, releasing all restrictions on said lots. This is plaintiffs' Exhibit 1:



Plaintiffs own in fee lots 4, 5, 6, 7, and 8 in block G, lots 1, 2, 3, 4, 5, 6, and 10 in block J, and lots 3, 8, and 9 in block P, as shown on plaintiffs' Exhibit 1.

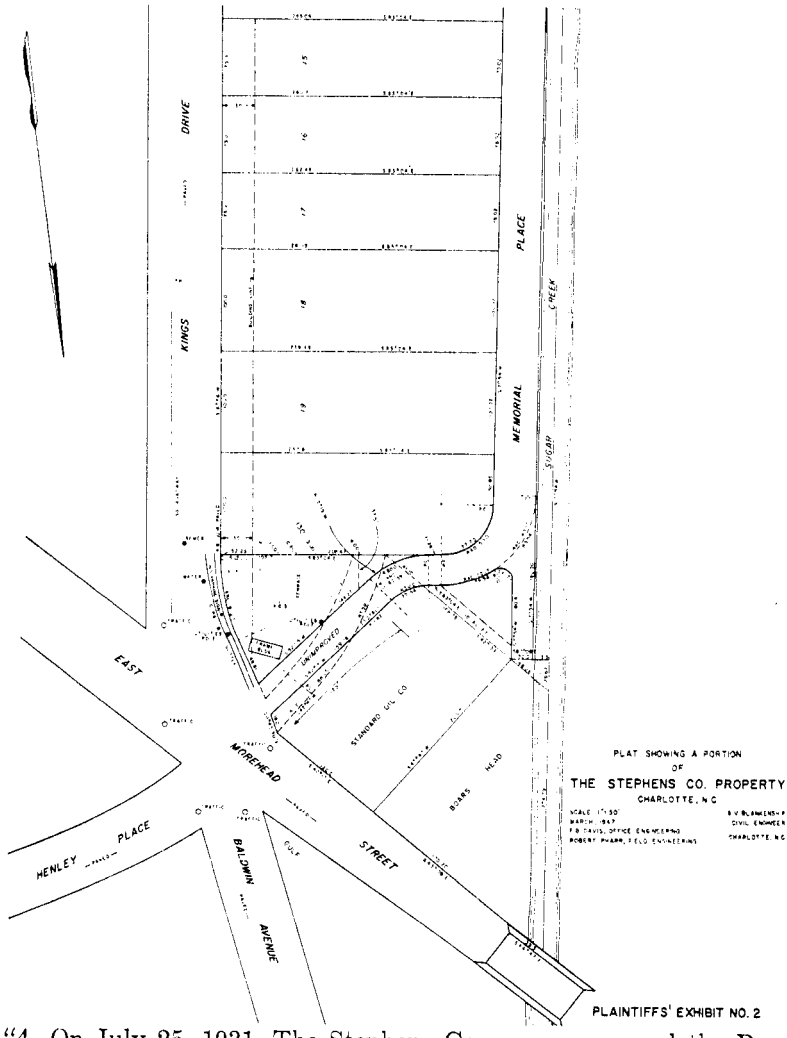
The following named defendants, Doctors Building, Inc.; John S. Brown and wife, Lelia Brown; Ernest K. Brown (Single); American Commercial Bank, Trustee; Mrs. Lula B. Austin (Widow); Harry Schaffer and wife, Maymie Schaffer; Ernest H. Brown (Single); Jones-Brown Realty Company, Inc.; J. A. Jones Construction Company; Ralph A. Clemmer and wife, Pearl L. Clemmer; Arthur R. R. Andrews (Single); Mrs. Annie Louise Cochrane (Widow); Casper C. Warren (Widower); Alfred F. Malluck and wife, Helen B. Malluck; H. V. Johnson and Son, Inc.; Vesta O. Slaughter (Widow); Ira H. Black and wife, Margaret N. Black; Robert H. Percival and wife, Kathleen R. Percival; Edgar S. Laney and wife, Hazel M. Laney; John Van Hanford and wife, Mary C. Hanford; Mrs. Mabel H. Pittle (Widow); C. G. Hungate and wife, Beulah Hungate were duly served with process, filed no answers or other pleadings, the time for answering or filing any pleading had expired, and Judge Craven entered a judgment by default final against them. Judge Craven in this judgment held it was an action to remove a cloud from the title of plaintiffs' lots, and adjudged that these defendants have no easement, right, estate or interest in the lots of plaintiffs tending to limit or restrict the use to which these lots may be put, and plaintiffs have the right to use these lots for other than residential purposes, or to use the same for business purposes, or to erect any business building thereon without any lawful claim adverse to plaintiffs existing on the part of any of these defendants. There is no exception to this judgment by default final.

All the other defendants, who were duly served with process and filed answers, and plaintiffs, pursuant to G.S. 1-184—1-185, waived trial by jury, and agreed that Judge Craven might find the facts, make conclusions of law, and render judgment thereon.

RELEVANT FINDINGS OF FACT.

"2. On July 8, 1931, The Stephens Company owned all of the numbered lots and the blocks marked 'Reserved Unrestricted' shown on plaintiffs' Exhibit 1, although the map which is Exhibit 1 was not made and recorded in the Mecklenburg Public Registry until January 17, 1940.

"3. On July 8, 1931, The Stephens Company caused to be made and recorded in the Mecklenburg Public Registry in Map Book 3 at Page 600 a map of the property shown on plaintiffs' Exhibit 2 as Standard Oil Company and Boar's Head, which were designated Lots 1 and 2, respectively, in Block R."



"4. On July 25, 1931, The Stephens Company conveyed the Boar's Head lot to one N. F. Baxter; that this lot was not restricted to residential use by The Stephens Company, and that the lot was described in the deed as Lot 2, Block R, as shown in Map Book 3 at Page 600.

"5. On February 9, 1937, The Stephens Company conveyed the Standard Oil lot to Standard Oil Company of New Jersey and the lot was described in the deed as Lot 1, Block R, as shown in Map Book 3 at Page 600 of the Mecklenburg Public Registry; that this conveyance contained no restriction to residential use.

"6. The area on plaintiffs' Exhibit 1 south of Morehead Street and east of Kings Drive was at one time owned by The Stephens Company and is shown on a map of Myers Park dated February, 1936, which map is recorded in Map Book 4, Page 76, in the Mecklenburg County Registry.

"7. On January 17, 1940, The Stephens Company had prepared and recorded plaintiffs' Exhibit A; that this exhibit was recorded in Map Book 4 at Page 401 in the Mecklenburg Public Registry; that at the time this map was put on record The Stephens Company owned all of the numbered lots shown on said map and all of the three tracts designated 'Reserved Unrestricted,' excepting approximately one-third of the 'Reserved Unrestricted' area at the northwesterly intersection of East Morehead Street and Kings Drive, which had been previously sold to Mr. Baxter and Standard Oil Company, as described above.

"8. The Stephens Company by a restriction between itself and Dr. A. R. Black and wife, Consuello G. Caldwell Black, restricted all of the numbered lots facing Kings Drive on plaintiffs' Exhibit 1 so that they could be used for 'residential purposes only.' Said restriction agreement was dated February 17, 1940, and was recorded in Book 997 at Page 275 of the Mecklenburg Public Registry; that a copy of said restriction agreement is attached hereto.

"9. The Stephens Company restricted the remainder of the numbered lots shown on plaintiffs' Exhibit 1 by instruments filed in Book 1446, Page 412, Book 491, Page 277, Book 1097, Page 235 and Book 1299, Page 502, 'for residential purposes only.'

"10. In April of 1947, The Stephens Company caused to be made and recorded in Map Book 5 at Page 438 the map shown as plaintiffs' Exhibit 2. At the time this map was made and recorded The Stephens Company owned all of the lots shown thereon, excepting those lots marked Standard Oil Company and Boar's Head.

"11. On March 24, 1948, The Stephens Company conveyed lots 18 and 19 in Block P as shown on plaintiffs' Exhibit 2 to Doctors Building, Inc.; that this conveyance did not contain restrictions requiring residential use of the lot.

"12. In December of 1951, The Stephens Company conveyed by metes and bounds descriptions all of the tracts marked 'Reserved Unrestricted' located at the southerly end of Kings Drive, as shown on plaintiffs' Exhibit A, and all of the tract marked 'Reserved Unrestricted' located at the southeasterly intersection of East Morehead Street and Kings Drive; that in December of 1951, The Stephens Company conveyed Lots 20 and A as shown on plaintiffs' Exhibit 2; that these conveyances were made to The Stephens Company stock-

holders as part of a plan of dissolution; that these conveyances did not contain restrictions requiring residential use.

"13. Except to locate some of the corners, none of the aforesaid deeds of The Stephens Company made any reference to plaintiffs' Exhibit 1 (Map Book 4, Page 401) to describe the areas conveyed and no restrictions against the use of such property for residential purposes were placed in said deeds.

"14. The Stephens Company had followed a custom in many of its maps which are recorded in the Mecklenburg County Registry of showing areas other than the platted lots on said maps. Such areas were divided into lots on other maps which were either previously recorded in the Mecklenburg Registry or later recorded in the Mecklenburg County Registry. The Stephens Company has placed many maps on record in the Mecklenburg Public Registry of different subdivisions of Myers Park.

"15. The Stephens Company restricted the numbered lots on plaintiffs' Exhibit 1 for 'residential purposes only' as a subdivision comprised of said lots only and in pursuance of a general plan of development or improvement.

"16. Substantially all of the lots facing Kings Drive in Blocks J, K, L, M, 18 and Q on plaintiffs' Exhibit 1 have fine, substantial residences on them; that Lots 4 through 8 in Block G are vacant and Lots 11 through 17 in Block P do not contain any structures on them and are used as parking lots as hereinafter set out. The City of Charlotte has opened a street connecting Kings Drive and Blythe Boulevard on a portion of Lot 14.

"17. No structures of any type have been erected on any numbered lots in the subdivision, except single family residences and duplexes.

"18. All of the residences in the subdivision have been built since 1940 and many have been built in the past ten years. The majority of the residences are occupied by owners. The yards are nicely landscaped and well kept. At least two of the defendants have made recent improvements within the past years on their homes costing $6,000.00 and $8,000.00 respectively.

"19. The City of Charlotte, by proper ordinance, has zoned all of the numbered lots and all of the areas marked 'Reserved Unrestricted,' as shown on plaintiffs' Exhibit 1, as follows:

"(1) All of the numbered lots *not* fronting on Kings Drive are zoned Residence 1." Then follows a specification of the uses permitted under such zoning.

"(2) That all of the numbered lots, fronting on Kings Drive, have

been zoned Residence 2." Then follows a specification of the uses permitted under such zoning.

"(3) That all of the three areas marked 'Reserved Unrestricted' and Lots 4, 5, 6, 7 and 8 in Block G, and Lots 15, 16, 17 in Block P, all as shown on plaintiffs' Exhibit 1, have been zoned Business 1." Then follows a specification of the uses permitted under such zoning.

"20. At the present time there is located on the tract at the southwesterly intersection of Kings Drive and East Morehead Street an alcoholic beverage control board store, an Esso service station, a two-story office building containing a branch office of Investors Diversified Services, Inc., a one-story office building containing a branch office of Addressograph-Multigraph-Varityper Corporation, a one-story office building containing a branch office of the Underwood Corporation, and a ten-story office building which contains, among other things, a cafeteria, a pharmacy, a dispensing optician, a branch of the Wachovia Bank and Trust Company, the Mecklenburg County Medical Library, a beauty shop, an artificial limb shop, a uniform shop, the Medical Management Company, the Zimmer Baxter Company, 101 physicians and dentists and approximately 200 nurses and technicians; that the structures contained on this tract are those indicated by the schedule accompanying plaintiffs' photographic exhibits.

"21. At the present time there is located upon the tract at the southeasterly intersection of Kings Drive and East Morehead Street a three-story office building containing the offices of the eastern marketing division of The Pure Oil Company, a filling station, a restaurant, and a laundry and dry cleaning establishment; that these structures are as shown on the schedule accompanying the plaintiffs' exhibits.

"22. At the present time there is located upon the tract marked 'Reserved Unrestricted,' located at the southerly end of Kings Drive, a two-story medical building which is occupied by approximately twenty physicians and their nurses and technicians and is surrounded by a large parking lot; that this building is as indicated by the schedule accompanying the plaintiffs' exhibit.

"23. The Stephens Company is dissolved and is no longer in existence.

"24. Independence Boulevard is one of the busiest streets in the City of Charlotte, and on its six lanes carries approximately 25,000 cars per day; that at the present time Kings Drive, south of Brunswick Avenue, has but two lanes of traffic and on these lanes travel approximately 12,500 cars per day; that on a per lane basis Kings Drive is 25% more heavily traveled than some parts of Independence Boulevard; that Kings Drive is not a truck route and almost all of

the vehicles travelling on said street are privately owned automobiles.

"25. On account of the heavy volume of traffic carried by Kings Drive, the City of Charlotte, in April of 1960, widened from 30 feet to 55 feet the paved portion of Kings Drive between the East Morehead section and Brunswick Avenue and installed a traffic control device at the intersection of Kings Drive and Brunswick Avenue; that because of the heavy volume of traffic carried by Kings Drive, the City of Charlotte, within the immediate future, is going to widen the paved portion of the remainder of Kings Drive from 30 to 45 feet and operate it as a four-lane street with on street parking prohibited at all times; that is shown on plaintiffs' Exhibit 1, Kings Drive was dedicated by The Stephens Company with a right of way of 70 feet.

"26. The ten-story office building, described above, is located on Lots 18 and 19 of Block B, as shown on plaintiffs' Exhibit 2, and is built so that its southerly wall runs from east to west approximately four feet distant from the length of the northerly line of Lot 17 in Block B.

"27. In said ten-story office building there are employed, in addition to the 101 physicians and dentists and 200 nurses and technicians, 78 persons in the various businesses set forth in paragraph 11 above.

"28. The said ten-story building is owned by one of the defendants, Doctors Building, Inc.; that this defendant has leased the space in said building to all of the physicians, dentists and businesses described above.

"29. To provide parking space for the 278 people who work in this building and the patients and customers who come to it, the defendant, Doctors Building, Inc., at the time it opened its building in 1950, had Lots 15, 16 and 17 paved with 2 inches of crushed rock and 4 inches of asphalt, inclosed, marked off, and turned into a parking lot capable of holding 259 cars; that said lots have been used for parking continuously since 1950.

"30. In 1955 Brunswick Avenue was run in an east-west direction through the northerly three-fourths of Lot 14 in Block P as shown on plaintiffs' Exhibit 1; that this portion of Brunswick Avenue leads into the grounds of Charlotte Memorial Hospital, which will be a 600 bed hospital when the wing now under construction is completed.

"31. In 1955 the defendant, Doctors Building, Inc., leased from the defendant, J. A. Jones Construction Company, Lot 13 and the southerly one fourth of Lot 14 in Block P as shown on plaintiffs' Exhibit 1, and that this area was paved like the lots described in paragraph 19 above, marked off and has been used as a parking lot continuously since 1955.

"32. In 1956 the defendant, Doctors Building, Inc., leased Lot 12

in Block P as shown on plaintiffs' Exhibit 1 from the defendant, Jones-Brown Realty Company, and turned the same into a paved parking lot; that in 1957 the defendant, Doctors Building, Inc., purchased Lot 11 in Block P as shown on plaintiffs' Exhibit 1 and turned the same into a parking lot; that Lot 12, since 1956 and Lot 11, since 1957, have been used continuously as parking lots.

"33. The uniform lease executed by the Doctors Building, Inc., with its tenants, requires the Doctors Building, Inc., to furnish parking for tenants, employees, patients and customers of tenants; that the only space furnished by the Doctors Building, Inc., for parking is on Lots 11, 12, 13, part of 14, 15, 16, and 17 in Block P and on Memorial Place, to the rear of these lots, as shown on plaintiffs' Exhibit 1; that the said defendant owns and leases no other space within the area where such parking could be furnished.

"34. The capacity of parking lots located on Lots 11, 12, 13, 15, 16, 17 and part of 14 in the area of Memorial Place to the rear of these lots is 469 automobiles; the automobiles of persons using the facilities located in the said ten-story building come and go from said lots during the day, with the result that a minimum of 1,000 automobiles use this parking lot each day.

"35. The patients and customers of the tenants of said ten-story building pay nothing as they enter or leave said parking lot, nor are they required to exhibit any evidence of the fact that they have used any of the facilities in said ten-story building; that it would be possible for the general public to use said lots and not enter the ten-story building.

"36. In no time since it began the operation of said parking lots in 1950, has the defendant, Doctors Building, Inc., ever been requested by any person, firm or corporation to cease to park automobiles thereon.

"37. Although none of the owners of other lots in the subdivision made formal objection to such use of said lots for the type of parking described above, the defendants refused to allow the use of Lots 16 and 17 in Block P for a proposed addition to the Doctors Building in 1955 and such proposed addition was placed to the rear of the existing Doctors Building, outside the subdivision.

"38. On two occasions since 1955, the defendants have refused to release the restrictions for the purpose of permitting buildings other than residences on the vacant lots in Block G.

"39. No structure of any sort has been erected on any of said parking lots.

"40. All of the lots owned by the plaintiffs are North of Ardsley

Road, as shown on plaintiffs' Exhibit 1, and all of the lots owned by the answering defendants are South of Ardsley Road as shown on said map; that the plaintiffs' lots are substantially more valuable for nonresidential use than for residential use.

"41. The unnumbered tract shown on Block J of plaintiffs' Exhibit 1, which is located immediately to the rear of Lots 1 - 10 in said Block, has located thereon the Miller Clinic; that the Miller Clinic Building is as represented by the plaintiffs' photographic exhibits and can be identified by using the schedule thereto attached."

CONCLUSIONS OF LAW.

"1. The numbered lots on plaintiffs' Exhibit 1 comprise an integral subdivision and uniform restrictions were imposed upon all of such lots restricting their use to residential purposes only; such restrictions were placed on said lots in conformity with a general plan for development and such restrictions constitute negative easements running with the land and are enforceable by the immediate and remote grantees of The Stephens Company *inter-se.*

"2. Any changes which may have taken place or any land use which is made of land adjacent to but outside the area embraced in the subdivision (the numbered lots on plaintiffs' Exhibit 1) is irrelevant and has no legal effect upon the validity of the restrictions placed on the lots within the subdivision.

"3. The use by Doctors Building, Inc., of all of Lots 11, 12, 13, 15, 16, 17 and part of Lot 14 in Block P, as shown on plaintiffs' Exhibit 1, for parking purposes in conjunction with operation of its office building, is a violation of the restrictive covenants requiring residential use of these lots; that such use does not constitute a major change within the subdivision nor does such use render it impossible to enforce the general plan of use of said lots in the subdivision for residential purposes only. The aforesaid use of said lots does not materially affect the enjoyment of the property of the defendants and the failure of the defendants to object to such use of said lots, coupled with the fact that the defendants have consistently objected to any structure other than a residence being erected on any lots in the subdivision, does not now estop the defendants from enforcing the restrictions that the lots within the subdivision to be used for residential purposes only.

"4. The restrictions set forth in Book 997, page 275, in the Mecklenburg County Registry are valid and binding on all of the land in the subdivision and that the plaintiffs are not entitled to make any use of their land within said subdivision inconsistent with said restrictions.

"5. The court is of the opinion that Lots 4, 5, 6, 7, 8 in Block G and

Lots 15, 16 and 17 in Block P, as shown on plaintiffs' Exhibit 1, should be released from the restrictions requiring residential use; that the court would adjudge that these lots are so released, except for the court's further opinion that the law requires either a complete abrogation of the restrictive covenants on all of the lots in the subdivision, or a complete enforcement of the restrictive covenants as to all of the lots in the subdivision."

Whereupon, Judge Craven adjudged and decreed that the relief sought by plaintiffs is hereby denied, and plaintiffs are ordered to make no use of any lots they may own shown as a numbered lot on the map recorded in Map Book 4, page 401, for any purpose other than residential purposes. The action was retained for further proceedings as may appear necessary from time to time.

On the same day Judge Craven signed the above two judgments, 8 February 1961, and after they were signed, Dewitt D. Phillips, Jr., one of the plaintiffs, filed with Judge Craven a written motion alleging in substance: He owns lot 3 in Block J as shown on plaintiffs' Exhibit 1. He is a practicing physician who has converted the structure located on his lot into an office for his use. As a result of the judgment in this case he will have to reconvert his structure to residential use at considerable expense, and move his office to another location. His lot is located very near the lots used by the defendant, Doctors Building, Inc., for parking purposes. Inasmuch as this plaintiff will be required to cease his nonresidential use of his lot, the judgment in this case should require not only that plaintiffs should cease nonresidential use of their lots, but that all defendants, including Doctors Building, Inc., should in like manner cease non-residential use of their lots. Wherefore, he prays that the court should adjudge and decree that all numbered lots shown on plaintiffs' Exhibit 1 are subject to the restrictive covenants appended to the findings of fact, and that all the owners of numbered lots shown on said map are required to use their lots in conformance therewith. Judge Craven denied his motion without comment.

From the judgment rendered in which a jury trial was waived, the plaintiffs appeal, and from the denial of the motion of the plaintiff, Dewitt D. Phillips, Jr., the plaintiffs appeal.

McClenenghan, Miller & Creasy By F. A. McCleneghan; and Dockery, Ruff, Perry, Bond & Cobb By James O. Cobb for plaintiffs, appellants.

Bell, Bradley, Gebhardt, DeLaney & Millette By Ernest S. DeLaney, Jr., for defendants, appellees.

PARKER, J. All the defendants, who were not parties to the judgment by default final, filed a joint answer, except W. S. Taylor and wife, Ambler M. Taylor, and George N. Harrill, single. There is nothing in the record to show these three defendants were served with process.

There are no exceptions to the judge's findings of fact, which would indicate there is no dispute as to the facts. The judgment states oral evidence was introduced, but none of it is in the record. We have copied verbatim from the record filed in this Court the findings of fact. A close reading of these findings of fact would seem to indicate there are some minor typographical errors.

Plaintiffs have three assignments of error. Their first assignment of error is to the judge's conclusions of law 1, 2, and 4, and to that part of conclusion of law 3 following the words "does not constitute a major change."

In respect to conclusion of law 1. Findings of fact 8 is: "The Stephens Company by a restriction between itself and Dr. A. R. Black and wife, Consuello G. Caldwell Black, restricted all of the numbered lots facing Kings Drive on plaintiffs' Exhibit 1 so that they could be used for 'residential purposes only.' Said restriction agreement was dated February 17, 1940, and was recorded in Book 997 at Page 275 of the Mecklenburg Public Registry; that a copy of said restriction agreement is attached hereto." The restriction agreement provides the Stephens Company "will hold all of said lots which remain unsold subject to said restrictions." This agreement further provides: "It is understood and agreed that the property shown upon said map as 'Reserved Unrestricted' may be held and conveyed by The Stephens Company free of any restrictions or subject to such restrictions as it may desire to impose upon the same." Finding of fact 9 is: "The Stephens Company restricted the remainder of the numbered lots shown on plaintiffs' Exhibit 1 by instruments filed in Book 1446," etc., " 'for residential purposes only.' " The findings of fact show that the areas shown on the map marked plaintiffs' Exhibit 1 marked "Reserved Unrestricted" were never restricted for residential use, and are now used for business and professional purposes on a large scale. Finding of fact 15 is: "The Stephens Company restricted the numbered lots on plaintiffs' Exhibit 1 for 'residential purposes only' as a subdivision comprised of said lots only and in pursuance of a general plan of development or improvement." It is to be noted The Stephens Company did not reserve the right to change the residential restrictions within the subdivision composed of numbered lots, and did not reserve any of these lots in this subdivision free from such restrictions. Finding of fact 17 is: "No structures of any type have been erected

on any numbered lots in the subdivision, except single family residences and duplexes." Finding of fact 16 is: "Substantially all of the lots facing Kings Drive in Blocks J, K, L, M, 18, and Q on plaintiffs' Exhibit 1 have fine, substantial residences on them; that Lots 4 through 8 in Block G are vacant and Lots 11 through 17 in Block P do not contain any structures on them and are used as parking lots as hereinafter set out. The City of Charlotte has opened a street connecting Kings Drive and Blythe Boulevard on a portion of Lot 14."

The findings of fact show many subdivisions of Myers Park by The Stephens Company and many maps. Many of these maps are not in the record. This Court has held "that the subdivisions of Myers Park are each a separate, distinct and integral development, and that Myers Park, consisting originally of 1100 acres was not planned and developed as a unit, composed of these subdivisions." *Johnston v. Garrett,* 190 N.C. 835, 130 S.E. 835; *Stephens Co. v. Homes Co.,* 181 N.C. 335, 107 S.E. 233; *McLeskey v. Heinlein,* 200 N.C. 290, 156 S.E. 489; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661.

This Court said in *Sedberry v. Parsons,* 232 N.C. 707, 62 S.E. 2d 88: "These principles are well settled in this jurisdiction: 1. 'Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created.' 26 C.J.S., Deeds, section 167; *Higdon v. Jaffa,* 231 N.C. 242, 56 S.E. 2d 661; *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471; *Bailey v. Jackson,* 191 N.C. 61, 131 S.E. 567; *Homes Co. v. Falls,* 184 N.C. 426, 115 S.E. 184.

"2 The right to enforce the restrictions in such case is not confined to immediate purchasers from the original grantor. It may be exercised by subsequent owners who acquire lots in the subdivision covered by the general plan through *mesne* conveyances from such immediate purchasers. *Higdon v. Jaffa, supra.*

"3. The restrictions limiting the use of land in the subdivision embraced by the general plan can be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions. *Higdon v. Jaffa, supra; Davis v. Robinson,* 189 N.C. 589, 127 S.E. 697.

"4. A purchaser of land in a subdivision is chargeable in law with notice of restrictions limiting the use of the land adopted as a part of a general plan for the development or improvement of the subdivision if such restrictions are contained in any recorded deed or other instrument in his line of title, even though they do not appear in his im-

mediate deed. *Higdon v. Jaffa, supra; Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Bailey v. Jackson, supra.* . . .

"The primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated. *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918; 14 Am. Jur., Covenants, Conditions, and Restrictions, section 202; 26 C.J.S., Deeds, section 167."

The unchallenged findings of fact amply support the judge's conclusions of law 1. These findings of fact further clearly show that the areas or tracts of land marked "Reserved Unrestricted" on the map marked plaintiffs' Exhibit 1 are not, and never have been a part of the separate, distinct and integral subdivision of numbered lots shown on this map reserved for residential uses only. The assignment of error to conclusion of law 1 is overruled.

In respect to conclusion of law 2. On this point we are favored with only a meager discussion in plaintiffs' brief. The fact that adjoining or surrounding property outside of the area embraced in the subdivision of numbered lots restricted for residential purposes only shown on the map marked plaintiffs' Exhibit 1 is now used for business and professional purposes on a large scale, does not alter the character of the residential subdivision itself. This Court said in *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471: "It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place within the covenanted area." Citing voluminous authority. See also: *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Vernon v. Realty Co.,* 226 N.C. 58, 36 S.E. 2d 710; *Higdon v. Jaffa, supra.* The assignment of error to conclusion of law 2 is overruled.

In respect to the assignment of error to part of conclusion of law 3. Neither the plaintiffs, nor Doctors Building, Inc., nor any defendant except to the first part of this conclusion of law which reads: "The use by Doctors Building, Inc., of all of Lots 11, 12, 13, 15, 16, 17 and part of Lot 14 in Block P, as shown on plaintiffs' Exhibit 1, for parking purposes in conjunction with operation of its office building, is a violation of the restrictive covenants requiring residential use of these lots."

In *Forstmann v. Joray Holding Co.,* 244 N.Y. 22, 154 N.E. 652, the Court said: "Doubtless the letter of such restriction has been violated by the defendants. But not every violation of a restrictive agreement

entitles an aggrieved party to equitable relief. Each case depends on its own circumstances."

The Court said in *Rombauer v. Compton Heights Christian Church,* 328 Mo. 1, 40 S.W. 2d 545, 553: "No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement."

See also 14 Am. Jur., Covenants, Conditions and Restrictions, Sections 305, 306, 307; 26 C.J.S., Deeds, Section 171; Thompson on Real Property, Permanent Edition, Vol. 7, Section 3651.

On the subject of changed conditions as affecting the enforcement of restrictive covenants, the cases are legion. Many of them are discussed or cited in Notes in 54 A.L.R. 812, 85 A.L.R. 985, 103 A.L.R. 734, 4 A.L.R. 2d 1111. The cases, of course, deal with different facts, and it seems it is not possible to reconcile many of the holdings on substantially similar facts. A full discussion of the subject is likewise to be found in *Booker v. Old Dominion Land Co.,* 188 Va. 143, 49 S.E. 2d 314, and in *Pitts v. Brown,* 215 S.C. 122, 54 S.E. 2d 538.

The Court said in *Holling v. Margiotta,* 231 S.C. 676, 100 S.E. 2d 397: "We find no error in the conclusion of the lower court that the defendants failed to make out their defenses of laches, estoppel and waiver on the part of the plaintiffs. The free parking on the unoccupied portion of Lot No. 2 by customers while shopping in the nearby stores is not an objectionable commercial use of the lot. Utilization of the first floor of the garage apartment as a storage place for the adjacent grocery was an insubstantial commercial use These very limited uses for nonresidential purposes were not objected to by plaintiffs or the other residents of the subdivision but should not, in equity be held to have estopped them from asserting their right against the subsequent substantial violation by defendants."

Finding of fact 37 is to the effect, that though none of the owners of other lots in the subdivision made formal objection to the use by Doctors Building, Inc., of all of Lots 11, 12, 13, 15, 16, 17 and part of Lot 14 in Block P as shown on plaintiffs' Exhibit 1 for parking purposes in conjunction with the operation of its office building, defendants refused to allow the use of Lots 16 and 17 in Block P for a proposed addition to the Doctors Building in 1955, and such proposed addition was placed in the rear of its building outside the subdivision.

We are of the opinion, and so hold, that the unchallenged findings of fact do not show that the use of Lots 11, 12, 13, 15, 16, 17 and part of Lot 14 in Block P of this subdivision is such a radical or fundamental change or substantial subversion as practically to destroy the

essential objects and purposes of the restriction agreement, as to warrant the removal of the residential restrictions, thereby destroying this residential subdivision with many fine, well kept homes. It would be inequitable to hold otherwise. The assignment of error to the challenged part of conclusion of law 3 is overruled.

For the reasons set forth above plaintiffs' assignment of error to conclusion of law 4 is overruled.

In respect to the assignment of error to conclusion of law 5.

Finding of fact 17 is: "No structures of any type have been erected on any numbered lots in the subdivision, except single family residences and duplexes." Finding of fact 16 in part is: "The City of Charlotte has opened a street connecting Kings Drive and Blythe Boulevard on a portion of Lot 14." This Court said in *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619: "And ordinarily the opening and maintenance of a street or a right of way for the better enjoyment of residential property as such does not violate a covenant restricting the property to residential purposes." *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134, cited and relied on by plaintiffs is factually distinguishable. In respect to the zoning of this subdivision by the city of Charlotte. "A valid restriction on the use of real property is neither nullified nor superseded by the adoption or enactment of a zoning ordinance, nor is the validity of the covenant thereby affected." 26 C.J.S., Deeds, p. 1181.

Business uses not permissible in this residential subdivision have gradually approached it on land outside this subdivision and not a part of it. The border lots in Block G and Lots 15, 16 and 17 in Block P as shown on the map marked plaintiffs' Exhibit 1, first feel the pressure. If equity should permit these border lots to deviate from the residential restriction, the problem arises anew with respect to the lots next inside those relieved from conforming. Thus, in time, the restrictions throughout the tract will become nugatory through a gradual infiltration of the spreading change.

"Contractual relations do not disappear as circumstances change. So equity cannot balance the relative advantages and disadvantages of a covenant and grant relief against its restrictions merely because it has become burdensome. It is bound to give effect to the contract unless changed conditions within the covenanted area, acquiesced in by the owners to such an extent as to constitute a waiver or abandonment, is made to appear. . . . Those who purchase property subject to restrictive covenants must assume the burdens as well as enjoy the benefits, for equity does not grant relief against a bad bargain voluntarily made and unbreached." *Vernon v. Realty Co., supra.* As set forth above, these changes within the covenanted area "must be so

radical as practically to destroy the essential objects and purposes of the agreement." *Rombauer v. Compton Heights Christian Church, supra.* As parties bind themselves so must the courts leave them bound.

Cooper v. Kovan, 349 Mich. 520, 84 N.W. 2d 859 (1957), was a proceeding by residential property owners to enjoin construction of commercial buildings in a subdivision. The circuit court judge held that restrictive covenants on the subdivision were valid, but ordered a compromise permitting erection of buildings under specified conditions, and both parties appealed. The Court held that the restrictive agreements were valid, and there was no justification for compromise of restrictions so as to permit construction of buildings. The Court said in reference to whether the circuit judge sitting in equity had power to effect such a compromise in the face of and at the expense of existing and valid residential restrictions, "we are unable to find that the power lies in judicial hands."

Restrictive covenants are contractual in nature, and create a species of incorporeal property right. *Sheets v. Dillon,* 221 N.C. 426, 20 S.E. 2d 344. "But it is not the way of equity to override the law or to invalidate contracts or to destroy property rights." *Vernon v. Realty Co., supra.*

To release all the lots in Block G and Lots 15, 16, and 17 in Block P in direct violation of the valid residential restrictions here would undoubtedly substantially affect the value of every home in this subdivision. It is clear in our minds that residential restrictions generally constitute a property right of distinct worth, certainly to those who desire to keep their homes for residential use. A careful consideration of all the findings of fact shows no invalidation by the answering defendants of the residential restrictions by laches or waiver or acquiescence or estoppel, so as to warrant the removal of the restrictions. *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408. It is not necessary for us to approve or disapprove of the judge's opinion that all of the lots in Block G and Lots 15, 16, and 17 in Block P should be released from the restrictions requiring residential use, but we do concur in his opinion as to the law set forth in conclusion of law 5. The assignment of error as to conclusion of law 5 is overruled.

The assignment of error to the signing of the judgment is overruled, for the reason that the unchallenged findings of fact, support the conclusions of law, and both support the judgment, with this exception: the judge erred in retaining the case for further proceedings as may appear necessary from time to time, and the judgment is ordered to be modified by striking this out.

Plaintiffs' last assignment of error to the denial by the judge to

sign a judgment as prayed for in the unverified motion of Dewitt D. Phillips, Jr., one of the plaintiffs, is overruled. Plaintiffs' complaint seeks no such relief.

It is to be noted that not a single defendant has excepted to any part of the judgment or appealed.

The judgment below is

Modified and Affirmed.

STATE v. IRVIN K. BASS.

(Filed 16 June, 1961.)

1. Mayhem § 1—

At common law, mayhem was a crime even though the injuries were self-inflicted or purposefully inflicted by another upon a consenting victim, in which instance both parties were guilty, and malice aforethought was required under the common law only in cases involving the cutting out of the tongue or the putting out of an eye.

2. Same—

Under G.S. 14-29 the elements of the offense of mayhem are the same as under the common law, and the consent of the victim does not constitute a defense in a prosecution under the statute, notwithstanding that the statute does not by express terms include such acts as are done with the consent of the victim.

3. Criminal Law § 10—

An accessory before the fact need not be the originator of the plan to commit the offense, but a person is an accessory before the fact if, with knowledge of the intent of the principal to commit the offense, he gives advice or counsel to the principal with regard to a proposed line of conduct, or does some act in aid to the principal in committing the offense, and is not actually present when the offense is committed. G.S. 14-5.

4. Same: Mayhem § 2—

Evidence tending to show that defendant, although he refused to cut off the fingers from the hand of another, deadened the fingers of such other with a hypodermic injection and furnished such other a tourniquet and instructed him in its use, all with knowledge that such other intended to have his fingers cut off to collect insurance money, which intent was actually carried out, is sufficient to make out a *prima facie* case against defendant as an accessory before the fact to mayhem.

5. Same—

It is immaterial that the person who actually cut off the victim's

fingers was not present when defendant deadened the victim's fingers with a hypodermic injection and instructed the victim how to use a tourniquet to stop the flow of blood after the commission of the act, since the counsel given the victim and communicated by the victim to the principal was in effect given by defendant to the principal through the agency of the victim.

6. Mayhem § 2—

In this prosecution of defendant as an accessory before the fact to mayhem, the evidence tended to show that at the time defendant counselled and aided the victim, the victim desired to have his fingers cut off to collect insurance money, but the evidence was conflicting as to whether, at the time the actual perpetrator cut off the victim's fingers, he did so at the request of the victim or whether he did so over the objection of the victim, the victim having changed his mind. *Held:* Conflict in the evidence as to whether the offense as committed was the one which defendant aided and counselled, does not justify nonsuit.

7. Criminal Law § 101—

When the substantative evidence offered by the State is conflicting, some tending to inculpate and some tending to exculpate defendant, it is sufficient to withstand motion for nonsuit.

APPEAL by defendant from *Mallard, J.*, October 1960 Term of ALAMANCE.

This is a criminal action.

The indictment charges that defendant on 2 July 1960 "did unlawfully, wilfully and feloniously be and become an accessory before the fact to the felonious maiming of Walter Rogers, which maiming was done by James Bryson by feloniously, wilfully and unlawfully cutting off on purpose but without malice aforethought four fingers on the left hand of Walter Rogers, with intent to maim the said Walter Rogers, said (defendant) having administered to said Walter Rogers a local anesthetic . . . ."

Plea: Not guilty.

The State's evidence tends to show:

Defendant, I. K. Bass, is a physician, licensed by the State of North Carolina, and resides at Reidsville. On 19 February 1960 defendant deadened the fingers of George Bryson by hypodermic injection. Bryson told defendant he was going to cut off his fingers to get insurance money. Defendant had previously refused to amputate the fingers. While his fingers were deadened by the injection they were cut off by his brother, James Bryson, with an electric skill saw. On 2 July 1960 George Bryson and Walter Rogers went to Reidsville and requested defendant to deaden Rogers' fingers. Defendant refused until he was paid $65.60, amount due him by George Bryson for former services, and $29.00 for deadening Rogers' fingers. These amounts

were paid. Defendant told Rogers he was foolish to cut off his fingers, but if he was fool enough to do it defendant would inject the fingers. George Bryson "made it plain" to defendant that he wanted Rogers' fingers injected so he would not feel pain when the attempt was made to cut off his fingers. Defendant injected Rogers' fingers with procaine which was somewhat diluted, gave him a rubber tourniquet to stop the flow of blood after his fingers had been cut off, and showed him how to apply and use it. Some two or three hours later at Rogers' home in Burlington, James Bryson, at Rogers' request, cut off four fingers on Rogers' left hand, using an electric skill saw. Rogers testified: ". . . (I) went in the room and tried to hide from him (George Bryson). . . . (I) did tell him two or three times I didn't want them cut off and I was not going to cut them off. . . . There was feeling in my fingers. . . . I did not ask James Bryson to cut them off. I asked him not to cut them off and I told him I did not want my fingers cut off. He cut them off anyhow."

Verdict: Guilty.

Judgment: Six months prison term, suspended on conditions.

Defendant appeals.

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

Bethea and Robinson for defendant.

MOORE, J. Defendant assigns as error the refusal of the court to grant his motion for nonsuit made at the close of the evidence. Defendant insists that there are at least three phases and circumstances of the case which make nonsuit mandatory, and that either of these is sufficient for dismissal.

(1) It is contended that Rogers consented to the maiming and that because of this consent the act of James Bryson in cutting off Rogers' fingers is not a violation of G.S. 14-29 upon which the indictment is based. Defendant argues that at common law mayhem, in cutting off fingers or other members of the body, when self-inflicted or inflicted upon one's consenting, was a punishable criminal offense only when done with malice aforethought, that G.S. 14-29 applies to such mayhems only when done without malice aforethought and when inflicted by one person upon another, that the statute alters, abrogates and replaces the common law and therefore there can be no crime of "maiming without malice aforethought where the person alleged to have been maimed has requested that the act of maiming be committed upon him."

This contention requires that we trace briefly the development and

application of the law relating to mayhem from the early days in England and from the colonial period to the present day in North Carolina.

To the early writers on English law the "common law" meant those rules which by custom, usage and court decision, and not by act of Parliament, had come to be recognized as the law of the land. At common law, as thus understood, "mayhem, *mayhemium*, was in part considered . . . as a civil injury; but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offense tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates his courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him." Chitty's Blackstone, Book IV, C. XV, pp. 205-206.

"Note, the life and members of every subject are under the safeguard and protection of the king . . . to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villiene, for the cause aforesaid, cannot mayheme the villiene, but the king shall punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ransome, and imprisonment, until the fine and ransome be paid." 1 Coke Upon Littleton (1st Amer. from 19th London Ed., 1853), s. 194.

". . . (T)he common law elements of Mayhem are (1) depriving; (2) anyone; (3) maliciously; (4) of a corporal member useful for fighting." Burdick: Law of Crime (1946), Vol. 2, s. 401, p. 71.

". . . (I)n order to found an indictment or appeal of mayhem the act must be done maliciously; though it matters not how sudden the occasion." 1 East, P. C., Ch. VII, s. 1, p. 393 (1803).

". . . (A)t common law . . . the injury must be done wilfully and maliciously; but it is not necessary that it shall be premeditated. It may be inflicted in a sudden affray." Clark and Marshall: Crimes (5th Ed.), s. 219, p. 288.

"Malice, according to the authorities, was an essential element in mayhem at common law." *State v. Wilson,* 188 N.C. 781, 125 S.E. 612 (1924).

Blackstone continues comment: "By the ancient law of England he that maimed any man, whereby he lost any part of his body was

sentenced to lose the like part; *membrum pro membro* . . . . But this went afterwards out of use. . . . So that, by the common law, as it for a long time stood, mayhem was only punishable by fine and imprisonment . . . ." Chitty's Blackstone, Book IV, Ch. XV, p. 206.

"But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Henry IV, C. 5. to remedy a mischief that then prevailed by beating, wounding, or robbing a man, and then cutting out his *tongue,* or putting out his eyes, to prevent him from being an evidence against them, this offense is declared to be a felony, if done of malice prepense; that is, as Sir Edward Coke explains it, voluntarily, and of set purpose, though done upon a sudden occasion." *ibid,* p. 206.

Thus, after 5 Henry IV (1404), the cutting out of a tongue or putting out of eyes was a felony if done with malice aforethought. Other acts of malicious maiming were aggravated misdemeanors. Except for minor modifications, not of interest here, this was the status of the law of mayhem until 1683.

As thus defined, mayhem was a crime at common law when self-inflicted, and if inflicted by another upon a consenting victim both were guilty of mayhem. It is clear that this was true regardless of whether malice or malice aforethought was involved. A case was tried and decided in 1603 which is remarkably similar to the case at bar. It is universally accepted as precedent and has been repeatedly cited as authoritative. In Lord Coke's commentaries it is reported in these words: ". . . (I)n my circuit in *anno* 1 *Jacobi regis,* in the County of Leicester, one Wright, a young strong and lustie . . . . rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid." 1 Coke upon Littleton (1st Amer. from 19th London Ed., 1853), s. 194.

". . . (A) person who even maims himself, or procures another to maim him, that he may have more colour to beg; or disables himself to prevent being pressed for a soldier; is subject to fine and imprisonment at common law; and so is the party by whom it was effected at the other's desire." 1 East, P. C., Ch. VII, s. 4, p. 396 (1803). Also see 1 Hale, P. C., Ch. XXXI, p. 412 (New Ed. 1778) in which the *Wright* case is cited.

". . . (T)here is self-murder, or suicide, at common law, and, logically, there may be self maiming also. In fact, this principle was recognized in an old English case (*Wright's* case) where it was held that if one maimed himself, or procured another to maim him, both the

injured person and the one by which the act was done were guilty." Burdick: Law of Crime (1946), Vol. 2, s. 403, p. 74.

"Consent of the person maimed is no defense. If a man procures another to cut off his hand, both are guilty." Clark and Marshall: Crimes (5th Ed.), s. 218, p. 288.

"According to the common law, a person could not rightfully take his own life. If he did so, he became guilty of murder. The law also prohibited self-maiming. Consequently, the consent of one given to another, either to kill or maim, was ineffective to prevent criminal liability on the part of the latter. Although suicide is no longer a crime in most jurisdictions, the rule still prevails that consent to a killing or maiming does not prevent its being criminal." Miller on Criminal Law (1934), s. 57(b), p. 172.

The question of the effect of consent of one given to another to maim, on the guilt or innocence of the person committing the act, has not heretofore been presented to this Court. The common law prevails in this State unless changed by statute. Such consent in the instant case is no defense to the action against defendant unless, as contended by him, statutory changes have necessarily abrogated the common law rule.

The last statute enacted by Parliament relative to mayhem prior to the delivery of Blackstone's commentaries was the Coventry Act. He said: "The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II, C. 1, called the Coventry act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in Parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or disfigure him;* such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy." Chitty's Blackstone, Book IV, Ch. XV, p. 207. See also Pickering's Statutes at Large, Vol. VIII, pp. 331-334.

At the time of the passage of the Coventry Act the colonization of what is now North Carolina was underway. Indeed the Carolinas were named in honor of Charles II. The common law of England prevailed in the Colony. The law of mayhem as it existed prior to the passage of the Coventry Act, and as it existed at the time of the Wright decision, was the law of the Colony until 1749. The Coventry Act "was adopted in North Carolina, 16 October 1749 (23 State Records, 324), but was superseded by the act of 1754 (North Carolina Assembly), which provided 'That if any person or persons . . . , on

purpose, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, bite or cut off a nose or lip, bite or cut off or disable any limb or member of any subject of his Majesty in so doing to maim or disfigure in any of the manners before mentioned such his Majesty's subjects,' etc." Second parentheses ours. *State v. Wilson, supra,* 783. See also 1 Potter: Code of North Carolina, Ch. 56, p. 194.

The Assembly thus repealed the Coventry Act and reinstated the common law as it existed, even prior to the act of 5 Henry IV, adding only acts done with intent to disfigure.

"In 1791, this act (of 1754) was repealed and the following statutes were enacted: 1. 'That if any person or persons shall of malice aforethought unlawfully cut out or disable the tongue, or put out an eye of any person with intent to murder, maim or disfigure, the person or persons so offending, their counsellors, abettors and aiders, knowing of and privy to the offense as aforesaid, shall for the first offense,' etc. 2. 'That if any person or persons shall on purpose unlawfully cut or slit the nose, bite or cut off a nose or lip, bite or cut off an ear, or disable any limb or member of any other person with intent to murder, or to maim or disfigure such person in any such case the person or persons so offending shall be imprisoned,' etc." *State v. Wilson, supra,* 783. See also 1 Potter; Code of North Carolina, Ch. 339, pp. 658, 659.

The first section of the act of 1791 relates to the cutting out and disabling of the tongue and putting out of an eye with malice aforethought. In essential substance it re-enacts 5 Henry IV, C. 5 (1404). Section 2, except for the matters dealt with in section 1, is essentially the same as the act of 1754 and the old common law of England. Section 1 is in all essential elements our present G.S. 14-30. Except for one modification which will be discussed later, section 2 is in all material aspects our present G.S. 14-29, upon which the bill of indictment was based in the instant case.

After the passage of the act of 1791 lawyers became concerned as to whether, from the wording of section 2, *malice aforethought* was necessary for guilt and conviction under that section and, if not, whether *malice* was an essential ingredient of the offense under section 2 (G.S. 14-29). *Ruffin, J.* (later *C. J.*), answered these questions in *State v. Crawford,* 13 N.C. 425. Here defendant was charged with biting off an ear under section 2 of the act (G.S. 14-29). The court held that *malice aforethought* had no application, but that *malice* was an ingredient of the offense. It said: "But even if the argument for the Defendant be allowed, so far as to make malice a necessary ingredient of each criminal act, forbidden in either section, it may well

be asked, what is malice, in reference to this subject? Does it mean an actual, express, or preconceived disposition to do his adversary the particular injury inflicted? I suppose not. But it is used in that enlarged and legal sense, which imports the intent or disposition, at the moment, to do, without lawful authority, and without necessity, that which the law forbids. And how does an act, done on purpose, and without the pressure of necessity, differ from that? To me it seems, that if it is done on purpose, it is done with malice, ..."

Parenthetically, the English Parliament repealed the Coventry Act in 1829 and enacted 9 Geo. IV, C. 31, s. XII, the provisions of which are quite similar to the North Carolina Act of 1754. Pickering's Statutes at Large, 9 Geo. IV, pp. 103-104.

In 1831 the North Carolina Assembly passed an act relating to castration. Acts of the General Assembly, session 1831-1832, Ch. XL. A portion of this act is codified as G.S. 14-28. The remainder of the act was merged with section 2 of the act of 1791 (G.S. 14-29) in 1837. Except for modification as to punishment, the statute (now G.S. 14-29) took final form. It is, in material part, as follows: "If any person shall, *on purpose* and unlawfully, *but without malice aforethought,* cut or slit the nose, bite or cut the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be imprisoned . . . ." (Emphasis added)

The material alteration in 1837 was the addition of the words "without malice aforethought." There was the impression in some quarters that these added words removed *malice* as an essential element of the offense. This is the basis of the contention of defendant in the instant case. He takes the position that the common law was hereby completely abrogated and since the statute does not by express terms include such acts as are done with the consent of the victim, there was no violation in this case. The meaning and effect of the words "without malice aforethought" were construed by *Ruffin, C.J.,* as follows: "It is thus seen that those words *'without malice aforethought,'* which were not in the second section of the act of 1791, are introduced into the revised act of 1837 — doubtless with the view of giving expressly to this latter act the same sense in which the former had been received by judicial construction. In other words, the Legislature approved of the interpretation adopted by the Courts, and meant to incorporate it as a distinct and express enactment of the statute." *State v. Girkin,* 23 N.C. 121, 123 (1840).

The interpretations placed on the statute by *Chief Justice Ruffin*

have not been overruled. We are not disposed now to overrule them. The words "on purpose" have the same significance as the word "maliciously." The words "without malice aforethought" were included in the statute to differentiate it from G.S. 14-30 and made it clear and definite that allegation and proof of premeditation (prepense) are not a requirement in the prosecution of offenses under G.S. 14-29. At common law, and at the time of the decision in the *Wright* case, it was only in mayhem cases involving the cutting out of the tongue or putting out of the eyes that *malice aforethought* was an essential element of the offense. In all other cases malice without premeditation was sufficient. Defendant's assumption that malice aforethought was an element of all acts of mayhem at common law is a mistaken one. Insofar as the instant case is concerned, under our statute the elements of the offense of mayhem are the same as at common law when the *Wright* case was decided in 1603. Consent of the victim in the case at bar is no defense to the charge in the bill of indictment, and no defense to James Bryson and George Bryson should they be prosecuted for mayhem. It would be strange policy indeed if a man could hire or persuade another to kill him and the murderer, by reason of the consent, go free, or if one could persuade another to disable him and the other escape punishment by reason of the consent. Our government is deeply concerned, financially and otherwise, for the health of its citizens and that they not become a public charge. Likewise our commonwealth needs the services of its citizens quite as much as the kings of England needed the services of theirs. It is true that G.S. 14-29 provides that "if any person shall . . . disable . . . the member of any *other person*" he shall be guilty of the offense. But we are not here called upon to decide whether self-inflicted mayhem is a crime in North Carolina. Rogers' fingers were cut off by another or others.

(2) Defendant further contends that his acts, words and conduct were insufficient to make him answerable as an accessory before the fact to mayhem.

G.S. 14-5 provides: "If any person shall counsel, procure or command any other person to commit any felony . . . (he) shall be guilty of a felony, and may be indicted and convicted . . . whether the principal felon shall or shall not have been previously convicted . . . ."

The crime of accessory before the fact is a common law offense. ". . . As to . . . who may be an accessory *before* the fact; Sir Matthew Hale defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime . . . ." Chitty's Blackstone, Book IV, Ch. III, p. 36.

"Counsel," according to Black's Law Dictionary (2d Ed.), p. 280,

means: "Advice given by one person to another in regard to a proposed line of conduct, claim or contention . . . . The words 'counsel' and 'advise' may be, and frequently are, used in criminal law to describe the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done."

In *State v. Williams*, 208 N.C. 707, 182 S.E. 131, defendant was charged with being an accessory both before and after the fact to murder. One Mozingo hired a man to kill deceased. Defendant carried kegs (all were in the illicit liquor business) to the scene of the killing and drove the killer to the scene in his automobile. He also furnished the killer a coat and a car for his escape. In a *per curiam* opinion the Court said: "The . . . facts . . . tend to show that defendant knew what was going on. Moreover, they tend to show that defendant was active in procuring a coat for the killer and in furnishing an automobile as a means of flight after the crime had been committed." No error was found in defendant's trial and conviction.

In the case at bar defendant said: "I knew what was going on." Defendant knew, at the time he injected Rogers' fingers, that Rogers intended to have his fingers cut off to collect insurance money and wanted his fingers deadened so he would not feel the pain. Defendant said that if Rogers didn't have any more sense than to cut his fingers off, he (defendant) didn't have any more sense than to give him the shots. Defendant was paid $29.00 for making the injection. Defendant gave Rogers a rubber tourniquet and showed him and George Bryson how to use it when the fingers were cut off to prevent excessive bleeding. Thus, defendant, with full knowledge of Rogers' and Bryson's intentions, gave advice and treatment in regard to and in furtherance of the proposed line of conduct and thereby contributed to it. In our opinion, the evidence is sufficient to make out a *prima facie* case of counselling the commission of a felony.

"There are several elements that must concur in order to justify the conviction of one as an accessary before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime." 22 C.J.S., Criminal Law, § 90, p. 269.

"The concept of accessary before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question." *Ibid*, § 92, p. 271.

"To render one guilty as an accessary before the fact to a felony he must counsel, incite, induce, procure or encourage the commission of the crime, so as to, in some way, participate therein by word or act. . . . It is not necessary that he shall be the originator of the de-

sign to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. . . ." *ibid,* § 93(a), pp. 271, 272.

It is true that James Bryson was not present when defendant deadened Rogers' fingers and delivered and explained the use of the tourniquet. But we think the fact that James Bryson, the person who actually cut off Rogers' fingers, was not present and was not directly counselled makes no difference in this case.

"It is not essential that there be direct communication between the accessory before the fact and the principal, and any such communication between them may be through a third person. It has been further held not necessary, either that the accessary shall know by whom the crime is actually to be perpetrated, or that the identity of the accessory be known to the principal in the crime." 22 C.J.S., Criminal Law, § 93a, p. 272.

The conduct of defendant contributed to the act done by James Bryson and laid the ground work for it. Rogers consented to the act and the aid, assistance and counsel given him and George Bryson by defendant was in effect given to James Bryson through them. George Bryson by his own testimony was *particeps criminis.*

(3) Defendant's third and last contention is that Rogers changed his mind and did not want his fingers removed at the time they were cut off, and thereby "the chain was broken between Walter Rogers and the defendant."

It is true that Rogers testified that he changed his mind and didn't want his fingers cut off but that they were cut off notwithstanding. But James Bryson testified: "Walter Rogers asked me to cut his fingers off, and I cut them off at his request." If defendant's contention has merit, the matter cannot be considered on a motion to nonsuit. When the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to withstand a motion for nonsuit. *State v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201.

The court properly denied the motion for nonsuit.

The judgment below is

Affirmed.

ALEXANDER J. JANICKI AND WIFE, MARY B. JANICKI, v. JOHN LOREK AND WIFE, LOUISE LOREK, AND SOPHIA LOREK.

(Filed 16 June, 1961.)

1. Dedication § 3— Admitted facts held to show withdrawal of dedication of street not used for more than fifteen years after dedication.

Admissions in the pleadings and stipulations of the parties disclosing that the corporate owner of lands recorded a map of a subdivision, showing lots and streets, that the corporation had ceased to exist and defendants own the entire block through which the street was shown, that the locus had never been opened up or used as a street and more than fifteen years had elapsed since the dedication, and that defendants had duly recorded a declaration of withdrawal of this street from dedication, *are held* to support the holding of the court that plaintiffs, as members of the public, were barred from asserting any right to use the street. Revocation of the dedication would not be effective as to a purchaser of a lot within the subdivision if such street was necessary for ingress and egress to and from his lot; as to whether such withdrawal would be effective if the street were not necessary to afford him ingress and egress, quaere? G.S. 136-96.

2. Dedication § 4—

A person who purchases a lot or parcel of land situated outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally, and when the rights of the public are withdrawn and barred, the rights of the owner of land outside the subdivision are also barred notwithstanding that his lands may be located at the dead-end of such street.

3. Dedication § 1— Where land is sold with reference to subdivisional maps and not with reference to map of entire tract, dedication of street relates to each subdivision separately.

The owner of a large tract of land made and recorded a "key map" of the entire tract showing a subdivision of the tract into small farms and also a townsite in skeleton form, showing streets and blocks of the townsite without numbering the blocks or dividing them into lots. The owner also recorded separate maps of the farm subdivisions and the townsite subdivision showing lettered blocks and numbered lots. *Held:* Whether the purchaser of one of the farms acquired by dedication any interest in the streets of the townsite depends upon whether the dedicator intended the subdivisions to be separate and sold the lands with reference to the respective subdivisional maps, or whether the entire tract constituted one composite subdivision, which intent of the dedicator is to be gathered from matters appearing in the record and chain of title and may not be established by parol, and when more than one conclusion may be drawn from the undisputed facts the question of intent is a question of fact for the jury, but when only one conclusion may be drawn therefrom the question of intent is one of law.

4. Same—

The intent to dedicate is an essential element of dedication.

5. Trial § 53—

Where the record discloses that the court stated that the issues arising upon the pleadings and evidence were issues of law and would be answered by the court "there being no objection," the absence of objection may constitute a waiver of trial by jury of any question of fact embraced in the issues. G.S. 1-184(3).

6. Limitation of Actions § 8—

The pleading of the predicate facts upon which the bar of the applicable statute of limitations rests is a sufficient pleading of the statute, and a mere statement that the party pleads a specified statute is insufficient.

7. Appeal and Error § 21—

An exception to the judgment presents the sole questions of whether the facts found and admitted are sufficient to support the judgment and whether there is error of law on the face of the record.

APPEAL by plaintiffs from *Mintz, J.*, October 1960 Term of NEW HANOVER.

Action for damages for obstructing plaintiffs in the use of a strip of land for a street, and to permanently enjoin defendants from interfering with plaintiffs' use thereof.

From the evidence, admissions in the pleadings, and stipulations, the following uncontroverted facts appear:

(a) In 1906 Carolina Real Estate Trust Company (hereinafter referred to as "corporation") owned a large tract of land in the vicinity of Castle Haynes in New Hanover County. It subdivided a small portion of this land as a townsite. In 1906 it caused a map of the subdivision, entitled "Official Map of Castle Haynes," to be recorded in Book 48, at page 150, of the office of the Register of Deeds of New Hanover County. The map is dated 23 March, 1906, and was admitted in evidence as plaintiffs' Exhibit B. This subdivision (hereinafter referred to as "townsite") contains 14 streets and 24 blocks. Most of the blocks contain 20 lots each. Most of the lots are 33 feet wide and 165 feet long.

(b) The corporation also subdivided a large area, contiguous to the townsite subdivision, into farms. Most of the farms contain 10 acres each. In 1910 the corporation caused a map of this subdivision, entitled "Ten Acre Farms at Castle Haynes," to be recorded in Book 59, at page 597, New Hanover County Registry. This map is dated 10 May 1906. This subdivision (hereinafter referred to as "farms") contains 85 farms and a number of roads. The map of the farms sub-

division was admitted in evidence as plaintiffs' Exhibit C, and the townsite subdivision is shown thereon in skeleton form. The map shows the townsite blocks and streets, but the blocks are not numbered and are not divided into lots thereon.

(c) Four blocks (25, 26, 27 and 28) of the townsite lie on the west side of Peachtree Street (U. S. Highway 117). Peachtree runs generally north and south. Castle Avenue runs east and west and crosses Peachtree. Blocks 26 and 28 are contiguous to and lie north of Castle Avenue. Cedar Street (50 feet wide) runs north and south and divides Blocks 26 and 28. Mulberry Street runs north and south and lies along the west boundary of Block 28.

(d) Block 26 is bounded on the east by Peachtree, on the south by Castle Avenue, and on the west by Cedar Street. Block 28 is bounded on the east by Cedar Street, on the south by Castle Avenue and on the west by Mulberry. Defendant Sophia Lorek and husband, Andrew Lorek (now deceased) acquired title to all of Block 26 by mesne conveyances from the corporation. Sophia Lorek is the present owner of Block 26. Defendant John A. Lorek is the owner of Block 28.

(e) Plaintiffs, Alexander Janicki and wife, Mary B. Janicki, are the owners of Farm F of the farms subdivision. Farm F is bounded on the east by Peachtree Street (U. S. Highway 117), and on the south by Blocks 26 and 28 of the townsite and the north ends of Cedar and Mulberry Streets. Cedar Street "dead-ends" at Farm F, as does Mulberry.

(f) Plaintiffs and defendants all acquired title to their respective lands by mesne conveyances from the corporation.

(g) In 1954 plaintiffs decided to build a house on Farm F for their son, C. E. Janicki. On 1 June 1954 they laid out an one-acre lot, not abutting on Cedar Street, but extending the entire length of the north boundary of Block 28, and extending thence northwardly 139.6 feet. If Cedar Street were extended, it would abut the east line of the one-acre lot. In 1956, after the institution of this action, plaintiffs conveyed this lot to C. E. Janicki and wife.

(h) The corporation has been dissolved and is no longer in existence.

(i) On 26 July 1954 defendants and their spouses executed and caused to be recorded in the office of the Register of Deeds of New Hanover County a declaration of withdrawal from dedication of all that part of Cedar Street bounded on the north by the south line of Farm F, on the east by Block 26, on the south by the north line of Castle Avenue, and on the west by Block 28. The declaration was executed and recorded in accordance with G.S. 136-96, and recites that the corporation had been dissolved and was not in existence, and

that the strip of land in question had never been opened and used as a street or way of ingress, egress or regress.

(j) "Cedar Street . . . has never been opened on the ground or used since the Map or Maps were put on record for the purpose for which it was dedicated." (Stipulation)

(k) On 30 July 1954 plaintiffs requested defendants, by letter, not to plant any further crops in Cedar Street after those then growing were harvested. Plaintiffs advised that they were going to use the street.

(l) On 3 August 1954 defendants advised plaintiffs, by letter from defendants' attorneys, that the dedication of the street had been withdrawn pursuant to statute and that defendants owned the land in fee. Defendants forbade plaintiffs to go upon the land formerly the street.

(m) This action was instituted 17 October 1955.

Plaintiffs' complaint alleges many of the facts above recited, and also the following (numbering ours):

(1) Cedar Street was dedicated with respect to the farms subdivision by the map recorded in 1910, and this dedication was not withdrawn by the terms of defendants' declaration of withdrawal.

(2) "The fee simple title to the lands . . . known as Cedar Street and attempted to be withdrawn from private or public use . . . is owned by plaintiffs and defendant(s) as tenants in common . . . . (D)efendants are wrongfully, unlawfully and wilfully obstructing the plaintiffs from using said lands . . . to their great damage in the sum of $500.00, and unless the defendants are restrained from prohibiting plaintiffs from using said lands, they will suffer continuous irreparable damage and loss of the use of the lands owned by the plaintiffs as tenants in common with said defendants."

(3) Plaintiffs intend to build a house for C. E. Janicki and wife facing Cedar Street extended.

(4) ". . . (T)hat it is convenient to the plaintiffs to have the right of ingress, egress and regress to, over and upon said Cedar Street to and from the plaintiffs' lands."

Defendants' answer contains the following averments, among others (numbering ours):

(1) The maps of the farms subdivision do not dedicate Cedar Street with respect to the farms shown on said maps, and do not make Cedar Street an appurtenance to Farm F.

(2) Defendants are the sole owners in fee of that part of Cedar Street in question; and plaintiffs have no title to or interest in the street, and no right to enter thereon or use it as a street or otherwise.

(3) No acts or conduct of defendants have deprived plaintiffs of any ingress, egress or entrance into Farm F.

The case came on for trial at term. A jury was impanelled. At the close of the evidence judgment was entered by the court, in material part, as follows:

"After the selection and impaneling of the jury it was agreed between the attorneys for the plaintiffs and the defendants that there were certain issues which should be answered by the Court prior to the submission of any issues to the jury.

"After hearing all of the evidence of the plaintiffs and of the defendants the Court announced that the following issues arise on the pleadings and the evidence in this case, which said issues are issues of law and should be answered by the Court, and there being no objection, the Court answered the issues as follows:

"1. Was Cedar Street prior to July 26, 1954 a street or easement included in the plan of development of Castle Haynes and by recordation of a map thereof dedicated to public and private use? Answer: Yes.

"2. Is the location of the lands of the plaintiffs and defendants, and its relation to each other, and Cedar Street, as shown and set out in Paragraph 7 of plaintiffs' complaint? Answer: Yes.

"3. Was a withdrawal of dedication executed by abutting owners and filed on July 26, 1954 withdrawing the street in controversy in this action from dedication? Answer: Yes.

"4. Has the statute of limitations barred the plaintiffs from obtaining the relief they seek in this action? Answer: Yes.

"And the Court having answered each of the said issues 'yes,' was of the opinion that there was no issue of fact left for submission to the jury:

"NOW, THEREFORE, UPON THE FOREGOING IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiffs' action be, and hereby is, dismissed."

Plaintiffs appeal.

Kellum & Humphrey for plaintiffs, appellants.
Hogue & Hogue for defendants, appellees.

MOORE, J. There are two assignments of error: (1) ". . . to the court answering issue #4 'yes.' " (2) ". . . to the signing of the judgment . . . ."

As to the first assignment, plaintiffs contend: ". . . that no statute of limitations applies in the instant case and no statute of limitations was pleaded." As to the second assignment, plaintiffs say: "They seek a free and unobstructed use of Cedar Street, as shown on Exhibits. . . . There has been no attempt to withdraw the dedication of this street

from the dedication made by the recording of the Map recorded in Book 59, at page 597, Exhibit C."

The assignments raise two questions: (1) Is there an applicable statute of limitations pleaded and, if so, does it bar plaintiffs' cause of action? (2) Do the stipulations, admissions in the pleadings, and issues as answered support the judgment?

Decision in this case involves interpretation and proper application of G.S. 136-96, relating to the abandonment of roads and streets after dedication, and the withdrawal thereof from dedication.

Plaintiffs contend that the only statute of limitations contained in G.S. 136-96 is the provision that where dedication "was made less than twenty (20) years prior to April 28, 1953," if the street was never opened and used, the right to a public or private easement therein "may be asserted within one year from and after April 28, 1953." This provision was not pleaded. Furthermore, it is wholly inapplicable to the facts in this case. The dedication herein was made more than twenty years prior to April 28, 1953.

G.S. 136-96 provides *inter alia:* "Every strip . . . of land which shall have been at any time dedicated to *public* use as a . . . street . . . , or for any other purpose . . . by a . . . map . . . or other means, which shall not have been actually opened and used by the *public* within fifteen (15) years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the *public* for the purposes for which same shall have been dedicated . . . ." (Emphasis added). But the conclusive presumption does not arise as a matter of course at the end of the fifteen-year period. According to the further provisions of the statute the abandonment shall not be presumed until a declaration of withdrawal is executed and recorded in the county wherein the land is situate by those persons entitled to withdraw the dedication. If the dedicator is a corporation and if the corporation is dissolved and ceases to exist, the title to the strip of land "shall be conclusively presumed to be vested in those persons . . . owning lots or parcels of land adjacent thereto," and such persons may withdraw the strip from dedication. G.S. 136-96. *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102.

The dedication of a street shown on a subdivision map is but a revocable offer *as to the public,* and dedication is not complete until the offer is accepted, and if not accepted by the *public* within fifteen years after offer of dedication, the offer may be withdrawn pursuant to G.S. 136-96; but if accepted by the *public,* by opening and using the street, at any time before withdrawal, the dedication is complete and it may not thereafter be withdrawn. *Steadman v. Pinetops, supra;*

Blowing Rock v. Gregorie, 243 N.C. 364, 367-8, 90 S.E. 2d 898; *Rowe v. Durham,* 235 N.C. 158, 161, 69 S.E. 2d 171.

In the instant case it has been established by the admissions in the pleadings, the stipulations and the first three issues answered by the court (to which there are no exceptions) that Cedar Street was dedicated more than fifteen years prior to 26 July 1954, that Cedar Street has never been opened or used for the purposes for which it was dedicated, and that defendants executed and had recorded a declaration of withdrawal of Cedar Street from dedication on 26 July 1954 pursuant to the provisions of G.S. 136-96. It is therefore conclusively presumed that the strip of land in question has been abandoned by the *public,* and by reason of the fifteen-year limitation and the recording of the declaration of withdrawal the *public* is barred of all rights or causes of action with respect thereto.

The question arises, are plaintiffs merely members of the general public and therefore barred, or do they own a parcel of land within the subdivision for the benefit of which Cedar Street was dedicated?

"Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots . . . the purchaser of a lot or lots acquires a right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened or accepted" by the public. "There is a dedication, and if they are not actually opened at the time of the sale they must be at all times free to be opened as occasion may require." *Stedman v. Pinetops, supra; Hine v. Blumenthal,* 239 N.C. 537, 544, 80 S.E. 2d 458. A purchaser of lots in a subdivision acquires a vested right to have all and each of the streets shown on the map kept open for his benefit. *Blowing Rock v. Gregorie, supra; Rowe v. Durham, supra.* "The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all lots embraced in the general plan or scheme . . . . (I)t is just to presume that purchasers paid the added value, and the donor (or his successors in interest) ought not, therefore, to be permitted to take it from them by revoking part of his dedication." (Parentheses ours). *Insurance Co. v. Carolina Beach,* 216 N.C. 778, 786, 7 S.E. 2d 13.

G.S. 136-96 has no application and a street may not be withdrawn from dedication, over objection of one owning a lot or lots within the subdivision, if the street "be necessary to afford convenient ingress or egress to" such lot or lots. *Hine v. Blumenthal, supra; Russell v. Coggin,* 232 N.C. 674, 677, 62 S.E. 2d 70; *Foster v. Atwater,* 226 N.C. 472, 473, 38 S.E. 2d 316; *Sheets v. Walsh,* 217 N.C. 32, 6 S.E. 2d 817. Where it is sought to withdraw a street of a subdivision from dedi-

cation, and a lot in the subdivision abutting on this street has no other way of ingress or egress, it will be conclusively presumed that the street is "necessary to afford convenient ingress or egress" to or from the lot, and, in the absence of consent by the lot owner to the withdrawal, G.S. 136-96 has no application and the dedication may not be withdrawn irrespective of lapse of time or whether or not the street has been opened and used. G.S. 136-96 (last paragraph).

In a case in which a lot in a subdivision was contiguous to two streets and it was sought to withdraw one of the streets from dedication, the question as to whether or not the street was necessary for convenient ingress or egress to and from the lot was submitted to the jury. *Evans v. Horne,* 226 N.C. 581, 39 S.E. 2d 612. But on appeal this Court strongly intimated that withdrawal from dedication under the circumstances was not permissible as a matter of law, saying: "Moreover, in the light of the holdings of this Court . . . , on the uncontroverted facts, plaintiffs (lot owners) would seem to be entitled to the relief demanded (that the street be not withdrawn from dedication) as a matter of law." (Parentheses ours). In this connection, the words "continued use of" in the last paragraph of G.S. 136-96 is construed to mean the continued right to use.

Where a lot in a subdivision does not abut on the street or the portion of the street sought to be withdrawn from dedication pursuant to G.S. 136-96, the question as to whether or not such street or portion thereof is necessary to afford convenient ingress to and egress from such lot is one of fact to be determined by the jury, or the judge when jury trial is waived. *Hine v. Blumenthal, supra; Broocks v. Muirhead,* 223 N.C. 227, 25 S.E. 2d 889.

A person who purchases a lot or parcel of land situate outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally. *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153. When the rights of the public are withdrawn and barred, the rights of the owner of the land outside the subdivision are thereby extinguished with respect to the street or streets of the subdivision withdrawn from dedication. One who purchases a parcel of land outside a subdivision, but at the "dead-end" of a street of the subdivision, acquires no more right to the use of the street than the public generally, and is not entitled to share the rights and interests therein of owners of lots within the subdivision abutting on the street. *Cohen v. Board of Trustees,* 276 S.W. 2d 26 (Ky. 1955).

Where the owner of a large tract of land makes a "key map" of the entire tract, showing the exterior boundaries and, in a general way, the relative location of blocks and lots and the general location

of streets, yet the map is not sufficiently definite in its details to furnish a correct description of any lot, block or street and was not intended nor used for the purpose of description or sale in the actual conveyance of property, and, thereafter, the owner makes separate subdivisional maps of parts of the whole tract, giving in detail and with accuracy the description of lots and blocks and streets adjacent thereto, and conveyances are made by reference to these subdivisional maps, then, and in such case, the subdivisional maps are not to be regarded as a unit, but the question of dedication and estoppel between the owner and a purchaser of a lot will apply only to the divisional map on which the lot purchased appears, and the various subdivisions will not be regarded as integral parts of the entire tract as a whole. It is the offer of sale by the particular plat, and the sale in accordance therewith that is the material thing which determines the rights of the parties. *Stephens Co. v. Homes Co.*, 181 N.C. 335, 107 S.E. 233. Accord: *Hidgon v. Jaffa*, 231 N.C. 242, 248, 56 S.E. 2d 661; *Homes Co. v. Falls*, 184 N.C. 426, 115 S.E. 184.

In the case at bar, before the fourth issue could be answered it was necessary to determine whether or not it was the intent of the corporation dedicator that townsite and farms should be one composite subdivision or separate subdivisions, that is, whether it intended to dedicate Cedar Street to the use and benefit of Farm F as a part of a composite subdivision. If the subdivisions are separate and distinct by intent of the corporation dedicator, Farm F lies outside the townsite subdivision and plaintiffs have no more rights with respect to Cedar Street than the public generally. All rights of the public are concededly barred to that portion of Cedar Street in question if Farm F does not lie within the subdivision of which Cedar Street is a part, for in that case all the owners of land in the subdivision adjacent to the strip withdrawn joined in the withdrawal.

The trial court resolved this crucial question against plaintiffs. It decided, in effect, that it was the intent of the corporation to dedicate Cedar Street only in relation to the townsite. There are substantial undisputed facts to support this conclusion. It is true that the townsite subdivision is shown on the farms subdivision maps. There are in evidence two such maps of farms subdivision, Exhibits C and D. Townsite appears on these maps in skeleton form, and seems to have been so placed to show relative position rather than to create a composite map to be referred to for the sale of lots and farms. *Hine v. Blumenthal, supra,* at page 545. These maps show the streets and blocks of townsite. The streets are named but dimensions are not given. The blocks are not numbered and are not divided into lots. No building lots could be sold by reference to either of these maps. The townsite

and farms maps were made and recorded at different times. On townsite map, Exhibit B, all streets are shown to be 50 feet wide, except Ash which is 35, and Mulberry which is 18. On farms maps the roads are either 18 feet or 24 feet wide. The farms subdivision contains only farms, and townsite subdivision contains only building lots. On both farms maps Cedar Street is closed at the north end by a line drawn from the northwest corner of Block 26 to the northeast corner of Block 28. The north end of this street is also closed in this manner on the townsite map. Mulberry Street is open at the north end on Exhibit C. Farm F fronts on Peachtree Street (U. S. Highway 117) a distance of 382 feet. While plaintiffs' deed was not made by the dedicator, Cedar Street is not mentioned anywhere in the deed, though a boundary description is given. Cedar Street has never been used by any of the owners of Farm F, though it was dedicated in 1906.

The fact that the corporation owned both the townsite and farms and developed the two as contiguous subdivisions does not of itself make them one composite subdivision as a matter of law. *Stephens Co. v. Homes Co., supra.* As to whether they constitute one composite subdivision is, as already indicated, a question of intent of the corporation. The intent to dedicate is the very life of every dedication. *Nicholas v. Furniture Co.,* 248 N.C. 462, 468, 103 S.E. 2d 837; *Milliken v. Denny,* 141 N.C. 224, 230, 53 S.E. 867. "Where the facts are undisputed and admit of but one legal interpretation or can lead to but one conclusion, the question of intention and dedication is one of law." *Spicer v. Goldsboro,* 226 N.C. 557, 560, 39 S.E. 2d 526. But where more than one conclusion may be drawn from undisputed facts, the broad question of the intention of the dedicator has been held to be a question of fact, and consequently for the jury. 16 Am. Jur., Dedication, s. 88, p. 424.

In the case at bar the material facts are not in dispute. The trial court undoubtedly considered that the question of the intention of the dedicator was a matter of law, that only one inference was permissible, and that this question is controlled by the decision in *Stephens Co. v. Homes Co., supra.* We are inclined to agree. The intent of the owner and dedicator is to be gathered from matters appearing in the chain of title and may not be established by parol. *Craven County v. Trust Co.,* 237 N.C. 502, 514, 75 S.E. 2d 620. But from the state of the record, it is unnecessary to decide whether the intention of the dedicator was an issue of fact or a question of law, for it is our opinion that the consent of plaintiffs that the court might answer the fourth issue as a matter of law authorized the court to draw the inferences on preliminary and subordinate questions necessary for the answering of the issue. The record does not disclose that plaintiffs requested that

an issue be submitted to the jury on this question of intention, or tendered such issue. The judgment recites that counsel agreed that "there were certain issues which should be answered by the court prior to the submission of any issues to the jury." At the close of the evidence the court announced that the four issues which appear in the record "arise on the pleadings and the evidence in this case, which are issues of law and should be answered by the court, and *there being no objection,* the court answered the issues . . . ." (Emphasis added). Under certain circumstances jury trial may be waived by failure to object. *Driller Company v. Worth,* 117 N.C. 515, 23 S.E. 427. Jury trial may be waived "by oral consent, entered in the minutes." G.S. 1-184(3).

On appeal, plaintiffs still do not object to the determination of the question by the court. The first assignment of error is based on exception "to the court answering Issue #4 'yes.'" The exception is to the answer and not to the answering. Plaintiffs' contention on this assignment is that there is no statute of limitations involved and none pleaded. But G.S. 136-96 provides that if the public does not use a street within 15 years after dedication, and this lapse of time is followed by withdrawal from dedication, "no person shall have any . . . cause of action thereafter, to enforce any public . . . easement therein." Plaintiffs' pleadings allege the facts upon which this limitation arises and the facts thus alleged are admitted by defendants, and defendants further aver "that the property described . . . has never been used as a street and that the said property has never been opened as a street and that the plaintiffs and their predecessors have never used the said property as a street since the map of said property was recorded in the year 1906 and that the plaintiffs have no right to use the said property, the defendants being the sole owners thereof." The plea of a statute of limitations is not good if it merely states that the party pleads the statute. "When the facts showing the lapse of time are pleaded, the pleader becomes entitled to the benefit of the plea as a matter of law." *Allen v. Seay,* 248 N.C. 321, 323, 103 S.E. 2d 332; *Jennings v. Morehead City,* 226 N.C. 606, 39 S.E. 2d 610.

Plaintiffs' contentions on the first assignment of error raise no question relative to the intention of dedicator as to the dedication of Cedar Street. For the reasons stated in the preceding paragraph the first assignment of error is not sustained.

The second and final assignment of error is to the signing of the judgment. An exception to the judgment presents the sole question, whether the facts found and admitted are sufficient to support the judgment, that is, whether there is error on the face of the record.

Moore v. Crosswell, 240 N.C. 473, 82 S.E. 2d 208; *Hall v. Hall,* 235 N.C. 711, 714, 71 S.E. 2d 471.

In the case at bar it appears from the admissions in the pleadings, the stipulations and the issues as answered by the court that Cedar Street was dedicated in 1906, that dedicator did not intend to dedicate it with respect to farms subdivision and Farm F, that plaintiffs as to Cedar Street are members of the public generally, that Cedar Street has never been opened and used for the purposes for which it was dedicated, that dedicator was a corporation which was dissolved prior to 26 July 1954 and was not in existence on that date, that defendants were entitled to withdraw and did withdraw Cedar Street from dedication on 26 July 1954, and that plaintiffs' cause of action is barred. The judgment is fully supported and there is no error on the face of the record.

In this view of the matter, the issues raised by plaintiffs' pleadings — (1) whether Cedar Street is necessary to afford convenient ingress to and egress from Farm F, and (2) whether plaintiffs are tenants in common with defendants with respect to the strip of land in question — are not reached and do not arise.

The judgment below is

Affirmed.

MODERN ELECTRIC COMPANY, INC. v. S. E. DENNIS, T/A DENNIS MOTOR SERVICE.

(Filed 16 June, 1961.)

1. Pleadings § 25—

The broad discretionary power of the trial court to allow amendments to pleadings extends before trial, and during trial when the circumstances afford the adverse litigant fair opportunity to investigate and rebut any new matter, to amendments in furtherance of justice upon such terms as the court deems proper; while after trial, or when the adverse party has no opportunity to investigate and rebut any new matter, the court's power to allow amendments is restricted to those which do not substantially change the claim or defense but merely amend the allegations to conform to the proof. G.S. 1-163.

2. Pleadings § 7—

A defendant may set up in his answer as many defenses as he has, and it is not required that the defenses be consistent. G.S. 1-138.

3. Pleadings § 25—

The allowance of an amendment to the answer to correct mistakes

as to the facts alleged in the original answer and to set forth what defendant contends are the true facts, which amendment is allowed some two months prior to trial, rests in the discretion of the trial court even though the facts as alleged in the amendment are contradictory to those alleged in the original answer and vary the defense, and the denial of plaintiff's motion to strike such amendment will not be disturbed, the amended answer being relevant and germane to the subject of action set out in the complaint.

4. Bailment § 1—

Evidence in this case is held not to show the relationship of bailee and bailor.

5. Negligence § 1—

Negligence is the breach of duty to exercise that care which an ordinarily prudent person would exercise under similar circumstances when injury to person or property is reasonably foreseeable as a result of such breach of duty.

6. Negligence § 24a— Whether defendant was negligent in performance of contract held for jury upon the evidence.

The allegations and evidence favorable to plaintiff tended to show that defendant's agent, operating defendant's crane truck, was engaged in hoisting plaintiff's machinery to the second floor of a building pursuant to a contract between plaintiff and defendant, that the I beam on the building, to which the cables were attached by a beam clamp, began bending and twisting with the strain, that the operator lowered the machinery and substituted a sling cable for the beam clamp, and that when the machinery had again been hoisted to about the second floor the sling cable broke, with permissible inference that it was cut by a sharp edge on the I beam. The evidence further tended to show that defendant's operator was the sole agent of defendant upon the job and that he did not examine the I beam to see if it had any sharp edges, either initially or after it had been bent or twisted. Held: The evidence is sufficient to carry the case to the jury on the theory of defendant's negligence.

7. Appeal and Error § 42—

The court submitted the issues of bailment, negligence, contributory negligence, and damages to the jury. The issue of bailment was inapposite but the allegations and evidence made out a case of negligence. Instructions that if the jury answered the first issue "No" it need not consider any of the other issues must be held for prejudicial error upon a negative finding by the jury to the first issue and the failure to answer the other issues, even though correct instructions were given in other parts of the charge.

APPEAL by plaintiff from *Williams, J.*, Regular January 1961 Civil Term of DURHAM.

Civil action to recover for damages to an electric switchboard, which

fell when it was being lifted by defendant with a crane truck to the second floor of a new addition to the Herald Sun Building in the city of Durham for installation.

The following issues were submitted to the jury:

"1. Was there a bailment of the electric switchboard from the plaintiff to the defendant, as alleged in the Complaint?

"2. Was the plaintiff's switchboard damaged by the negligence of the defendant, as alleged in the Complaint?

"3. Did the plaintiff, by its own negligence, contribute to the damage of the switchboard, as alleged in the Answer?

"4. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue No, and did not answer the other issues.

From a judgment that plaintiff recover nothing from defendant, plaintiff appeals.

Haywood & Denny and George W. Miller, Jr., for plaintiff, appellant.

Bryant, Lipton, Strayhorn & Bryant and F. Gordon Battle for defendant, appellee.

PARKER, J. Plaintiff alleged in its complaint in substance: On 22 August 1957 plaintiff and defendant entered into a contract whereby defendant would unload an electric switchboard of large size and heavy weight from a truck, and then hoist it to the second floor of a new addition to the Herald Sun Building in the city of Durham, and there deliver it in good condition to plaintiff for installation. Defendant was to provide all necessary equipment, to manage and supervise the entire operation, and to have sole control and authority over it. Plaintiff delivered the electric switchboard to defendant in perfect condition, who set about hoisting it with his crane truck and with attached lines and cables to the second floor of the building. While it was being hoisted, due to defendant's negligence, it fell to the ground, and was badly damaged. Defendant was negligent in the following respects: He failed to exercise reasonable care in the hoisting of the electric switchboard; he failed to supervise and to manage properly the hoisting of the electric switchboard; he failed to provide proper and adequate equipment to do the work; he failed to exercise that care for the protection of plaintiff's property required of him as a bailee.

Defendant in his answer admitted there was an agreement be-

tween plaintiff and himself, whereby he was to perform certain services for plaintiff, but denied that these are accurately set forth in the complaint, admitted he was to provide all necessary equipment, to manage and supervise the entire operation, and to have sole control and authority over it, and then entered general denials. In his further answer he alleges in substance: While his agent was attempting to hoist the electric switchboard in a proper manner, he was interfered with by an employee of plaintiff, who stopped his agent and directed that the work be done in a different way. Plaintiff's agent and employee and manager put a cable around a steel beam and hooked a block in the cable, and then directed his agent to hoist the electric switchboard. The method of work chosen by his agent was safe and the work would have been done satisfactorily had not his agent been stopped by plaintiff's manager and agent, and ordered to do the work in a different manner. If the electric switchboard was caused to fall by reason of any negligence, the negligence was that of plaintiff and not himself, and bars any recovery by plaintiff. And further, if he was negligent in any way, which he denies, plaintiff was guilty of contributory negligence.

Some ten months after the filing of his answer, Judge Hall on 12 August 1959 allowed defendant, on his motion, to file an amendment to his answer, and he filed such an amendment on 12 August 1959. When the amendment to the answer was filed, plaintiff on 31 August 1959 moved to strike out the amendment to the answer on the ground that its allegations "are irrelevant, redundant, impertinent, immaterial, evidentiary, and allege legal conclusions; that said allegations substantially change the defense heretofore set forth and sworn to in the answer heretofore filed, and are prejudicial to the plaintiff." On 12 November 1959 defendant filed an affidavit, which states in relevant part in substance: He has read plaintiff's motion to strike certain portions of the amendment to his answer. He is under the impression that he explained to his lawyers that on this particular job he merely rented his equipment to plaintiff, and is under the impression that his answer had been drawn on that basis. However, in preparing the case for trial several weeks ago, he read and studied his answer and immediately realized that it did not correctly set forth the facts, and requested his lawyers to amend his answer. The amendment was made in order that his answer might speak the truth. His purpose was to correct an error, and not to assert an inconsistent defense. Judge Hall on 16 November 1959 allowed plaintiff's motion as to three parts of the amendment to the answer, and denied it as to two parts. Plaintiff excepted to the denial of its motion to strike as to two parts of the amendment to the answer, and assigns this as error.

The allegations, which Judge Hall refused to strike out are in substance: His operator had no supervision or control over the manner in which the work was to be done, but reported to plaintiff's foreman. Plaintiff's agents and employees chose the method in which the tackle and rigging were to be used, and if the method chosen by plaintiff's foreman was unsafe and negligent, the negligence was that of plaintiff and not of him, and bars any recovery on plaintiff's part. He was employed to furnish to plaintiff a hoist and operator at so much rent per hour, and plaintiff was to furnish all labor and supervision, including the manner of doing the work. And further, if he was in any way negligent, which he denies, then plaintiff was guilty of contributory negligence.

G.S. 1-163 vests in the judge broad discretionary powers to permit amendments to any pleading, process or proceeding either before or after judgment. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Garrett v. Trotter,* 65 N.C. 430. This statute provides in pertinent part as follows: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved."

The Court said in *Perkins v. Langdon,* 233 N.C. 240, 63 S.E. 2d 565: "An analysis of this statute lends support to the view that the scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. The statute contains alternate provisions . . . . It would seem that a fair interpretation of the alternate provision, *'or when the amendment does not change substantially the claim' (or defense), '. . . by conforming the pleading or proceeding to the fact proved,'* is referable to amendments offered during or after trial for the purpose of conforming the pleadings to the facts proffered or admitted in evidence. The power to grant such tardily proposed amendments necessarily should be and is more restricted in scope than is the power to allow amendments offered prior to trial under circumstances which afford the other litigant ample opportunity to investigate and answer the new matter set up."

The other part of the statute confers upon the judge the power, *"in furtherance of justice, and on such terms as may be proper,"* to *"amend any pleading . . . by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case."* We interpret these portions of the statute "as

being intended to regulate the allowance of amendments before trial (or during trial under circumstances affording the adverse litigant fair opportunity to investigate and rebut any new matters brought in by way of amendment, even to the extent, if needs be, of granting a continuance for the term). This section of the statute confers upon the court broad, sweeping discretionary powers of amendment." *Perkins v. Langdon, supra.*

G.S. 1-138 provides in relevant part: "The defendant may set forth by answer as many defenses . . . as he has, whether they are of a legal or equitable nature, or both." A defendant may set up and rely upon contradictory defenses. *Hayes v. Wilmington,* 243 N.C. 525, 91 S.E. 2d 673.

Light Co. v. Bowman, 231 N.C. 332, 56 S.E. 2d 602, was a civil action for injunctive relief, here on a former appeal. After the opinion of the Court on the former appeal was certified down, the court below, on motion of defendants, permitted defendants to file an amendment to their answer. Plaintiff excepted. Thereupon, defendants filed an amendment pleading certain facts by way of estoppel. Plaintiff moved (1) to strike the amendment "for that the same is not amendatory of but is inconsistent with the original Answer and Amendments thereto, and for that all matters alleged in said Amendment to the Complaint are *res adjudicata*"; and (2) to strike certain portions of paragraphs 11, 12, and 13 thereof for that the facts alleged are immaterial, redundant, and repetitious. The motion was denied, and plaintiff appealed. The Court said: "The exception to the order permitting defendants to amend their answer is without merit. Whether the amendment should be allowed rested within the sound discretion of the court below. Citing authority. Its ruling thereon is not subject to review on appeal except for palpable abuse. Citing authority. The defendants are not required to be consistent. They may interpose various and contradictory defenses." The Court refused to reverse the order denying the motion to strike. See also *Hicks v. Nivens,* 210 N.C. 44, 185 S.E. 469; 71 C.J.S., Pleading, page 680.

Defendant, by permission of court, filed an amendment to his answer on 12 August 1959. Plaintiff's motion to strike the amendment was allowed in part and disallowed in part on 16 November 1959. The case was tried on its merits in January 1961. Plaintiff had plenary time to prepare its case for trial after its motion to strike the amendment to the answer was disallowed in part. Judge Hall did not abuse his discretion in permitting defendant to file an amendment to his answer to correct a mistake and to set out what he contends are the true facts, so that he can have his day in court. This did not prejudice plaintiff, or deprive it of any vested rights. The allegations in the

amendment to the answer, which Judge Hall refused to strike, are relevant and germane to the subject of action set out in the complaint. Plaintiff's assignment of error to the denial of its motion to strike the two parts of the amendment to the answer is overruled.

Plaintiff's evidence tends to show the following facts: Plaintiff and defendant entered into a contract whereby defendant, who is engaged in the business of moving and hoisting heavy equipment, was to hoist a large and heavy electric switchboard for plaintiff to the second floor of a new addition to the Herald Sun Building in the city of Durham. Defendant was to provide the equipment necessary and supervision for the work. On 22 August 1957 the electric switchboard was brought to the job site on a trailer truck. It was 90 inches high, 78 inches wide, 36 inches deep, and weighed about 3600 pounds. Shortly thereafter defendant's agent, Thomas A. Gooch, arrived at the site with a crane truck. No other employee of defendant was present at the scene. Gooch fastened cables around the electric switchboard, backed his crane truck up to the trailer truck, hooked his other cable onto the one around the electric switchboard, and pulled it down to the end of the trailer truck. Gooch then used the cable fastened to his crane to go over the large pulley fastened onto the top of the cable on the electric switchboard, lifted it off the trailer truck, and lowered it down close to the ground. Gooch was alone in the crane truck. J. W. Vaughan, president and manager of plaintiff, told Gooch two of his men would stay with the switchboard to keep it from swinging back and forth, while Gooch was driving the crane truck up an alley to where the hoisting was to take place. These two men did this, when Gooch drove up the alley, and stopped where the hoisting was to take place. When Gooch stopped, he lowered the switchboard to the ground, and took the cable loose from the top. He then took a beam clamp from his truck and threw it up to the second floor, where some of plaintiff's men were working, telling them to fasten the clamp to an I beam over the second floor of the building and supporting the third floor. Gooch then passed a pulley or snatch block up to swing from this hook, and then he passed his cable up from his winch drum, telling them to put it over the pulley, pulled it back down, and fastened it to the cable around the switchboard. There was a beam on the third floor directly over the beam on the second floor, so Gooch fastened an additional cable to the other cable to pull the switchboard away so it would not hang under the beam as he was hoisting it. Then Gooch began hoisting the switchboard. When the switchboard had been hoisted almost to the second floor, the I beam began bending, the flange on the I beam was beginning to twist a little from the strain being put on it. A popping sound was heard. Employees of plaintiff told Gooch

the beam was bending. Whereupon, Gooch lowered the switchboard to the ground, and gave one of plaintiff's employees a cable to take the place of the clamp, known as a sling. It was a large steel mesh cable that can be wrapped around the I beam and a block hooked into it. Gooch said: "Put that around the beam, that will hold it." This employee of plaintiff hooked that onto the I beam. Gooch did not go up to look at the I beam. Then Gooch started again hoisting the switchboard, and when it had reached almost even with the second floor, the cable broke or was cut, and the switchboard fell to the ground, and was badly damaged. Gooch then left.

Gooch told plaintiff's employees how and where to connect the cables.

Defendant offered evidence tending to show: Mr. Vaughan asked him to send a truck to his job to assist in putting this switchboard on the second floor. He asked Vaughan if he needed additional labor. Vaughan replied his men were available. Normally, this job would require 6 to 7 men. He rents all his equipment out on an hourly basis and with the operators. All the work he has done for plaintiff has been on an hourly basis. After the switchboard had fallen, he went to the scene. He saw the steel mesh cable lying on the ground in two places. He was positive it was cut, it was all sheared at one point. He did not go up to the second floor, and examine the I beam.

Gooch testified that when he was told the beam was bending, he stopped. He did not go up and inspect the beam. The large steel mesh cable was new, and had a lifting capacity of 21,000 pounds. Gooch testified: "I had not inspected the edges of the flanges on the I beam to determine if they were sharp or not. I hadn't been off the ground. This could have a definite effect, however, on whether or not the cable might be cut. When the flange was bent, I did not inspect the I beam to determine if there were any sharp edges caused by that. I didn't ever leave the ground. I was just the operator."

The issues submitted by the court to the jury are set forth above. Plaintiff tendered to the court two issues: one, of negligence, and the other of damages, which the court declined to submit. To this ruling plaintiff did not except in apt time.

Defendant contends plaintiff bottomed its case on bailment, and it must rise or fall on this issue. This argument is not tenable. Plaintiff bottomed its case on negligence in large part, if not entirely, and contends in its brief that the court erred in submitting an issue of bailment.

The law of bailment is not applicable to the facts disclosed in this case by plaintiff's evidence, as well as by defendant's evidence. This

Court said in *Wells v. West,* 212 N.C. 656, 194 S.E. 313: "The generally accepted definition of a bailment is that it is 'a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purposes of the bailment shall be answered.' 2 Kent Comm., 559. To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive. 6 Am. Juris., 191. 'There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give the bailee for the time being the sole custody and control thereof.' 6 Am. Juris., 192." See, 6 Revised Am. Jur., Bailments, Section 65; 8 C.J.S., Bailments, page 249.

Actionable negligence is based upon the breach of a duty on the part of one person to exercise due care to protect another against injury, by failing to perform, or in the manner of performing, such duty, as a proximate result of which the latter sustains an injury. Due care being the care an ordinarily prudent man would exercise under similar circumstances, and when charged with a like duty. *Griffin v. Blankenship,* 248 N.C. 81, 102 S.E. 2d 451; *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898. It is well settled in North Carolina that foreseeability is a requisite of proximate cause. *Davis v. Light Co.,* 238 N.C. 106, 76 S.E. 2d 378; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331.

Plaintiff's evidence tends to show that defendant did not exercise due care in hoisting the switchboard, according to his contract, in that he did not have enough employees there to do the work properly, in that the I beam, on which the cables of the crane truck were fastened, was not examined by defendant at the beginning to see if it had any sharp edges which might cut the cable or cables in hoisting, and in that after the I beam began bending, and was beginning to twist a little from the strain being put on it, and a popping sound was heard, and Gooch was told the beam was bending, he, defendant's employee, did not examine the I beam to see if sharp edges had been created by such bending and popping, but caused a cable to be wrapped around it, and began hoisting again, and that in doing so the cable was cut, (this is defendant's testimony), permitting the reasonable inference that the I beam had sharp edges upon it before the hoisting began, or that such sharp edges were caused by the strain of hoisting before the last cable was wrapped around it, and that such negligence proximately caused the switchboard to fall, and that any person of ordinary prudence could have reasonably foreseen that such a result, or some injurious result, was probable under the facts as they existed.

Plaintiff's evidence, including defendant's evidence favorable to it, was sufficient to carry the case to the jury on the theory of negligence.

The issue of bailment was improperly submitted. Even so, when the jury answered that issue No, that did not end the case, but the jury should have been instructed to consider and answer the second issue.

Plaintiff assigns as errors the following parts of the charge in parentheses: One, "Now, if you answer the first issue YES, you will then consider the second issue. (But, if you answer that issue NO, you need not consider any of the other issues)." Two, later on the court charged, "(Now, if you answer the first issue NO, and the second issue NO, that ends the case. Or, if you answer the first issue NO, and the second issue YES, then you will consider the third issue)." Three, later on the court charged, "(Now, if you answer that Issue #1, NO, and #2 NO, as I say, that ends the case. If you answer that Issue #1, YES, and #2, YES, you will then consider this third issue and answer it)."

In the face of these conflicting instructions, the jury may have acted, and probably did, upon the part of the charge which instructed them if they answered the first issue No, they need not consider any of the other issues. What was said later did not cure this patent error. The exceptions to the charge are well taken, and entitle plaintiff to a new trial. *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313. Further, the issues do not support the judgment.

New Trial.

GEORGE W. BASS v. THELMA JOHNSON LEE, H. P. LEE AND ALVER BASS.

(Filed 16 June, 1961.)

1. Automobiles § 17—

The fact that a motorist is faced by a green traffic control signal at an intersection does not warrant him in going forward blindly in reliance on the signal, but he remains under duty to maintain a lookout and to exercise reasonable care under the circumstances.

2. Automobiles § 27—

The fact that a motorist is travelling within the speed limit fixed by law does not relieve him of the duty of reducing his speed when approaching an intersection or when special hazards exist with respect to pedestrians or other traffic. G.S. 20-141(a) (c).

3. Automobiles §§ 41g, 43— Evidence of concurring negligence of drivers resulting in collision at intersection held for jury.

Plaintiff passenger was injured in a collision at an intersection con-

trolled by traffic lights. The evidence tended to show that both cars approached the intersection at the same time, each travelling about 35 miles per hour, and that each driver could see the other vehicle when he was 75 feet from the intersection. Plaintiff testified to the effect that as the vehicle in which he was riding approached the intersection the traffic light facing him was green, that he saw the other vehicle to his left when 75 feet from the intersection and, when he was 40 feet from the intersection, warned the driver of the car in which he was riding of its seeming heedless approach, but that the driver did not slacken speed or take any action to avoid collision. The evidence further tended to show that the driver of the other vehicle did not see the car in which plaintiff was riding until the moment of impact, but that in reliance on the green traffic light which he asserted faced him, he proceeded on into the intersection. *Held:* Plaintiff's evidence is sufficient to be submitted to the jury on the issue of negligence of each driver and support recovery from both on the theory of concurring negligence.

4. Torts § 3—

Where plaintiff sues both defendants for negligent injury, the right of contribution is determined by the statute, and neither defendant may set up a plea for contribution against his co-defendant. G.S. 1-240.

5. Torts: Negligence § 20—

Where plaintiff sues two defendants to recover for negligent injury, a covenant not to sue executed by one of the defendants in favor of the other is not germane to plaintiff's action, and allegations in regard thereto are mere surplusage in relation to plaintiff's action, and the pleading of such covenant may not be read to the jury or evidence thereof introduced upon the trial.

BOBBITT, J., concurring in result.

APPEAL by defendants Thelma Johnson Lee and Alver Bass, from *Nimocks, J.*, October Civil Term 1960 of HARNETT.

The plaintiff instituted this action to recover for personal injuries sustained in an automobile collision which occurred at the intersection of North Clinton Avenue and East Edgerton Street in the Town of Dunn, Harnett County, North Carolina, on Sunday, 7 June 1959, about 12:15 p.m. Both of these streets are paved and each one is 44 feet wide, measuring from curb to curb.

The plaintiff was a guest passenger in the Ford automobile owned and being operated at the time of the collision by defendant Alver Bass. The other automobile involved was owned by defendant H. P. Lee and was being operated at the time of the collision by his mother, defendant Thelma Johnson Lee. The Bass automobile was traveling south on North Clinton Avenue and the Lee car was traveling west on East Edgerton Street when the collision occurred approximately in the center of the intersection, underneath a traffic light which controlled traffic at this particular intersection.

Plaintiff alleges in his complaint that the concurring negligence of both drivers, Alver Bass and Mrs. Lee, the latter acting as agent and servant of H. P. Lee, was the proximate cause of the injuries he sustained in the collision.

Essentially, the plaintiff alleges that defendant Mrs. Lee operated her car (1) against the traffic control signal and entered the intersection at a time when the signal was red for the purpose of stopping vehicles traveling on East Edgerton Street, in violation of the ordinances of the Town of Dunn and the laws of the State of North Caroline, (2) "without keeping a proper and careful lookout"; (3) that she failed "to keep said vehicle under reasonable control to enable her to bring same to a stop at said intersection, and did fail to yield the right of way at said intersection to the * * * automobile owned and being operated by Alver Bass"; and (4) that she operated said automobile "at a speed greater than was reasonable and prudent under the circumstances and conditions then existing."

The plaintiff alleges that defendant Bass operated his car (1) without keeping a proper and careful lookout; (2) that he failed "to keep his car under proper and reasonable control, and to operate said automobile in a careful and cautious manner"; (3) that he operated said car "at a speed greater than was reasonable and prudent under conditions then existing"; and (4) "notwithstanding the fact that he (Bass) had the green light, he failed to see the defendant Thelma Johnson Lee's disobedience to the traffic light in time to avoid the collision, which he could have done * * * by the exercise of reasonable care."

The plaintiff testified as follows: "On Sunday, June 7, 1959, I was riding in a Ford automobile driven by Alver Bass, traveling south on North Clinton Avenue, and as we were approaching the intersection of East Edgerton Street and North Clinton Avenue * * * at approximately 75 feet before entering * * * I observed another Ford automobile, traveling from east to west on East Edgerton Street, and as I glanced up this traffic light was green at the time I saw it. When I saw this car approaching the intersection from East Edgerton Street * * * I noticed that neither party was making any effort to stop whatsoever, so when the car that I was riding in got approximately 40 feet from the stop light, I hollered, 'Look out.' I said, 'Look out, Alver,' to Mr. Bass here. He didn't do anything. They both kept going and the cars hit together under the stop light. Mrs. Thelma Johnson Lee was driving the other car.

"When I first saw the automobile being operated by Mrs. Thelma Johnson Lee I was approximately 75 feet from the stop light. Thelma Johnson Lee was approximately the same distance, 75 feet. Alver Bass

did not apply any brakes. He did not make any effort to stop. He did not slow down.

"I don't think Thelma Johnson Lee applied any brakes. She did not slow down. She did not stop until the collision.

" * * * I was approximately 40 feet from the intersection when I hollered, 'Look out.' * * * He did not apply any brakes. I don't know where he looked. * * * He did not change his direction of travel or slow down.

"The light was green the only time I observed it. I was then approximately 75 feet from the intersection. When I saw that car approaching I did not take my eyes off of that car until it hit the car I was riding in."

The evidence tends to show that Mrs. Lee was operating her automobile at approximately 35 miles an hour, and that defendant Alver Bass was operating his car at a speed of approximately 30 or 35 miles an hour.

The plaintiff offered other evidence tending to show that the light was red on East Edgerton Street when defendant Mrs. Lee entered the intersection, while defendant Mrs. Lee offered evidence tending to show that the light was red on North Clinton Avenue and green on East Edgerton Street at the time she entered the intersection. Mrs. Lee testified: "That Ford automobile driven by Mr. Bass just came up in front of me. I didn't see it in time to stop. At the time that I entered the intersection, I didn't see it. * * * As I approached the light it was green and I proceeded to go on across * * *." On cross-examination, this witness testified: "I did look to the right to see what was coming. I didn't see anybody. * * * This car that I ran into on the side came from the right. I never saw it until I hit him."

It was stipulated by counsel for each party that there was at the time of the collision out of which this cause of action arose, an electric traffic control signal erected over the center, or approximate center, of the intersection of North Clinton Avenue and East Edgerton Street, which traffic light was a three-panel light carrying the colors red, amber and green, and that the said traffic light was erected and maintained by the Town of Dunn pursuant to an ordinance duly enacted by the Town Board, and at the time of the collision such traffic control signal was in good order and was working properly.

It was further stipulated by counsel for the respective parties that the automobile driven by Thelma Johnson Lee was owned by H. P. Lee and was being operated at the time of the collision by Thelma Johnson Lee with his knowledge, consent and permission.

The following issues were submitted to the jury and answered as indicated.

"1. Was the plaintiff injured and damaged by the negligence of the defendant, Thelma Johnson Lee, as alleged in the complaint? Answer: Yes.

"2. Was the defendant, Thelma Johnson Lee, operating the 1954 Ford of H. P. Lee as the agent of H. P. Lee and in the course and scope of her employment? Answer: No.

"3. Was the plaintiff injured and damaged by the negligence of the defendant, Alver Bass, as alleged in the complaint? Answer: Yes.

"4. What amount of damages, if any, is George W. Bass entitled to recover? Answer: $9,000.00."

From the judgment entered on the verdict the defendants Thelma Johnson Lee and Alver Bass appeal, assigning error.

Wilson & Bain for appellee.
Teague, Johnson & Patterson for appellant Lee.
Robert B. Morgan; Fletcher, Lake & Boyce for appellant Bass.

DENNY, J. Each of the appealing defendants assigns as error the failure of the court below to sustain their respective motions for judgment as of nonsuit, made at the close of plaintiff's evidence and renewed at the close of all the evidence.

According to the evidence, there was a brick building at the northeastern intersection of North Clinton Avenue and East Edgerton Street; that one approaching the intersection from the north on North Clinton Avenue, when he reached a point 75 feet from the traffic light he could see a distance of 75 feet from the traffic light on East Edgerton Street. Likewise, one approaching the intersection from the east on East Edgerton Street, when he reached a point 75 feet from the traffic light he could see a distance of 75 feet from the traffic light on North Clinton Avenue.

There can be no question about the fact that these defendants entered the intersection at about the same time. Neither can there be any doubt about the fact that while each of these defendants traveled the last 75 feet before colliding with each other a few feet north of the center of the intersection, they could have seen each other approaching the intersection if they had looked and observed what they could and should have seen *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330; *Taylor v. Brake,* 245 N.C. 553, 96 S.E. 2d 686; *Norris v. Johnson,* 246 N.C. 179, 97 S.E. 2d 773. Moreover, the evidence tends to show that when the defendant Bass was 40 feet from the stop light or 40 feet from the intersection (the plaintiff testified to both distances), the plaintiff warned him by saying, "Look out, Alver"; and the evidence further tends to show that the defendant Bass, notwithstanding

this warning, made no effort to determine whether or not the defendant Mrs. Lee was going to stop and yield the right of way to him, nor did he apply his brakes, slow down, or make any attempt whatever to avoid the collision.

It is true the plaintiff alleged that the defendant Bass entered the intersection on a green light, but the testimony of the plaintiff himself, in support of his allegation in this respect, on direct examination, was that, "The light was green the only time I observed it. I was then approximately 75 feet from the intersection." On cross-examination he testified: "The first and only time that I saw the light that was controlling traffic in that intersection was when I was about 75 feet from it. At that time it was green for traffic on North Clinton Avenue. From then on I was watching for a collision to occur. I was not looking at the light at the time of impact." It then becomes a question as to whether or not these defendants were guilty of negligence in entering the intersection without exercising reasonable care to determine whether or not the entrance into such intersection could be made with safety. The evidence tends to show that both appellants had sufficient time to stop before the collision if they had observed one another's presence as soon as their presence could and should have been observed. In fact, the testimony of the plaintiff himself was to the effect that each car was being driven so that it could have been brought to a stop in less than 40 feet.

In the case of *Hyder v. Battery Co., Inc.*, 242 N.C. 553, 89 S.E. 2d 124, the plaintiff, operator of a vehicle, stopped for a red traffic light. When he saw the light change, he started across the intersection, but he had only gone a short distance when his wife exclaimed, "Look out, that truck is going to hit us." The plaintiff jammed on his brakes and stopped, with the front of his automobile 17 feet into the intersection when the collision occurred. The plaintiff testified that he was not paying any particular attention, except to the green light. This Court held that the evidence warranted the submission of an issue as to the plaintiff's contributory negligence.

In the instant case, there is no evidence as to whether or not the defendant Alver Bass ever observed the traffic light or the approaching automobile operated by Mrs. Lee. He elected to offer no evidence in the trial below.

This Court said in the last cited case: "The duty of a driver at a street intersection to maintain a lookout and to exercise reasonable care under the circumstances is not relieved by the presence of electrically controlled traffic signals, which are intended to facilitate traffic and to render crossing less dangerous. He cannot go forward blind-

ly even in reliance on traffic signals. 4 Blashfield, p. 244. The rule is well stated in 60 C.J.S., 855 as follows:

" 'A green traffic light permits travel to proceed and one who has a favorable light is relieved of some of the care which otherwise is placed on drivers at intersections, since the danger under such circumstances is less than if there were no signals. However, a green or "go" light or signal is not an absolute guarantee of a right to cross the intersection solely in reliance thereon without the necessity of making any observation and without any regard to traffic conditions at, or other persons or vehicles within, the intersection. A green or "go" signal is not a command to go, but a qualified permission to proceed lawfully and carefully in the direction indicated. In other words, not withstanding a favorable light, the fundamental obligation of using due and reasonable care applies.' "

" 'The fact that the operator of a motor vehicle may have a green light facing him as he approaches and enters an intersection where traffic is regulated by automatic traffic control signals does not relieve him of his legal duty to maintain a proper lookout, to keep his vehicle under reasonable control * * *.' *Cox v. Freight Lines, supra* (236 N.C. 72, 72 S.E. 2d 25)." *Funeral Service v. Coach Lines,* 248 N.C. 146, 102 S.E. 2d 816; *Williams v. Funeral Home,* 248 N.C. 524, 103 S.E. 2d 714; *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543.

In *Currin v Williams,* 248 N.C. 32, 102 S.E. 2d 455, the automobile of the plaintiff and the automobile of the defendant collided under a stop light in the Town of Rocky Mount, North Carolina. The plaintiff had the green light and the defendant ran the red light. Plaintiff was traveling 15 to 20 miles an hour and the defendant was traveling 20 miles an hour. Plaintiff did not look to his right or to his left, but he could see the "broadness" of the street ahead. Plaintiff could have stopped within 10 feet. This Court said the plaintiff was not contributorily negligent as a matter of law, but that the issue was properly submitted to the jury as to the contributory negligence of the plaintiff. Likewise, in the factually similar cases of *Wright v. Pegram,* 244 N.C. 45, 92 S.E. 2d 416, and *Stathopoulos v. Shook,* 251 N.C. 33, 110 S.E. 2d 452, this Court held the respective plaintiffs not guilty of contributory negligence as a matter of law but that the issue of contributory negligence in each case was properly submitted to the jury.

It was established in the trial below that the speed limit fixed by law on the streets in the area involved in the present action was 35 miles per hour. There was no evidence tending to show that either of the appellants exceeded this limit. Even so, it is provided in G.S. 20-141, subsection (a) that, "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the

conditions then existing." It is further provided in subsection (c) of the same statute, as amended, that, the fact that the speed of a vehicle is lower than that fixed by statute "Shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection * * * or when special hazard exists with respect to pedestrians or other traffic * * * 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." *Butler v. Allen,* 233 N.C. 484, 64 S.E. 2d 561.

In our opinion, the plaintiff's evidence when considered in the light most favorable to him, as it must be on a motion for judgment as of nonsuit, was sufficient to carry the case to the jury against both appellants, and we so hold. These assignments of error are overruled.

The plaintiff in instituting this action alleged that the defendant Bass and the defendants Lee were jointly and concurrently negligent in causing the collision out of which his injuries arose. The answer of the defendants Lee alleged that the collision was caused solely by the acts of negligence of the defendant Bass. In a further answer and defense the defendants Lee alleged that if they are responsible for negligently causing the collision and the plaintiff's injuries, which they expressly denied, these defendants would be entitled to contribution from the defendant Bass in accordance with the General Statutes of North Carolina, § 1-240.

The defendant Bass filed a reply to the further answer of the defendants Lee, denying the allegations as to contribution. Thereafter, the defendants Lee paid the defendant Bass $465.00 for personal injuries and damage to property resulting from the collision involved in this action and obtained from Bass a covenant not to sue. When this cause came on for trial, the defendant Bass moved to amend his reply to the further answer and defense of the defendants Lee, in order to plead the covenant not to sue executed by the defendant Bass. The trial judge allowed the motion to amend, over the objection of the plaintiff and the defendants Lee, but refused to allow the reply as amended to be read to the jury. The court held that the execution of the covenant not to sue, which was stipulated by counsel for the several defendants, "constituted a matter of law for the court." Defendant Bass excepted to this ruling and assigns it as error.

Under the decisions of this Court, in an action against two defendants as joint tort-feasors, one of such defendants is not authorized to set up a plea for contribution against his co-defendant. *Greene v. Laboratories, Inc.,* 254 N.C. 680, 120 S.E. 2d 82.

In the instant case, since the plaintiff made out a case against both defendants, and the jury found that defendant Mrs. Lee and defendant Bass were guilty of negligence as alleged in the complaint, and a joint and several judgment was entered on the verdict, any right of contribution as between these defendants does not arise on this appeal. Furthermore, the covenant not to sue defendants Lee, executed by defendant Bass, had no bearing whatever on the liability of these defendants to the plaintiff herein. It was stipulated in the covenant not to sue that payment of the amount therein recited was not to be an admission of liability on the part of the Lees.

The plaintiff stated a cause of action against both defendants and procured his judgment on the cause of action alleged; therefore, the allegations of defendants Lee with respect to contribution, and the allegations of the defendant Bass with respect to the covenant not to sue, were mere surplusage and had no bearing on the cause of action alleged by the plaintiff. Moreover, we hold that to have permitted the defendant Bass to read his amended reply to the jury, or to have permitted him to introduce the covenant not to sue in evidence, would have been prejudicial to the plaintiff and to the defendants Lee. *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209, and cited cases.

The appellants have set out in the record more than 50 assignments of error very few of which have been brought forward and discussed in the respective briefs. However, a careful examination of these assignments leads us to the conclusion that no prejudicial error that would justify a new trial has been shown by either appellant.

In the trial below, we find

No error.

BOBBITT, J., concurring in result. For the reasons stated in the dissenting opinion in *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82, it is my opinion that, when two defendants are sued as joint tort-feasors, one defendant may, under G.S. 1-240, allege a cross action against his codefendant *for contribution* with reference to the amount, if any, of plaintiff's recovery from the defendant who asserts such cross action. In all other respects, I concur in the Court's opinion.

STATE v. ASA WILLIAMS, HUGH WARD McCAIN, WALTER V. ASHLEY AND BENNY DANSAVAGE.

(Filed 16 June, 1961.)

1. Criminal Law § 159—

Exceptions and assignments of error not brought forward and argued in the brief will be deemed abandoned. Rule of Practice of the Supreme Court, No. 28.

2. Conspiracy § 6—

While conspiracy may be proved by circumstantial evidence, such evidence must establish facts from which an agreement to do a specific unlawful act may be legally inferred, and a conviction cannot be upheld if the facts are as consistent with innocence as with guilt.

3. Same—

Evidence tending to show that four persons conspired to assault and disable a particular person, and that two of them thereafter burned a building, is insufficient to support conviction of the other two of conspiracy to burn the building even though there is evidence that one of the second two defendants paid a sum of money to one of the arsonists after the building had been burned, there being no evidence that the payment was for the burning of the building.

4. Criminal Law § 162—

Assignments of error to questions propounded by the solicitor to a witness during the trial cannot be sustained when defendant's objection to each of the questions is sustained, or when what the witness would have testified had he been permitted to answer does not appear in the record.

5. Same—

A defendant cannot complain of testimony elicited by his own counsel on cross-examination of a witness.

6. Conspiracy § 7: Criminal Law § 106—

In charging upon the principle that a single defendant cannot be convicted of conspiracy, a statement of the court that the jury might return a verdict of guilty as to any two or more or all or not guilty as to any one or more or all, as the jurors might be "satisfied from the evidence," will not be held for prejudicial error, it being apparent that this portion of the charge did not relate to the burden of proof and that the court had theretofore and thereafter given explicit and correct instructions as to the burden of proof, and that the jury could not have been misled.

7. Same—

In stating the principle that the punishment in the event of a conviction was for the court and not the jury, a statement of the court that it was the responsibility of the jury to return a verdict of guilty or not guilty as the jury should find the facts to be beyond a reasonable doubt, will not be held for prejudicial error, it being apparent that this portion

of the charge did not relate to the burden of proof and that the court had theretofore and thereafter given explicit and correct instructions as to the burden of proof, and that the jury could not have been misled.

APPEAL by defendants from *Mallard, J.*, 26 September Mixed Term 1960 of ORANGE.

This is a criminal action. In Case No. 1629, the defendants Asa Williams, Hugh Ward McCain, Walter V. Ashley, and Benny Dansavage were charged in a bill of indictment with the crime of conspiring to feloniously set fire to and burn a building in the possession of and used by the Reverie Lingerie, Inc., in the manufacture of lingerie.

In Case No. 1630, the defendants Hugh Ward McCain and Asa Williams were charged in a bill of indictment with the crime of feloniously setting fire to and burning a building in the possession of and used by the Reverie Lingerie, Inc., in the manufacture of lingerie.

In Case No. 1631, the defendants Asa Williams, Hugh Ward McCain, Walter V. Ashley, and Benny Dansavage were charged in a bill of indictment with the crime of conspiring to commit a secret assault upon one O'Neal Gosnell, by breaking his arms.

The Solicitor moved that the three cases be consolidated for trial. The defendants objected.

The trial court in its discretion granted the Solicitor's motion to consolidate Cases Nos. 1629 and 1630 for trial, but denied the motion as to Case No. 1631, which is still pending for trial in the Superior Court of Orange County.

The State's evidence tends to show that Reverie Lingerie, Inc. owned a building in Hillsboro, Orange County, North Carolina, in 1957; that it employed about 100 people, none of whom were Union members; that the International Ladies Garment Workers Union undertook to organize these employees and brought about a strike from about 3 March 1957 until 27 September 1957 and maintained a picket line thereat; that as a result of the strike approximately fifty per cent of the employees stayed out of work; that defendants Ashley and Dansavage were organizers with the above Union and were seen from time to time on the picket line; that on 27 September 1957 the plant of Reverie burned to the ground between the hours of 6:00 p.m. and 9:00 p.m. No one was in attendance at the plant that night. It was not being operated that day. It was during Jewish holidays and the plant was closed during that time.

Betty Johnson, an employee of the Southern Bell Telephone & Telegraph Company (hereinafter referred to as Southern Bell) at Birmingham, Alabama, testified that she accompanied the defendants

Williams and McCain, also employees of Southern Bell at Birmingham, from Birmingham to Atlanta, Georgia, on 25 September 1957; that they spent the night in the Piedmont Hotel in Atlanta, where they met defendant Ashley, whom she had known in Birmingham; that Ashley said he wanted Williams and McCain to go to Durham, North Carolina, to break a man's arms and beat him up; that Williams and McCain agreed to make the trip; that Ashley gave them a telephone number and a name to call when they got to Durham. Ashley also gave them expense money for the trip. She testified that she accompanied Williams and McCain to Durham the next day where Williams and McCain got in touch with Dansavage over the telephone and that he met them in his car somewhere in downtown Durham; that she remained in the car they drove to Durham and did not hear the conversation between Williams, McCain and Dansavage in Dansavage's car.

The witness and Williams and McCain spent the night at the Dutch Village Motel in Durham. The next morning they had breakfast at the Rebel Restaurant where they met and talked with Dansavage. While they were at this restaurant, Dansavage told them where "that man" lived. He also told them where the plant was located that was on strike where "that man" worked. He gave them the location of the home of the man they talked about, and told them that he, Dansavage, could be contacted at the Chesterfield Motel, where he was staying. He instructed them to call him, not to come by there. He said he didn't want anybody to see them at the motel with him.

This witness further testified that later that day she, Williams and McCain followed the instructions of Dansavage and located the Reverie plant at Hillsboro, North Carolina, and "that man's" house, but did not find him. "Before we got to the plant, there was a conversation between Williams and McCain as to what they were going to do. Williams and McCain were going to burn the plant down. * * * (T)hey drove up behind the plant on a dirt road on the east side of the plant * * * and turned the car around * * * facing the highway * * *. Asa Williams got out of the car, broke the back window of the building, and threw something into the building. I don't know what he threw into the building contained, but I know it was something that was supposed to explode. Before Williams threw this object in the broken window, he lit the end of it. After it was thrown into this window, it just made a big pop sound, and we left."

The witness continued, "At the time Williams threw this lit object into the building, McCain was driving the automobile and after Williams got back into the car, we left the scene immediately. When we got to the highway, we turned right and drove away pretty fast. I

really don't know how long we drove before we stopped, it was two or three hours." They drove in the direction of Atlanta, and went on to Atlanta the next day.

This witness further testified that defendant Ashley had instructed them to call him before they came back to the hotel in Atlanta. A call was made and they went to the Piedmont Hotel, where she, Williams and McCain met Ashley in his room. Mr. Ashley told them when they got there "that the plant had been completely burned down, that he had already got word." The defendant Ashley then paid Williams and McCain some money, but the witness did not know how much.

The State also offered evidence tending to show that the defendant Ashley was upset and displeased with the burning of the plant. It likewise introduced statements made by Betty Johnson to investigators of her employer and to agents of the State Bureau of Investigation of North Carolina (hereinafter referred to as SBI), in corroboration of her testimony at the trial.

The jury returned a verdict of guilty as charged against the defendants on both bills of indictment, and from the judgments imposed on the verdicts, the defendants appeal, assigning error.

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

Bonner D. Sawyer; Ledford & Ledford for the defendants.

DENNY, J. At the close of the State's evidence each one of the defendants moved for judgment as of nonsuit. The motions were denied and each defendant rested without introducing any evidence, and renewed his motion. The motions were again denied and each defendant excepted to the ruling and assigns it as error. However, only assignments of error Nos. 42 and 43, set out in behalf of defendants Ashley and Dansavage, were brought forward and argued in the appellants' brief. Therefore, exceptions and assignments of error Nos. 40 and 41, challenging the correctness of the ruling on the motions for judgment as of nonsuit as to the defendants Williams and McCain, will be treated as abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562, *et seq.*

The evidence tends to show that Ashley, Williams and McCain entered into an agreement pursuant to which Williams and McCain were to commit an assault on "some man" who worked at the Reverie plant, and that the trip to Durham was in furtherance of that agreement. However, there is no evidence tending to show that Ashley conspired with them to burn the plant of the Reverie Lingerie, Inc.

Further, the State concedes that the fact that Ashley was "very surprised and displeased that the plant had been burned" and that he was "upset about it," tends to exculpate him. There is evidence tending to show, however, that Ashley conspired with Williams and McCain for them to inflict personal injury on "some man" who worked at the Reverie plant and who would not co-operate with the Union in its strike at the Reverie plant; and that Ashley, who was a Union organizer, wanted this man physically incapacitated to the extent he would be unable to work. This evidence is further supported by the fact that the defendant Dansavage gave Williams and McCain the address of "the man" whom they wanted assaulted and disabled. Here, again, the evidence tends to show that Dansavage knew Williams and McCain were in Durham on a nefarious or unlawful mission. He told them that he, Dansavage, could be contacted at the Chesterfield Motel, where he was staying, but he instructed them to call, and not to come by there. He said "he didn't want anybody to see them at the motel with him." This was rather an unusual statement, if Williams and McCain were in Durham on a legitimate mission. Even so, there is no direct evidence that Dansavage was a party to the conspiracy to burn the plant. The conduct of Ashley was suspicious, particularly since Williams and McCain returned to Atlanta and were paid some money by Ashley after Ashley knew the plant had been burned and also knew that Williams and McCain had not located "the man" they supposedly went to Durham to assault and disable.

It is a fundamental rule of law, however, that one cannot be guilty of a conspiracy based upon acts done or declarations made after the conspiracy has ended. *Stanley v. United States* (6th Cir.), 245 F. 2d 427; *Cleaver v. United States* (10th Cir.), 238 F. 2d 766.

In *S. v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762, this Court quoted with approval from *Johnson v. State,* 208 Ind. 89, 194 N.E. 619, as follows: "There must be an agreement or joint assent of the minds of two or more before there can be a conspiracy. Such agreement or joint assent of the minds need not be proved by direct evidence. * * * There must be, however, an agreement, and there must be such evidence to prove an agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy." *S. v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322; *S. v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *S. v. Ritter,* 197 N.C. 113, 147 S.E. 733.

A conviction should not be upheld if the evidence is as consistent

with innocence as with guilt. 15 C.J.S., Conspiracy, Section 93, page 1150.

A careful consideration of the evidence adduced in the trial below leads us to the conclusion that the State's evidence is insufficient to sustain the convictions of defendants Ashley and Dansavage for conspiracy to burn the plant of the Reverie Lingerie, Inc. Assignments of error Nos. 42 and 43, challenging the correctness of the rulings below on the respective motions for judgment as of nonsuit, interposed by the defendants Ashley and Dansavage, will be upheld.

Assignments of error Nos. 4, 6, 9, 11, 13, 14, 15, 16, 17, 18, 19, 21, 26, 30, 31, 35 and 38 are directed to questions propounded by the Solicitor during the course of the trial. Each one of the foregoing assignments of error is without merit and must be overruled for two reasons. First, the defendants' objection to each and every one of the questions involved was sustained, and second, what answer the witnesses would have given to the respective questions propounded if the witnesses had been permitted to answer, does not appear in the record. *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *S. v. Ballenger,* 247 N.C. 260, 100 S.E. 2d 845; *S. v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *S. v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *Bd. of Education v. Mann,* 250 N.C. 493, 109 S.E. 2d 175; *S. v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398.

The defendants have numerous additional assignments of error directed to certain questions relating to where the State's witness, Betty Johnson, was kept for several weeks preceding the trial of this action. Many of these assignments of error are directed to identical questions to which the defendants objected and the objections were sustained and which were included in the above-numbered assignments of error which we have overruled.

The State's witness, Betty Johnson, on cross-examination, testified as to the various places she lived after the investigation of this case was begun by special agents of Southern Bell and the SBI. It was brought out by defendants' counsel that her employer, Southern Bell, was paying her salary and expenses in the various motels at which she stayed. It was likewise brought out without objection, on the direct examination of one of the special agents of Southern Bell, that Betty Johnson moved from Birmingham to Atlanta at the suggestion of the special agent. This witness testified: "We had her safety in mind * * *. We paid her hotel bill and daily per diem." This witness further testified without the objection of any of the defendants except McCain, that "She later removed to Birmingham, at my suggestion, for the same reason. She later moved from Birmingham to Florida at my suggestion for the same reason."

Testimony as to the different places Betty Johnson stayed and who paid her expenses for several weeks prior to the trial was repeatedly admitted without objection by any of the defendants. Counsel for the defendant Williams, on cross-examination, propounded the following question to an agent of the SBI: "Why were you keeping such close contact with her?" The record states that all of the defendants objected and that the court sustained the objection as to all the defendants except Asa Williams, and instructed the jury not to consider the answer against any of the defendants except as to Asa Williams. This witness then testified: "We were keeping such close contact on her because we had information that her life was at stake; that there had been a man hired to kill her and that two private investigators had also been hired to locate her so that this third party could kill her. We had nothing upon which to base that except what I had heard, and we acted on that information. We had no facts upon which to base our action except the information we received." Thereupon, counsel for Williams undertook to ascertain the source of the SBI's information. The State objected. Counsel for defendant Williams insisted on going into the matter to ascertain "whether or not there is any basis whatever for his statement that they had information that someone had been hired to do bodily harm to her, and to see whether or not it can be traced, in any way, to Asa Williams." It was then brought out that the SBI had received its information from one of the special agents of Southern Bell. Williams excepted and assigns as error the admission of this evidence against him. This information having been brought out by counsel for Williams, on cross-examination, over the objection of all the other defendants, he cannot complain of the answers elicited by his own counsel. *S. v. Case*, 253 N.C. 130, 116 S.E. 2d 429. All of these assignments of error are overruled.

Assignment of error No. 54 is to the following portion of the charge to the jury: " * * * so your verdict may be guilty as to any two or more or all, or not guilty as to any one or more or all, as you may find and are satisfied from the evidence." This portion of the charge in context was directed to bill of indictment No. 1629, the bill charging the defendants with conspiracy to burn the Reverie plant, and reads as follows: " * * * the court instructs you that under the evidence in this case and the law applicable thereto, that you may return a verdict of guilty as to any two or more of the defendants, or you may return a verdict of not guilty as to one or all of the defendants; you cannot find one alone guilty, because it is necessary that at least two combine in order to form a conspiracy (so your verdict may be guilty as to any two or more or all, or not guilty as

to any one or more or all, as you may find and are satisfied from the evidence)."

It is clear that in this portion of the charge his Honor was not addressing himself to the question of *quantum* or burden of proof, but was explaining to the jury that under the indictment in the conspiracy case no one defendant could be found guilty unless at least one more defendant was also found guilty, because it takes at least two to form a conspiracy. This assignment of error is overruled.

Assignment of error No. 57 is to the following excerpt from the charge: "In both of these cases it is your responsibility and duty to return a verdict of guilty or not guilty, just as you find the facts to be and beyond a reasonable doubt." This excerpt in context reads as follows: "Gentlemen, there has also been some question or some statement made about the punishment that may or may not be inflicted in the event of a guilty verdict. I instruct you that you are not to consider that. (In both of these cases it is your responsibility and duty to return a verdict of guilty or not guilty, just as you find the facts to be and beyond a reasonable doubt), and pronouncing judgment on the verdict of the jury is the responsibility of the Presiding Judge."

The appellants cite and rely upon *S. v. Patterson,* 212 N.C. 659, 194 S.E. 283, and *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685. In the last cited case, the court said in its charge to the jury: "The defendant contends that he is not guilty; the State contends that you should be satisfied, by the greater weight of the evidence, that he is guilty." In the *Patterson* case the court instructed the jury as follows: "Gentlemen of the jury, you will see in this case that you may return one of three verdicts, as you so find from the evidence and beyond a reasonable doubt: first, guilty of murder in the second degree; second, guilty of manslaughter; third, not guilty."

In each of the last cited cases a new trial was granted. However, in the instant case, it is quite clear that in giving the instruction complained of, the court was not instructing the jury on the burden of proof, but was informing the jury that it should not concern itself with the question of punishment, that the question of punishment was the responsibility of the court. Moreover, the next four paragraphs of the charge, following the last quoted portion thereof, in the instant case, were devoted exclusively to instructions on the burden of proof and what the jury would have to find, beyond a reasonable doubt, with respect to the charges in the two bills of indictment, before the jury could return verdicts of guilty.

The jury was also instructed in each case that if the jury failed to find the defendants or either of them guilty beyond a reasonable

doubt, as charged in the bills of indictment, "it will be your duty to return a verdict of not guilty, or if, upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to their guilt, it is your duty to give them and each of them the benefit of the doubt and acquit them or him."

Furthermore, near the beginning of the charge, the jury was instructed as follows: "To the charges in each bill of indictment, each of the defendants named therein has come into court and entered a plea of not guilty; the plea of not guilty thus interposed challenges the credibility of the State's evidence, and raises in behalf of each of the defendants a presumption of innocence, that is, each of the defendants, in this as in all criminal cases, enters upon the trial presumed to be innocent, and this presumption remains with and surrounds them throughout the trial and entitles them to an acquittal at your hands unless and until the State has, by competent evidence, satisfied you and each of you of their guilt beyond a reasonable doubt."

We hold that when the charge given in the trial below is considered contextually, no prejudicial error of sufficient merit to warrant a new trial as to these defendants is made to appear.

The thirteen other assignments of error to the charge have been abandoned. Other exceptions and assignments of error set out in the record have been abandoned or, in our opinion, present no prejudicial error.

As to defendants Ashley and Dansavage

Reversed.

As to defendants Williams and McCain

No error.

CHRISTOPHER L. RUDD, MINOR, BY HIS NEXT FRIEND, C. C. RUDD v. WALTER E. STEWART AND MELVILLE DAIRY, INC.

(Filed 16 June, 1961.)

1. Automobiles § 46½—

The refusal of the court to submit the issue of contributory negligence in submitting the issues upon defendant's counterclaim will not be held for error, the matter being determinable upon the issue of negligence submitted in the issues upon plaintiff's cause of action.

2. Trial § 40—

It is the duty of the trial court to submit such issues as are necessary to settle the material controversies arising upon the pleadings, but with-

in the limitations of this requirement the form and number of issues rests in the sound discretion of the trial court.

3. Automobiles § 8—

In making a left turn, a motorist is required to give either the hand signal or a mechanical or electrical signal, but is not required to give both, G.S. 20-154(b).

4. Trial § 35—

A charge correctly stating and pointing out the provisions and requirements of a pertinent statute cannot constitute an expression of opinion by the court upon the evidence.

5. Trial § 37—

An exception on the ground that the court misstated the contentions of appellant will not be sustained when the error is not called to the attention of the court in time to afford opportunity for correction.

6. Automobiles § 46—

Where excessive speed and failure to maintain a proper lookout are permissible inferences from the evidence, exceptions to the charge on the ground that the court should not have charged the law in regard thereto cannot be sustained.

7. Automobiles § 25—

The operation of a motor vehicle in excess of the speed limits prescribed by G.S. 20-141(b) is negligence *per se*, and G.S. 20-141(e), prescribing that the inability of a motorist, travelling at a lawful speed, to stop within the radius of his lights should not constitute negligence *per se*, is not applicable when there is evidence that the motorist was exceeding the statutory speed limit and the question of ability to stop before hitting a vehicle on the highway is not involved in the action.

APPEAL by plaintiff from *Olive, J.*, December Regular Civil Term 1960 of CASWELL.

This is a civil action instituted by Christopher L. Rudd, a minor, by his next friend, C. C. Rudd, against Walter E. Stewart and Melville Dairy, Inc., to recover for personal injuries and damage to his 1953 Ford automobile as a result of a collision between the automobile of the plaintiff and the truck of the defendant corporation, the truck being driven at the time by the defendant Stewart.

The defendants filed answers and set up counterclaims against the plaintiff, the defendant Stewart for personal injuries and the corporate defendant for damages to its truck and other property.

It was stipulated that defendant Stewart at the time of the collision was the agent, servant and employee of defendant Melville Dairy, Inc., and at the time was engaged in the business of his master.

The accident occurred on 5 March 1959, about 9:30 a.m. The plaintiff, a resident of Caswell County, North Carolina, was proceeding

towards Burlington, North Carolina, on the State Highway leading from Union Ridge to Burlington. When the plaintiff arrived at or near the entrance to the driveway leading to the residence of G. S. Kernodle, the plaintiff's motor vehicle was involved in a collision with a 1958 Chevrolet truck owned by the defendant corporation and being driven by defendant Stewart in the same direction the plaintiff was traveling.

Plaintiff's evidence tends to show that approximately one thousand feet north of the point of accident Stewart entered the Union Ridge Road from the West on the Stoney Creek Road; that Stewart turned right and proceeded in a southerly direction ahead of plaintiff Rudd. Plaintiff testified that he saw Stewart about 250 or 300 yards ahead of him, and that he came up behind him and followed him to the crest of the hill, and seeing his way clear for about a half mile or more, blew his horn when two or three car lengths behind Stewart, and pulled over to the left lane to pass; that just as he was approaching the entrance to the driveway of the Kernodle residence and started to pass, at a speed of about 50 miles per hour, Stewart pulled his truck slightly to the right of the highway and suddenly turned directly across the highway to his left in front of him (Rudd) to enter the Kernodle driveway and was hit head-on by Rudd's car on the left rear of the truck. Rudd was knocked unconscious and sustained personal injuries which required eleven days' confinement in hospital.

On cross-examination the plaintiff testified: "I was about 250 to 300 yards from the truck when I first saw it. * * * I was coming uphill when I came up behind the truck. The truck was approximately 75 yards from the Kernodle driveway; the truck did not go over the knoll and out of my sight; you could see part of the truck * * *. At the time I was three or four car lengths behind the truck as it went over the knoll, I was driving around 40 miles per hour * * *. I speeded up to go past the truck * * *. I didn't pay much attention to the truck's speed at that time — it was traveling around 35 miles an hour — it might have slowed some; I didn't pay much attention to it until it swerved off and started pulling over. * * * At the time * * * I was maybe two and a half car lengths from it, 35 feet, approximately. * * * (T)he speed of the truck when it turned in front of me was 15 or 20 miles an hour. * * *I don't think I had time to put on my brakes * * *. I had been traveling the road where the accident occurred for some time, and I was fairly familiar with it."

The defendants' evidence tends to show that Stewart saw the car driven by Rudd about the time he entered the Union Ridge Road from Stoney Creek Road; Rudd's car was north of the intersection, about one thousand feet behind the car driven by a Mr. Page. Stoney

Creek Road intersects the Union Ridge Road in a valley between two hills. Stewart did not see these cars again until he reached the top or crest of the hill. At that time the Page car was in front. It is about 350 feet from the crest of the hill to the driveway of the Kernodle residence. Stewart testified: "I had my left-turn signal on before I crested the hill. I slowed down to approximately 5 miles an hour and made a left turn into the G. S. Kernodle driveway * * *. As I made the left turn, I looked in my mirror; I could only see the hill * * *. I got the cab of the truck, the door, the opening, across the driveway ditch, the back wheels were still on the road when Mr. Rudd hit me; the rear wheel back to the back of the truck was struck. The truck turned over and landed in a ditch south of the driveway toward Burlington. I did not hear any signal given by the Rudd car; there was no horn blown."

Mr. Page testified that he was operating his car 50 to 55 miles an hour; that Rudd passed him about a quarter of a mile from the scene of the accident; that he (Page) continued to drive at the same speed and was in the valley when the collision occurred. He said: "I did not hear the collision; I was down at the intersection * * * of Stoney Creek Road."

The State Highway Patrolman, who arrived at the scene of the accident very shortly after it occurred, testified that the plaintiff's car left skid marks for a distance of 84 feet north of the point of impact on the left-hand side of the highway; that it is approximately 400 feet from the intersection of Stoney Creek Road to the crest of the hill. This witness further testified that the "speed limit on the Union Ridge Road at the time of the accident was 55 * * *."

Mrs. G. S. Kernodle testified: "I was hanging up clothes on the line, I had heard the milk truck out at the road; then I heard a car coming down the road and it was making a lot of fuss, sounded like it was going fast. I * * * have no idea how fast it was going, though. It was going toward Burlington. I remember hearing the tires squeak and then the collision. * * *"

The following issues were submitted to the jury and answered as indicated.

"1. Was the plaintiff injured and his automobile damaged by the negligence of the defendants? Answer: No.

"2. Did the plaintiff by his own negligence contribute to his injury and damage, as alleged in the answer: Answer: _____.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant for (a) personal injuries; (b) damage to automobile? Answer: (a) for personal injuries _____.

(b) for damage to automobile _____.

"4. Was the defendant Walter E. Stewart injured and the Melville Dairy, Inc. damaged by the negligence of the plaintiff, as alleged in the answers: Answer: Yes.

"5. What amount, if any, is the defendant Walter E. Stewart entitled to recover of the plaintiff: Answer: $565.00.

"6. What amount, if any, is the defendant Melville Dairy, Inc. entitled to recover of the plaintiff? Answer: $2,000.00."

From the judgment entered on the verdict the plaintiff appeals, assigning error.

D. Emerson Scarborough for plaintiff.
Sanders & Holt for defendants.

DENNY, J. Assignments of error Nos. 1 and 2 are to the submission of the issues set out hereinabove and the refusal of the court below to submit the issues tendered by the plaintiff.

The issues tendered by the plaintiff did not include an issue as to the contributory negligence of the plaintiff, as alleged in the answers, but it did include issues as to the contributory negligence of defendant Stewart on his counterclaim and as to defendant Stewart as agent and servant of the corporate defendant on its counterclaim for the recovery of damages to its truck and contents. The plaintiff in his reply to the counterclaims of the defendants alleged contributory negligence on the part of Stewart, the driver of the corporate defendant's truck.

We think, however, the issues submitted were adequate for the determination of the issues raised by the pleadings. When the jury found that the plaintiff had failed to establish actionable negligence against the defendants, and answered the first issue in the negative, in our opinion, the plaintiff was not prejudiced by the failure of the court to submit issues of contributory negligence as to the defendants on their counterclaims.

"Ordinarily the form and number of the issues in the trial of a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him. * * * It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings." *Griffin v. Insurance Co.*, 225 N.C. 684, 36 S.E. 2d 225. *O'Briant v. O'Briant,* 239 N.C. 101, 79 S.E. 2d 252; *Whiteman v. Transportation Co.*, 231 N.C. 701, 58 S.E. 2d 752; *Bailey v. Hassell,* 184 N.C. 450, 115 S.E. 166; *Potato Co. v. Jeanette,* 174 N.C. 236, 93 S.E. 795; *Clark v. Guano Co.,* 144 N.C. 64, 56 S.E. 858, 119

Am. St. Rep. 931; *Burton v. Manufacturing Co.,* 132 N.C. 17, 43 S.E. 480; *Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45. These assignments of error are overruled.

Assignment of error No. 3 is to the following portion of the charge: "The driver of any vehicle upon the highway before turning from a direct line shall first see that such movement can be made in safety, and when the operation of any other vehicle may be affected by such movement, shall give a signal by any mechanical or electric signal device with which such motor vehicle is equipped, or by giving a signal indicating his intention to turn by extending hand and arm from and beyond the left side of the vehicle when making a left turn — hand and arm horizontal, forefinger pointing. You will note * * * that either of those signals may be given, it does not require both."

The appellant points out in his brief that the specific error in the above portion of the charge is the following portion thereof: "You will note * * * that either of those signals may be given, it does not require both," and cites and relies upon *Ervin v. Mills Co.,* 233 N.C. 415, 64 S.E. 2d 431.

The facts in the *Ervin* case are easily distinguishable from those in the instant case. In the *Ervin* case the defendant testified that he did not look in his rear mirror; that he did not give a turn signal for the distance required by statute; that he did not see the plaintiff's motorcycle approaching from the rear when he had an unobstructed view for 700 to 800 feet; and further, the evidence tended to show that defendant's driver did not make a proper turn but "angled in," and did not pass to the right of the center of the mill driveway before turning left. The *Ervin* case simply holds that giving a statutory signal does not relieve a driver from exercising due care in other respects. However, there is nothing in the statute or in our decisions that require under any conditions that a hand signal and a mechanical or electrical signal shall both be given before making a left turn. The statute, G.S. 20-154 (b), among other things, provides: "The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any mechanical or electrical signal device * * *."

In the instant case, the defendants' evidence is to the effect that Stewart turned on his left-turn signal before he reached the crest of the hill; that he slowed down to approximately five miles per hour and looked in his rear mirror and could not see anything but the hill. At five miles per hour the corporate defendant's truck would have been moving only seven feet per second, while the plaintiff's automobile, according to plaintiff's testimony, was traveling 74 feet per second at the time of the collision. Therefore, his car at this speed

traveled from the crest of the hill to the point of collision in slightly less than five seconds. The appellant contends that, by instructing the jury that a signal indicating an intent to turn may be given by means of the hand and arm in the manner specified in the statute or by any mechanical or electrical signal device, but that the statute does not require both, could be construed by the jury as an expression of an opinion on the evidence by the court. This contention is untenable. Pointing out the provisions and requirements of a pertinent statute does not constitute an expression of opinion on the evidence. This assignment of error is overruled.

Appellant's assignment of error No. 4 is to the portion of the charge in which the trial judge gave the contentions of the defendants. There is nothing in the record to indicate that the appellant interposed any objection to the statement of the contentions at the time, or called the court's attention to any misstatement therein. It has been repeatedly and universally held by this Court that an assignment of error based on an exception to statements in the charge giving the contentions of the parties, and not called to the attention of the court at the time they are made, in order to give the court an opportunity to make a correction of any erroneous statement made therein, will not be upheld. *S. v. Spivey,* 230 N.C. 375, 53 S.E. 2d 259; *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514; *Steele v. Coxe,* 225 N.C. 726, 36 S.E. 2d 288; *Manufacturing Co. v. R.R.,* 222 N.C. 330, 23 S.E. 2d 32; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657; *S. v. Hobbs,* 216 N.C. 14, 3 S.E. 2d 431.

Assignment of error No. 5 is directed to the following portion of the charge: " * * * (I)f you are satisfied by the greater weight of the evidence that the plaintiff was driving at a speed that was not reasonable and prudent under the circumstances, or driving at a speed in excess of 55 miles an hour, and that the speed limit was 55 miles an hour there, or was not keeping a proper lookout, or that he didn't give any signal that he was going to pass and that he was negligent in one of these matters, or negligent in any other way, and you are so satisfied by the greater weight of the evidence, and if you are further satisfied by the greater weight of the evidence that such negligence was a proximate cause of injury and damage to the defendant Stewart and damage to Melville Dairy, Inc. property, and you are so satisfied by the greater weight of the evidence, it would be your duty to answer the fourth issue YES. * * *"

The appellant argues and contends that the foregoing instruction was prejudicial error for the reason that there is no evidence tending to show that he was exceeding the speed limit, or that he was operating his car in a careless or reckless manner, or that he did not have his

car under proper control, or that he was not keeping a proper lookout. He says and contends in his brief that at the time of the collision he "was going downgrade, and the fact that his skid marks were only 84 feet long would indicate that he had his car under proper control and was not speeding." The evidence with respect to the plaintiff's speed, and whether or not he had his car under control and was keeping a proper lookout at the time of the collision, constituted questions of fact for the determination of the jury.

The plaintiff further contends that the last quoted portion of the charge is prejudicial for the further reason that the court failed to charge the jury that the plaintiff's alleged failure to give an audible warning by his horn or other warning device before passing or attempting to pass the defendant would not constitute negligence or contributory negligence in itself, although the same may be considered with other facts in the case in determining whether the plaintiff was guilty of negligence or contributory negligence, citing G.S. 20-149 (b).

The appellant apparently overlooked the fact that the court had already charged exactly what he now contends it erroneously failed to charge. In connection with the above portion of the charge, we do not approve of the underlined portion thereof, set out hereinbelow, to wit, " * * * (I)f you are satisfied by the greater weight of the evidence that the plaintiff was driving at a speed that was not reasonable and prudent under the circumstances, or driving at a speed in excess of 55 miles an hour * * * or was not keeping a proper lookout, or that he didn't give any signal that he was going to pass, and that he was negligent in one of these matters, *or negligent in any other way* * * *." However, the appellant does not challenge the correctness of the charge on this ground. Consequently, the assignment of error will not be upheld.

Appellant's assignment of error No. 6 challenges the correctness of the following excerpt of the charge. "If you come to the fourth issue and find from the evidence, not by its greater weight but simply find from the evidence that the plaintiff was driving his automobile carefully, cautiously and lawfully, and was not negligent in any manner, it would be your duty to answer it NO, or if you find from the evidence that the plaintiff was operating his automobile carefully there, cautiously and lawfully, that he was operating it at a reasonable and prudent speed under the circumstances and was not exceeding the speed limit and that he was keeping a proper lookout; and that he was not negligent in any manner, it would be your duty to answer this issue NO; or, if you are satisfied by the greater weight of the evidence that the plaintiff was negligent, but you are not satisfied by the greater weight of the evidence that such negligence was a

proximate cause of injury and damage to the defendant Stewart and damage to Melville Dairy, Inc. property, it would be your duty to answer the fourth issue NO."

The only argument in support of this assignment of error is that it requires the jury to find the plaintiff negligent if he were exceeding the 55 miles per hour speed limit at the time of the accident. He argues that under the provisions of G.S. 20-141 (e) exceeding the speed limit is not negligence *per se*. The cited statute is not applicable to the factual situation in this case. The statute provides in subsection (e) thereof, Cumulative Supplement 1959, " * * * that the failure or inability of a motor vehicle operator who is operating such vehicle within the maximum speed limits prescribed by G.S. 20-141 (b) to stop such vehicle within the radius of the lights thereof or within the range of his vision shall not be considered negligence *per se* or contributory negligence *per se* in any civil action, but the facts relating thereto may be considered with other facts in such action in determining the negligence or contributory negligence of such operator."

The operation of a motor vehicle in excess of the applicable limits set forth in G.S. 20-141 (b) is negligence *per se*. *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143; *Albritton v. Hill,* 190 N.C. 429, 130 S.E. 5.

The reasons stated are insufficient to sustain this assignment of error and it is overruled.

Other assignments of error have been carefully considered and, in our opinion, they present no error sufficiently prejudicial to require the disturbing of the verdict and judgment from which the appeal is taken.

No error.

CITY OF DURHAM, A MUNICIPAL CORPORATION, PLAINTIFF v. REIDSVILLE ENGINEERING COMPANY, INC., AND UNITED STATES CASUALTY COMPANY AND FRANK R. PENN, DEFENDANTS AND W. M. PIATT, III, AND P. D. DAVIS, D/B/A PIATT AND DAVIS, ADDITIONAL DEFENDANTS.

(Filed 16 June, 1961.)

1. Contracts § 25—

Where the contract is made a part of the pleadings, the rights of the parties under the instrument, as presented by demurrer, will be determined in accordance with the terms of the agreement rather than the allegations or conclusions of the pleader.

2. Contracts § 13½: Principal and Surety § 9— Engineer inspecting and certifying work is not liable to contractor's surety for defects.

Where a contract for construction provides that an engineer should inspect and certify the work as it progressed before payments to the contractor, that the engineer should decide the meaning and intent of any portion of the specifications and plans upon dispute between the owner and the contractor, and that the engineer should have the right to correct any errors or mistakes that might be necessary to the proper fulfillment of the contract, but further provides that inspection of the work should not relieve the contractor of the obligation to do sound and reliable work and that the failure of the engineer to disapprove any work should not constitute an acceptance by the owner of defective work, *held*, the contract does not impose liability upon the engineer to the contractor's surety upon the recovery by the owner on the maintenance bond for defects in the performance of the work discovered during the period covered by the maintenance bond after the work had been certified by the engineer and accepted by the owner.

3. Pleadings §§ 8, 18—

In a suit by the owner against the contractor and the surety on its maintenance bond for defects discovered after the acceptance of the work, the surety is not entitled to file a cross-action against the engineer who inspected the work and certified the work as it progressed, and the demurrer of the engineer to the cross-action for misjoinder of parties and causes of action should have been sustained.

On *certiorari* of additional defendants Piatt and Davis from *Williams, J.*, March Civil Term 1961 of DURHAM.

This is a civil action for breach of a contract instituted by the City of Durham (hereinafter referred to as the City) against defendant Reidsville Engineering Company, Inc. (hereinafter referred to as Construction Company) and its surety, United States Casualty Company (hereinafter referred to as Casualty Company).

In essence the complaint alleges:

(1) A contract between the City and the Construction Company for power and light wiring for a sewage treatment and disposal plant being built by the City.

(2) The execution of a "Contract Bond" in the sum of $43,700.00 by the Construction Company as principal and the Casualty Company as surety to insure the faithful performance of the contract.

(3) Payment in full of the contract price plus extras by the City to the Construction Company in the sum of $46,348.45.

(4) The execution of a "Maintenance Bond" in the sum of $46,348.45 by the Construction Company as principal and the Casualty Company as surety in favor of the City to guarantee satisfactory performance of the work for a period of two years from and after the date of 24 August 1956, this date being specified therein as the

date of acceptance by the City of the work for purposes of the obligation.

(5) The discovery of defects by the City in the performance of the contract by the Construction Company.

(6) Resulting in damages in the sum of $19,850.28, which the City was required to expend in order to have the defective work remedied.

The original defendants filed answer denying any breach of contract and alleging that the City was estopped to maintain the action because the work had been certified by the Supervising Engineers and accepted by the City.

The original defendants filed a cross-action against Piatt and Davis, Engineers, and moved that they be made additional parties defendant. The motion was allowed. The additional defendants demurred to the cross-action and the demurrer was sustained. The original defendants were given thirty days from 9 June 1960 to file an amended cross-action. Only the defendant Casualty Company filed an amended cross-action against the additional defendants.

The Casualty Company alleged:

(1) That Piatt and Davis were the Supervising Engineers on the job and among other things were required to certify the satisfactory performance of the work to the City prior to any payments.

(2) Reliance on Piatt and Davis in executing the contract and maintenance bonds.

(3) A contractual obligation by Piatt and Davis to the Casualty Company to properly supervise the performance of the contract by the Construction Company.

(4) Periodic certificates by Piatt and Davis that the work was being satisfactorily performed.

(5) A final certificate by Piatt and Davis that the work was completed and final payment by the City including the release of the ten per cent (10%) retainage which was held pending the completion of the work under the terms of the contract.

(6) The insolvency of the Construction Company.

(7) That if the contract was not properly performed it was due to the negligence of Piatt and Davis in failing to properly supervise the work.

(8) That if the City recovers judgment against it, then it is entitled to judgment over against Piatt and Davis.

The additional defendants demurred to the amended cross-action. The demurrer was overruled and the additional defendants petitioned this Court for writ of *certiorari* and the petition was allowed.

Sapp & Sapp for Casualty Company.

Bryant, Lipton, Strayhorn & Bryant; F. Gordon Battle for Piatt and Davis.

DENNY, J. The additional defendants are relying upon two exceptions and the assignments of error based thereon as follows: (1) That the Judge of the Superior Court erred in overruling their demurrer in that the cross-action of the Casualty Company does not state facts sufficient to constitute a cause of action; and (2) that the Judge of the Superior Court erred in overruling the demurrer to the amended cross-action of the Casualty Company in that there is a misjoinder of parties and causes of action.

With respect to the first assignment of error, it was stipulated that the pertinent portions of the contract referred to in the pleadings are to be considered as a part of the cross-action for purposes of determining whether or not the court below committed error in overruling the demurrer of the additional defendants. We must, therefore, look to the contract itself to determine the duties of the parties, rather than to the general allegations set out in the cross-action filed by the Casualty Company. *Williamson v. Miller,* 231 N.C. 722, 58 S.E. 2d 743.

In the last cited case this Court said: "Since the contract is made a part of the complaint, and is alleged as the sole basis of recovery, the Court will look to its particular provisions rather than the more broadly stated allegations in the complaint, or the conclusions of the pleader as to its character and meaning. Upon proper construction of these writings depends the propriety of the judgment overruling the demurrer." *Ferrell v. Highway Commission,* 252 N.C. 830, 115 S.E. 2d 34.

An examination of the contract reveals that it was executed by the Construction Company as party of the first part and the City as party of the second part. It is true that the Proposal, which became the contract, and included the plans and the specifications, was prepared by Piatt and Davis, Engineers, for the City; but they did not execute the contract, nor in any way bind themselves as surety for the Construction Company. The last paragraph of the contract states: "The acceptance of this Proposal by the City Council for and on behalf of the City of Durham, N. C., party of the second part, as evidenced by the signature of the properly authorized officers of said City, shall be held to be a mutual agreement as to each and every clause of this Proposal and to constitute a contract between the parties hereto."

The contract also provides that the contractor "agrees to be responsible for the entire work herein contemplated until its completion

and final acceptance * * *." Neither does any inspection prior to the issuance of certificates for progress payments or final payment appear to be required by the terms of the contract.

As to the progress payments, the contract provides simply that "the Engineer will once a month make an approximate estimate in writing of the work done and materials furnished or apparatus delivered or installed from the beginning of the work."

Regarding the final payment, the contract provides: "That whenever in the opinion of the Engineer the work proposed shall have been completely performed on the part of the party of the first part the Engineer will proceed * * * to measure up the work and will make out the final estimate for the same, and will certify the same * * *."

It is provided in the contract that where the word "Engineer" is used it shall be held to mean Piatt and Davis, the Supervising Engineers, or any authorized assistant acting within the scope of the particular duties entrusted to him.

The contract provides further that "inspection of the work at any time shall not relieve the party of the first part (the Construction Company) of any obligation to do sound and reliable work * * * and * * * that any omission to disapprove of any work by the Engineer * * * shall not be construed to be an acceptance of any imperfect, unsightly, or defective work."

With respect to the duties and responsibilities of the additional defendants under the terms of the contract, the contract provides: "That the Engineer shall decide the meaning and intent of any portion of these specifications or of the plans where same may be found to be obscure or at variance or in dispute and shall have the right to correct any errors or omissions therein when such corrections are necessary to the proper fulfillment of the intention of said plans and specifications and that the Engineer shall have the final decision on all matters of dispute involving the character of the work, the compensation to be made therefor or any other question arising upon this Proposal after its acceptance."

We hold that, with respect to the interpretation of the meaning and intent of the plans and specifications, as well as to the authorization that additional work not expressly authorized in the contract but which the Engineers may deem necessary to the fulfillment of the terms of the contract and the proper completion of the job, which authority is expressly granted to the Engineers in the contract, together with their decision on all matters of dispute involving the character of the work, compensation for extra work, etc., the Engineers in making such decisions under the terms of the contract would be acting in the capacity of arbitrators and could not be held liable in damages

to either party to the contract in the absence of bad faith. *Stevenson v. Watson* (1879, Eng.), L.R. 4 C.P. Div. 148; *Chambers v. Goldthorpe* (1901, Eng.), 1 K.B. 624, 4 B.R.C. 833-C.A.; *Corey v. Eastman,* 166 Mass. 279, 44 N.E. 217, 55 Am. St. Rep. 401; *Wilder v. Crook,* 250 Ala. 424, 34 So. 2d 832. Other cases are to the effect that the Supervising Architect or Engineer may be held liable to the building owner for damages resulting from negligently certifying the completion of the work. *Palmer v. Brown,* 127 Cal. App. 2d 44, 273 P. 2d 306; *Bump v. McGrannahan,* 61 Ind. App. 136, 111 N.E. 640; *Lindeburg v. Hodgens,* 89 Misc. 454, 152 N.Y.S. 229; *Pierson v. Tyndall* (Tex. Civ. App., 1894), 28 S.W. 232; *School District v. Josenhans,* 88 Wash. 624, 153 P. 326. See Annotations, 43 A.L.R. 2d 1227. However, the question of the liability of these additional defendants to the City is not presented for determination on this appeal.

In the case of *Bump v. McGrannahan, supra,* the Court held that an architect may be held liable to the owner where he "agreed and undertook to supervise the construction * * * and determine * * * when any payments were due * * * according to the plans and specifications and contracts previously entered into * * * and to see that the work was done in accordance therewith"; where he wrongfully authorized payments to be made that were not due; and where the owner "paid out money he should have retained * * * and * * * was damaged to the extent of the money so paid out by him." The Court said further: "It is not claimed * * * that appellants (architects) undertook to construct, or to guarantee the completion of, the building at the contract price, and their liability would not therefore arise by reason of the failure of the contractor to complete the building according to the contract * * * .

"The liability for failure to complete the building would be against the one who had contracted so to do * * *."

It is provided in the contract: "That the Engineer is hereby granted the right and is hereby authorized to appoint such person or persons as he may deem proper to inspect the work done and the materials to be furnished under this Proposal and to see that the said work and materials furnished under this Proposal conform in every respect to the plans and specifications and his instructions thereunder and the party of the first part hereby agrees that said inspectors shall be afforded the proper facilities for discharging the duties assigned to them."

The foregoing is a provision for the benefit and protection of the City. There is no mandatory provision in the contract to the effect that it shall be the duty of the Engineer to supervise the work of the contractor and inspect the materials used and to see that the

work and materials conform in every respect to the plans and specifications. Under the terms of the contract, the responsibility for the proper completion of the job remains on the Construction Company until its completion and final acceptance. And, likewise, the Construction Company as principal and the Casualty Company as surety have contracted in the maintenance bond to be responsible for and to "replace and reinstall all appurtenances, equipment, appliances and other parts of the project which may prove to be defective in the normal operations or which may contain undiscovered defects in either materials, equipment or manufacture or defects in installation for a period of twenty-four (24) months from and after the above-stated date (24 August 1956) of acceptance of said work and project, and shall indemnify, save harmless and reimburse the City of Durham for the cost of any repairs or replacements which the City of Durham may be required or find it necessary to make by reason of such defects * * *."

In view of the fact that the plaintiff's cause of action is bottomed on undiscovered defects in both materials and in installation, which were not discovered until after 24 August 1956, together with the further fact that it is provided in the contract that "inspection of the work at any time shall not relieve the party of the first part (the Construction Company) of any obligation to do sound and reliable work * * * and * * * that any omission to disapprove of any work by the Engineer * * * shall not be construed to be an acceptance of any imperfect, unsightly, or defective work," in our opinion the demurrer interposed by the additional defendants to the cross-action of the Casualty Company should have been sustained, and we so hold. The first assignment of error is upheld.

Furthermore, if we had held that the cross-action stated a good cause of action, in our opinion it could not survive the demurrer for the reasons assigned in the second assignment of error, and, upon the further ground, that it is not the type of cross-action that can be maintained for affirmative relief in this jurisdiction. *Rose v. Warehouse Co.*, 182 N.C. 107, 108 S.E. 389; *Hoover v. Indemnity Co.*, 202 N.C. 655, 163 S.E. 758; *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397; *Bost v. Metcalfe*, 219 N.C. 607, 14 S.E. 2d 648; *Bd. of Education v. Deitrick*, 221 N.C. 38, 18 S.E. 2d 704; *Beam v. Wright*, 222 N.C. 174, 22 S.E. 2d 270; *Schnepp v. Richardson*, 222 N.C. 228, 22 S.E. 2d 555; *Horton v. Perry*, 229 N.C. 319, 49 S.E. 2d 734; *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659.

In *Schnepp v Richardson, supra,* the plaintiff, a subcontractor, brought an action against the owner to enforce a subcontractor's lien. Defendants answered, denying the allegations of the complaint and

setting up a cross-action against the contractor. The contractor demurred for misjoinder of parties and causes of action. The demurrer was sustained and affirmed on appeal. This Court said: "The cross-action defendants seek to set up against Fisher (the contractor) is not germane to, founded upon or necessarily connected with the subject matter in litigation between plaintiff and defendants. Decision on the issues thus attempted to be raised is not essential to a full and complete determination of the cause of action alleged by the plaintiff. It should not be engrafted upon his action and thus compel him to stand by while defendants and Fisher litigate their differences in his suit. * * *

"There is a misjoinder both of parties and of causes of action."

In the case of *Gaither Corp. v. Skinner, supra,* the plaintiff entered into a contract with defendant to construct a building for an agreed price in accordance with plans and specifications prepared by plaintiff's architects. The plaintiff instituted an action and alleged in his complaint that the defendant knowingly used faulty and defective materials in the construction of the roof on the building in breach of the contract.

The defendant denied that the roof constructed by him was otherwise than in accord with the plans and specifications furnished him; alleging that the construction of the roof had been let to a competent subcontractor who had constructed it in accord with the plans and specifications, and that if the subcontractor failed to erect the roof in accordance with the specifications, then the subcontractor was liable to the plaintiff and the defendant for any damages suffered by reason of his failure so to do; and he prayed that the subcontractor be made a party to the action, and that if the plaintiff should recover judgment of the defendant that the defendant recover judgment over against the subcontractor. Thereafter, the subcontractor appeared and moved that he be dismissed from the action. The court allowed the motion. This Court said: "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. * * *

"The statute permitting joint tort-feasors to be brought in for the purpose of enforcing contribution does not apply here. G.S. 1-240. Nor does an issue as to primary and secondary liability arise in this case * * *."

The ruling on the demurrer of the additional defendants to the cross-action of the defendant Casualty Company is

Reversed.

MARY RUTH NIXON v. LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 16 June, 1961.)

1. Insurance § 3—

Relevant statutory provisions in force at the time of the execution of a contract of insurance become a part of the policy to the same extent as if they were actually written therein.

2. Insurance § 62—

Under G.S. 20, Article 9A, violation of policy provisions by insured in an assigned risk liability policy, when such violations occur subsequent to an accident resulting in injury or damage to third persons, cannot defeat the right of such third persons as against insurer, it being the purpose of the statute to provide protection to innocent parties injured by the acts of financially irresponsible motorists.

3. Same—

By refusing to defend an action against insured on the ground that the policy was not in effect at the time of the accident, insurer waives provisions of the policy prohibiting settlement of claim by insured without insurer's consent, and also the provisions making the liability of insurer dependent upon a judgment against insured; nevertheless insurer may be held liable in case of a settlement only for such amount as is reasonably necessary to effect the settlement.

4. Same—

In an action by the injured person against insurer to recover the amount of a judgment by default and inquiry or a consent judgment against insured, obtained after insurer had refused to defend the suit, insurer is not entitled to allege the defense of the policy provision that insurer should not be liable upon a consent judgment to which it did not consent, but is entitled to allege that it is liable only for the amount reasonably necessary to effect the settlement, leaving for determination only the questions of whether the policy was in force at the time of the accident and whether the consent judgment was reasonable and made in good faith, and if not, the amount of the plaintiff's damages.

On *certiorari* of defendant from *Patton, J.*, 27 February 1961 Civil A Term of MECKLENBURG.

Civil action to recover the amount, with interest and costs, of an unpaid judgment, which defendant refuses to pay, for $5,000.00 entered on 20 July 1960 in the superior court of Mecklenburg County against James Henry Johnson in an action instituted in said court on 2 June 1960 by plaintiff against James Henry Johnson for personal injuries sustained while plaintiff was riding in an automobile owned and driven by James Henry Johnson, to whom defendant, pursuant to the provisions of our Motor Vehicle and Financial Responsibility Act, G.S. Chapter 20, Article 9A, had issued an assigned risk auto-

mobile liability policy, which allegedly was in force at the time of plaintiff's injuries on 14 May 1960, heard on plaintiff's motion to strike parts of defendant's answer.

The insurance policy is not in the record. The complaint alleges it covered personal injury liability for one person injured or killed in the amount of $5,000.00, and contains the following provision: "I Coverage A — Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." The complaint does not allege the title of this provision, which is copied from the answer.

Defendant in its answer admits the issuance of an assigned risk automobile liability policy to James Henry Johnson, but alleges that it was cancelled several weeks prior to 14 May 1960 because James Henry Johnson refused to pay the premiums, and that the policy was not in force on 14 May 1960. Defendant further admits that plaintiff and James Henry Johnson on 20 July 1960 entered into a consent judgment, which was signed by the assistant clerk of the superior court of Mecklenburg County, and is duly recorded. Defendant alleges it had no notice or knowledge of the purported judgment, and did not consent thereto, and that if it is valid for any purpose, it is a mere contract between the parties and is not binding upon it, and does not constitute an adjudication or a determination of its liability, and defendant is not indebted to and is not liable to plaintiff.

And for a further answer and defense and in bar of any recovery defendant alleges in substance: The policy contains the following provisions: One, the "I Coverage A — Bodily Injury Liability" set forth in the complaint. Two: "12. Assistance and Cooperation of the Insured — Coverages A, B, D, E, F, G and I. The insured 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 insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident." Three. "13. Action Against Company — Coverages A and B. No Action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual

trial or by written agreement of the insured, the claimant and the company." That the consent judgment was not a judgment within the coverage of the policy, and defendant did not consent to it. Plaintiff was not entitled to recover $5,000.00 for her alleged injuries. If the court should find the policy was in force at the time of plaintiff's injuries, even then plaintiff is not entitled to recover.

Plaintiff filed a written motion to strike from paragraphs 10 and 11 of defendant's answer the word "purported" appearing before the word "judgment," and the words "it is not indebted to and is not liable to the plaintiff," and all of defendant's further answer and defense, except "this defendant did not consent to the entry of said purported judgment," though even here asking that the word "purported" be stricken.

Judge Patton allowed the motion to strike in its entirety, to which defendant excepted. We allowed defendant's petition for a writ of *certiorari,* filed pursuant to Rule 4(a) (2), Rules of Practice in the Supreme Court.

Helms, Mulliss, McMillan & Johnson and E. Osborne Ayscue, Jr., for defendant, appellant.

Welling, Welling & Meek for plaintiff, appellee.

PARKER, J. Defendant in its answer sets out the consent judgment, and plaintiff in her brief speaks of it as a consent judgment. Plaintiff contends that the consent judgment entered into between plaintiff and James Henry Johnson was conclusive on defendant, if the policy was in force at the time of plaintiff's injuries, and, therefore, the only issue involved in this action is whether the policy was in force at the time of plaintiff's injuries. And in consequence, Judge Patton's allowance of her motion to strike in its entirety should be affirmed.

Defendant states in its brief it "is not asserting non-co-operation on the part of the alleged insured. It waived any such objection by refusing to defend the suit against him." As to this assertion see *Swain v. Insurance Co.,* 253 N.C. 120, 116 S.E. 2d 482.

This is an assigned risk automobile liability policy. "Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it." *Howell v. Indemnity Co.,* 237 N.C. 227, 74 S.E. 2d 610.

North Carolina has realized the need to protect innocent, injured parties from the financially irresponsible motorist. G.S. Chapter 20, Article 9A, Motor Vehicle Safety and Financial Responsibility Act,

Section 20-279.21, "Motor vehicle liability policy" defined, subsection (f) reads in part: "Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: 1. The liability of the insurance carrier with respect to the insurance required by this article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy; 2. The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage."

The Court said in *Swain v. Insurance Co., supra:* "The 1957 Act required *every owner* of a motor vehicle, as a prerequisite to the registration thereof, to show 'proof of financial responsibility' in the manner prescribed by G.S. Article 9A, Chapter 20, to wit, the 1953 Act. The manifest purpose of the 1957 Act was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle; and, in respect of a 'motor vehicle liability policy,' to provide such protection notwithstanding violations of policy provisions by the owner subsequent to accidents on which such injured parties base their claims."

The policy here contains this provision: "I Coverage A — Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, etc." The relevant part of the policy provision "13. Action Against Company — Coverages A and B" reads: "No action shall lie against the company . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." Defendant alleges in its stricken further answer and defense and in bar of any recovery here a violation of the above two provisions of the policy, in that plaintiff's action is based on a consent judgment to which it did not consent.

Defendant stated in its brief, it refused to defend the suit against James Henry Johnson, its insured, brought by plaintiff. This refusal was based, according to defendant's answer, on the ground that the policy was not in force when plaintiff was injured, for the reason that it had been cancelled several weeks prior to the date of plaintiff's injuries, because the insured had refused to pay the premiums.

The courts generally hold that where a liability insurer denies liability for a claim asserted against the insured and unjustifiably refuses to defend an action therefor, the insured is released from a provision of the policy against settlement of claims without the insurer's consent, and from a provision making the liability of the insurer dependent on the obtaining of a judgment against the insured; and that under such circumstances, the insured may make a *reasonable* compromise or settlement in good faith without losing his right to recover on the policy. Annotations 142 A.L.R. 812 and 49 A.L.R. 2d 744, where many cases are cited from many jurisdictions; 5A Am. Jur., Automobile Insurance, Section 130; 45 C.J.S., Insurance, Section 937, b, page 1072; Huddy, Encyclopedia of Automobile Law, 9th Ed., Volume 13 - 14, page 371-3; Appleman, Insurance Law and Practice, Vol. 8, Section 4690; *Bituminous Casualty Corp. v. Walsh & Wells,* St. Louis Court of Appeals, 170 S.W. 2d 117, where many cases are cited; *Traders & General Ins. Co. v. Rudco Oil & Gas Co.,* 129 F. 2d 621, 142 A.L.R. 799, where many cases are cited.

In *Jaloff v. United Auto. Indemnity Exchange,* 121 Ore. 187, 253 P. 883, the Court quoted from *Butler Bros. v. American Fidelity Co.,* 120 Minn. 157, 139 N.W. 355, 44 L.R.A. (N. S.) 609, as follows: "The company has refused to take the defense, has refused to exercise its right to settle the case, or defend it, as it saw fit, and has left the entire control and conduct of the litigation with the insured, all contrary to its contract. The amount paid on a reasonable settlement constitutes a 'loss from the liability imposed by law' as much as does the payment of a judgment rendered after a trial. . . . We hold that, by its refusal to take the defense of the action, defendant broke its contract, and waived the condition therein which required a judgment after trial of the issue, as well as released the insured from its agreement not to settle the case without its consent." See *Combs v. Hunt,* 140 Va. 627, 125 S.E. 661, 37 A.L.R. 621.

The headnote in *St. Louis Dressed Beef & P. Co. v. Maryland Casualty Co.,* 201 U.S. 173, 50 L. Ed. 712, reads: "The amount paid by an employer in the prudent settlement of suits against it, founded on the negligence of an employee, may be recovered from the insurer against loss because of such negligence, who had denied all liability, and refused to defend the suits, as provided in the policy, although such policy contains a condition against compromising any claim without the written consent of the insurer, and provides that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." In the opinion *Mr. Justice Holmes* said: "But a

sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

The first and most obvious of the positive obligations created by an insurer's unjustified refusal to defend is its obligation to pay the amount of the judgment rendered against the insured or of any reasonable compromise or settlement made in good faith by the insured of the action brought against him by the injured party. Annotation 49 A.L.R. 2d 717, where numerous cases are cited from many jurisdictions, including North Carolina.

Anderson v. Insurance Co., 211 N.C. 23, 188 S.E. 642, was an action brought by plaintiff against defendant to recover the amount paid by plaintiff for bodily injury damage, on account of an accident that is alleged to be covered by the liability insurance policy issued by defendant to plaintiff. Actions were brought against plaintiff by parties injured in a collision. Immediately, and before the time for answering had expired, notice was given defendant, who refused to defend. Later, the actions were compromised by plaintiff, and this action was brought to recover under the policy the amount paid the injured parties. The record in this case on file in the office of this Court shows that the compromises were in the form of consent judgments, signed by counsel for the parties and the presiding judge. The Court in its opinion said: "It goes without saying that the compromise amount sued for by plaintiff, which was paid by plaintiff to those injured, must be reasonable and made in good faith."

The case was again before this Court, and is reported in 212 N.C. 672, 194 S.E. 281. The Court in its opinion said: "The jury has found by its verdict that the defendant insured the truck set out and described in the complaint, and that the plaintiff was reasonably required to expend the amount claimed by it herein in settlement of suits instituted for damages resulting from the negligent operation of the said truck. Under the verdict of the jury, judgment was properly rendered against the defendant."

In *Cab Co. v. Casualty Co.*, 219 N.C. 788, 15 S.E. 2d 295, the Court quoted from the case of *Anderson v. Insurance Co.*, 211 N.C. 23, what we have quoted above, and then quoted from Huddy, Encyclopedia of Automobile Law, 9th Ed., Vol. 13-14, § 294, as follows: "By denying liability or refusing to settle claims against insured, which are covered by the automobile indemnity policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured. Thereafter, the insured may properly assume responsibility for the conduct of his own defense of the case, and may either continue the litigation and go to trial with the case, or, if his judgment so dictates, he may make

a reasonable settlement of the claim. Under such circumstances, he may recover from the company the amount which is reasonably required to effect the settlement as damages ordinarily and naturally resulting from the insurer's failure to defend the action, even though the contract provided for recovery only when the payment is in satisfaction of a judgment." To the same effect see *Commercial Casualty Ins. Co. v. Tri-State Transit Co.*, 190 Miss. 560, 1 So. 2d 221, 133 A.L.R. 1510, and see Annotation 49 A.L.R. 2d 748, as to application of the general rule permitting settlements by the insured despite the presence of a "no settlement" clause, and as to reasonableness of the settlement and good faith in making it, and the same annotation, page 720-1, as to limit of liability of the insurer to pay the amount of the judgment or settlement. Beginning on page 694 and ending on page 760 of 49 A.L.R. 2d is an elaborate annotation on the consequences of an liability insurer's refusal to defend.

Plaintiff cites and relies on what is said in *Squires v. Insurance Co.*, 250 N.C. 580, 108 S.E. 2d 908, as follows: "The defendant had an opportunity to defend in the plaintiff's action against the defendant's named insured. The judgment is, therefore, conclusive as to the insurer on the question of agency and damage. The only defense available to the defendant is that its policy does not cover the insured's liability." The record on file in this case in the office of the Clerk of this Court shows that the judgment plaintiff obtained was based on a trial and a jury verdict. What is said in that case is not applicable to the instant case, where plaintiff's judgment against the insured is a consent judgment.

If the policy here was in force at the time plaintiff was injured, which is alleged by plaintiff and denied by defendant, then defendant's refusal to defend the action brought by plaintiff against its insured to recover damages for bodily injuries sustained, while riding as a passenger in its insured's automobile, was a breach of its contract with its insured, and was an unjustified refusal, and released its insured from a provision of the policy prohibiting the insured from assuming any obligation or incurring any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident, and from a provision of the policy making the liability of the insurer dependent upon a final determination of its insured's obligation to pay either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company, and under such circumstances, its insured could make such a reasonable compromise or settlement or consent judgment in good faith as ordinary or reasonable prudence and caution might dictate to be advisable. If, under

such circumstances its insured entered into a reasonable consent judgment in good faith, then there is a positive obligation on defendant, created by its unjustified refusal to defend the suit instituted by plaintiff against its insured to recover damages for bodily injuries, to pay the amount and costs of such reasonable consent judgment entered into in good faith by its insured in the action brought against him by plaintiff, and, therefore, the only questions still litigable, according to the pleadings before us, are: One, whether the policy was in force at the time of plaintiff's injuries. And two, if the policy was in force, whether the consent judgment entered into was reasonable and made in good faith, and if not, the amount of plaintiff's damages. G.S. Chapter 20, Article 9A, Section 20-279.21, subsection (f), 1; *Krasilovsky Bros. Truck Corp. v. Maryland Cas. Co.*, 54 N.Y.S. 2d 60; 5A Am. Jur., Automobile Insurance, page 131; Annotation 49 A.L.R. 2d, page 749.

In *St. Louis Dressed Beef & P. Co. v. Maryland Casualty Co., supra*, the Court said: "We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion."

The briefs of plaintiff and defendant state that in the case of plaintiff against James Henry Johnson, defendant's insured, Johnson failed to file an answer, and a judgment by default and inquiry was entered against him by the clerk of the superior court of Mecklenburg County on 13 July 1960, and on 20 July 1960 a consent judgment in the case was signed by attorneys for plaintiff and attorneys for defendant Johnson and by the assistant clerk of the superior court of Mecklenburg County. However, the record before us contains no reference to a judgment by default and inquiry.

It follows from what is said above that Judge Patton was correct in allowing plaintiff's motion to strike in its entirety, with the exceptions that the allegation in paragraph 11 of the answer that "it is not indebted to and is not liable to the plaintiff," and the allegation in the further answer "that the plaintiff was not entitled to $5,000.00 for the injuries complained of" should not have been stricken.

Defendant, if it sees fit, can make a motion in the court below to amend its answer to allege facts, if it can, to show that the consent judgment was not a reasonable settlement in good faith of plaintiff's bodily injuries and as to the nature and extent of her bodily injuries.

Judge Patton's order is

Modified and Affirmed.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER LAST WILL AND TESTAMENT OF H. C. CAMERON, DECEASED, v. WILLIAM A. WILDER AND HENRY WILDER, ADMINISTRATORS, ESTATE OF RUTH WILDER CAMERON, AND MARGARET C. TEMPEST.

(Filed 16 June, 1961.)

1. Estates § 9—

The federal regulations in regard to the title and ownership of United States savings bonds have the force and effect of federal law and become a part of the bond contract between the purchaser and the Federal Government, and are determinative of the property rights of the parties to the bonds.

2. Same—

Where United States savings bonds are registered in the names of two individual co-owners in the alternative, and one of the co-owners dies, the surviving co-owner takes title by right of survivorship under the terms of the bonds, regardless of any provisions in the will of the deceased co-owner.

3. Same: Executors and Administrators § 6— Rights of surviving co-owner of savings bonds may not be affected by written declaration of deceased co-owner.

Testator purchased savings bonds and had them registered in the alternative in his own name and the name of his daughter. Testator retained control of the bonds and after his death they were found with a letter in his handwriting attached thereto, which letter stated that the bonds belonged to him and his second wife, as they had paid his daughter the face amount of the bonds. *Held:* Upon the father's death, title to the bonds vested in the daughter, and the contention that the daughter should hold the proceeds in trust is untenable, since the self-serving declaration in testator's handwriting is incompetent in evidence and cannot have the effect of impressing the proceeds of the bonds with a trust in favor of testator's widow.

4. Declaratory Judgment Act § 2—

In proceedings under the Declaratory Judgment Act the court is not required to give effect to incompetent evidence even though such evidence is embodied in the stipulations of counsel, there being sufficient competent evidence to support a judgment.

5. Evidence § 28—

A statement in the handwriting of testator, found attached to U. S. savings bonds registered in his and his daughter's names stating that he and his wife had given his daughter the face amount of the bonds and that the bonds belonged to himself and his wife, is incompetent as hearsay, and since such evidence is hearsay and does not come within any exceptions to the hearsay rule, it is incompetent irrespective of the fact that it is a self-serving declaration.

6. Pleadings § 30—

Where defendant admits plaintiff's allegations of indebtedness in a

specified amount, the court is authorized to enter a judgment according G.S. 1-510, and such defendant is bound by the judgment.

APPEAL by defendants Wilder, administrators, from *Hobgood, J.*, August 1960 Civil Term of HARNETT.

Civil action for declaratory judgment determining the ownership of, and the interests of the respective parties in, certain United States Savings Bonds.

The cause was heard without intervention of a jury upon facts stipulated and admissions in the pleadings. These facts and admissions are summarized as follows (paragraphing ours):

(a) Two United States Savings Bonds, Series G, Nos. V 445 154G and V 475 355G, dated Nov. 1944, were issued to "Hugh C. Cameron or Mrs. Margaret C. Tempesta." Hugh C. Cameron and H. C. Cameron are the same person; and Margaret C. Tempesta and Margaret C. Tempest are one and the same person. Margaret C. Tempest is the daughter of H. C. Cameron.

(b) The bonds were issued under the Code of Federal Regulations, Cumulative Supplement, Book 6, 1944, Title 31, Chapter II, Part 315, Sub-part K, s. 315.32.

(c) H. C. Cameron died testate 14 July 1955. His will was admitted to probate and the plaintiff, Wachovia Bank and Trust Company, qualified as executor and trustee thereunder.

(d) Testator's wife, Ruth Wilder Cameron, and his daughter, Margaret C. Tempest, survived him. Ruth Wilder Cameron was testator's second wife and the step-mother of Margaret C. Tempest.

(e) At the time of testator's death the bonds in question were in his and Ruth Wilder Cameron's possession. They were delivered to plaintiff by Ruth Wilder Cameron and plaintiff now has them in possession. The following letter was attached to the bonds at the time of their delivery to the plaintiff, and it was written on H. C. Cameron's stationery, was entirely in his handwriting, and was signed by him:

"April 5, 1952

"Those 2—5000.00 dollar Bonds of H. C. Cameron or Margaret Cameron Tempest belong to H. C. Cameron and Mrs. Ruth Cameron as we have given Margaret check for $10,000.00 for the bonds. She now has no part in them.

H. C. Cameron."

(f) The will of H. C. Cameron provides, in pertinent part, as follows:

"ARTICLE II. If my wife, Ruth Wilder Cameron, is living at the

time of my death, I bequeath to her any and all United States Government bonds owned by me at the time of my death. . . . If my wife or any other beneficiary herein named shall owe me or Cameron Lumber Company any debt at my death, the same shall be settled by deducting such debt from the shares of each such beneficiary in the distribution of my estate."

"Article VII. . . .

"If my said wife, Ruth Wilder Cameron, does not survive me or shall die before any part of my property is distributed to her under the terms of this my last will and testament, then her interest in my property shall lapse and the share or shares thereof to which she would be entitled if living shall go to my surviving children or their legal representatives equally and share and share alike."

(g) Margaret C. Tempest is entitled to a one-seventh distributive share in the undivided estate of H. C. Cameron (not specifically devised). The estate is solvent.

(h) Ruth Wilder Cameron died intestate 20 February 1957 and defendants Wilder qualified as administrators of her estate.

(i) This action for declaratory judgment was instituted by plaintiff executor. The complaint alleges, *inter alia:*

"5. Margaret C. Tempest claims said bonds, and asserts and states that they were delivered to her father by her as security for a no interest loan of $10,000.00 and that she is entitled to the bonds on payment of said sum less her pro rata share as devisee under the Will of H. C. Cameron, and that she justly owes said estate said sum;

"6. The defendants Wilder claim said bonds as the property of their intestate."

(j) Defendant Tempest, answering, admits the allegations of paragraph 5 of the complaint. Defendants Wilder deny the allegations of paragraph 5 and admit the allegations of paragraph 6.

(k) Plaintiff's prayer for relief contains the following:

"(1) That the rights of the parties under said will and writings be determined and declared; and

"(2) That plaintiff be declared entitled to recover of the defendant Margaret C. Tempest the sum of $10,000.00 less her one-seventh distributive share and the proceeds of said bonds be impressed with a trust in its favor in said amount; and

"(3) The defendants Wilder be adjudged not entitled to said bonds in any particular . . ."

The court entered judgment, containing findings of fact (involving conclusions of law), in part as follows:

"(2) That Mrs. Margaret C. Tempesta is one and the same person

as Margaret C. Tempest, referred to in the pleadings of the parties; and is the same person as Mrs. Margaret C. Tempesta set forth in the face of the aforesaid two Series "G" Savings Bonds.

"(3) That at the time of the death of Hugh C. Cameron (referred to in the pleadings as H. C. Cameron), the aforesaid two Series G Savings Bonds were in *his possession.*

"(4) That . . . Margaret C. Tempest is entitled to a one-seventh (1/7) distributive share in said Estate of H. C. Cameron.

"(5) That the aforesaid Series "G" Savings Bonds are non-assignable or non-transferable, pursuant to the Regulations of the Department of the Treasury of the United States of America.

"(6) That Margaret C. Tempest is the surviving payee set forth within the face of the aforesaid two Savings Bonds of $5,000.00 each.

"(7) That Margaret C. Tempest, contrary to the legal effect of the Regulations of the Department of the Treasury of the United States of America, pledged said two Savings Bonds to H. C. Cameron for a non-interest bearing loan or advancement of $10,000.00 sometime in April, 1952, and received from H. C. Cameron at said time the sum of $10,000.00.

"(8) That Margaret C. Tempest is the legal owner of the aforesaid two Series G. Savings Bonds, totaling $10,000.00, and such interest as thereon has accrued and may be payable by the Department of the Treasury of the United States of America.

"(9) That by virtue of the Pledge, of said Bonds to H. C. Cameron by Margaret C. Tempest, although contrary to Treasury Department Regulations, the Estate of H. C. Cameron has an equitable lien upon said bonds in the sum of and to the extent of $10,000.00.

. . . .

"(11) That the codefendants William A. Wilder and Henry Wilder, Administrators of the Estate of Ruth Wilder Cameron, have no right or interest in said bonds in their administrative capacity or otherwise as to or for the Estate of Ruth Wilder Cameron."

"NOW, THEREFORE, upon the foregoing findings of fact, IT IS ORDERED, ADJUDGED AND DECREED that:

"(1) Margaret C. Tempest shall execute, as surviving payee, the "Request for Payment" section on the back side of the United Savings Bond V-445-154-G in the sum of $5,000.00, and Bond V-475-355-G in the sum of $5,000.00, and thereupon transmit said bonds for payment to the Treasury Department of the United States through the facilities of the plaintiff.

"(2) That upon receipt of the proceeds from aforesaid two Savings Bonds the sum of $10,000 shall be turned over to the plaintiff, its Trust Department, and said sum shall be incorporated as a part

of the funds belonging to the Estate of Hugh C. Cameron. Any sum representing interest upon said Bonds, in excess of the $10,000.00 aforesaid, shall be and remain the separate property of Margaret C. Tempest.

"(3) That the plaintiff, as Executor of the Estate of Hugh C. Cameron, shall retain said bonds in its possession and control until and pending the execution of the "Request for Payment" by Margaret C. Tempest; and shall act as agent for Margaret C. Tempest in the transmittal of said bonds for payment; and if said bonds are paid by Treasury Department Check or Checks, the plaintiff shall retain the possession and control of same and present same for the endorsement of Margaret C. Tempest.

"(4) The Estate of Hugh C. Cameron has an equitable lien upon the aforesaid two Savings Bonds in the sum of $10,000.00, and the proceeds from said bonds to this extent are engrafted and impounded in the hands of the agent of Margaret C. Tempest, while the cashing in of the bonds is in process; and until such time as the sum of $10,000.00 is delivered into the hands of the plaintiff, Executor of Hugh C. Cameron Estate."

Defendants Wilder appeal.

D. B. Teague and Hoyle & Hoyle for plaintiff, appellee.

James R. Farlow for defendant Margaret C. Tempest, appellee.

Mordecai, Mills and Parker for defendants Wilder, administrators, appellants.

MOORE, J. It is stipulated by all parties that the United States Savings Bonds, Series G, here involved, were issued under and subject to the Code of Federal Regulations, Cumulative Supplement, Book 6, 1944, Title 31, Chapter II, Part 315, Sub-part K, s. 315.32. The effect of these regulations in relation to the title and ownership of such and similar bonds has been the subject of discussion and decision in a number of cases in this jurisdiction. *Tanner v. Ervin,* 250 N.C. 602, 109 S.E. 2d 460; *Wright v. McMullan* and *Wright v. Wright,* 249 N.C. 591, 107 S.E. 2d 98; *Jones v. Callahan,* 242 N.C. 566, 89 S.E. 2d 111; *Watkins v. Shaw,* 234 N.C. 96, 65 S.E. 2d 881; *Ervin v. Conn* and *Bank v. Frederickson,* 225 N.C. 267, 34 S.E. 2d 402. In the opinions in these cases the decisions in this and other jurisdictions are cited and discussed and explanations of the principles applied are fully set out. Explanative and extended discussion of the subject would be unnecessarily repetitious in the instant case. Here we merely summarize the applicable and controlling principles already established.

"United States Savings Bonds are not transferable and are payable only to the owners named thereon . . . . Accordingly, savings bonds may not be sold or hypothecated as collateral for a loan and may not be used as security for the performance of an obligation. . . ." Fed. Regs., Title 31, C. II, Part 315, Sub-part C, s. 315.8.

"The regulations by clear and unmistakable language fix ownership by the form of registration. These bonds could not be the subject of a gift *inter vivos* or *causa mortis*. State laws fixing the requirements for a valid gift have no application to these bonds." *Wright v. McMullan* and *Wright v. Wright, supra.*

Section 315.32 of the above Regulations provides: "A savings bond registered in the names of two persons as coowners in the form 'John A. Jones or Mrs. Mary C. Jones,' will be paid or reissued as follows: (a) . . . . (b) *After the death of one coowner.* If either coowner dies without having presented and surrendered the bond for payment . . . the surviving coowner will be recognized as the sole and absolute owner of the bond, and payment will be made only to him."

"The rule followed by a majority of the Courts, including North Carolina, frequently called the 'majority rule,' with respect to rights in United States Savings Bonds registered . . . in the name of two individual co-owners in the alternative, is that, upon the death of one of the co-owners, the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor." *Tanner v. Ervin, supra.*

"The principal basis of the majority view is that solution of the question as to the property rights of the surviving co-owner in a . . . Bond is one of contract, and that the Treasury Regulations having the force and effect of federal law, become a part of the bond as a contract between the purchaser and the federal government, and fix legal title to the bond, and are determinative of the property rights of the parties to the bond." *ibid.* Accord: *Ervin v. Conn* and *Bank v. Frederickson, supra,* at page 274.

Where a co-owner dies testate, the title to the bond passes not by virtue of anything contained in the will, but by right of survivorship under the terms of the bond itself. *Jones v. Callahan, supra.*

Where a husband and wife purchased United States Savings Bonds with money owned jointly by them, the bonds being issued in their names in the alternative, and they thereafter entered into a separation agreement in which it was provided that the husband should have and own the bonds, he having given valuable consideration therefor and having failed to present the bonds for payment during his lifetime, this Court held that the proceeds of the bonds were impressed

with a resulting trust in favor of the husband's executor by reason of the separation agreement and the unjust enrichment of the wife should she be permitted to retain the proceeds. *Tanner v. Ervin, supra.*

In the case at bar defendants Wilder contend that, as evidenced by letter attached to the bonds, H. C. Cameron paid to Margaret C. Tempest $10,000.00, in consideration of which Margaret C. Tempest surrendered and conveyed to Cameron all beneficial interest in the bonds and now has only the bare right to present the bonds for payment and to collect the principal and interest, and must hold the proceeds in trust for the person entitled to the beneficial interest. They contend further that the beneficial interest passed to Ruth Wilder Cameron under the will of H. C. Cameron.

The decisive question in this case is: What weight and effect must be given by the court to the letter which was attached to the bonds by H. C. Cameron? The court below gave it no effect and thereby eliminated the crucial evidence upon which the claim of defendants Wilder depends.

The letter was included in the stipulations of counsel. Had it been offered in evidence upon trial, its admission, over objection, would have been error. It is hearsay evidence. The fact that it was admitted by stipulation does not require the judge to give it legal effect, although exceptions to a judgment on the ground that it is based on incompetent evidence have been held untenable when the evidence is admitted without objection. *Poole v. Gentry,* 229 N.C. 266, 269, 49 S.E. 2d 464. However, "in reviewing a trial before the court without a jury it will be presumed that incompetent evidence was disregarded and the issue determined only from a consideration of competent evidence . . . ." *Bizzell v. Bizzell,* 247 N.C. 590, 605, 101 S.E. 2d 668. There is no rule requiring a judge, in a case in which the facts are agreed and stipulated, to give effect to incompetent evidence, though not objected to, if there is sufficient competent evidence to support a judgment.

The self-serving declarations of a deceased, whether oral or written, are ordinarily considered to be hearsay and inadmissible in evidence. "There is a general rule that self-serving declarations, defined as statements favorable to the interest of the declarant, are not admissible in evidence as proof of the facts asserted, whether they arose by implication from acts and conduct or were made orally or reduced to writing. The vital objection to the admission of this kind of evidence is its hearsay character." 20 Am. Jur., Evidence, s. 558, pp. 470, 471. ". . . (I)t has been held that self-serving declarations, although admitted without objection, are without probative value." 88 C.J.S., Trial, s. 152, p. 298. *Fredenburg v. Horn,* 218 P. 939, 30

A.L.R. 1153 (Ore. 1923), was an action to recover damages for alleged conversion of estate property by the executor. In reference to an exception to the exclusion of evidence, the Court said: "It is alleged that the Court erred in sustaining the objections made to testimony as to declarations of the deceased that he was the owner of the property. . . . (T)hey were purely self-serving, if made at all."

We do not seek to alter the hearsay rule so as to make the incompetency of self-serving declarations more extensive than heretofore in this jurisdiction, and we quote with approval the following statement: "Hearsay statements are sometimes excluded on the ground that they are 'self-serving.' This phrase is often useful as emphasizing the inapplicability of some hearsay exception or as suggesting a reason for the rigid enforcement of the hearsay rule in the particular case, but it does not describe an independent ground of objection. If the statement is hearsay, and is not admissible under some specific rule, it is subject to exclusion regardless of whether it is self-serving, neutral, or self-disserving." Stansbury: North Carolina Evidence, s. 140, p. 280.

We think the unsupported *ex parte* statement of deceased H. C. Cameron, that he had purchased the bonds from Margaret and that they belonged to him and Mrs. Cameron, was incompetent and the court was justified in disregarding it. It does not come within an exception to the hearsay rule. Stansbury: North Carolina Evidence, s. 147, p. 300.

It is our opinion and we hold that Margaret C. Tempest has title to and owns the bonds in controversy. *Wright v. McMullan* and *Wright v. Wright, supra.*

Defendant Tempest admits, in answering paragraph 5 of the complaint, that she obtained a "no interest loan" of $10,000.00 from H. C. Cameron and is indebted to his estate in this amount. She further admits that she delivered the bonds to him as security for the loan.

It is unnecessary to decide whether or not the transaction alleged by plaintiff and admitted by defendant Tempest created an equitable lien in favor of the estate of H. C. Cameron against the proceeds of the bonds. Defendant Tempest consented to the judgment entered by the court below and is bound thereby.

When it is alleged that a defendant is indebted to plaintiff and defendant admits that all or a portion of the debt is due, the court is authorized to enter judgment accordingly. G.S. 1-510. *McKay v. Investment Co.*, 228 N.C. 290, 45 S.E. 2d 358; *Fertilizer Co. v. Trading Co.*, 203 N.C. 261, 165 S.E. 694.

In affirming the judgment below we approve only those conclusions of law necessary to support the judgment and which are in accord with this opinion.

Affirmed.

WACHOVIA BANK & TRUST COMPANY, ADMINISTRATOR C.T.A. OF THE ESTATE OF HAYWOOD M. TAYLOR, DECEASED, v. ALICE B. TAYLOR (WIDOW), ALICE LEE TAYLOR McLEOD AND HER HUSBAND, G. B. McLEOD, MARTHA ANNE TAYLOR SWAYZE AND HER HUSBAND, THOMAS R. SWAYZE, AND ALICE LEE McLEOD AND GEORGE BADGER McLEOD, IV, MINOR CHILDREN OF ALICE LEE TAYLOR McLEOD AND HER HUSBAND, G.B. McLEOD, AND THOMAS RANDOLPH SWAYZE, NELSON TAYLOR SWAYZE, AND ROBERT LOUIS SWAYZE, MINOR CHILDREN OF MARTHA ANNE TAYLOR SWAYZE AND HER HUSBAND, THOMAS R. SWAYZE.

(Filed 16 June, 1961.)

1. Wills § 27—

The intent of testator as ascertained from an examination of the will from its four corners, giving every word and clause effect if possible, is the paramount aim of construction.

2. Wills § 33—

A devise of realty "in trust" to testator's wife for her life, then "in trust" to testator's two daughters for life, and upon the death of the daughters their respective shares to be divided equally between their children, *is held* a devise of a life estate to the wife and daughters, successively, with remainder to testator's grandchildren in accordance with the obvious intent of testator, since even if the wife and daughters are held to take the bare legal title in trust there are no duties imposed upon them as trustees and no beneficiaries of such trust, and therefore the trust would be passive and merge in the equitable titles of the beneficiaries.

3. Trusts § 3—

In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. G.S. 41-7.

4. Same: Trusts § 1—

The essentials for creation of a valid trust are the sufficiency of words to raise it, a definite subject, and an ascertained object.

5. Wills § 34—

A devise to testator's daughters for life and at their deaths their respective shares to be divided among their children, each daughter having children living at the time of testator's death, vests the remainder in the children as a class, subject to be opened up to include children later born.

6. Same—

An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment, and a remainder after a life estate is vested if the only obstacle to the right of immediate possession by the remaindermen is the existence of the preceding estate; but if there is uncertainty as to the person or persons who are to take, and the uncertainty is to be resolved in a particular way according to conditions existing at a time in the future, the remainder is contingent.

7. Wills § 40— Remainder under this will held vested in members of class and devise does not violate rule against perpetuities.

The will in this case devised land to testator's daughters for life with provision that upon their deaths their respective shares should be divided equally between their children when they reached the age of 25 years. *Held:* The devise to testator's grandchildren as members of a class vested upon testator's death, the *quantum* and not the quality of the estate being involved in the opening up of the class to admit later born children, and the provision that the land should be equally divided among the children when they reach the age of 25 years does not affect this result, the grandchildren of testator being entitled to possession immediately upon the deaths of testator's daughters, but the property should not be partitioned among them until the youngest reaches the age of 25 years or until the deaths of their mothers, whichever is later, there being no language disclosing an intent that only the grandchildren living at the end of the 25 year period or the deaths of their mothers, should take.

APPEAL by defendants, other than Alice Lee Taylor McLeod and Martha Anne Taylor Swayze, from *Hall, J.*, at Chambers 8 April 1961 in DURHAM.

Action pursuant to Declaratory Judgment Act (G.S. 1-253 *et seq.*) for construction of a will.

Haywood M. Taylor died testate 21 October 1960. He was survived by his widow, Alice B. Taylor, his children, Alice Lee Taylor McLeod and Martha Anne Taylor Swayze, and his grandchildren, Alice Lee McLeod and George Badger McLeod IV (children of Alice Lee Taylor McLeod), and Thomas Randolph Swayze, Nelson Taylor Swayze and Robert Louise Swayze (children of Martha Anne Taylor Swayze). The grandchildren are all minors.

The will of Haywood M. Taylor, dated 19 January 1958, was admitted to probate 10 November 1960 in Durham County, and is in material part as follows:

". . . . All of my personal property I leave to me (sic) wife, Alice B. Taylor. To each of my daughters, Alice Lee Taylor McLeod and Martha Anne Taylor Swayze, I leave the sum of $5000 each. The balance of my estate I leave in trust to my wife, Alice Lee Brown Taylor, for her lifetime — then in trust to my two daughters above

for their lifetime, and upon their death their share is to be divided equally between their children when they reach the age of twenty-five years."

Plaintiff qualified as administrator c.t.a. The inventory value of the assets of the estate is as follows: Cash $13,000.00; common stocks and treasury bills $17,318.69; real estate $53,200.00. The debts of the estate, including taxes and costs of administration, are approximately $11,000.00. Property of a value in excess of $100,000.00 passed to the widow by right of survivorship, outside the will.

This action was instituted by the administrator. S. C. Brawley, Jr. was appointed guardian *ad litem,* in separate orders, for the infant grandchildren and for the unborn children of testator's daughters, and filed answers. Daughter, Alice Lee Taylor McLeod, answered, but the widow and daughter, Martha Anne Taylor Swayze, filed no answers or other pleadings.

Plaintiff and answering defendants agreed that the will should be construed and the following questions answered:

1. Does the widow take all the personal property of the estate after payment of debts, taxes and expenses of administration?

2. Should the bequests of $5,000 each to the daughters be paid from the personal estate?

3. Do the provisions of the will with respect to the residue (real estate) violate the rule against perpetuities?

Jury trial was waived. The court found facts, made conclusions of law, and entered judgment in pertinent part as follows:

"The Court being of the opinion and concluding that it was the intent of the testator that his daughters . . . receive the sum of $5000 each and that his wife receive the rest and residue of his personal property; that the testator intended his wife . . . to have a life estate in his real property and his daughters herein named to have a life estate in said real property at the expiration thereof; and being of the further opinion and concluding that the trust attempted to be created in the will is a passive trust (G.S. 41-7), and that the remainder interest to the children of Alice Lee Taylor McLeod and Martha Anne Taylor Swayze is void as in violation of the rule against perpetuities, and that such remainder interest vested as of the death of Haywood M. Taylor and passes to his heirs under the intestate succession law as if he had died intestate.

"NOW, THEREFORE, IT IS CONSIDERED, ORDERED, AND ADJUDGED:

"1. That Alice Lee Taylor McLeod and Martha Anne Taylor Swayze be paid the sum of $5000 each out of the personal assets of the estate and that Alice B. Taylor (widow) is entitled to the rest

and residue of the personal property, subject to the payment of debts, taxes, and costs of administration.

"2. That Alice B. Taylor (widow) has a life estate in the real property of the estate and that upon the termination of said life estate Alice Lee Taylor McLeod and Martha Anne Taylor Swayze have a life estate therein.

"3. That the remainder interest to the children of Alice Lee Taylor McLeod and Martha Anne Taylor Swayze is void as in violation of the rule against perpetuities and that such remainder interest vested in the heirs at law of Haywood M. Taylor at the time of his death and that such remainder interest passes under the intestate succession laws as if he had died intestate."

The guardian *ad litem* appealed on behalf of the infant defendants and the unborn children of the testator's daughters.

S. C. Brawley, Jr. for appellants.
Albert W. Kennon for defendant appellees.

MOORE, J. The appellants contend that the court erred "in concluding and adjudging that the devise of the remainder interest in the real property to the children of Alice Lee Taylor McLeod and Martha Anne Taylor Swayze was in violation of the rule against perpetuities and therefore void."

There is no appeal from the court's interpretation of the will with respect to the disposition of personal property. The judgment below as to the personal estate is binding on all parties and this phase of the case is not considered and discussed here. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 562. Furthermore, the rulings as to the personal estate do not affect the rights or interests of the infant defendants or of the unborn children of testator's daughters.

We are here concerned only with the following provision: "The balance of my estate (real property) I leave in trust to my wife . . . for her lifetime — then in trust to my two daughters . . . for their lifetime, and upon their death their share is to be divided equally between their children when they reach the age of twenty-five years."

"The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator." *Entwistle v. Covington,* 250 N.C. 315, 318, 108 S.E. 2d 603. And the intent of the testator is ordinarily to be ascertained from an examination of the will from its four corners. *Bullock v. Bullock,* 251 N.C. 559, 563, 111 S.E. 2d 837. In construing a will every word and clause will be given effect if possible. *Andrews v. Andrews,* 253 N.C. 139, 147, 116 S.E. 2d 436.

Testator in the devises to his wife and daughters uses the words

"in trust." Yet an examination of the residuary clause as a whole indicates that no trust was created or intended. Certainly there is no manifest or implied purpose that an active trust be established and a trustee be appointed to manage the real estate for the benefit of widow, daughters and grandchildren. Ordinarily when property is devised to one "in trust," the devisee is the trustee. But when we consider the language of the will in this light we find nothing to indicate an intent on the part of testator that the widow and daughters hold the land in trust during their respective lives for use and benefit of the grandchildren with obligation to account for rents and profits. The will provides that upon the death of the daughters *their share* is to be equally divided between their children. If testator intended that the daughters have *a share* which was to pass to the grandchildren after their death, he undoubtedly meant that share to be something more than the bare legal title of a passive trust. The interest of a trustee in a passive trust is a mere formality without substance, for in a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of use. *Phillips v. Gilbert,* 248 N.C. 183, 187, 102 S.E. 2d 771. "The Statute of Uses, 27 Henry VIII, preserved in this State by G.S. 41-7, merges the legal and equitable titles in the beneficiary of a passive trust . . . ." *Finch v. Honeycutt,* 246 N.C. 91, 99, 97 S.E. 2d 478.

The essentials for creation of a trust are: "(1) sufficiency of words to raise it, (2) a definite subject, and (3) an ascertained object. *Finch v. Honeycutt, supra; Thomas v. Clay,* 187 N.C. 778, 122 S.E. 852. In the instant case no trust object is stated even if we concede that the first two essentials appear. No duties are imposed and no beneficiaries are designated, expressly or by implication.

It is clear that testator intended that the widow and, in turn, the daughters, have and enjoy life estates in the land, with the benefits ordinarily accruing therefrom. If the words "in trust" created any legal estate as distinguished from the use or equitable estate, the two merged so as to vest in the widow and daughters life estates in the usual and ordinary sense. The words "in trust" as used in this will mean nothing more than that the life tenants pay taxes, not commit waste, and maintain and preserve the property as befits, and is required of, one having a life estate.

We have this situation: A devise to the widow for life, and at her death to the daughters for life, and at their death "their share is to be divided equally among their children." The devise of the remainder, subject to the life estates, is to a class (grandchildren). Some of the members of the class were living at the death of the testator.

"A legacy given to a class subject to a life estate vests in the per-

sons composing that class at the death of the testator; but not absolutely; for it is subject to open, so as to make room for all persons composing the class, not only at the death of the testator, but also at the falling in of the intervening estate. This is put on the ground that the testator's bounty should be made to include as many persons who fall under the general description or class as is consistent with public policy; and the existence of the intervening estate makes it unnecessary to settle absolutely the ownership of the property until that estate falls in." *Mason v. White*, 53 N.C. 421, 422. The rule thus clearly enunciated has been consistently adhered to in this jurisdiction. *Privett v. Jones*, 251 N.C. 386, 393, 111 S.E. 2d 533; *Sawyer v. Toxey*, 194 N.C. 341, 343, 139 S.E. 692; *Walker v. Johnston*, 70 N.C. 576, 579.

We next inquire as to the effect of the language — "upon their (daughters) death their share is to be divided equally between their children when they reach the age of twenty-five years." It is our opinion and we hold that this language does not exclude the devise of the remainder in the case at bar from the rule above quoted from the *Mason* case. " 'The remainder is vested in the children of the life tenant who are *in esse*, and their interest is subject only to a contingency affecting the *quantum* of their interest, but not the quality of the estate taken by them.' . . . Nor was the vested character of the remainder affected by the direction that the property be equally divided . . . after the death of their mother(s)." *Beam v. Gilkey*, 225 N.C. 520, 524, 35 S.E. 2d 641. The rule against perpetuities does not relate to and is not concerned with the part postponement of the full enjoyment of a vested estate. The time of vesting of title is its sole subject matter. *McQueen v. Trust Co.*, 234 N.C. 737, 741, 68 S.E. 2d 831. ". . . (I)f there is in terms a devise, and the time of enjoyment merely is postponed, the interest is a vested one, but if the time be annexed to the substance of the gift or devise, as a condition precedent, it is contingent . . . ." *Bowen v. Hackney*, 136 N.C. 187, 190, 48 S.E. 633. ". . . (A) remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate." *Trust Co. v. McEwen*, 241 N.C. 166, 169, 84 S.E. 2d 642. "An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment." *Patrick v. Beatty*, 202 N.C. 454, 461, 163 S.E. 572.

It is patent that testator intended, in the case at bar, that immediately upon the death of his daughters their children should have the right of possession. For reasons satisfactory to him he did not

desire the land partitioned among his grandchildren until they reached the age of twenty-five years. He certainly did not intend an hiatus in the title for the possible period between the death of the daughters and the time for actual partition. At the death of the daughters the roll is to be called and the *quantum* of interest of each is then fixed and determined. But the lands, according to testator's wishes, are not to be partitioned until they "reach the age of twenty-five years." ". . . (A) devise should take effect at the earliest moment that the language will permit." *McDonald v. Howe,* 178 N.C. 257, 259, 100 S.E. 427. Had the language of the will been such as to show that the testator intended that the remainder go to such of the grandchildren only as survived testator's daughters and were living at the time the youngest grandchild attained age twenty-five, then the remainder would have been contingent. *Bowen v. Hackney, supra; Anderson v. Felton,* 36 N.C. 55.

It is our opinion and we hold that the remainder in fee vested in the infant defendants at testator's death, subject to open so as to make room for any children thereafter born to testator's daughters, but at the death of the daughters of testator the *quantum* of interest of each of the grandchildren will become fixed and certain, and the grandchildren will be entitled to possession immediately upon the death of the daughters, and that according to the wishes of the testator the property is not to be partitioned and allotted to the grandchildren until "they reach the age of twenty-five years," or until the death of their mothers, whichever is later. We hold that the remainder interest in the real property to the grandchildren is not in violation of the rule against perpetuities — this being the only question for decision on this appeal.

Both the appellants and appellees quoted from and relied on *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899. The devise in that case, as here, was to a class, including members of the class which might be born after the death of testator. (For further comment see *Clarke v. Clarke,* 253 N.C. 156, 161, 162, 116 S.E. 2d 449.) In all other respects the instant case and the *Parker* case are distinguishable. In *Parker* there was a private trust. The personalty and land were willed and devised to the trustee, with specific directions for the management of the property, accumulation of income and accounting to the clerk of Superior Court. The use and benefits of the trust income were given to such members of the beneficiary class as should finish public school and go to college. College expenses were to be paid from the accumulated trust income. There was no division of the fund among members of the class, and the right of a member to any part of the fund was *contingent* upon finishing public school and attending college. The

trust was to continue until the youngest member of the beneficiary class was 28 years of age. At the death of the testator the *possibility* existed that the trust income would not vest in a beneficiary, if at all, within twenty-one years, plus the period of gestation, after some life or lives in being. (See definition of rule against perpetuities in *McPherson v. Bank*, 240 N.C. 1, 15, 81 S.E. 2d 386.) The trust to provide funds for college education was the primary object of testator. The pertinent item of the Parker will uses no language which in any way tends to vest any interest in the corpus or income of the trust in any particular beneficiary or the beneficiaries as a class prior to the final distribution after termination of the trust. It is then provided: "When the child or the youngest one shall arrive at the age of twenty-eight (28), the trustee will convey the land . . . (and personal property) . . . to such child or children, and if any child or children shall in the meantime have died leaving issue surviving, such issue shall stand for, and represent his, her or their parents, and *receive* the share that his, her or their parents *would have received.*" (Parentheses and emphasis added.) So it is clear that it was intended that the roll would not be called until the trust terminated, and the right to receive a share was contingent upon ability to answer roll-call. ". . . (W)hen there is uncertainty as to the person or persons who are to take, the uncertainty to be resolved in a particular way or according to conditions existing at a particular time in the future, the devise is contingent." *Trust Co. v. Schneider,* 235 N.C. 446, 452, 70 S.E. 2d 578; *Scales v. Barringer,* 192 N.C. 94, 133 S.E. 410. Where there is no gift of an estate, or the income therefrom, or other interest therein, distinct from the division which is to be made equally between all the children and, for the first time, upon the termination of the trust, the "when" of the division is of the essence of the donation and is a condition precedent. It marks both the time of vesting and time of enjoyment of the estate. *Carter v. Kempton,* 233 N.C. 1, 6, 62 S.E. 2d 713. See also *Anderson v. Felton, supra.*

In the instant case the court erred in holding that the remainder interest in the real property to the children of testator's daughters was in violation of the rule against perpetuities and therefore void.

This cause is remanded and the judgment below will be modified to conform to this opinion.

Modified and remanded.

SYLVIA HARRIS MOREHEAD, JOHN WESLEY HARRIS, WAYMAN HARRIS, AND WILEY HARRIS, JR., PLAINTIFFS, V. DAISY HARRIS, MARY LOUISE PRICE, NOW MARY LOUISE PRICE BOQUIST, AND HER HUSBAND, RICHARD E. BOQUIST, AND HELEN MOORE PRICE, NOW HELEN MOORE PRICE HOOPER, AND HER HUSBAND, PHILLIP M. HOOPER, DEFENDANTS, AND CORA JANE LEA (CORA E. LEA) AND LETTIE ORA WALKER (ORA LEA WALKER), ADDITIONAL DEFENDANTS.

(Filed 16 June, 1961.)

1. Trial § 57—

In a trial by the court under agreement of the parties, the court is required to find the facts on all issues of fact joined on the pleading, to declare separately the conclusions of law arising upon the facts found, and to enter judgment accordingly. G.S. 1-185.

2. Appeal and Error § 55—

Where the findings of fact are incomplete and insufficient to support the conclusions of law and judgment, and there is conflict between the findings and the stipulations, particularly with reference to whether some of the parties had been properly served and were before the court, the cause will be remanded to the end that the facts may be sufficiently and definitely found so that the appellate court may more accurately and safely pass upon the conclusions of law and the judgment.

3. Appeal and Error § 37—

Upon a proper showing of diligence by counsel and circumstances mitigating the failure of appellants represented by him to authorize and direct him to prosecute the appeal in time, such counsel may be permitted to adopt in behalf of his clients the brief duly filed by other appellants.

APPEAL by defendants and additional defendants from *Olive, J.*, 9 January 1961 Regular Civil Term of GUILFORD, Greensboro Division.

Civil action instituted on 11 June 1956 against the original defendants to have the fee simple title and right of possession to real property declared to be in plaintiffs, subject to any right of dower to which the defendant Daisy Harris may be entitled.

Hoyle and Hoyle, attorneys at law, filed an answer for the defendants, Boquist and Hooper. An answer was filed by L. Herbin, Jr., an attorney at law, as guardian *ad litem* for the defendant, Daisy Harris.

Daisy Harris died testate on 6 February 1960, and it seems devised a house and lot on Retreat Street, in Greensboro, to her two sisters, Cora Jane Lea (Cora E. Lea) and Lettie Ora Walker (Ora Lea Walker), old Negro females, one, Cora Jane Lea, residing in North Carolina about five miles north of Haw River, and the other, Lettie Ora Walker, in the State of New York. The will is not in the record.

This stipulation appears in the record: "It was stipulated between

the parties hereto that Cora E. Lea and Ora Lea Walker were duly made parties defendant to this action and adopted answer heretofore filed by L. Herbin, Jr., guardian *ad litem* for Daisy Harris, and were represented in court and at this hearing by their counsel, L. Herbin, Jr." This stipulation appears in the record: "The record on appeal to the Supreme Court shall consist of the plaintiffs' amended complaint; an order allowing plaintiffs to amend further; the answer of the defendants Boquist and Hooper; the answer of L. Herbin, Jr., guardian *ad litem* for Daisy Harris, defendant (which answer was adopted by stipulation with plaintiffs' counsel by additional defendants, Cora E. Lea and Ora Lea Walker); plaintiffs' evidence with exhibits; defendants' evidence with exhibits . . . ." This stipulation also appears in the record: "IT IS FURTHER STIPULATED AND AGREED that summons was duly and properly issued herein, and that, together with a copy of summons and a copy of complaint as amended, it was duly served on the defendants and each of them, and that at the time of the trial all parties, including the additional defendants Lea and Walker, were properly before the Court."

The only summons in the record before us is a summons issued on 11 June 1956, which directs the sheriff of Guilford County to serve it with a copy of the complaint on Mary Louise Price and Helen Moore Price, and this summons does not show service by the sheriff.

There is a stipulation in the judgment that the parties were represented by counsel, and that they, pursuant to G.S. 1-184—1-185, waived trial by jury, and agreed that Judge Olive might find the facts, make conclusions of law, and render judgment thereon.

SUMMARY OF FINDINGS OF FACT.

Plaintiffs are the only surviving children and heirs at law of Wiley Harris, deceased, who died intestate on 3 May 1933. The ages of plaintiffs are: Sylvia Harris Morehead, 56 years, John Wesley Harris, 68 years, Wayman Harris, 67 years, and Wiley Harris, Jr., 66 years. The defendant Daisy Harris was his surviving widow, and on 31 May 1933 was appointed and duly qualified as administratrix of her deceased husband's estate.

On 14 November 1927 Wiley Harris and wife, Daisy Harris, executed a deed of trust to Thomas C. Hoyle, Trustee, properly recorded, on the lands hereinafter described to secure an indebtedness of $200.00 evidenced by their note. Then follows a description by metes and bounds of two tracts of land, designated as Tract No. 1 and Tract No. 2, in Morehead Township, Guilford County. (The following does not appear in the findings of fact: Plaintiffs' Exhibit 2, which is also defendants' Exhibit 1, is a photostatic copy of this deed of trust, and

shows that in its granting clause the grantors in the granting clause conveyed to Hoyle, Trustee, only a five-sixth undivided interest in Tract No. 1, it being all the land owned by Hannah Harris at the time of her death).

Wiley Harris was the owner in fee simple of the two tracts of land.

On 26 August 1933 Thomas C. Hoyle, Trustee, foreclosed this deed of trust by selling the two tracts of land at public auction to satisfy the indebtedness secured by the deed of trust, when and where Daisy Harris became the last and highest bidder for the two tracts of land at the price of $217.00.

On 9 September 1933 Thomas C. Hoyle, Trustee, made and executed a deed to Daisy Harris, properly recorded, conveying the two tracts of land to her in her individual capacity. This deed recites that Tract No. 1 was first offered for sale and did not bring a sufficient amount to pay off the debt and costs, and then Tract No. 2 was then offered for sale, and Daisy Harris became the last and highest bidder for both tracts in the sum of $217.00. (This was done to conform to the provisions of the deed of trust). The descriptions of the two tracts of land in Hoyle's deed as trustee are identical with the descriptions of the two tracts of land in the deed of trust above mentioned dated 14 November 1927. (This does not appear in the findings of fact: Plaintiffs' Exhibit 3, which is defendants' Exhibit 2, is a photostatic copy of the deed of Hoyle, Trustee, to Daisy Harris, and shows in its granting clause that Hoyle, Trustee, conveyed to Daisy Harris only a five-sixth undivided interest in Tract No. 1). Plaintiffs offered the deed of Hoyle, Trustee, to Daisy Harris for the purpose of attack.

On 31 May 1933 Daisy Harris filed in the office of the clerk of the superior court of Guilford County *in re* the administration of the estate of her deceased husband a sworn statement in which she valued his real estate at $1,000.00.

On 12 June 1934 Daisy Harris, as administratrix of her deceased husband, filed in the office of the aforesaid clerk a final report showing that in May 1933 she disbursed "to T. C. Hoyle, Sr., Trustee, in foreclosure of Wiley Harris property One Hundred Seventeen and 07/100 Dollars ($117.07)."

On 1 June 1946 Daisy Harris made and executed a deed to Grace Construction Company, properly recorded, purporting to convey to Grace Construction Company a part of Tract No. 1, described in the deed of Hoyle, Trustee, to her, and then follows a description by metes and bounds of the part of the tract conveyed. This deed was offered in evidence by plaintiffs for the purpose of attack.

On 5 May 1947 Grace Construction Company made and executed a deed to Mary Louise Price and Helen Moore Price, properly re-

corded, purporting to convey to them the tract of land conveyed to it by Daisy Harris. Plaintiffs offered this deed for the purpose of attack.

No allotment of dower was made to Daisy Harris.

Daisy Harris died testate on 6 February 1960, devising a house and lot located on Retreat Street in Greensboro to her sisters, Cora Jane Lea and Lettie Ora Walker, who were duly made parties defendant to this action.

Daisy Harris was in peaceful possession of the property in controversy from her husband's death in May 1933 until her death on 6 February 1960.

"The evidence of the defendants is insufficient as a matter of fact and as a matter of law to establish adverse possession under the provisions of G.S. 1-38 and G.S. 1-40." (Quote from the findings of fact).

CONCLUSIONS OF LAW SUMMARIZED.

1. Daisy Harris under the deed of Hoyle, Trustee, to her, acquired the two tracts of land for the benefit of herself as widow and the heirs at law of her deceased husband, plaintiffs herein. Her dower interest terminated at her death.

2. Her possession was not adverse to the heirs at law of her deceased husband, but was in privity with them.

3. Defendants Mary Louise Price Boquist and Helen Moore Price Hooper, under the instruments through which they claim title, did not acquire any more than the dower interest of Daisy Harris, which terminated at Daisy Harris' death.

4. Defendants, nor any of them, have acquired title to said lands, or any part thereof, by adverse possession.

5. Plaintiffs are the owners in fee simple of the lands and every part thereof, and are entitled to the immediate possession thereof.

Whereupon, the court entered judgment that plaintiffs are the owners in fee simple and entitled to the immediate possession of the two tracts of land described in the deed of Hoyle, Trustee, to Daisy Harris, including the part of Tract No. 1 conveyed by her to Grace Construction Company, and by it to Mary Louise Price and Helen Moore Price, and that defendants do not own any interest whatever in the lands.

From the judgment defendants Boquist and Hooper and the additional defendants appealed.

H. L. Koontz and Shuping & Shuping for plaintiffs, appellees.

Hoyle, Boone, Dees & Johnson for defendants Boquist and Hooper, appellants.

L. Herbin, Jr., for additional defendants Lea and Walker, appellants.

PARKER, J. Plaintiffs state in their brief: "Attention is called to the fact that as to that portion of the land of Wiley Harris in which is located the tract claimed by the defendants Boquist and Hooper, the deed of trust to Thos. C. Hoyle, Trustee, (Plaintiffs' Exhibit 2, Defendants' Exhibit 1) and the instrument executed by said Thos. C. Hoyle, Trustee, (Plaintiffs' Exhibit 3, Defendants' Exhibit 2) purport to convey only a five-sixths undivided interest in said land and do not purport to convey the entire interest in said portion of the land in controversy. Such being the case, if the defendants' contentions as to the record title should be accepted, which plaintiffs specifically deny, defendants Boquist and Hooper could not have acquired any more than a five-sixths undivided interest in the land in controversy under the instruments under which they claim title."

An examination of the deed of trust from Wiley Harris and wife, Daisy Harris, to Hoyle, Trustee, which is an exhibit of plaintiffs and defendants, shows that the deed of trust in the granting clause conveys to Hoyle, Trustee, only "a five-sixths undivided interest" in Tract No. 1. An examination of the deed from Hoyle, Trustee, to Daisy Harris, which is an exhibit of plaintiffs and defendants, shows that this deed in the granting clause conveys to Daisy Harris only "a five-sixths undivided interest" in Tract No. 1.

The judge's findings of fact refer to the aforesaid deed of trust and deed by book and page as duly recorded in the public registry of Guilford County. The judge finds as a fact that Wiley Harris was the owner in fee simple of the two tracts of land. If, in fact Wiley Harris did own a fee simple title to the two tracts of land, it seems that he and his wife would have conveyed to Hoyle, Trustee, a fee simple title to all of Tract No. 1 instead of only "a five-sixths undivided interest" in Tract No. 1. These facts seem to be in conflict, and the findings of fact do not clear up such apparent conflict. If someone else not a party to this action owns a one-sixth undivided interest in Tract No. 1, such a person is a necessary party to a final and complete determination of this action.

The defendants and the additional defendants assign as error the judge's conclusion of law that plaintiffs are the owners in fee simple and entitled to the immediate possession of the two tracts of land, including the part of Tract No. 1 conveyed by Daisy Harris to Grace Construction Company, and by it to Mary Louise Price and Helen Moore Price. This seeming conflict above stated, apart from all other questions presented by the appeal, prevents us from safely and accurately passing on this conclusion of law.

Defendants Boquist and Hooper assign as error this so called finding of fact: "19. That the evidence of the defendants is insufficient

as a matter of fact and as a matter of law to establish adverse possession under the provisions of G.S. 1-38 and G.S. 1-40."

Defendants Boquist and Hooper plead as a further answer and defense twenty years adverse possession, G.S. 1-40, and seven years adverse possession under color of title, G.S. 1-38.

Defendants Boquist and Hooper have offered evidence to this effect: The father of Mary Louise Price and Helen Moore Price bought for them in 1947 a part of Tract No. 1 from Grace Construction Company. In 1947 Mary Louise Price and Helen Moore Price were under the age of 21 years. Their father lives in Greensboro, North Carolina, Mary Louise Price Boquist lives in Minnesota, Helen Moore Price Hooper lives in Rockingham County, North Carolina. Their father has a power of attorney from them, and has managed the land since 1947. Their father for them has listed and paid the taxes on the land every year since 1947, has leased it, and collected the rents. It has been under lease twelve years to the same lessee. They have built no building on the land.

Plaintiffs offered no evidence as to possession. However, this stipulation appears in the record: "It is stipulated and agreed between the parties hereto and their counsel that Daisy Harris was in the peaceful possession of the property in controversy from the death of her husband, Wiley Harris, in 1933, until her death on June 6, 1960 (sic)." The judge found as a fact this stipulation, with the exception that he found the date of Daisy Harris' death was 6 February 1960. If the stipulation as to the peaceful possession of "the property in controversy," includes, as it seems to, that part of Tract No. 1 conveyed by Daisy Harris to Grace Construction Company, and by it to the *feme* defendants Boquist and Hooper, then the defendants Boquist and Hooper have stipulated themselves out of court as to their alleged defenses of obtaining title by adverse possession. We do not consider the findings of fact clear on this question, and we are fortified in our opinion by the fact that appellees in their brief do not contend that the defendants Boquist and Hooper have stipulated themselves out of court as to their alleged defenses of obtaining title by adverse possession.

The judge's so called finding of fact 19 is a conclusion of law, not a finding of fact.

"Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required by G.S. 1-185 to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly." *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

The pleadings and the evidence require a specific finding of fact as to the possession of the part of Tract No. 1 conveyed by Daisy Harris to Grace Construction Company, and by it to the *feme* defendants Boquist and Hooper, and a conclusion of law, separately stated, based on the findings of fact as to whether or not the *feme* defendants Boquist and Hooper have acquired title by adverse possession pursuant to the provisions of G.S. 1-38 or G.S. 1-40. On this point the findings of fact are totally inadequate.

L. Herbin, Jr., acted as counsel for the additional defendants during the trial before Judge Olive. The record shows that he made appeal entries for them, and contains their assignments of error. L. Herbin, Jr., filed no brief for them in this Court. However, on 21 May 1961, he filed in this Court a written motion for the additional defendants to be allowed to adopt the brief filed in this Court by the defendants Boquist and Hooper. In this motion L. Herbin, Jr., states in substance: The additional defendants by reason of their age, places of residence, health, education and lack of familiarity with court procedure did not realize the importance of the necessary procedures in the proper prosecution of a civil action and the appeal thereof, and did not realize the necessity of any action on their part "inasmuch as defendants Lea and Walker were made parties to the action by the adoption of a previously filed answer and their presence was not essential at the trial of the said action in the Superior Court." (This is a quote from the motion). That the additional defendants did not respond to his communication in respect to an appeal, until it was too late to prepare and file a brief. That he had been closely associated with counsel for the defendants Boquist and Hooper in the preparation of the case for trial, the actual trial of the action, in the preparation of the case on appeal, and is well acquainted with the brief filed by counsel for the defendants Boquist and Hooper. Their brief embodies the identical arguments which the additional defendants would make, with the exception of their argument as to adverse possession. This motion is allowed, permitting him to adopt the brief filed in this Court by the defendants Boquist and Hooper.

Judge Olive's finding of fact 15 is: "That Daisy Harris died testate on the 6th day of February, 1960, devising house and lot located on Retreat Street, in Greensboro, North Carolina, to her sisters, Cora Jane Lea and Lettie Ora Walker." However, there is no finding of fact to the effect that this house and lot ever belonged to Wiley Harris, or was part of the two tracts of land conveyed by Hoyle, Trustee, to Daisy Harris. If it was part of the two tracts of land conveyed to Hoyle, Trustee, to Daisy Harris, then the additional defendants

are necessary parties to a complete and final determination of this action.

There is nothing in the record before us to show definitely that the additional defendants were ever made parties defendant by any order of court, although a stipulation states they "were duly made parties defendant to this action and adopted answer heretofore filed by L. Herbin, Jr., guardian *ad litem* for Daisy Harris." However, a further stipulation states the "answer was adopted by stipulation with plaintiffs' counsel by additional defendants." In the light of the entire record before us a serious question is presented as to whether the so called additional defendants are as a matter of law parties to this action. As the action must go back for a new trial, and if the so called additional defendants are necessary parties, as stated above, then they can properly be made parties defendants, provided they have not been made so by instruments which do not appear in this record.

In the absence of sufficient and definite findings of fact, as required by the statute when a jury trial is waived, we are of opinion that the judgment should be vacated and the case remanded to the superior court to the end that the facts may be sufficiently and definitely found, that we may more accurately and safely pass upon the conclusions of law and the judgment. *Jamison v. Charlotte,* 239 N.C. 423, 79 S.E. 2d 797; *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572; *Trust Co. v. Transit Co.,* 198 N.C. 675, 153 S.E. 158; *Knott v. Taylor,* 96 N.C. 553, 2 S.E. 680. It is so ordered.

Remanded.

HUGH DINKINS, ADMINISTRATOR OF THE ESTATE OF JAMES LLOYD CRANFILL, v. WILLIAM GRADY CARLTON

AND

JAMES WESLEY WILLIAMS, BY HIS NEXT FRIEND, BETTY WILLIAMS, v. WILLIAM GRADY CARLTON.

(Filed 16 June, 1961.)

1. Automobiles § 49—

A passenger is required to exercise the care of an ordinarily prudent man for his own safety and he may be held contributorily negligent in voluntarily riding with a driver whom he knows to be reckless, or in failing to abandon the trip after he ascertains that the driver is intoxicated or driving in a reckless manner, when an ordinarily prudent person, under similar circumstances, would not have voluntarily undertaken the trip or would have abandoned the trip after the discovery of the recklessness of the driver.

2. Same—

Whether a passenger is guilty of contributory negligence in failing to remonstrate with the driver in regard to the driver's excessive speed or reckless driving must be determined upon the facts of each particular case, with consideration as to whether under the attendant circumstances remonstrance would seem to be futile and also with consideration of the fact within common knowledge that "back seat driving" often confuses the driver and that physical interference with the driver would increase the hazard.

3. Same—

Whether a passenger is guilty of contributory negligence in voluntarily embarking on a trip with a driver whom he knows to be reckless, or in failing to abandon the trip after discovery that the driver was operating the vehicle in a reckless manner or while intoxicated, or in failing to remonstrate with the driver, is usually a question for the jury under the rule of the ordinary prudent man, and the conduct of the passenger in these respects will not ordinarily be held for contributory negligence as a matter of law.

4. Trial § 22—

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit.

5. Negligence § 26—

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to him, establishes contributory negligence as a proximate cause of the injury so clearly that no other reasonable conclusion can be drawn therefrom.

6. Automobiles § 49— Evidence held not to disclose contributory negligence as matter of law on part of passenger in failing to abandon trip.

The evidence tended to show that the 29 year old defendant had drunk some intoxicant, that three teenage boys, at about 3:30 a.m., accepted his invitation to go to a neighboring town under agreement that one of the boys would drive the car, that en route defendant objected to the slowness of the driver and the car was stopped in a church yard and defendant took control of the car, that defendant drove "all right" at first but then began to drive at excessive speed along the narrow and curving road, and twice permitted the wheels to run off the edge of the hard surface, and that some three or five miles after taking over the wheel, the car ran off the highway and turned over, resulting in the injuries in suit. There was no evidence that defendant had the reputation of a reckless driver or that any of the passengers had theretofore riden with him, and no evidence that the passengers objected to his taking over the driver's seat or that they remonstrated with him as to his manner of driving. *Held:* While the evidence is sufficient to require the submission to the jury of the issues of the passengers' contributory negligence, the evidence does not disclose contributory negligence on their part as a matter of law.

DINKINS *v.* CARLTON AND WILLIAMS *v.* CARLTON.

APPEALS by defendant from *Johnston, J.*, December 14, 1960, Term, of YADKIN.

On June 13, 1959, about 4:00 a.m., a 1950 Chevrolet, owned and operated by defendant, in which James Lloyd Cranfill and James Wesley Williams were passengers, ran off the road and overturned. Cranfill and Williams were injured. Cranfill's injuries caused his death.

Joe Gray Williams, older brother of James Wesley Williams, was also a passenger. Injuries, if any, received by him, are not involved in these actions. Hereafter, James Wesley Williams is referred to as "Williams," James Lloyd Cranfill is referred to an "Cranfill," and Joe Gray Williams is referred to as "Joe Williams."

These actions, one for the wrongful death of Cranfill and the other for Williams' injuries, were consolidated, by consent, for trial. The complaints contained substantially the same allegations as to defendant's actionable negligence. Defendant, answering, denied he was negligent and pleaded the contributory negligence of Cranfill and Williams.

The only evidence was that offered by plaintiff. Relevant portions thereof will be set forth in the opinion.

In each case, the jury answered the issues of negligence and contributory negligence in favor of plaintiffs and awarded damages. Judgments, in accordance with the verdicts, were entered. Defendant, in each case, excepted and appealed.

H. Smith Williams and R. Lewis Alexander for plaintiffs, appellees.

Walter Zachary and Womble, Carlyle, Sandridge & Rice for defendant, appellant.

BOBBITT, J. The only assignments of error are based on defendant's exceptions to the overruling of his motions for judgment of nonsuit.

There was plenary evidence as to defendant's actionable negligence. While defendant, in his answers, denied plaintiffs' allegations as to his negligence, he now asserts the evidence discloses he was so incapacitated or reckless by reason of intoxication that Cranfill and Williams were contributorily negligent as a matter of law in riding with him when they knew or should have known it was hazardous to do so.

Defendant, in his brief, states this one question is presented, *viz:* "Did the trial Court err in overruling defendant's motion for judgment of nonsuit on the grounds that plaintiff's intestate and the plaintiff Williams were guilty of contributory negligence as a matter of

law in continuing to ride with the defendant after acquiring knowledge of defendant's intoxication?"

Pertinent general principles have been stated as follows: "A passenger or guest has a right to assume that the driver of the automobile will exercise proper care and caution, until he has notice to the contrary. His acceptance of the driver's manner of operating the vehicle ordinarily is not contributory negligence unless the driver's fault or incompetence is so obvious as to demand effort on the passenger's part to abate danger." 5A Am. Jur., Automobiles and Highway Traffic § 789. Again: "One who rides in an automobile driven by another whom he knows or should known *(sic)* to be a careless or reckless driver . . . is guilty of contributory negligence such as will preclude his recovery if his conduct in voluntarily riding with the driver amounts to a failure to exercise reasonable or ordinary care for his own safety. . . . Mere knowledge on the part of the passenger of reckless driving by the operator of the car does not *ipso facto* charge him with contributory negligence or bar his recovery, if he used the degree of care that an ordinarily prudent man would have used under like or similar circumstances." 5A Am. Jur., Automobiles and Highway Traffic § 790. Again: "While the mere circumstance of having entered an automobile driven by an intoxicated person is not of itself determinative of the passenger's contributory negligence, if one enters a car with knowledge of the driver's intoxicated condition and thereafter rides with him under such conditions as would impel a reasonably prudent man to take all possible measures to stop or leave the vehicle, he may be found guilty of contributory negligence and barred from recovery against the driver or owner of the car." 5A Am. Jur., Automobiles and Highway Traffic § 792.

Our decisions, cited and reviewed by *Parker, J.*, in *Bell v. Maxwell*, 246 N.C. 257, 98 S.E. 2d 33, are in substantial accord. In all, except *Bogen v. Bogen*, 220 N.C. 648, 18 S.E. 2d 162, this Court held the issue, whether the guest passenger was guilty of contributory negligence, was for jury determination.

As stated by *Devin, J.* (later *C.J.*), in *Samuels v. Bowers*, 232 N.C. 149, 153, 59 S.E. 2d 787: "The passenger is required to use that care for his own safety that a reasonably prudent person would employ under same or similar circumstances. Whether he has measured up to this standard is ordinarily a question for the jury. Contributory negligence when interposed as a defense to an action for damages for personal injury involves the element of proximate cause, and the determination of the proximate cause of an injury from conflicting inferences is a matter for the jury." In 5 Am. Jur., Automobiles § 712, it is stated: "The duty of an invited passenger in an automobile is

so dependent upon special circumstances, and upon such varied and conflicting notions of the propriety of interference in the management of the automobile, that in cases of accident the courts are loath to hold such a passenger guilty of contributory negligence as a matter of law. Ordinarily, the question of the contributory negligence of a guest in an automobile involved in a collision, is for the jury to decide in the light of all the surrounding facts and circumstances."

In *Bogen v. Bogen, supra,* where a guest passenger was held contributorily negligent as a matter of law, the opinion of *Barnhill, J.* (later *C.J.*), contains this statement as to the factual situation under consideration: "Here, plaintiff became a guest upon the automobile of defendant, knowing at the time that he habitually drives in a reckless manner at a high rate of speed without keeping a proper lookout and that he would ignore any protest or remonstrance she might make, and then failed to abandon the journey and return home on any one of the numerous occasions she had opportunity so to do after his continued recklessness became apparent." Plaintiff's testimony unequivocally and fully supported this statement.

The evidence must be considered in the light of these two well-settled principles: 1. 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. *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881; *Bell v. Maxwell, supra.* 2. "(I)nvoluntary nonsuit on the ground of the contributory negligence of the plaintiff may be allowed only when the plaintiff's evidence, considered in the light most favorable for him, establishes his own negligence as a proximate contributing cause of the injury so clearly that no other conclusion reasonably can be drawn therefrom." *Samuels v. Bowers, supra.*

The evidence tends to show the facts narrated below.

When the mishap occurred, defendant, then 29, was driving. Williams, then 16, was on the front seat, to the driver's right. Cranfill, then 17, and Joe Williams, then 18 or 19, were on the back seat. All were friends. They were on their way from Yadkinville to the "Night Spot" in Jonesville.

The tar and gravel road on which they were traveling, known as Center Road, was "right narrow" and had "a lot of curves." At a curve, the car "went off on the right side" and "started sliding and slid about 200 feet" before turning over. Williams and Cranfill were thrown out of the car.

Joe Williams had "just finished high school" and had a job in Yadkinville at the Yadkin Cafe. Williams had just completed the

tenth grade and was unemployed. Cranfill was "in the eleventh grade." There is no evidence as to defendant's education or occupation.

The Williams boys lived with their parents at Pilot View, about three miles from Yadkinville. Each had a driver's license. Williams had gotten his driver's license "about two weeks before the accident."

Joe Williams went to work at the Yadkin Cafe about 12:00 o'clock (midnight) and got off around 3:00 a.m. He had driven to work in his father's car. When he got off work, he started home. He drove his father's car around the block and stopped in front of the Yadkin Cafe. Williams and Cranfill were in Yadkinville, waiting for Joe Williams "to get off work." Until he got off work and had started home, Joe Williams had not seen defendant.

When Joe Williams stopped, Williams and Cranfill started to get in the Williams car. At that time, defendant pulled up behind the Williams car. Williams went back to see what defendant wanted. Defendant asked if "they" wanted to go to the "Night Spot" in Jonesville. Williams asked defendant who was going to drive. Defendant replied: "I don't care; you can if you want to." The Williams boys and Cranfill conferred and decided to go to Jonesville in defendant's car. Joe Williams parked his father's car in Yadkinville. When they left Yadkinville in defendant's car, about 3:30 a.m., Williams was driving. Defendant was on the front seat, to the driver's right. Cranfill was on the back seat, left side, and Joe Williams was on the back seat, right side.

Williams drove defendant's car until they reached Mitchell Chapel Church, some four to six miles from Yadkinville and some six to eight miles from Jonesville. Williams drove into the churchyard and stopped. He did so because defendant told him "to pull over and let him drive." Williams had been driving at 40 to 45 miles an hour. Defendant had complained that Williams was not driving fast enough. Defendant had told Williams "to press the accelerator down." He "would press it down but then take (his) foot off." The reason defendant gave for telling Williams to stop was this: "I want to show you how to drive."

In the churchyard, Williams got out of the car, defendant moved over into the driver's seat and Williams walked around the car and got back in on the front seat, to the right of the driver. Cranfill and Joe Williams did not change their positions. Defendant started driving. He had driven somewhere between two and five miles (wide variation in estimates) before the mishap occurred.

Defendant "drove all right at first." He kept on increasing his speed until he got up to 60 miles an hour or more. Before the mishap occurred, defendant had run off the road twice. Williams testified: "When

I say that Grady got off the road twice, I just mean he ran off the edge of the road. The wheels were off the hard surface, on the shoulder. He just ran the car off the road and cut it back on." When these two incidents occurred, defendant slowed down but picked up speed again.

At the churchyard, neither the Williams boys nor Cranfill expressed any objection to defendant's decision that he would drive from there to Jonesville. While defendant was driving, neither of the Williams boys nor Cranfill told defendant to slow down or otherwise objected to the way he was driving. Williams testified he did not make any objections to Grady's driving "because it wasn't my car." Joe Williams testified: "It was his (defendant's) car. What could we do about it?"

The evidence relating to defendant's intoxication is narrated below.

Williams testified he had seen defendant in Yadkinville, at a "closed" filling station, between 12:00 o'clock (midnight) and 1:00 a.m.; that he and Cranfill, at that time, got into defendant's car but "did not go anywhere"; that he then "smelled alcohol on (defendant)"; that he did not see defendant drink any liquor or know where defendant had got liquor; that defendant left about 1:00 a.m.; that he did not know where defendant went; and that he did not see defendant again until around 3.30 a.m.

An investigating State Highway Patrolman testified to a conversation he had with defendant at the hospital in Elkin about 5:30 a.m. He testified: "It was obvious to me when I talked to Grady Carlton that morning at around 5:30 A.M. that he had been drinking, as the odor was on him. The odor on him was clear. You could tell clearly that he had been drinking. He said he had been drinking earlier in the night but was not intoxicated when he wrecked." Again: "He stated that he had been out all night but not with these boys. He said that he had been drinking some beer at a tavern or a joint in Forsyth County, but he was not intoxicated at the time of the accident. However, it was obvious to me that he had been drinking." About 6:00 or 6:30, the patrolman drove defendant to Yadkinville, taking him home. The patrolman testified: "I did not notice the smell of alcohol on Grady in the car when we were driving back to Yadkinville. Grady sat on the front seat there and I talked to him all the way back. I noticed the smell of alcohol on him when I first got up with him in the hospital. I sat down right beside him on a bench and was talking to him." Again: "(H)e (defendant) was not drunk when I put him out at his home that morning."

Joe Williams testified: "I did not see any whiskey in the car. I did not see anybody drink any whiskey. I did not see anybody drink any

beer or any form of intoxicating beverage." Again: "I could smell the odor of liquor on Grady that night, after we got into his car, and before we got to the church. Although I was sitting on the back seat of the car and Grady was sitting on the front seat, I could smell liquor on him when he turned around." Joe Williams testified that Cranfill, "on the way to Jonesville," told him "he saw Grady drinking whiskey while he was at the service station."

Neither Williams nor Joe Williams nor Cranfill "had had anything to drink that night."

There was no evidence as to prior relationships between defendant and the Williams boys or Cranfill except the simple statement that they were friends. There was no evidence that either of the Williams boys or Cranfill, on any prior occasion, had been a passenger in a car operated by defendant. There was no evidence that defendant had any prior reputation or record as a reckless driver.

In Yadkinville, defendant gave Williams permission to drive his car to Jonesville. Certainly, under these circumstances, it was not contributorily negligent as a matter of law for the Williams boys and Cranfill to get into defendant's car in Yadkinville for the trip to Jonesville. The more serious question is whether, after defendant had made Williams stop at Mitchell Chapel Church, Williams and Cranfill were guilty of contributory negligence in continuing the trip with the knowledge that defendant insisted on driving from there to Jonesville. The Williams boys and Cranfill were in high school or had just graduated. It was defendant's car. Defendant was 29. It may be inferred that the three boys deemed it both unwise and futile to object or interfere.

True, the Williams boys and Cranfill could have refused to accompany defendant from Mitchell Chapel Church to Jonesville. In such case, they would have been stranded in the churchyard about 4:00 a.m. All circumstances considered, we cannot say they were contributorily negligent as a matter of law in remaining in the car after defendant stated he was going to take over the driving. Nor do we think their failure to call upon him to slow down or otherwise object to the way he drove, over a comparatively short distance, may be considered contributory negligence as a matter of law. If and when it became evident that defendant was driving too fast on a narrow and crooked tar and gravel road, whether, under the circumstances, remonstrance and protest by the passengers would likely restrain defendant or would merely divert him and render their predicament more hazardous, was for jury determination. As stated by *Connor, J.*, in *Smith v. R. R.*, 200 N.C. 177, 182, 156 S.E. 508: "It is a matter of common knowledge to those who ride in automobiles—certainly to those who

drive them—that 'back seat' driving often confuses a driver, and more often than otherwise, prevents him from avoiding dangers encountered on the road." Certainly, actual physical interference with the manner in which defendant was operating the car would have increased the hazard.

Williams testified he *guessed* he made this statement to an investigator: "I am of the opinion that I should not have got back in the car when we stopped at the Mitchell Chapel Church." Joe Williams testified he made this statement to an investigator: "I am of the opinion I should have got out of the car when we stopped in front of the Mitchell Chapel Church." He added that this was still his opinion. In retrospect, these opinions were certainly justified. However, they shed little, if any, light upon how matters reasonably appeared to Williams and Cranfill when they were in the churchyard. See *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383.

Unquestionably, the evidence was sufficient to justify the submission of the contributory negligence issue in each case. This was done. The jury answered the contributory negligence issues in favor of plaintiffs. 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. Although sufficient to support jury findings that Williams and Cranfiill were guilty of contributory negligence, the conclusion reached is that the evidence does not establish contributory negligence as a matter of law. Hence, defendant's motions for judgments of nonsuit were properly overruled.

No error.

STATE OF NORTH CAROLINA ON RELATION OF CHARLES F. GOLD, COMMISSIONER OF INSURANCE, PETITIONER v. EQUITY GENERAL INSURANCE COMPANY, RESPONDENT.

(Filed 16 June, 1961.)

1. Appeal and Error § 4—

Only the "party aggrieved," who is one whose rights have been directly and injuriously affected by the action of the court, may appeal from the Superior Court to the Supreme Court. G.S. 1-271.

2. Same: Receivers § 5— Persons not parties and whose rights could not be precluded by judgment, may not appeal.

In an action instituted by the ancillary receiver of an insolvent insurance company, order restraining a North Carolina bank from paying out funds represented by certificates of deposit purchased by the insurance company was continued to the hearing. Nonresidents, who were not parties to the action, made a special appearance solely to test the jurisdiction of the court and appealed from the order continuing the temporary restraining order. It appeared from the findings upon evidence introduced solely by the parties to the action that the certificates of deposit had been transferred to the nonresidents, and such parties attacked the validity of this transfer. *Held:* Claims of the nonresidents could not be precluded by judgment in the action to which they were not parties or served with summons, and such nonresidents were not parties aggrieved by the order continuing the temporary restraining order, and their appeal therefrom must be dismissed.

APPEAL by First Bank of Brighton, Brighton, Colorado, and American National Bank of Denver, Denver, Colorado, from an order dated March 11, 1961, entered by *Bickett, Resident Judge,* in an action pending in the WAKE Superior Court.

On September 23, 1960, J. Edwin Larson, State Treasurer and *ex officio* Insurance Commissioner of the State of Florida, was, by order of a Circuit Court in and for Leon County, Florida, appointed Domiciliary Receiver of Equity General Insurance Company (Equity). Equity, incorporated under the insurance laws of Florida, had its principal office and place of business in Miami, Florida, with Administrative Offices in Boulder, Colorado. Equity is insolvent.

In this cause, on September 27, 1960, Charles F. Gold, Commissioner of Insurance of the State of North Carolina, was appointed temporary Ancillary Receiver of Equity and, by order of October 15, 1960, his appointment as Ancillary Receiver was made permanent. The Ancillary Receiver was authorized and directed to recover and hold all assets of Equity located in this State. G.S. 58-155.12; G.S. 58-155.19.

The said Receivers were appointed in Florida and in North Carolina, respectively, under the terms of the Uniform Insurers Liquidation Act.

On December 19, 1960, the Resident Judge, based on the affidavit and motion of the Ancillary Receiver, entered a temporary order restraining the North Carolina National Bank "from paying out the $125,000 on deposit with the bank in the name of Equity General Insurance Company or any of the interest on said principal amount, all of which is represented by outstanding Certificates of Deposit Nos. 1, 2, 3, 4 and 5 issued by North Carolina National Bank at Burlington, North Carolina on July 5, 1960 in amounts of $25,000 each, with interest at the rate of 3%, to mature on January 1, 1961, until

further Order of this Court." The Order directed the North Carolina National Bank "and any other persons or parties claiming an interest in the deposits or Certificates of Deposit" to appear at a designated time and place "to show cause, if any there may be, why this Order should not be continued in full force and effect until a determination by this Court as to the rights of the Ancillary Receiver and all other interested parties in the deposits and Certificates of Deposit."

Answering, the North Carolina National Bank alleged both the Domiciliary Receiver and the Ancillary Receiver had demanded payment of the $125,000.00 deposit represented by said certificates; that the Brighton Bank had demanded payment of Certificates Nos. 4 and 5; and that the Denver Bank had demanded payment of Certificates Nos. 1, 2 and 3. It alleged it had "refused to pay said funds to anyone and still refuses to pay out said funds without a surrender of said Certificates of Deposit, or until claimants therefor agree upon the ownership thereof, or until the ownership thereof is otherwise legally determined." It asserted it was a mere stakeholder; that it was ready and willing to pay the said sum of $125,000.00 to such person or persons as may be lawfully entitled thereto but was unable to determine the lawful ownership thereof; and that it was threatened with litigation by each of several claimants. It prayed "for the direction and protection of this Court" and "that said claimants be required to interplead with each other to determine herein their respective rights to said funds" and that it "be relieved and discharged from any and all liability on account of such funds except as otherwise legally determined by judgment herein."

A petition for intervention was filed by "T. B. Jones Insurance Service, Inc. and Affiliated Offices." Attached to said petition are (1) a copy of a contract dated June 1, 1959, in which Equity appointed "T. B. Jones Insurance Service, Inc. and Affiliated Offices, Burlington, N. C." as its exclusive General Agent in all states east of the Mississippi River except Wisconsin, Illinois and Rhode Island, and (2) a copy of a proof of claim for $82,257.02 filed by said petitioner with the Ancillary Receiver in which said petitioner asserts a "(p)referred or secured" claim against the funds deposited in the name of Equity as "Escrow Deposits" in the North Carolina National Bank.

The hearing before Judge Bickett was to determine whether the restraining order he had issued on December 19, 1960, should be continued in effect. At said hearing, the Brighton Bank, through its counsel, and the Denver Bank, through its counsel, "appeared specially, solely and only for the purposes of challenging the jurisdiction of the Court." No affidavit, motion or other writing was filed by or on behalf of these Colorado banks.

This summary of Judge Bickett's findings of fact is sufficient, for present purposes, to indicate the nature of the claims of the Ancillary Receiver and of the intervenor to the alleged "Escrow Deposits," now represented by said certificates of deposit.

T. B. Jones Insurance Service, Inc., and Seaboard Underwriters, Inc., as General Agents, had issued Equity's liability policies to companies in this and other states engaged in the long-haul trucking business. The insureds had deposited with said General Agents the amount of the estimated premiums therefor. These were held as "Escrow Deposits." If policies were cancelled, the insureds were entitled to refunds in respect of unearned premiums. Prior to July 5, 1960, these "Escrow Deposits" had accumulated to an amount in excess of $125,000.00. On that date, said General Agents, as directed by Equity's President, obtained from the North Carolina National Bank five certificates of deposit, payable to the order of Equity, representing $125,000.00 of said "Escrow Deposits." These were forwarded by said General Agents to Equity in reliance upon the false and fraudulent representations of Equity's President that Equity would not withdraw any of these funds or assign the certificates of deposit. Equity's policies of liability insurance were cancelled. The "Escrow Deposits," represented by the certificates of deposit, were impressed with a trust in favor of Equity's policyholders whose (advanced) estimated premiums had created the fund. Equity transferred Certificates Nos. 4 and 5 to the Brighton Bank and transferred Certificates Nos. 1, 2 and 3 to the Denver Bank. These transfers were made within four months prior to the receivership. G.S. 58-155.26. ". . . the officers and employees of the said banks knew or should have known that the Certificates of Deposit were procured and removed from the State of North Carolina by fraudulent misrepresentations of the aforementioned officers of Equity General Insurance Company and that the transfer of the Certificates of Deposit to the American National Bank at Denver, Colorado, and the First Bank of Brighton, at Brighton, Colorado, constituted a voidable transfer."

The order entered March 11, 1961, was as follows: "IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Order of this Court temporarily restraining North Carolina National Bank at Burlington, N. C. from paying out the $125,000 on deposit in the name of Equity General Insurance Company and represented by five outstanding Certificates of Deposit issued by said bank be, and the same is hereby continued in full force and effect pending a final determination at this Court as to the rightful owners of said funds; that T. B. Jones Insurance Service, Inc., and Seaboard Underwriters, Inc., with the consent of counsel for the Ancillary Re-

ceiver, be and the same are hereby made parties defendant in this action."

The Brighton Bank and the Denver Bank excepted to designated portions of Judge Bickett's findings of fact and order "(t)o the extent that such findings of fact and conclusions of law . . . relate to the jurisdiction of the Court over The First Bank of Brighton, Brighton, Colorado, or over the American National Bank of Denver, Denver, Colorado, or over the certificates of deposit held by said banks, or either of them, or to the jurisdiction of the Court to continue the restraining order herein, and solely to that extent, The First Bank of Brighton and the American National Bank of Denver, each appearing specially, solely and only for the purpose of challenging the jurisdiction of the Court."

The following appears in the record: "To the entry of the foregoing order The First Bank of Brighton, Brighton, Colorado and American National Bank of Denver, Denver, Colorado, each appearing specially, solely and only for the purpose of challenging the jurisdiction of the Court excepts and appeals to the Supreme Court of North Carolina. Notice of appeal given in open Court. Further notice waived."

North Carolina National Bank did not appeal.

Attorney General Bruton and Assistant Attorney General Pullen for petitioner, appellee.

Cooper & Cooper for intervenors, appellees.

Ruark, Young, Moore & Henderson for First Bank of Brighton, appellant.

Smith, Leach, Anderson & Dorsett for American National Bank of Denver, appellant.

BOBBITT, J. Only a "party aggrieved" may appeal from the superior court to the Supreme Court. G.S. 1-271; *Langley v. Gore,* 242 N.C. 302, 87 S.E. 2d 519. "(A) 'party aggrieved' is one whose right has been directly and injuriously affected by the action of the court." McIntosh, North Carolina Practice and Procedure, § 675; *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434; *In re Application for Reassignment,* 247 N.C. 413, 421, 101 S.E. 2d 359. "An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, . . . which affects a substantial right claimed in any action or proceeding . . ." G.S. 1-277; *Veazey v. Durham,* 231 N.C. 357, 57 S.E. 2d 377; *Buick Co. v. General Motors Corp.,* 251 N.C. 201, 110 S.E. 2d 870.

"A special appearance by *a defendant* is for the purpose of testing

the jurisdiction of the court over his person." (Our italics) *In re Blalock,* 233 N.C. 493, 503, 64 S.E. 2d 848, and cases cited; McIntosh, North Carolina Practice and Procedure, § 328.

The Colorado banks are not named as parties to this action. No attempt has been made to serve process upon them. Judge Bickett found as a fact they had not been served with process. Moreover, Judge Bickett's order contains this provision: ". . . and the Court being of the opinion that it does not have jurisdiction over the American National Bank of Denver, Colorado, or the First Bank of Brighton, Brighton, Colorado, or over any property within the possession of said banks, . . ."

Appellants rely largely on *First Nat. Bank of Rome v. First Nat. Bank of Jasper* (C.C.A. 5th), 264 F. 83, affirmed by the United States Supreme Court in *Bank of Jasper v. First Nat. Bank,* 258 U.S. 112, 42 S. Ct. 202, 66 L. Ed. 490. But consideration of these decisions illustrates the fallacy of appellants' position.

In the cited case, the action was instituted by the (Rome) Georgia bank against the (Jasper) Florida bank in the United States District Court in Florida to recover as owner and holder of certificates of deposit issued by the Florida bank. The Florida bank pleaded as *res judicata* decrees previously entered in a Florida State Court. Under these decrees, the Florida bank was required to pay the funds represented by these certificates of deposit to Florida claimants, plaintiffs in an equity suit. The Georgia bank, also two other Georgia corporations, were named as defendants in said Florida equity suit. The purported service of process on these Georgia corporations was by publication. It was held the Georgia bank was not barred by the decrees in the prior Florida equity suit. The ground of decision was that the service of process by publication was insufficient to confer jurisdiction. The opinion of *Mr. Justice Brandeis* (258 U.S. 112) concludes:

> ". . . Such certificates are merely promissory notes of the Jasper bank, payable like unsecured notes of individuals, out of general assets. Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. There is not even an allegation either that the transfer to the First National Bank (of Rome) had been made after maturity of the certificates or that the endorsee took them with notice of the fraud.
>
> "As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder."

The decision, in gist, was this: The Georgia bank, named as defendant in the Florida equity suit, had no property in Florida affording the basis for service of summons by publication, Hence, as to the Georgia bank, the decrees in the Florida equity suit were void for lack of jurisdiction and did not constitute *res judicata.*

Here, no contention is made by the Ancillary Receiver or by the intervenor that the deposit in the North Carolina National Bank constitutes property in this State owned by the Colorado banks affording a basis for service of process upon them by publication.

Appellants are not parties or named as parties to this action. The order from which they attempt to appeal declares they have not been served with process and disavows any attempt to exercise jurisdiction over them. In short, the exceptions and assignments of error on this purported appeal are presented by strangers to the action. Appellants' appearance was and is "specially, solely and only for the purpose of challenging the jurisdiction of the Court," notwithstanding the court has not asserted or attempted to assert jurisdiction over them. Their position is anomalous and untenable.

In the superior court, appellants filed no affidavit, made no motion and asserted no rights. They presented nothing that invoked a ruling by the court as to them. Their counsel, orally, simply challenged or questioned the jurisdiction of the court.

Unless and until appellants are made or voluntarily become parties to this action, they are not bound by orders and decrees entered herein. If appellants are entitled to recover on said certificates of deposit from the North Carolina National Bank, adequate procedural remedies are available. As of now, nothing appears to show they are "aggrieved" by Judge Bickett's order within the meaning of G.S. 1-271. Hence, appellants' purported appeal is dismissed.

It is noted: The North Carolina National Bank did not appeal from Judge Bickett's order. However, no order has been made purporting to adjudicate the ownership of the $125,000.00 represented by said certificates of deposit or requiring the North Carolina National Bank to make payment thereof, in whole or in part, to anybody.

Appeal dismissed.

CASSIE V. LEE SMITH v. CHARLIE H. SMITH, PEOPLES SAVINGS & LOAN ASSOCIATION OF WILMINGTON, N. C., AND FIRST-CITIZENS BANK & TRUST CO. OF CLINTON, N. C.

(Filed 16 June, 1961.)

1. Banks and Banking § 4—

Money deposited in a bank to the joint credit of a husband and wife, nothing else appearing, belongs one-half to the husband and one-half to the wife, but when it is made to appear that the funds deposited were the sole property of the husband, such deposit remains his property with mere agency to the wife to withdraw funds from the account.

2. Same: Gifts § 1—

The fact that a husband deposited funds belonging solely to himself in a joint account with his wife does not constitute a gift *inter vivos* to the wife of any part of the funds, his act in so doing being alone insufficient to evidence an intent to make her a gift, and the husband not having divested himself of dominion over the funds.

3. Husband and Wife § 15—

There is no community property law in North Carolina, and income and profit from a farm owned by the husband, or even a farm owned by husband and wife by the entireties, are his separate and sole property.

4. Banks and Banking § 4: Building and Loan Association § 1—

While a husband by contract may vest in his wife ownership or a property right in all or any portion of a joint bank account, including the right of survivorship, provision of a joint deposit in a building and loan association stipulating that the deposit "shall be for the use and benefit of us both," is insufficient to create a trust in her favor or to constitute her the owner of any part of the funds belonging solely to him at the time the deposit was made. The right of survivorship is not involved and G.S. 41-2.1 is not applicable.

APPEAL by plaintiff from *Williams, J.*, November 1960 Term of BLADEN.

Action by plaintiff wife to recover one-half of amount deposited in two savings accounts in the name of defendant husband *or* plaintiff wife.

The cause was tried, without the intervention of a jury, upon the admissions in the pleadings and facts stipulated by the parties.

The admissions and stipulations are:

"That the plaintiff, Cassie V. Lee Smith, and the defendant Charlie H. Smith were married in 1920, and that they lived together as husband and wife from the time of their marriage up until January, 1960, on a farm in Bladen County, containing a total of about 51 acres, owned by defendant Charlie H. Smith prior to marriage."

In January 1960 plaintiff and defendant separated and "are now living separate and apart from each other."

On 6 April 1955 the sum of $5,000 was deposited in Peoples Savings and Loan Association, Wilmington, N. C., and at the time of this deposit plaintiff and defendant signed and left with the Association the following agreement:

NO. 7170

Smith	Charlie H. or Mrs. Cassie Smith
Last Name	First Name.

AGREEMENT CONCERNING STOCK IN PEOPLES SAVINGS AND LOAN ASSOCIATION.

Wilmington, N. C. 4-6-55

Each and both of the undersigned hereby agree that the shares in the Peoples Savings and Loan Association issued to or standing in the names of the two persons whose names are signed below, either now or hereafter, are and shall be for the use and benefit of each and both of us, and the said Association is hereby authorized and empowered to pay from time to time any part or all of the withdrawal value of said shares to either of the undersigned upon receipts signed by only one of us, or upon endorsement of any certificate for any part or all of said shares by either of us.

It is further stipulated and agreed between the undersigned that upon the death of either of us the survivor shall be entitled to and be the sole owner of Shares in said Association then standing in the names of both of us, and the said Association is authorized and empowered upon the death of either of us to transfer said Shares absolutely to the survivor, or pay to the survivor the withdrawal value of any or all such Shares.

There is deposited in a savings account in the First-Citizens Bank and Trust Company, Clinton, N. C., the sum of $1,000 to the credit of "Charles H. Smith or Cassie Smith."

At the commencement of the action the deposit books for the accounts were in the possession of plaintiff. The Savings and Loan Association deposit book has been deposited with the Clerk of the Superior Court of Bladen County pending the termination of the action.

"That the funds in question were various incomes derived from the aforesaid farm; that as to the $5,000.00 deposited in Peoples Savings and Loan Association which was made on April 6, 1955, said funds

came from a savings account in the name of the defendant Charlie H. Smith on the 5th day of April, 1955 in the Scottish Bank of Garland, said account having been opened in the amount of $5500.00 on the 26th day of January 1955, and that funds in said Scottish Bank Savings Account came from a savings account in the joint name of Mr. or Mrs. Charlie H. Smith in the Scottish Bank at Garland, N. C. which was originally opened with a deposit of $2,000.00 in September, 1945, $2,000.00 in September, 1947, and $1,000.00 in October, 1948; and from another savings deposit in the Scottish Bank in the name of Charlie H. Smith or Virgie Smith in the sum of $262.74, both accounts being closed on the 25th day of January, 1955, and proceeds therefrom in the sum of $5,500.00, deposited in the name of Charlie H. Smith on January 26, 1955 in said Scottish Bank at Garland; that as to the deposit in the name of the defendant Charlie H. Smith and plaintiff Cassie V. Smith in First-Citizens Bank and Trust Company at Clinton, N. C. said deposit was made in the original sum of $1,620.57 on the 4th day of January 1955, and that withdrawals from this account were made by the defendant Charlie H. Smith as shown by the savings account book introduced in evidence, and that there is now a balance due in said account in the sum of $1,000.00, plus accrued interest."

The court entered judgment declaring defendant the owner and entitled to the immediate possession of all the funds, including accrued interest, in both accounts, and declaring that the Savings and Loan Association and the Bank "occupy the position of stake-holders."

Plaintiff appeals.

Clark, Clark & Grady for plaintiff, appellant.
Hester and Hester for defendant, appellee.

MOORE, J. Plaintiff excepts to the signing of the judgment and contends that, upon the facts admitted and stipulated, she is entitled to one-half of the deposits in question.

The deposit in the First-Citizens Bank and Trust Company is in the name of "Charles H. Smith or Cassie Smith."

Under the laws in this jurisdiction, nothing else appearing, money in the bank to the joint credit of husband and wife belongs one-half to the husband and one-half to the wife. *Bowling v. Bowling,* 243 N.C. 515, 519, 91 S.E. 2d 176; *Smith v. Smith,* 190 N.C. 764, 767, 130 S.E. 614; *Turlington v. Lucas,* 186 N.C. 283, 290, 119 S.E. 366.

But in the absence of evidence to the contrary the person making a deposit in a bank is deemed to be the owner of the fund. If a husband deposits his own money in a bank and the money is entered

upon the records of the bank in the name of the husband or his wife, it is still the property of the husband, nothing else appearing. *Hall v. Hall,* 235 N.C. 711, 714, 71 S.E. 2d 471; *Nannie v. Pollard,* 205 N.C. 362, 171 S.E. 341; *Jones v. Fullbright,* 197 N.C. 274, 277, 148 S.E. 229; *Thomas v. Houston,* 181 N.C. 91, 93, 106 S.E. 466.

Such deposit does not constitute a gift to the wife. To make a gift *inter vivos* there must be an intention to give coupled with a delivery of, and loss of dominion over, the property given, on the part of the donor. Donor must divest himself of all right and title to, and control of, the gift. Such gift cannot be made to take place in the future. The transaction must show a completely executed transfer to the donee of the present right to the property and the possession. *Buffaloe v. Barnes,* 226 N.C. 313, 318, 38 S.E. 2d 222; *Nannie v. Pollard, supra; Thomas v. Houston, supra.* When a husband deposits his money in the name of husband or wife, this fact taken alone does not necessarily indicate an intent to make a gift to the wife. It may, indeed, be only for the convenience of the husband. Furthermore, he does not thereby divest himself of dominion over the fund. He may withdraw any or all of it at any time. "The delivery of the deposit book for such an account is not sufficient to meet the formal requirements for a gift." 14 N.C. Law Rev. 133, and cases there cited (N. 23).

When a husband deposits his money in this manner he merely constitutes the wife his agent with authority to withdraw funds from the account, and the agency is terminated by death of the husband. (See cases cited in the second paragraph next above.) The agency may be terminated during the lives of husband and wife by withdrawal of the fund and closing the account by the husband, notice to the agent and the bank, or by other methods recognized by law for termination of the principal and agent relation. Annotation, 161 A.L.R., Joint Deposit — Powers as to, pp. 71-95; Zollmann Banks and Banking (Perm. Ed.), Vol. 5, s. 3231, p. 250; *Cashman v. Mason,* 72 F. Supp. 487, 491.

In the instant case defendant husband was the owner of a 51-acre farm at the time he married plaintiff. The funds in the deposits in question "were various incomes derived from the aforesaid farm." The only withdrawals from the account in the First-Citizens Bank and Trust Company were by the husband.

The income and profits from a farm owned by the husband are his sole and separate property. The husband has the duty to provide necessaries for his wife and must support and maintain her in accordance with his means and station in life. North Carolina has no community property law. The domestic services of a wife, while living with her husband, are presumed to be gratuitous, and the performance of work and labor beyond the scope of her usual household and marital

duties, in the absence of a special contract, is also presumed to be gratuitous. *Sprinkle v. Ponder,* 233 N.C. 312, 318, 64 S.E. 2d 171. Furthermore, where husband and wife own land by the entireties, the husband has the right to the full control of such property and to the income therefrom to the exclusion of the wife. *Porter v. Bank,* 251 N.C. 573, 577, 111 S.E. 2d 904.

Here, defendant owned the farm and the profits from the farm were his separate property. The facts stipulated and admitted do not disclose which of the parties actually made the deposit in the bank. Even so, it was stipulated that the fund so deposited was derived from the operation of the farm. This being so, it is clear that the deposit is the property of defendant husband, and the entry "Charles H. Smith or Cassie Smith" did not constitute a gift to plaintiff wife but merely made her an agent of the defendant with authority to withdraw funds from the account so long as the agency remained in effect.

At the time the deposit was made in the Peoples Savings and Loan Association plaintiff and defendant executed an agreement in writing with respect thereto. It is presumed that the agreement was in accordance with a form required or furnished by the Association and it appears that it was primarily for the protection of the Association.

By contract and agreement between husband and wife, either oral or written, a husband may vest in the wife ownership or a property right in all or a portion of a joint bank account, including the right of survivorship, at the time the deposit is made. *Wilson County v. Wooten,* 251 N.C. 667, 669, 111 S.E. 2d 875; *Bowling v. Bowling, supra; Jones v. Waldroup,* 217 N.C. 178, 7 S.E. 2d 366. See also *Comastri v. Burke,* 290 P. 2d 663, 666 (Cal. 1955); *Arsenault v. Arsenault,* 148 N.E. 2d 662, 665 (Mass. 1958). In some situations North Carolina recognizes third party contracts. *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566. But this Court has not recognized transactions between bank and depositor to a joint account as contracts enforceable in favor of the named alternate. *Jones v. Waldroup, supra;* 35 N.C. Law Rev. 80, 81.

The case at bar does not involve survivorship rights. Husband and wife are both living.

As to the Association deposit, the inquiry is whether or not the agreement executed by plaintiff and defendant at the time the deposit was made was sufficient to vest in the plaintiff wife any ownership of, or property right in, the funds so deposited. If not, this deposit is subject to the rules of law applicable to the bank deposit already discussed, and the husband is the owner and entitled to the possession of the fund.

We have carefully examined the terms of the agreement and we find nothing to indicate that the defendant recognized the ownership

and title of the plaintiff in and to the fund or any part thereof, or that he undertook to vest in her any title or ownership. It merely says that the deposit "shall be for the use and benefit of us both." It does not create a trust; the facts stipulated and agreed are insufficient to show an intent to create a trust. *Walker v. Welsh,* 11 N.E. 727 (Mass. 1887). The words "use and benefit" when construed in context mean nothing more than the right to withdraw and that the manner of use after withdrawal shall not be the basis of an action against the Association. The agreement in the *Wilson County* case used the words ". . . all funds now, or hereafter, deposited . . . shall be our joint property and owned by us . . . ."; and in the *Bowling* case the words "in the joint names of the undersigned as joint tenants . . . ." The agreement signed by plaintiff and defendant does not conform to the suggested form of agreement in G.S. 41-2.1, and this statute has no application. In any event the agreement was executed and the deposit made prior to the passage of this statute.

Under the law in this jurisdiction, defendant is the owner and entitled to the possession of the deposits in question.

The judgment below is

Affirmed.

GRACE B. HEADEN AND ROBERT E. BENCINI, EXECUTORS OF THE ESTATE OF NANCY E. BENCINI, AND AS INDIVIDUALS v. BETTY BENCINI JACKSON AND HAMILTON B. TATUM.

(Filed 16 June, 1961.)

Adoption § 6: Wills §§ 47, 65—

Where the adoptive parent is named a legatee in the will of her mother but dies prior to the mother's death, the adoptive child takes the personalty bequeathed his adoptive mother under G.S. 31-42.1, since under the provisions of G.S. 48-23 the adopted child has the same standing as though he had been born to his adoptive parent.

WINBORNE, C.J., dissenting.

PARKER, J., joins in dissent.

APPEAL by defendant Hamilton B. Tatum from *Olive, J.,* January 1961 Civil Term, GUILFORD Superior Court — Greensboro Division.

Civil action by the executors to have the court determine, by de-

claratory judgment, the rights of Hamilton B. Tatum under the will of Nancy E. Bencini. The pertinent facts are stipulated. In substance they are: Nancy E. Bencini executed her will on October 22, 1948. She died on March 6, 1960. The estate consists entirely of personalty. The will did not contain a residuary clause. Item First disposed of the entire estate: "I give, devise and bequeath all of my property, both real and personal, wherever situate, to my four children, Robert E. Bencini, Robah B. Tatum, Grace B. Headen, Margaret B. Walker, and my granddaughter, Betty Bencini Jackson (the daughter of my deceased son, R. Banks Bencini) share and share alike."

Robah B. Tatum, daughter of testatrix, died on June 26, 1959. In 1924 she adopted for life the defendant, Hamilton B. Tatum. He survives as her only child. Among the facts stipulated are the following:

"7. From the date of the adoption of Hamilton B. Tatum by Robah B. Tatum in 1924, and until her death, the said Nancy E. Bencini, testatrix, treated the said Hamilton B. Tatum in the same manner and with the same apparent regard and affection as her natural grandchildren."

The court entered judgment in pertinent part:

> "1. The Court finds that the defendant Hamilton B. Tatum, although lawfully adopted for life by the legatee, Robah B. Tatum, and did survive the testator, was not the issue of the legatee under the provisions of G.S. 31-42.1.
>
> "2. That the legacy to Robah B. Tatum lapsed and the said Hamilton B. Tatum does not share in the estate of Nancy E. Bencini."

The appellant excepted to the conclusions and the judgment, and appealed.

Douglas, Ravenel, Josey & Hardy, for plaintiffs, appellees.
Morgan, Byerly, Post & Van Anda, for defendant Tatum, appellant.

HIGGINS, J. The testatrix, Nancy E. Bencini, executed her will in 1948. She gave her daughter, Robah B. Tatum, one fifth of her estate which consisted entirely of personalty. The will did not contain a residuary clause. Robah B. Tatum died in June, 1959, leaving Hamilton B. Tatum, the appellant, whom she adopted in 1924 as her only child. The testatrix died in March, 1960. Does the legacy given to Robah B. Tatum go to the defendant, Hamilton B. Tatum, or does it lapse? The court held that the legacy lapsed and the adopted child

does not share in the estate. The question here involves the property rights of an adopted child.

Three of our cases give the step-by-step history of an adopted child's property rights as they have been changed from time to time by legislative enactments: *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836, decided June 9, 1950; *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632, decided April 29, 1953; and *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510, decided May 21, 1958. The *Bennett* case was decided since the change in the adoption laws made by Chapter 813, Session Laws of 1955, now codified, in part, as G.S. 48-23, 1959 Cumulative Supplement. The Act became effective July 1, 1955. Among other things, it provided: The adopted child shall have the right "to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes of descent and distribution. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth." The Act further provides that after the adoption the natural parents cannot take from the adopted child, who likewise cannot take from the natural parents, either under the laws of descent or distribution.

The faculty of the University of North Carolina Law School and the student editors reviewed and summarized the legal effect of Chapter 813, Session Laws of 1955:

> "Here is a simple and clear rule which eliminates all doubt as to the standing and rights of an adopted child. For all legal purposes he is in the same position as if he had been born to his adoptive parents at the time of the adoption. There is no need for any learned and complicated interpretations. Whatever the problem is concerning an adopted child, his standing and his legal rights can be measured by this clear test: 'What would his standing and his rights be if he had been born to his adoptive parents at the time of the adoption?' If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose."

Chapter 813, Session Laws of 1955 is made retroactive to obviate the objection raised in *Wilson v. Anderson, supra.* "The provisions of this Act shall apply to adoptions, whether granted before or after the effective date of the Act, and Section 9 declared the effective date 1 July 1955. Here then is explicit language by the Legislature that the right of an adopted child to take property as a result of intestacy occurring subsequent to 1 July 1955, should be governed and controlled by the statutes of descent and distribution." *Bennett v. Cain, supra.*

The appellees have argued that Hamilton B. Tatum is not issue of the legatee Robah B. Tatum and, therefore, the legacy lapsed under G.S. 31-42.1. Even if it be conceded the adoption statute does not repeal all inconsistent provisions of law, as it provides, and does not in effect constitute the adopted child issue, (and we make no such concession) nevertheless, his rights to claim the legacy and prevent its lapse is protected by the alternative provision of the section. . . . *"or would have been a distributee of the estate of the testator if the legatee had survived the testator and there had been no will."* (emphasis added)

Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child, was swept away by the repealing clause in Chapter 813, Session Laws of 1955. In language too clear for misunderstanding, the Legislature has provided that an adopted child from the date of its adoption shall have the same property rights as a natural born child from the date of its birth. In order to implement this legislative command, we must hold that Hamilton B. Tatum is entitled to receive the share given to his adoptive mother in the will of Nancy E. Bencini. Nothing in the will indicates any intent to the contrary.

The judgment of the Superior Court of Guilford County is Reversed.

WINBORNE, C.J., dissenting. I am unable to agree with the majority opinion. The single question presented for decision on this appeal is whether or not an adopted child comes within the provisions of the North Carolina anti-lapse statute, 31-42.1, so that a legacy of personal property to an adoptive parent who predeceases the testator will pass to the adopted child instead of lapsing.

G.S. 31-42.1 provides as follows: "Unless a contrary intent is indicated by the will, where a legacy of any interest in personal property not terminable at or before the death of the legatee is given to a legatee, who predeceases the testator, such legacy does not lapse but passes to such issue of the legatee as survive the testator in all cases

where the legatee is issue of the testator or would have been a distributee of the testator if the legatee had survived the testator and there had been no will."

This section of the General Statutes of North Carolina is in contravention of the common law, and therefore must be strictly construed. *Smith v. Smith,* 58 N.C. 305; *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510. Indeed, this Court in *Farnell v. Dongan,* 207 N.C. 611, 178 S.E. 77, said: "The statute is not ambiguous. The intention of the General Assembly in its enactment is expressed in language which leaves no room for judicial construction."

Is the defendant appellant "issue of the legatee" within the meaning of the anti-lapse statute? This Court has held that the word "issue" does not include adopted children, but is limited to bodily issue. *Bradford v. Johnson,* 237 N.C. 572, 75 S.E. 2d 632. In that case *Denny, J.,* speaking for the Court, said: "The natural and ordinary meaning of the word 'issue' is understood to include only a child or children born of the marriage of the ancestor or their descendants * * * ."

Therefore, this definition of "issue" being the natural and ordinary meaning of the word, it must be presumed that the General Assembly used the word in its natural and ordinary sense. Indeed, as shown by *Wilson v. Anderson,* 232 N.C. 212, 59 S.E. 2d 836; *Bradford v. Johnson, supra;* and *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510, legislation affecting the rights of the adopted child has been enacted piecemeal by the legislature and so interpreted by this Court.

It must also be noted that when the General Assembly re-wrote the entire law of descent and distribution in 1959, it was careful to clarify those statutes concerning the adopted child. But no change was made in the language of the anti-lapse statute.

In fine, there is nothing to indicate that the General Assembly intended to change the natural and ordinary meaning of the word as set out in the *Bradford* case, *supra.*

The majority apparently bases its decision on the language of G.S. 48-23. However, in so doing, clear language of this Court on this matter is entirely overlooked. In *Bradford v. Johnson, supra,* it is said: "Regardless of any provisions that may be contained in an adoption law with respect to the parent and child relationship, or the right of an adopted child to take by, through, and from its adoptive parents, the adoption of a child under such law does not make such adopted child a lawfully begotten heir of the bodies of the adoptive parents." See also *Barton v. Campbell,* 245 N.C. 395, 95 S.E. 2d 914.

Furthermore, the provision of G.S. 31-42.1 set out in the majority opinion as an "alternative provision" has no applicability. This clause, "or would have been a distributee of the estate of the testator if the

legatee had survived the testator and there had been no will" merely defines who the legatee is with respect to the testator and under no circumstances upon the facts of the present case can be interpreted to define who is to take under the anti-lapse statute.

Therefore, the conclusion is that the word "issue" as used in G.S. 31-42.1 does not include an adopted child. "Whether this distinction should be abandoned in the law of this State, as having no sound basis under modern social and economic conditions, is a matter for the General Assembly, and not this Court, to determine." *Farnell v. Dongan, supra.*

I vote to affirm.

PARKER, J., joins in dissent.

AMERICAN BRIDGE DIVISION UNITED STATES STEEL CORPORATION, PLAINTIFF (AND READY-MIXED CONCRETE OF DUNN, INC., ADDITIONAL PLAINTIFF BY WAY OF STATUTORY JOINDER AND INTERVENTION) v. E. P. BRINKLEY AND UNITED STATES CASUALTY COMPANY, DEFENDANTS.

(Filed 16 June, 1961.)

1. Principal and Surety § 8—

Public policy prohibits liens for labor or materials used or furnished on contracts for public construction, but such laborers and materialmen are given the substantial equivalent in the requirement of bonds from the contractors for such work, G.S. 44-14 and G.S. 136-28, and these statutes provide how the laborer or materialman may enforce his rights.

2. Same—

A laborer or materialman for public construction must file a statement of his claim with the contractor and the surety within six months from the completion of the project, G.S. 136-28, and, if a creditor institutes suit on the bond, he must notify all other claimants by publishing a notice accurately informing them how they may proceed, G.S. 44-14, and such other claimants may intervene in such action at any time within six months of the institution of the action.

3. Same—

Where, in a creditor's action against the contractor and the surety on his bond to recover for labor and materials furnished and used in public construction, the notice of the pendency of the suit erroneously states the time limit for intervention by the other claimants, such notice does not meet the requirements of the statute, G.S. 44-14, and a claimant who has given notice of his claim to the contractor and the surety

within six months of the completion of the contract may not be precluded from intervening and joining in the recovery against the bond because of his failure to intervene within six months from the institution of the suit, the notice being defective.

APPEAL by Ready-Mixed Concrete of Dunn, Inc. from *Hobgood, J.*, September 26, 1960 Civil Term of JOHNSTON.

The facts determinative of this appeal were stipulated by the parties. Summarized they are:

Defendant Brinkley contracted with State Highway Commission for the construction of a road in Johnston County designated as Project 2337. Brinkley as principal and United States Casualty Company as surety executed a bond payable to Highway Commission in the sum of $689,510, conditioned that Brinkley would perform the work as contracted for and would "well and truly pay all and every person furnishing material or performing labor in and about the construction of said project all and every sum or sums of money due him, them, or any of them, for all such labor and materials for which the Contractor is liable."

The work contracted for was completed 13 August 1958. On 15 December 1958 plaintiff instituted this action to recover for materials furnished Brinkley for use in the construction of the road. A notice dated 19 December 1958, signed by plaintiff, was published in a newspaper in Johnston County in the issues of 19 and 26 December 1958 and 2 and 9 January 1959, notifying materialmen and laborers who furnished materials and performed services for Brinkley in connection with the construction of Project 2337 of the institution of this action to recover the amount owing plaintiff for materials used in the construction of the road. The concluding phrase of the notice reads: ". . . any and all materialmen and laborers who have furnished materials or labor on said project have six months from August 13, 1958, in which to intervene in this action for the recovery of any sum due for labor or materials by E. P. Brinkley and his surety, United States Casualty Company, in connection with Project 2337."

Upon the completion of the contract Brinkley was indebted to applicant, Ready-Mixed Concrete of Dunn, Inc., in the sum of $20,019.45. On 10 October 1958 appellant filed with Brinkley and defendant surety company a statement of its claim for the materials furnished Brinkley.

On 12 January 1959 a partial payment was made on the claim of appellant, leaving a balance due on that date of $17,299.23. Three others who furnished materials to Brinkley intervened herein for the purpose of asserting their claims under the provisions of the bond. These interventions were made 29 December 1958, 12 March 1959,

and 15 April 1960. Appellant sought to intervene and assert its claim on 24 July 1959.

Defendants, to defeat appellant's right to recover, pleaded its failure to file a complaint and intervene within six months from 15 December 1958, the date this action was begun.

The court, being of the opinion that the failure to intervene within six months from the institution of the action did not affect appellant's right to recover from Brinkley, entered judgment against him for the amount owing, but, being of the opinion that the failure to intervene within six months from the commencement of the action defeated any claim which appellant could have asserted against defendant surety by intervening within six months, adjudged that appellant take nothing as to it. Appellant excepted and appealed from that portion of the judgment denying it the right to proceed against the surety on the bond.

Stanley Winborne, Vaughn S. Winborne, and Samuel Pretlow Winborne for appellant.

Smith, Leach, Anderson & Dorsett for appellee.

RODMAN, J. Our Constitution contains a mandate directing the General Assembly to enact legislation to give mechanics and laborers a lien on the subject matter of their labor. N. C. Constitution, Art. XIV, sec. 4. Public policy prohibits the acquisition of liens for labor or materials used or furnished in the construction of a public edifice or way. *Noland Co. v. Trustees,* 190 N.C. 250, 129 S.E. 577, and cases there cited.

The General Assembly has, by the enactment of G.S. 44-14 and G.S. 136-28, given to laborers and materialmen engaged in public construction a substantial equivalent to the lien given laborers and materialmen engaged in private construction. The surety on the bond is, for practical purposes, the substitute for the lien. *Lumber Co. v. Lawson,* 195 N.C. 840, 143 S.E. 847; *Mfg. Co. v. Blaylock,* 192 N.C. 407, 135 S.E. 136. Just as the statutes fix the manner of enforcing liens against private construction, the statutes dealing with surety bonds given for public construction provide how the laborer or materialman may enforce his rights. A civil action may be brought on the bond in the county in which the contract was performed. This action is in effect a creditor's action to determine the rights of all claimants to a fund to be provided by the surety not to exceed the penal sum of the bond. *Manufacturing Co. v. Hudson,* 200 N.C. 541, 157 S.E. 799; *Bond v. Cotton Mills,* 166 N.C. 20, 81 S.E. 936.

When, as here, the bond is given to assure payment of labor and

material entering into the construction of a State highway, the institution of the action must await the completion of the contract, and a beneficiary of the bond provisions who would not be barred from benefiting thereby must file a statement of his claim with the contractor and the surety within six months from the completion of the contract. G.S. 136-28.

When a claimant-beneficiary under this statutory provision brings his action, the procedure to be followed to enforce payment of a sum not to exceed the penal sum of the bond and distribution of this sum among claimants is that prescribed by G.S. 44-14.

A creditor's action is appropriate to fix priorities and the portion to which each creditor is entitled with respect to a fund claimed by several. All claimants to the fund are proper parties and should be before the court so that it may determine priorities, the sum of valid claims, and the percentage each claimant is entitled to receive if the fund is insufficient to pay all in full. *Fisher v. Worth,* 45 N.C. 63; McIntosh, N. C. P. & P., 2d ed., § 2475.

To prevent unreasonable delay in directing distribution of the fund, the subject of a creditor's action, courts have and exercise the power to fix a time within which creditors must present their claims in order to participate in any distribution ordered. Notice of this time limitation should be given all who might be claimants. The usual manner of giving notice is by publication in a newspaper selected so as to probably inform claimants of the time fixed.

In actions on bonds of the character here involved, the Legislature imposed the duty on the plaintiff of notifying claimants "of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action . . ." That duty is performed by publishing a notice accurately informing claimants how they may protect their rights. The statute further provides: "All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and not later." The time limit so fixed was, in our opinion, not intended to diminish the fund available to claimant or to relieve the surety of the obligation which it had been paid to discharge. That obligation could, by the terms of the statute, be discharged by paying the amount of the bond into court. The time limitation was intended merely to permit prompt distribution of the sum owing by the surety.

Notwithstanding notice to a creditor in the manner described by a court order and partial distribution of the fund among creditors who have filed within the time fixed, courts have permitted creditors who have not so filed to intervene and assert their claims against any

surplus. The language of Lord Eldon, quoted in *Glenn v. Bank,* 80 N.C. 97, is, we think, appropriate in interpreting legislative intent from the language used. He said: "Although the language of the decree, when an account of debts is directed, is that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to *prove his debt as long as there happens to be a residuary fund in Court or in the hands of an executor, and to pay him out of that* residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree." To like effect see *Hardware Co. v. Holt,* 173 N.C. 304, 92 S.E. 6.

We need not here determine whether the Legislature, having imposed a duty on claimants to file their claim with the surety, intended thereby to impose a duty on the surety to inform the court who are claimants and hence should be made parties.

It is, we think, manifest that the notice which was published by plaintiff as quoted in the statement of facts was not a compliance with and did not meet the requirements of G.S. 44-14. It contemplates notice which informs, not a notice which misinforms. Plaintiff's action was begun 15 December. By the express language of the statute the notice should have informed claimant that it might intervene at any time prior to 15 June 1959. To the contrary, the notice was that it might intervene within six months from 13 August 1958. It cut short by four months the time claimants had to intervene and participate in the distribution of the fund—penal sum of the bond. Manifestly the surety company, with knowledge of the claim which it failed to disclose to the court, cannot profit from the notice as published. *Bank v. Jordan,* 252 N.C. 419, 114 S.E. 2d 82; *Menzel v. Menzel,* 250 N.C. 649, 110 S.E. 2d 333; *Comrs. of Roxboro v. Bumpass,* 233 N.C. 190, 63 S.E. 2d 144; *Scott & Co. v. Jones,* 230 N.C. 74, 52 S.E. 2d 219; *Brett v. Davenport,* 151 N.C. 56, 65 S.E. 611; 72 C.J.S. 1102.

G.S. 1-108 is indicative of legislative policy not to bar claimants to a fund by service of process by publication when they may be accorded their just rights without injuriously affecting innocent parties.

By the terms of the statute, G.S. 136-28, the Highway Commission is entitled to priority in the monies to be paid by the surety company. After it has been paid, the balance should be paid to claimants who establish their claims. Presumably the bond provided ample monies to discharge all claims of the Highway Commission and laborers and materialmen now unpaid. If so, appellant is entitled to be paid the amount of its debt. If not, appellant is, since the notice was not suf-

ficient to meet statutory requirement, entitled to participate with other laborers and materialmen in such balance as may remain after discharging any claims of the Highway Commission.

Reversed.

CROWN CENTRAL PETROLEUM CORPORATION, A CORPORATION v. PAGE-MYERS OIL COMPANY, INC., A CORPORATION; FRANK ROGER PAGE, DORIS B. PAGE, JAMES D. MYERS AND WILLIE MAE C. MYERS.

(Filed 16 June, 1961.)

1. Trial § 10—

Where a defendant relies upon accord and satisfaction and testifies that he mailed plaintiff a letter, enclosing a check, stating that defendant was sending the check in full satisfaction of his obligation, and plaintiff's witness has testified that he had searched for the asserted letter but could not find it, a statement by the court upon tender by plaintiff of another witness to testify to the same import, that the court was "of the opinion that it had been sufficiently gone into" must be held prejudicial as intimating an opinion by the court that the letter had not been mailed.

2. Trial § 33—

Where the crux of defendant's defense is that he mailed a letter, enclosing a check, stating that the check was in full satisfaction of defendant's obligations to plaintiff, and that plaintiff had cashed the check, an instruction to the effect that if plaintiff received and acted upon the letter it would release the defendant must be held for error as failing to charge on the *prima facie* presumption that if the letter were mailed it was received by the addressee, and in failing to explain that the cashing of the check tendered upon condition would constitute "acting" upon the letter.

APPEAL by defendants Frank Roger Page and wife, Doris B. Page, from *Sink, J.*, at 17 October, 1960 Civil Term of MECKLENBURG.

Civil action to recover money allegedly due on account to Crown Central Petroleum Corporation, Inc.

Plaintiff, Crown Central Petroleum Corporation, hereinafter referred to as Crown, alleged in its complaint that between 8 January 1959, and 22 May 1959, it sold and delivered to the defendant corporation, Page-Myers Oil Company, hereinafter referred to as Oil Company, on account certain petroleum products, statement of which was attached to the complaint as Exhibit A. Plaintiff claims $15,483.24 as the amount due. Plaintiff further alleges and contends that each of

the individual defendants, Frank Roger Page, Doris B. Page, James D. Myers, and Willie Mae Myers, is jointly and severally liable to it on a written guaranty of payment to the full extent of $15,483.24. A copy of the guaranty of payment is attached to the complaint as Exhibit B.

Defendant Oil Company answered and denied generally the allegations of the complaint and, by way of a further answer and defense, alleges in substance that the plaintiff Crown agreed to take over the business of the Oil Company and assume its outstanding indebtedness in satisfaction of the indebtedness due Crown from the Oil Company. There is alleged also the further condition that individual defendant, James D. Myers, would represent Crown as an agent and that he would pay Crown $3,000 in full satisfaction of the account due plaintiff. There is no allegation, however, that James D. Myers paid the $3,000 or that he in fact acted as Crown's agent.

Defendant James D. Myers answers and generally pleads the allegations of the Oil Company, as set out above, and further alleges that Crown was to pay him one and one-half cents per gallon of all gasoline sold by Page-Myers in Forsyth County, North Carolina. He alleges that the amount due him under this agreement is $6,000, but that he is entitled to recover only $3,000 of this amount because of the $3,000 he had agreed to pay Crown with respect to the indebtedness of the Oil Company.

The individual defendants, Frank Roger Page and Doris B. Page, answered jointly. As a first further answer and defense they allege that the individual defendant, Doris B. Page, executed the document of guaranty as an accommodation to Frank Roger Page and that she was not assuming any liability independent of her husband, and that these facts were known by the parties to the guaranty of payment. They further allege that Crown was notified of defendant Frank Roger Page's withdrawal from the Oil Company and that subsequently thereto Crown and the Oil Company entered into a new credit arrangement which constituted a novation and giving rise to an estoppel.

For a second further answer and defense the appellants allege that the defendant, Frank Roger Page, announced to Crown's regional officer that he was getting out of the Oil Company, and that on 10 May 1958, he wrote Crown at its Charlotte office and enclosed his personal check in the sum of $479.67 in full payment of all bills through 1 May 1958. They further allege that under the terms of this letter Crown was advised that Frank Roger Page "is no longer responsible for any bills to Crown Petroleum Corporation." They allege that in accepting the check for $479.67 and in failing to advise either of the appellants, Frank Roger Page and Doris B. Page, of its non-

acceptance of the notice terminating their liability that they were no longer bound under the above mentioned guaranty of payment. They specifically plead estoppel and accord and satisfaction.

For a third further answer and defense they plead the allegations contained in the Oil Company's answer as set out hereinabove, specifically pleading accord and satisfaction and novation.

At the conclusion of all the evidence the counterclaim of the defendant James D. Myers was nonsuited. Thereupon, the following issues were submitted to the jury and answered in the plaintiff's favor as against the Oil Company, and the jury also found that each of the individual defendants was jointly and severally liable to the plaintiff for the amount owed by the defendant Oil Company on their guaranty of payment:

"1. What amount, if any, is the plaintiff entitled to recover of the defendant Page-Myers Oil Company, Incorporated? Answer: $8,000.00.

"2. Which individual defendants, if any, are liable jointly and severally to the plaintiff for the amount set forth in 1 above? Answer: Frank Roger Page, Doris B. Page, James D. Myers, Willie Mae C. Myers.

"3. Which individual defendants, if any, are not liable jointly and severally to the plaintiff for the amount set forth in 1 above? Answer: _____."

To judgment entered in accordance therewith, the plaintiff and each of the defendants give notice of appeal. Only the defendants Frank Roger Page and Doris B. Page perfected their appeal, and assign error.

Fleming, Robinson & Bradshaw for plaintiff appellee.
Clyde C. Randolph, Jr., for defendant appellants.

WINBORNE, C.J. The first assignment of error relates to the following exchange which occurred after the plaintiff and all the defendants had rested. The plaintiff requested permission to offer one John J. Burke as a rebuttal witness, which was permitted by the trial judge in his discretion. At the conclusion of testimony by Burke the following transpired:

"Mr. Fleming (in the presence of the jury): 'Your Honor, we purpose to call Mr. Duckworth but his testimony would be largely cumulative.' "

"Mr. Randolph: 'Object to that.'

"The Court: 'Overruled— Exception.'

"Mr. Fleming: 'I was going to say your Honor has permitted us to have one witness, and since Mr. Randolph takes that attitude, whether your Honor would permit us also to have Mr. Duckworth testify, but

I would have to admit to your Honor that his testimony would be largely cumulative of what Mr. Burke has testified to.'

"The Court: 'The Court is of the opinion that it has been sufficiently gone into to repeat the testimony. Overruled. Exception.' "

The defendant Frank Roger Page contends that the statement "The court is of the opinion that it has been sufficiently gone into to repeat the testimony," amounts to prejudicial error.

When considered in the light of the evidence produced at the trial of case on appeal we are of the opinion that there is error and that the defendants are entitled to a new trial.

The male defendant Page admitted the execution of the guaranty contract. His defense was confession and avoidance, and the burden was upon him to establish it. *Jones v. Ins. Co.,* 254 N.C. 407, 119 S.E. 2d 215.

After defendant Page offered his evidence Crown would have the right to offer evidence to controvert the defendants' claim that the guaranty had been terminated.

The evidence in the record shows that when the guaranty contract was executed, Frank Roger Page was a stockholder and officer in the defendant corporation, Page-Myers Oil Company. Invoices were regularly mailed to his address. Early in May 1958 a conference was held in Winston Salem with respect to the continued operation of the corporate defendant. There is evidence that a price war existed and that Page demanded relief. Present at this meeting were Mr. Duckworth, chief district officer of Crown, his assistant, Mr. Burke, and his principal salesman, Mr. Felton. In this connection defendant Page testified: "So it was agreed upon with Duckworth, Mr. Burke and Archie Felton that, in order to maintain what we had already established in the territory, they would let Mr. Myers take full charge of it * * * Mr. Myers then bought out my interest for that price and I was out of the distributing business with Crown and with Page-Myers Oil Company."

There is evidence that following the conference defendant Page wrote a letter to Crown enclosing his check for $479.69 and containing the statement that he was "no longer responsible for any bills to Crown Central Petroleum Corporation." The letter also contained directions to mail subsequent invoices to "Page-Myers Oil Company, Route #8, Lexington, North Carolina." It is conceded by all parties that Crown got and cashed the check. It is likewise conceded that invoices were thereafter mailed as testified to by Mrs. Page.

To repel defendant Page's assertion of cancellation of the guaranty contract the plaintiff Crown put the assistant district manager, Burke, on the witness stand. He testified that he had searched for the letter

Page claimed to have written but did not find it. However, he does not deny that he knew that Page terminated his relationship with Page-Myers Oil Company in May. Nor does he deny that the conference was had. He says: "No, I don't definitely deny that the statement was made. I can't be positive myself." He concludes his testimony by saying that he is at a complete loss to explain why the company changed the mailing address.

Thereafter, counsel for the plaintiff, speaking with respect to what Duckworth, the district manager, would testify to, said: "I would have to admit to your Honor that his testimony would be largely cumulative to what Mr. Burke has testified to."

What was it Burke had testified to? That he did not know why they had changed the address, or that he did not remember the details of the conference in Winston Salem in May to which defendant Page had testified, or that he could not find the letter?

Then followed the court's statement: "The court is of the opinion that it has been sufficiently gone into to repeat the testimony." Could not the jury in this situation have understood the judge to imply that Burke had made a thorough and careful search for the defendant Page's letter and failing to find such letter, Page had simply not told the truth when he said he wrote and mailed the letter? Could not the jury have understood the court to mean that Page was not telling the truth when he testified that he had agreed with Duckworth to terminate his relationship with Crown at the Winston Salem conference?

Therefore, in the light of the foregoing evidence, we are constrained to hold that the trial court intimated an opinion as to the weight and sufficiency of the evidence in this case in contravention of G.S. 1-180.

Furthermore the portion of the court's charge: "In other words his responsibility and as an owner of stock are totally disassociated conditions, and his guarantee was as much his liability whether he owned stock or whether he did not, so long as he did not comply with his obligation to the time of this letter. If he had done so, and you find from this evidence that in his letter referred to heretofore, they acted upon it, it would release him," is vague and fails to declare and explain the law as required by G.S. 1-180. The court should have also told the jury that if the letter was written and mailed as testified to by Mrs. Page, there is a *prima facie* presumption that it was received. *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074; *White v. Ins. Co.,* 226 N.C. 119, 36 S.E. 2d 923.

Furthermore, the court erred in charging that if Crown received and acted upon the letter it would release Page. The jury could have gotten the erroneous impression that "acting upon" the letter meant

cashing the check and ignoring the condition contained in the letter.

For reasons stated the defendants are entitled to a new trial.

New trial.

FLORENCE R. WESTMORELAND v. WILLIAM HAROLD GREGORY AND EUGENE ROBERT GREGORY.

(Filed 16 June, 1961.)

1. Automobiles § 41b—

Evidence tending to show that defendant driver had drunk some whiskey and beer and was driving in excess of the legal speed limit on the wrong side of the road, when he lost control of the car on a curve so that the car ran off the road and overturned to the injury of plaintiff passenger, *is held* sufficient to be submitted to the jury on the issue of defendant driver's negligence.

2. Automobiles § 55—

Conflicting evidence relating to defendant owner's liability for the driving of his nephew under the family purpose doctrine held to raise the issue for the determination of the jury.

3. Automobiles § 49—

Conflicting evidence as to whether plaintiff passenger was guilty of contributory negligence in failing to warn defendant driver of apparent danger and in failing to remonstrate with him in regard to his excessive speed, and in distracting his attention by kissing him while he was attempting to negotiate a curve, *is held* to raise the issue of plaintiff's contributory negligence for the determination of the jury.

4. Negligence § 28: Trial § 33—

A charge which reviews the respective contentions of the parties in regard to the evidence of contributory negligence, defines contributory negligence in general terms, but fails to instruct the jury as to what facts in evidence would constitute the basis for an affirmative finding upon the issue, must be held prejudicial in failing to apply the general law to the facts in evidence.

5. Same—

Where defendant introduces evidence tending to support his plea of contributory negligence on the part of plaintiff, a passenger in defendant's car, the failure of the court to charge the jury as to the duty imposed by law upon a guest passenger must be held for prejudicial error.

6. Trial § 33—

The trial court is required to relate and apply the law to the variant factual situations presented by the evidence, and, even in the absence of a request for instructions, must charge the law on all the substantial features of the case arising on the evidence. G.S. 1-180.

WESTMORELAND *v.* GREGORY.

APPEAL by defendants from *Hooks, Special Judge,* September, 1960, Civil Term, of HARNETT.

Plaintiff's action is to recover damages for personal injuries she received April 30, 1959, 3:30-4:00 p.m., while a passenger in a 1957 four-door Ford automobile owned by Eugene Robert Gregory and operated by William Harold Gregory. While proceeding towards Lillington on McDougald Road, a rural paved road, the car ran off the road and overturned. This occurred some three miles west of Lillington.

Plaintiff alleged the mishap was proximately caused by the negligence of William Harold Gregory, hereafter referred to as "Harold Gregory," in that he lost control while attempting "to round" a curve while driving at an excessive and unlawful speed and without keeping a proper lookout. She alleged Eugene Robert Gregory, hereafter referred to as "Buddy Gregory," although not present when the mishap occurred, was liable under the family purpose doctrine for the negligence of Harold Gregory.

Defendants, in separate answers, denied the mishap was proximately caused by the negligence of Harold Gregory, and denied that Buddy Gregory was liable for the negligence, if any, of Harold Gregory, and pleaded contributory negligence on the part of plaintiff. In addition, Buddy Gregory asserted a cross action against plaintiff for damages to his car, alleging substantially the same facts as to plaintiff's negligence as those on which defendants based their pleas of contributory negligence.

Each defendant alleged plaintiff was negligent in one or more of these respects: In riding and continuing to ride in the automobile "knowing that William Harold Gregory had been drinking whiskey and beer to the extent that it would affect his ability to operate the car; in that she failed and neglected to keep a proper lookout and to warn the defendant William Harold Gregory of the danger ahead which she saw or, in the exercise of reasonable care, should have seen; in that she rode and continued to ride in the automobile without protest or remonstrance; and in that she grabbed the defendant William Harold Gregory and kissed him as he was approaching a curve, thereby distracting his attention and causing him to lose control of the car which left the roadway and wrecked."

Issues as to the negligence of Harold Gregory, the contributory negligence of plaintiff, the liability of Buddy Gregory under the family purpose doctrine, were answered in favor of plaintiff, and the jury awarded damages in the amount of $7,000.00. Issues relevant to Buddy Gregory's counterclaim were also submitted. However, the jury, under the court's instructions, did not reach these issues.

From judgment for plaintiff, in accordance with the verdict, defendants excepted and appealed.

Wilson & Bain for plaintiff, appellee.
Dupree, Weaver, Horton & Cockman for defendants, appellants.

BOBBITT, J. Defendants' motions for judgments of nonsuit were properly overruled. The evidence, when considered in the light most favorable to plaintiff, was amply sufficient to support findings that Harold Gregory's actionable negligence proximately caused the mishap and that Buddy Gregory was liable therefor under the family purpose doctrine. Whether plaintiff was contributorily negligent, as alleged by defendants, was for jury determination upon sharply conflicting evidence.

On April 30, 1959, Harold Gregory was twenty years old. He had been in the military service from 1955 until April 28, 1958. From November, 1958, until April 30, 1959, he resided in the home of Buddy Gregory, his uncle, on the Sanford Road (Highway 421), west of Lillington. During this period, he worked for Buddy Gregory in his motor boat business on Main Street in Lillington, referred to as Buddy's Marine, where Jack Westmoreland, plaintiff's husband, was employed by Buddy Gregory as a mechanic.

On April 30, 1959, plaintiff was thirty-four years old. She had married Jack Westmoreland in December, 1946. They, and their three children, lived on First Street in Lillington. Buddy Gregory's home was "on the opposite side of town" from the Westmoreland residence.

Harold Gregory, also Buddy Gregory and his wife, had visited in the Westmoreland home. There is no evidence of any impropriety in the relations of Harold Gregory and plaintiff prior to April 30, 1959. Harold Gregory testified he had played cards with the Westmoreland boys in the Westmoreland home.

Jack Westmoreland left Lillington during the morning of April 30, 1959, on a business trip. He was to go, and did go, to Durham and from there to Greensboro. At that time, Jack Westmoreland had, in his home, some "bootleg" whiskey. Harold Gregory went to the Westmoreland home between 1 and 2 p.m. When he arrived, and while he was there, plaintiff was the only other person in the Westmoreland home. Harold Gregory had a drink of the Westmoreland whiskey while he and plaintiff sat in the Westmoreland home and watched a television program. Apart from these facts, the testimony of plaintiff and the testimony of Harold Gregory as to what transpired between them from the time he arrived at the Westmoreland home until the mishap on the McDougald Road are in sharp conflict.

Plaintiff's testimony, in summary, tends to show she did not telephone Harold Gregory or otherwise invite him to her home; that, upon his arrival, he stated her husband had told him "he had some whiskey there that he could have a drink of"; that, when she brought the whiskey to Harold Gregory, he poured out "an inch in a juice glass" and drank it while they watched television; that she loaned Harold Gregory one dollar to buy beer and handed him an extra dollar to buy two cans of beer for her; that, upon leaving to go for the beer, he did not take the two dollars, which were on the kitchen table; that, upon his return, he commented that he had forgotten the money and asked her if she wanted to go with him to get the beer; that she consented to go upon his assurance they would be gone only five or ten minutes; that she was in the car when Harold Gregory bought four cans of beer; that, upon his return to the car, he gave her an opened can of beer, kept an opened can and put the two unopened cans in the foot of the car; that, instead of taking her home, Harold Gregory drove out into the country under the pretext of showing her where his girl lived and ignored her repeated requests that he take her home; that, after he had turned off the highway and stopped the car, he made an improper proposal to her, which she indignantly refused and demanded that he take her home; that there was no "kissing and petting" there or elsewhere; that she did not sit "real close up to (him)" at any time while riding with him; that, on their return to Lillington, Harold Gregory drove between 60 and 65 miles an hour, around curves, on the wrong side of the road; that she repeatedly told him to slow down and drive on his side of the road but did not physically interfere with him in any way; that she knew he had had a drink when she left her house with him to go and purchase beer and that thereafter he had a can of beer but "(i)t did not appear to (her) then he was under the influence of anything that he had been drinking."

Harold Gregory's testimony, in summary, tends to show he went to plaintiff's home, in response to her telephone request, and upon arrival was invited into her house and given a drink of whiskey; that she gave him money with which to go and buy beer; that he went and bought the beer and upon his return he and plaintiff drank beer at the Westmoreland house; that she then went with him to buy more beer; that after this second purchase of beer he drove several miles, she "sitting over real close" to him, and turned off the highway to a secluded spot known as "Hell's Half Acre," where they stayed some 50 minutes or more, drinking beer and "kissing and petting"; that, after these events, plaintiff asked him to take her home; that, on the way back to Lillington, plaintiff "was sitting

real close up to (him)"; that she made no objection or comment as to how he was driving; that he had had "one glass of whiskey and two beers"; that plaintiff, to the best of his knowledge, had had four cans of beer, three at the house (first purchase) and one after the second purchase was made; and that, just before they got to the curve where the car ran off the road, plaintiff "grabbed (him) and pulled (him) over and kissed (him)"; and that, when this occurred, he lost control of the car.

The investigating State Highway Patrolman, a witness for plaintiff, testified he talked with Harold Gregory when he arrived at the scene of the mishap. He referred to his opinion as "borderline" as to whether Harold Gregory at that time was under the influence of intoxicants. Harold Gregory was not charged with driving while under the influence of intoxicants but pleaded guilty to driving (1) in excess of 55 miles per hour and (2) on the wrong side of the road. On cross-examination, the Patrolman testified: "It was very obvious that this defendant (Harold Gregory) was drinking." Again: "It was very obvious to me that at least some of his faculties were impaired."

With reference to the contributory negligence issue, the court reviewed what plaintiff contended the evidence showed and then what defendants contended the evidence showed. Thereafter, the court defined, in general terms, the elements of contributory negligence. But the court did not instruct the jury as to what facts would constitute the basis for a finding that plaintiff was guilty of contributory negligence. In short, the legal task of applying the general law to the facts in evidence was committed to the jury.

With further reference to the contributory negligence issue, defendants submitted requests for special instructions as to the duty imposed by law upon a guest passenger. Whether the court should have given all or any of the requested instructions in the form submitted need not be decided. Whether a guest passenger is contributorily negligent is determinable in accordance with legal principles stated in *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33, and cases cited therein. In this connection, see *Dinkins v. Carlton, ante,* 137, 120 S.E. 2d 543. Examination of the charge discloses the court gave no instruction as to these legal principles. In view of defendants' plea of contributory negligence and the evidence tending to support said plea, we are constrained to hold that the failure to instruct, even in general terms, as to the legal principles applicable in determining whether plaintiff was guilty of contributory negligence was prejudicial error.

With reference to the fourth issue, whether Buddy Gregory was liable for the negligence, if any, of Harold Gregory, under the family

purpose doctrine, the court instructed the jury correctly, in general terms, as to the family purpose doctrine, and reviewed what plaintiff contended the evidence showed and then what defendants contended the evidence showed. However, the court failed to instruct the jury as to what facts would constitute a basis for a finding that Buddy Gregory was liable for the negligence, if any, of Harold Gregory, under the family purpose doctrine. We deem it unnecessary to review the sharply conflicting evidence relevant to this issue.

Under G.S. 1-180, the trial judge is required to relate and apply the law to the variant factual situations having support in the evidence. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323, and cases cited; *Harris v. Greyhound Corp.,* 243 N.C. 346, 351, 90 S.E. 2d 710; *Glenn v. Raleigh,* 246 N.C. 469, 478, 98 S.E. 2d 913; *Brooks v. Honeycutt,* 250 N.C. 179, 108 S.E. 2d 457; *Godwin v. Hinnant,* 250 N.C. 328, 108 S.E. 2d 658. He has ". . . the positive duty of instructing the jury as to the law upon all of the substantial features of the case." *Lewis v. Watson,* 229 N.C. 20, 23, 47 S.E. 2d 484; *Spencer v. Motor Co.,* 236 N.C. 239, 72 S.E. 2d 598; *Glenn v. Raleigh, supra.* Moreover, in the absence of request for special instructions, a failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. *Howard v. Carman,* 235 N.C. 289, 69 S.E. 2d 522; *Barnes v. Caulbourne,* 240 N.C. 721, 725, 83 S.E. 2d 898; *McNeill v. McDougald,* 242 N.C. 255, 87 S.E. 2d 502; *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727.

On account of the court's failure to declare, explain and apply the law arising on the evidence as to all substantial features of the case, as required by G.S. 1-180, a new trial is awarded. See *Byrnes v. Ryck,* 254 N.C. 496, 119 S.E. 2d 391, and cases cited.

New trial.

J. O. BARBOUR, JR., W. R. HAMILTON, R. S. EUDY, EARL MADES, L. D. SPRINGLE, CHARLES DAVIS, E. W. DOWNUM, JULIAN FULCHER, SR., JAMES H. POTTER, III, H. D. PAUL, CLIFFORD LEWIS, ALBERT CHAPPELL, LESLIE G. MOORE, W. L. ARRINGTON, JARVIS HERRING, MRS. G. W. DUNCAN, IVEY GASKILL, C. WESLEY WILLIS, W. H. POTTER, RESIDENTS AND TAXPAYERS OF CARTERET COUNTY, NORTH CAROLINA, IN THEIR OWN INTEREST AND IN THE INTEREST OF ALL OTHER RESIDENTS AND TAXPAYERS OF CARTERET COUNTY WHO MAY MAKE THEMSELVES PARTIES TO THIS ACTION v. CARTERET COUNTY; S. A. CHALK, JR., HAROLD TAYLOR, DAVID YEOMANS, GASTON SMITH AND MOSES HOWARD, CONSTITUTING THE BOARD OF COUNTY COM-

MISSIONERS OF CARTERET COUNTY, THE LAST NAMED BEING CHAIRMAN OF SAID BOARD OF COUNTY COMMISSIONERS.

(Filed 16 June, 1961.)

1. Taxation § 6—

A county may issue its bonds or bond anticipation notes for the special purpose of constructing and operating a public hospital, there being legislative approval therefor, G.S. 153-77(d), but such bonds are not for a necessary expense and may be issued only after approval of a majority of those voting in an election held for that purpose. Constitution of North Carolina, Art. VII, § 7.

2. Taxation § 11—

The order of the county commissioners of a county for the issuance of county bonds, stipulating the purpose and amount of the bonds, and such other conditions as the county commissioners may annex, G.S. 153-78, constitutes the proposition submitted to the voters and such stipulations are controlling.

3. Same—

Allegations to the effect that a bond order stipulated that the issuance of the proposed bonds should be conditioned upon the refinancing of other bonds of the county, and that no agreement had been made with the holders of such other bonds for repayment or acceptance of refunding bonds in discharge thereof, states a cause of action to enjoin the issuance of the proposed bond anticipation notes.

4. Payment § 5—

A debtor cannot compel his creditor to accept payment before maturity in the absence of agreement.

5. Taxation § 12—

The expenditure of the proceeds of bonds in accordance with the purpose for which the bonds were issued is a duty resting upon the county commissioners, G.S. 153-9(8) (9), and the courts will not substitute their judgment for that of the county officials honestly and fairly exercised, but allegations to the effect that the commissioners had agreed to pay a specified sum for designated property, that the property had not been appraised, and that the price agreed was double the value of the property, are sufficient upon demurrer to charge bad faith, justifying a court of equity in acting to prevent the alleged misuse of public funds.

6. Pleadings § 12—

The admission by demurrer of the facts alleged in the pleadings are in no way binding when the cause is heard on the merits.

PARKER, J., concurs in result.

APPEAL by plaintiffs from *Cowper, J.*, April 1961 Term of CARTERET.

Plaintiffs, taxpayers of Carteret County, instituted this action to (1) determine the validity and enjoin the sale of a bond anticipation

note in the sum of $100,000 which defendants proposed issuing to acquire properties for the construction of a public hospital, and (2) enjoin defendants from expending any monies which might be derived from a sale of the note for the purchase or construction of a hospital on a lot described in the complaint. As the basis for the relief sought, plaintiffs divide their complaint into four causes of action—the first, relating to the right of defendants to issue and sell the note; the remaining three, to the right to use any monies which might be derived from the sale of the note or bonds in acquiring or constructing a hospital on the described lot.

Defendants demurred to the complaint for that it failed to state a cause of action and for asserted misjoinder of causes. The demurrer was sustained. Judgment was entered dismissing the action. Plaintiffs appealed. Defendants' motion to advance the appeal and hear the same at this term was allowed.

C. R. Wheatly, Jr. and Thomas S. Bennett for plaintiff appellants.
Luther Hamilton, Jr. for defendant appellees.

RODMAN, J. No valid bond anticipation note may be issued unless authority exists for the issuance of bonds to provide funds to pay the note. G.S. 153-108.

The General Assembly has given its approval to the issuance of bonds by counties for the special purpose of erecting and purchasing hospitals. G.S. 153-77(d). The construction and operation of a public hospital is not a necessary expense in the sense that expression is used in the Constitution. *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749, and cases there cited. Bonds cannot, therefore, be issued by a county for the purpose of providing hospital facilities unless approved by a majority voting at an election held for that purpose. N. C. Constitution, Art. VII, sec. 7; *Sessions v. Columbus County,* 214 N.C. 634, 200 S.E. 418; *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603; G.S. 153-92.1

The first step looking to the issuance of bonds by a county is an order of the county commissioners. This order designates the purpose for which bonds are to be issued, the aggregate amount thereof, and such other conditions as the county commissioners may annex. G.S. 153-78. When the bond order is submitted to and approved by the electorate, governing authorities cannot ignore conditions precedent to the sale or use the proceeds of the sale for an unauthorized purpose. As said in *Waldrop v. Hodges,* 230 N.C. 370, 53 S.E. 2d 263: "The law is founded on the principle of fair play, and fair play demands that defendants keep faith with the electors of the district."

Lewis v. Beaufort County, 249 N.C. 628, 107 S.E. 2d 77; *Greensboro v. Smith,* 239 N.C. 138, 79 S.E. 2d 486; *Parker v. Anson County,* 237 N.C. 78, 74 S.E. 2d 338; *Rider v. Lenoir County,* 236 N.C. 620, 73 S.E. 2d 913; *McCracken v. R.R.,* 168 N.C. 62, 84 S.E. 30.

The Legislature has authorized counties to issue bonds for the purpose of "Funding or refunding of valid indebtedness if such indebtedness be payable at the time of the passage of the order authorizing the bonds or be payable within one year thereafter, or, although payable more than one year thereafter, is to be cancelled prior to its maturity and simultaneously with the issuance of the funding or refunding bonds . . ." G.S. 153-77(h).

We summarize the allegations on which plaintiffs base their right to relief: Prior to July 1937 Carteret County had bonds outstanding which were in default. It entered into an agreement with a committee representing bondholders that it would create a sinking fund to pay the bonds at maturity and would annually levy a tax sufficient to provide the sinking fund with a minimum of $90,000. It has failed to comply with its agreement. (This agreement is referred to for its provisions but is not attached to and made a part of the complaint.) Bonds to be paid with the sinking fund mature 1 July 1977. "(I)n November 1960 the voters of Carteret County voted in a referendum and by their vote agreed to the issue of One Million ($1,000,000.00) Dollars Hospital Bond, but said issue was predicated on a refinancing of the bonded indebtedness in order that the tax burden on the taxpayers of this county would not be so heavy . . ." "(A)s an element of the bond order or notice a refinancing of the present indebtedness of said county has been contemplated, said refinancing to be placed into effect simultaneously with the issuance of bonds and the issuance of said bonds being conditioned thereon . . . . as yet no agreement has been effected for the reissuance of bonds; neither have plans been effected for said reissuance . . ."

Giving these allegations the liberal interpretation we are required to accord, *Lynn v. Clark,* 254 N.C. 460; *Insurance Co. v. Chevrolet Co.,* 253 N.C. 243, 116 S.E. 2d 780; *Moore v. W O O W, Inc.,* 253 N.C. 1, 116 S.E. 2d 186; we think the complaint alleges: (1) Carteret County has a large outstanding indebtedness incurred prior to 1937, maturing 1 July 1977. Sinking fund requirements have not been complied with to provide payment of these bonds at maturity. (2) The ordinance authorizing the issuance of hospital bonds declared the present debt of the county would be refunded before the hospital bonds were issued. The voters approved the hospital bonds on that condition. (3) No effort has been made by the governing authorities to reach an agreement with the bondholders to provide for prepayment of the

outstanding bonded indebtedness.

Since a debtor cannot compel his creditor to accept payment before maturity except upon terms stipulated, *Bakeries v. Insurance Co.*, 245 N.C. 408, 96 S.E. 2d 408, and the bonds to be refunded do not mature until 1 July 1977, it is clear that Carteret County does not now have the right to issue the hospital bonds authorized at the November election. Because the county has no authority to issue the bonds, it has no authority to issue bond anticipation notes to be repaid from said bond issue.

It may be conceded that the complaint is not a model of plain and concise statement of facts as required by G.S. 1-122. We have given it the interpretation demanded by the statute. G.S. 1-151. If we have given an interpretation more favorable to plaintiffs than the allegations warrant, defendants could have protected themselves by moving for an order requiring the complaint to be made definite and certain. G.S. 1-153. Such a motion followed by an order requiring specific and definite allegations, including, if proper, the inclusion of copies of the bondholders' agreement and the bond ordinance, would not have prevented defendants from demurring.

Do the allegations of the second, third, and fourth so-called causes of action relating to the acquisition of the proposed site suffice to state a cause of action?

The answer to this question must be determined independently of the right to issue bonds as these allegations presuppose the availability of funds to make the purchase.

County commissioners, in approving the design, the method of construction, the site for a public building, and the amount to be paid for the site, are performing duties inherent to their offices, expressly conferred by the Legislature. G.S. 153-9(8), (9). Courts have no right to pass on the wisdom with which they act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good. *Burton v. Reidsville*, 243 N.C. 405, 90 S.E. 2d 700; *Kistler v. Board of Education*, 233 N.C. 400, 64 S.E. 2d 403; *Waldrop v. Hodges, supra; Jackson v. Commissioners*, 171 N.C. 379, 88 S.E. 521; *Commissioners v. Commissioners*, 165 N.C. 632, 81 S.E. 1001; *Newton v. School Comm.*, 158 N.C. 186, 73 S.E. 886; *Jeffress v. Greenville*, 154 N.C. 490, 70 S.E. 919.

While plaintiffs make allegations which they divide into three separate causes of action, we think the allegations are all directed to a single factual conclusion, i.e., the county commissioners, in total disregard of their duty to the public, intended to squander public

funds. They allege facts with respect to the size and location of the lot, the character of the soil, and other factors which are addressed not only to its suitability for the purpose intended, but likewise addressed to the fair market value of the lot.

These general allegations as to location and suitability are accompanied by this specific allegation in the so-called fourth cause of action: "That the defendants, for reasons unknown to these plaintiffs and for causes known only to themselves, have agreed to pay the heavy unwarranted sum of $75,000 for 80.98 acres of land described in that certain deed from Earle W. Webb to Eva Arnold Webb, of record in Book 73, page 387, without first having said property appraised and its value determined. That as these plaintiffs are advised, believe and so aver, said sum is more than twice what said property should be reasonably worth, is excessive, and as such is an unwarranted waste of the taxable revenue of Carteret County. That the action on the part of the defendants is arbitrary, capricious, and without regard to what is a proper price to pay for said premises and is being done in a spirit of haste in an attempt to effect for reasons unknown to these plaintiffs a site settlement as to the county hospital to the detriment of the taxpayers of Carteret County who will be expected to repay said costs and charges as a result of an ad valorem levy on their property."

The demurrer admits the commissioners have, without appraisal or other investigation as to value and for reasons known only to them, hastily agreed to pay $75,000 for property reasonably worth less than half that sum. Such conduct does not comport with the duty which public officials owe those they represent. It manifests bad faith, not bona fide action. It suffices to justify court action to prevent misuse of public funds.

We hold the factual allegations admitted to be true by the demurrer suffice to state causes of action on which a judgment can be entered enjoining the issuance of the bond anticipation note and the expenditure of $75,000 for the purchase of a lot worth less than half that sum.

Even if the complaint had failed to state a cause of action, permission should have been given to amend. *Lumber Co. v. Pamlico County,* 250 N.C. 681, 110 S.E. 2d 278.

Plaintiffs should, on motion, be permitted to amend and make more specific and certain, as the court in its discretion may permit or require. Of course the factual admissions resulting from the demurrer are in no way binding on defendants when the cause is heard on the merits.

Reversed.

PARKER, J., concurs in result.

C. W. FULTON AND GRANITE CITY MOTOR COMPANY v. LOUIS P. TALBERT.

(Filed 16 June, 1961.)

1. Corporations § 13—

G.S. 55-35, which is declaratory of the law prior to the effective date of the Business Corporation Act, constitutes the officers and directors of a corporation fiduciaries and liable to the corporation and its shareholders for the utilization of their authority for their own benefit to the detriment of the corporation, but notwithstanding, contracts between them and the corporation fixing the amount and method of payment of compensation for services are not void or voidable *per se*.

2. Corporations § 5—

An action against officers and directors of a corporation to recover salary or other compensation paid to the officer which was not honestly earned and fairly owed, may be maintained by a minority stockholder when the corporation is so dominated and controlled by the wrongdoer that it is powerless to act.

3. Corporations § 13—

An action against a corporate officer to recover salaries, bonuses, or other remuneration paid by the corporation to the officer, is based on fraud in the receipt of monies not honestly earned and fairly owed, and mere allegation that such amounts were exorbitant, unreasonable and unjust is insufficient, it being required that plaintiff allege facts from which conclusions of fraud may be drawn.

APPEAL by plaintiff Fulton from *Johnston, J.*, February 1961 Term of SURRY.

This is an appeal from a judgment sustaining a demurrer based on a failure to state a cause of action.

Folger & Folger for plaintiff appellant.
Woltz & Faw for defendant appellee.

RODMAN, J. The allegations of the complaint may be summarized thus: Plaintiff Fulton owns 10 shares of the stock of Granite City Motor Company, a corporation created under the laws of this State for the purpose of buying and selling new and used automobiles. The corporation is now in process of voluntary liquidation. Defendant, his wife, and George C. Wright and wife were elected as directors of the corporation in 1950, at which time George C. Wright was elected president and treasurer, his wife, assistant secretary, defendant, vice president and secretary, and his wife, an assistant secretary. These four have held these offices and served as directors continuously since 1950. Defendant owns 73 shares of the company stock. George C.

Wright owns a like number. They, with their respective wives, own and control 213 shares of stock which constitute a majority of the outstanding stock of the company. In 1951 the four named directors voted to pay a salary of $1000 per month to defendant and a like salary to George C. Wright. Monthly salaries were accordingly paid to defendant and Wright beginning in 1951 and continuing through 1959. Defendant and Wright were, over a period of eight years, each paid bonuses in excess of $41,000. In addition to the salaries and bonuses so authorized and paid, defendant and Wright were, pursuant to authorization of the four directors, paid traveling, promotional, and entertainment expenses. The amount paid to defendant for these purposes amounted to $24,500 in an eight-year period. An identical amount was paid to Wright, the president, for these purposes. The amounts so paid defendant were exorbitant, unreasonable, and unjust, and far in excess of just and reasonable value of the services rendered, resulting in his unjust enrichment at the company's expense in a sum in excess of $83,000.

The complaint is barren of allegations that plaintiff Fulton had in corporate meetings protested or otherwise challenged the propriety of paying bonuses or promotional or entertainment expenses or the reasonableness of the sums paid for these purposes or paid as salaries. The complaint contains no allegation with respect to the volume of business done, earnings and dividends paid, territorial area in which the corporation did business, the character of the business done other than selling automobiles, the need for entertainment expenses, sums actually expended by defendant for travel, promotional and entertainment expenses as compared with the amounts withdrawn from the corporation for these purposes, nor any basis for computing reasonable salaries.

The Business Corporation Act provides: "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions." G.S. 55-35. This statutory provision, in effect since 1957, is declaratory of the law prior to the effective date of that Act. *Teague v. Furniture Co.,* 201 N.C. 803, 161 S.E. 530; *Pender v. Speight,* 159 N.C. 612, 75 S.E. 851.

Notwithstanding the fiduciary relationship existing between officers and the corporation which they serve, contracts fixing the amount and method of paying compensation for services to be rendered are not void or voidable *per se.* G.S. 55-30; *Caho v. R.R.,* 147 N.C. 20; *Credit*

Corp. v. Boushall, 193 N.C. 605, 137 S.E. 721; *Putnam v. Juvenile Shoe Corp.,* 40 A.L.R. 1412; *Rogers v. Hill,* 289 U.S. 582, 88 A.L.R. 744; 13 Am. Jur. 982-983.

Where, however, an officer of a corporation so utilizes his authority as to benefit himself to the detriment of the corporation, a right of action accrues to the corporation. *McIver v. Hardware Co.,* 144 N.C. 478.

Ordinarily stockholders have no right in their name to enforce causes of action accruing to the corporation. *Jordan v. Hartness,* 230 N.C. 718, 55 S.E. 2d 484. But, where the corporation is so dominated and controlled by a wrongdoer as to be powerless to act, minority stockholders may bring the action, making the corporation a party. *Belk v. Department Stores,* 250 N.C. 99, 108 S.E. 2d 131; *R.R. v. R.R.,* 240 N.C. 495, 82 S.E. 2d 771; *Hill v. Erwin Mills,* 239 N.C. 437, 80 S.E. 2d 358; *Murphy v. Greensboro,* 190 N.C. 268, 129 S.E. 614.

The right of action which accrues for the fixing and taking by one in authority of salaries, bonuses, or other monies not honestly earned and fairly owing is based on fraud. When one seeks to recover for wrongs fraudulently inflicted, he must allege the facts which, if proven, will establish the fraud. It is not sufficient merely to allege as a conclusion that the payments were "exorbitant, unreasonable, and unjust." *Products Corp. v. Chestnutt,* 252 N.C. 269, 113 S.E. 2d 587; *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441; *Isley v. Isley Co.,* 248 N.C. 417, 103 S.E. 2d 495; *Thomas & Howard Co. v. Insurance Co.,* 241 N.C. 109, 84 S.E. 2d 337; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620.

Because plaintiff based the right to recover on factual conclusions and not on facts from which conclusions could be drawn, the court was correct in sustaining the demurrer. The judgment properly allows plaintiff time to amend. G.S. 1-131.

Affirmed.

C. W. FULTON AND GRANITE CITY MOTOR COMPANY v. GEORGE C. WRIGHT.

(Filed 16 June, 1961.)

APPEAL by plaintiff Fulton from *Johnston, J.,* February 1961 Term of SURRY.

This is a companion case to *Fulton v. Talbert, ante,* 183. Except

for the name of the defendant, the complaint herein is substantially identical with the complaint in that case. Here as there defendant demurred for failure to state a cause of action. The demurrer was sustained and plaintiff appealed.

Folger & Folger for plaintiff appellant.
Woltz & Faw for defendant appellee.

PER CURIAM. For the reasons given in *Fulton v. Talbert, ante,* 183, the judgment is
Affirmed.

ROGER E. LEMONS, BY AND THROUGH HIS NEXT FRIEND, EUGENE RUFFIN LEMONS v. GEORGE E. VAUGHN
AND
GEORGE E. VAUGHN, SR., v. EUGENE RUFFIN LEMONS.

(Filed 16 June, 1961.)

1. Automobiles § 8—

The statutory requirement that a motorist shall not turn left across a traffic lane of a highway without first seeing that such movement can be made in safety imposes the legal duty on him to exercise resonable care under the circumstances in ascertaining that such movement can be made in safety, acting upon the assumption that the drivers of other vehicles will observe the safety statutes, and the law does not require him to refrain from making such movement unless the circumstances render it absolutely free from danger.

2. Auomobiles § 41—

Evidence favorable to defendant tending to show that defendant, travelling north along a highway, attempted to make a left turn to enter the driveway on the west side of the highway, that he saw plaintiff's vehicle approaching from the north some 250 feet away, that he thought he had sufficient time to make the movement in safety, together with evidence permitting the inference that plaintiff was travelling at an unlawful rate of speed, *is held* sufficient upon defendant's counterclaim to be submitted to the jury on the issue of plaintiff's negligence, and nonsuit on the counterclaim is error.

APPEAL by George E. Vaughn, Sr., from *Olive, J.,* November, 1960 Civil Term, ROCKINGHAM Superior Court.

These civil actions for personal injury and property damage grew out of a collision between a 1955 Ford automobile owned by Eugene

Ruffin Lemons and driven by his minor son, Roger E. Lemons, and a 1954 Chevrolet automobile owned and driven by George E. Vaughn, Sr. The collision occurred about 6:15 p.m. on Highway No. 87 four miles north of Reidsville. One action was brought on behalf of Roger E. Lemons by his Next Friend against George E. Vaughn, in which Vaughn filed a counterclaim, and another by Vaughn against Eugene Ruffin Lemons. By consent the actions were consolidated and tried together.

The accident occurred as Vaughn, driving north on Highway 87, attempted to turn left, cross the lane for south-bound traffic and enter the driveway leading to his home. Before Vaughn completed his intended movement and cleared the west lane his vehicle and the Ford driven south by Roger E. Lemons collided. In general, Vaughn claimed the accident resulted from Lemons' excessive speed, his failure to keep a proper lookout, and to observe and heed Vaughn's mechanical turn signal given when Lemons was at least 250 feet away. Lemons claimed he was in his proper lane of traffic, driving at a lawful rate of speed, and that Vaughn, without notice, cut across, into, and blocked his lane of traffic without giving him time to stop or otherwise avoid the accident.

The plaintiff, Roger E. Lemons, testified: "As I approached Mr. Vaughn's driveway, he cut right across the road in front of me. I would say I was somewhere around 100 feet from his driveway when he cut in front of me. I then slammed on my brakes and I cut my car to the right. He just kept on coming across the road . . . I was driving between 45 and 55 miles per hour."

The highway patrolman who investigated the accident testified as a witness for Vaughn: "That highway is 24 feet wide, including 2-foot addition. When I speak of debris being at the edge of the road, it would be at the 2-foot addition to the highway." The skidmarks extended 90 feet north from the point of impact. Some of the skidmarks were on the additional two feet. Mr. Vaughn's car was 43 feet south of the debris in the direction Lemons was traveling. "The Vaughn car had been struck sort of to the right front . . . I went to the hospital and talked to Roger Lemons. Lemons was a little confused at the hospital . . . He said he didn't remember too much about what happened. I asked him how fast he was going and he said he thought he was running around 55 or 60 — didn't think he was running over 60 . . . I saw Lemons at his home after that night at the hospital, and he said just about the same things that he told me at the hospital."

The appellant testified that he gave a mechanical turn signal, saw the Lemons vehicle 250 feet away. "I figured he was driving at a reasonable rate of speed and I had plenty of time. After I started

making my turn, I again observed the Lemons car. It was probably 125 feet away . . . At that time I had got a little past the center of the road, and as to the speed of the Lemons car, it was fast — I couldn't say what speed, but it was plenty fast."

The accident occurred about 6:15 p.m. on March 11, 1960. Vaughn's turn signal and his parking lights were on. Lemons was driving without lights. The hard surface of the highway was free of snow and ice but there was snow on the shoulders.

At the close of all the evidence, Vaughn's counterclaim against Roger E. Lemons and his claim against Eugene Ruffin Lemons were dismissed "as of involuntary nonsuit." The jury found (1) that Roger E. Lemons was injured and the property of Eugene Ruffin Lemons was damaged by the negligence of George E. Vaughn; (2) that Roger E. Lemons and Eugene Ruffin Lemons were not guilty of contributory negligence; (3) that Roger E. Lemons was entitled to recover $4,000 for personal injury and Eugene Ruffin Lemons was entitled to recover $800 for property damage. From the judgment on the verdict, George E. Vaughn appealed.

Brown, Scurry, McMichael & Griffin, for George E. Vaughn, appellant.

Price & Osborne, Smith, Moore, Smith, Schell & Hunter, James M. Farris for Roger E. Lemons and Eugene Ruffin Lemons, appellees.

HIGGINS, J. The pleadings raise issues whether the accident and injury were caused by (1) the sole negligence of Vaughn, (2) the sole negligence of Roger E. Lemons, (3) the concurrent negligence of both. By dismissing Vaughn's claim and counterclaim the court held the evidence insufficient to go to the jury on (2). The effect of the court's ruling was that, in no event, could Vaughn recover. Of course, if the evidence was insufficient on (2) the ruling was correct. If sufficient, however, the error brought Lemons home free on (2) and half way home on (3).

Vaughn admitted making a left turn when the movement, as disclosed by events, was unsafe. The accident resulted. Was it the fault of Vaughn, or of Roger E. Lemons, or both? The time was 6:15 p.m. on March 11. In the twilight Vaughn saw meeting him a vehicle without lights. At the time he began his left turn across the west lane, (width 12 feet) the approaching vehicle was 250 feet away. In the absence of notice to the contrary, he had the right to assume and to act on the assumption the driver would obey the speed laws, keep a proper lookout, and have his vehicle under proper control. Under the circumstances was Vaughn justified in attempting the crossover? If

not, he was negligent. If, under the circumstances the cause of the accident was not his but was due to the failure of Lemons to obey the speed laws, keep the lookout, and control his vehicle, then Lemons was negligent. Each driver had the right to assume the other would adhere to the safety laws. This assumption continued until a driver had notice to the contrary. As was said by *Justice Ervin* in *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115: "Its manifest object is to promote and not to obstruct vehicular travel. In the very nature of things, drivers of motor vehicles act on external appearances. . . . The statutory provision 'that the driver of any vehicle upon the highway before . . . turning from a direct line shall first see that such movement can be made in safety' does not mean that a motorist may not make a left turn on a highway unless the circumstances render such turning absolutely free from danger. It is simply designed to impose upon the driver of a motor vehicle, who is about to make a left turn . . . the legal duty to exercise reasonable care under the circumstances in ascertaining that such movement can be made in safety to himself and others before he actually undertakes it." (citing authorities)

The evidence permits the inference that Roger E. Lemons was driving at a high rate of speed. He and two other boys were "headed for town." He admitted three convictions of speeding — two for driving 65 miles in a 55-mile zone, and one for driving 45 miles in a 35-mile zone. His admission to the officer that he didn't think he was driving over 60, in connection with the physical evidence — 90-foot skidmarks before the impact which knocked Vaughn's vehicle 40 feet down the road, permitted an inference of unlawful speed. We are considering permissible inferences only. What the evidence actually proves is for the jury.

Because of the distance separating the two vehicles when Vaughn began his intended left turn—250 feet—this case falls into a middle ground somewhere between *Cooley v. Baker, supra,* and *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331. In the *Cooley* case, the court held as a matter of law that Baker was free of negligent responsibility for the collision because of the distance — 300 yards — separating the vehicles at the time he attempted to make the left turn. On the other hand, in the *Aldridge* case Burns was held negligent as a matter of law because he attempted to make a left turn when Hasty was only 20 to 25 feet away.

In this case it cannot be held as a matter of law that either driver was or was not guilty of negligence. This case presents issues of fact for jury determination. The judgments dismissing Vaughn's claim and counterclaim are reversed. The judgments in favor of Roger E. Lem-

ons and Eugene Ruffin Lemons are set aside. A new trial is ordered on all issues raised by the pleadings.

Reversed in part.

New trial in part.

LAURA R. MOTLEY v. W. E. MOTLEY.

(Filed 16 June, 1961.)

1. Marriage § 1—

Marriage is not only contractual between the parties thereto but is a status in which the State has an interest and to which the law has attached certain incidents which may not be abrogated without the consent of the State.

2. Husband and Wife §§ 1, 2—

It is the duty of the husband to support his wife, and public policy will not permit him to contract away this obligation, and therefore a provision in an antenuptial contract relieving the husband of this duty is void as against public policy. G.S. 52-13 relates to the release of interests in property by antenuptial contract and has no bearing whatever on the right of a wife to support.

3. Divorce and Alimony § 18—

Provisions of an antenuptial agreement that neither party would make any demands upon the other with respect to alimony or support of any kind are void and cannot preclude the court from ordering subsistence and counsel fees *pendente lite* upon supporting findings of fact.

4. Same—

Findings supported by evidence warranting the conclusion that the husband had offered such indignities to the wife as to render her condition intolerable and her life burdensome, and that as a result thereof she had moved out of the home, with further findings that she was without means to defray the expenses of the action, *are held* sufficient to support the court's order allowing subsistence and counsel fees *pendente lite* in the wife's action for alimony without divorce, the complaint alleging sufficient facts to constitute a cause of action therefor.

APPEAL by defendant from *Williams, J.*, October Term 1960 of BRUNSWICK.

The plaintiff and the defendant were married on 29 September 1956 in Raleigh, North Carolina, and lived together until 2 November 1959. No children were born of this marriage. The plaintiff instituted this action on 14 July 1960.

The first cause of action set out in the complaint is for alimony without divorce. The second cause of action is to recover the sum of $3,150.00 borrowed by the defendant from the plaintiff and which the defendant promised to repay and now refuses to do so, and for an accounting in connection with the construction of a home at Castle Hayne, Wilmington, North Carolina, now in the possession of the defendant, the title to which is held by the plaintiff and the defendant as tenants by the entireties. The plaintiff alleges that she purchased the lot on which the residence was constructed and paid $1,650.00 therefor, and that she paid $7,876.00 towards the construction of the home.

The plaintiff also alleges, among other things, that after the defendant got possession of all her assets, which according to the complaint amount to $12,676.00, he became indifferent and discourteous to the plaintiff; that he would tell their friends that he did not have to support the plaintiff and that there was nothing she could do about it except to live with him and do his bidding. It is further alleged that in February 1958 the defendant humiliated and embarrassed the plaintiff in front of visitors in the home; that the friends left the home immediately thereafter. That the plaintiff tried to impress upon the defendant the fact that he was ruining their friendship with their friends by his conduct. He then told the plaintiff that "he did not care anything about her except for what she could do for him, that he would continue to bring home the groceries and expect her to cook for him and keep the house but that otherwise he wanted nothing more to do with her. * * * (T)hat if she got any more money for her personal needs she would have to earn it with outside work." That defendant thereafter moved into separate quarters and never had anything further to do with the plaintiff as a wife; that he would not even talk to plaintiff socially except when other persons were present in the home; that his conduct toward her became progressively worse until she moved out of the home on 2 November 1959.

It is alleged that the conduct of the defendant, as alleged, constituted such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome. That while the plaintiff and the defendant were living together she was a faithful and dutiful wife and that the acts of the defendant were without provocation of the plaintiff.

The defendant filed an answer in which he denied the pertinent allegations of the complaint, plead the three-year statute of limitations against the loans the plaintiff alleged she made to him, and plead in bar of plaintiff's right to support an antenuptial agreement entered into by the parties on 24 September 1956, five days prior to their mar-

riage, which agreement, among other things, purports to provide that should the parties disagree and such disagreement should result in a separation, neither party would make any demand upon the other with respect to alimony or support of any kind.

The plaintiff made a motion in the court below for an allowance for her attorneys and for alimony *pendente lite.*

The defendant demurred to the complaint and the plaintiff moved to strike from the answer the defendant's plea in bar. Defendant thereafter withdrew his demurrer to the second cause of action set out in the complaint and the court overruled the demurrer to the first cause of action. The court allowed the plaintiff's motion to strike the defendant's plea in bar.

The matter was heard on the pleadings and the affidavits submitted in support thereof by the respective parties. The court found that the facts set out in the complaint, for the purpose of the motion for allowances only, are true as stated therein. The court further found that "the plaintiff is without property and assets sufficient to provide attorneys' fees and expenses incident to this litigation." Thereupon, the court ordered the defendant to pay into the office of the Clerk of the Superior Court of Brunswick County forthwith, attorneys' fees in the sum of $300.00 for the use and benefit of the attorneys representing the plaintiff, and that the defendant pay into the office of the Clerk of the Superior Court of said county the sum of $35.00 each week, beginning Monday, 24 October 1960, and on Monday of each calendar week thereafter for the support and maintenance of the plaintiff during the pendency of this action.

From this order the defendant appeals, assigning error.

Herring, Walton & Parker for plaintiff.
S. B. Frink for defendant.

DENNY, J. The defendant does not except to or assign as error the order of the court below overruling the demurrer to the plaintiff's first cause of action, or to the allowance of plaintiff's motion to strike the plea in bar set out in the defendant's further answer and defense. He appeals only from the order making the allowances hereinabove set out.

In the hearing below the defendant introduced in evidence the antenuptial contract dated 24 September 1956, and relies thereon as a release and a bar to the right of plaintiff to have the court award her attorneys' fees and alimony *pendente lite,* citing G.S. 52-13. This statute reads as follows: "Contracts between husband and wife not forbidden by § 52-12 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to

§ 52-12, any married person, may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released."

It will be noted that the foregoing statute relates to the release of an interest in property, but has no bearing whatever on the right of a wife to support.

In the case of *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414, *Stacy, C.J.,* speaking for the Court, said: "While it is true that in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, *Price v. Electric Co.,* 160 N.C. 450, 76 S.E. 502, still there is nothing in the statutes to indicate a purpose on the part of the General Assembly to reduce the institution of marriage, or the obligations of family life, to a commercial basis. G.S. 52-12; 52-13. It is the public policy of the State that a husband shall provide support for himself and his family. 41 C.J.S., 404; 26 Am. Jur., 934. This duty he may not shirk, contract away, or transfer to another. 41 C.J.S., 407. It is not a 'debt' in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment. * * *

"There are three parties to a marriage contract — the husband, the wife, and the State. For this reason marriage is denominated a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State. The moment the marriage relation comes into existence, certain rights and duties spring into being. One of these is the obligation of the husband to support his wife. *French v. McAnarney,* 290 Mass. 544, 195 N.E. 714, 98 A.L.R. 530. 'In the public interest the State has ever deemed it essential that certain obligations should attach to a marriage contract, amongst which is the duty of a husband to support his wife. Defendant was therefore shorn of power to enter into any arrangement or contract which would relieve him of such obligation.' * * *" *McLean v. McLean,* 237 N.C. 122, 74 S.E. 2d 320.

The antenuptial agreement relied upon by the defendant herein is against public policy and is null and void in so far as it undertakes to relieve the defendant from the duty of supporting the plaintiff. The rights of the parties herein to the relief sought must be determined without regard to the contents of the antenuptial agreement. This agreement does not bar the plaintiff from making an application for temporary alimony and attorneys' fees in this action. *Bailey v. Bailey,*

127 N.C. 474, 37 S.E. 502; 26 Am. Jur., Husband and Wife, sections 275 and 326, at pages 881 and 923, *et seq.*

The evidence adduced in the hearing below with respect to the misconduct of the defendant towards the plaintiff is much stronger than the allegations of the complaint with respect thereto. Even so, in our opinion, the findings of fact by the court below are sufficient to support the order from which the appeal was taken, and we so hold. *Barwick v. Barwick,* 228 N.C. 109, 44 S.E. 2d 597.

The cases of *McManus v. McManus,* 191 N.C. 740, 133 S.E. 9, and *Ipock v. Ipock,* 233 N.C. 387, 64 S.E. 2d 283, relied upon by the defendant, are not controlling on the facts in the instant case.

The order of the court below is

Affirmed.

LEGETTE JACKSON v. NEILL McKAY GIN COMPANY.

(Filed 16 June, 1961.)

1. Negligence § 21—

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant owed plaintiff under the circumstances, that such negligence produced the injury in continuous sequence and without which it would not have occurred, and that a person of ordinary prudence could have foreseen that such result was probable under the existing facts.

2. Negligence § 24a—

In order for circumstantial evidence to be sufficient to be submitted to the jury in an action for negligence, the facts proved must establish negligence and proximate cause as a reasonable inference and not raise a mere conjecture or surmise.

3. Negligence § 21—

Negligence is not presumed from the mere fact of injury, but plaintiff is required to offer legal evidence tending to establish each essential element of actionable negligence.

4. Negligence § 23—

Whether there is sufficient evidence of actionable negligence to be submitted to the jury is a question of law.

5. Negligence § 5—

The doctrine of *res ipsa loquitur* does not apply unless there is an injury which ordinarily does not occur in the absence of any negligence on someone's part, and unless the instrumentality which causes the injury is under the exclusive control and management of the defendant.

6. Same—

Plaintiff was injured while assisting with the loading of cotton on a truck with a hydraulic lift, hooks being placed over each side of a bale of cotton and being embedded in the bagging and cotton by the weight when the bale was raised by the hydraulic lift. Plaintiff was injured when a bale of cotton so lifted fell from the hooks. Plaintiff testified that he himself put the hooks in the bales and generally assisted in the loading operation. *Held:* On plaintiff's evidence, the instrumentality was not under the exclusive control of defendant and the doctrine of *res ipsa loquitur* is not applicable.

7. Master and Servant § 32—

Plaintiff's evidence was to the effect that he was assisting in loading cotton on a truck with a hydraulic lift owned by defendant and operated by defendant's employee, that hooks were placed on each side of the bale of cotton and embedded in the bale by its weight when the bale was lifted, and that as a bale was being loaded it fell from the hooks, resulting in plaintiff's injury. *Held:* In the absence of evidence of any defect in the loading mechanism or that it was negligently operated by defendant's employee, nonsuit is proper.

APPEAL by plaintiff from *Hall, J.*, at November 1960 Term of SCOTLAND.

Civil action to recover damages for personal injuries allegedly caused by the negligence of the defendant.

The plaintiff and a co-worker, both employees of a third party, were assisting in the loading of cotton on a truck upon the premises of the defendant Gin Company. The cotton was being loaded by the use of a hydraulic lift mechanism connected with a tractor. Attached to the lift there was a pair of hooks which were placed over each side of the bale of cotton. As the hydraulic lift was raised, the hooks would become embedded in the bagging and cotton by the weight of the bale upon the hooks. The tractor in question was being operated by one of the defendant's employees. The plaintiff would place the hooks in the bales of cotton and then the lift operator would raise the bale and take it over to the truck where it would be lowered on to the bed of the truck. Fifteen bales had been moved in this manner, but the sixteenth bale fell from the hooks, hit the bed of the truck, and then fell upon the plaintiff causing serious personal injuries.

At the conclusion of the plaintiff's evidence, the defendant's motion for judgment of nonsuit was sustained. To the judgment entered in accordance therewith the plaintiff excepts and appeals to the Supreme Court and assigns error.

King & Cox for plaintiff appellant.
Mason & Williamson for defendant appellee.

WINBORNE, C.J. The only question presented for decision is whether or not the Superior Court committed error in granting defendant's motion for judgment of nonsuit at the close of plaintiff's evidence.

Taking the evidence offered by the plaintiff, as shown in the record of case on appeal, in the light most favorable to the plaintiff, giving to him the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as is done in such cases, a negative answer is deemed proper. *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Heuay v. Construction Co.* 254 N.C. 252, 118 S.E. 2d 615.

The plaintiff first alleges and contends that the equipment was defective in that the hooks would not properly hold the cotton as it was being lifted. However, there is no evidence in the record that the equipment in question was defective in any way on the date here involved. Indeed, all the evidence presented by the plaintiff is to the effect that the equipment was in good condition.

The operator of the equipment, James W. McLean, testified that "There was nothing wrong with the machine." He further testified that nothing was wrong with the hooks that day. William James McPhatter and W. G. Buie III, both of whom were familiar with the equipment, also testified that there was nothing wrong with it.

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 negligence was the proximate cause of the injury— a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Heuay v. Construction Co., supra.* And when the plaintiff relies upon circumstantial evidence, he must establish negligence and proximate cause as a reasonable inference from the facts proved and not circumstances which raise a mere conjecture or surmise. *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55.

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. *Heuay v. Construction Co., supra.*

The plaintiff's evidence does show that other bales of cotton had fallen from this equipment at other times, but upon the record in the present case there is no evidence that connects the falling of the cot-

ton on October 3, 1958 (date of the injury complained of herein), and any other time with any defective condition of the defendant's equipment.

The doctrine of *res ipsa loquitur* is not applicable in the present case. For the doctrine to apply the plaintiff must prove (1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant. *Lane v. Dorney, supra; Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9; *Young v. Anchor*, 239 N.C. 288, 79 S.E. 2d 785.

Here the plaintiff's own testimony shows that the equipment was not entirely under the control and management of the defendant Gin Company. Indeed, he testified that he put the hooks in the bales of cotton himself and generally assisted in the loading operation. In this connection he testified: "On that morning, the Gin Company did not have another employee to assist in putting the hooks in the bales; and I was requested to put the hooks in. I loaded 15 bales before the accident. I put the hooks under the steel band that went around the bale of cotton."

As stated by *Adams, J.*, in *Saunders v. R.R.*, 185 N.C. 289, 117 S.E. 4: "It is essential to show that the appliance, machinery, device, or other agency causing the injury is under the management of the defendant or his servants * * * ."

The plaintiff next alleges and contends that the defendant's employee was negligent in the operation of the equipment. Again, there is no evidence in the record that the operator was negligent, or evidence from which an inference of negligence can be made. The only evidence relating to the operation of the equipment is by the operator, James W. McLean. He testified: "I didn't do anything wrong that day, operated it as best I could as far as I am concerned. I did not let the bale fall. There is nothing wrong with the way I operated the equipment. Nobody accused me of dropping this bale."

In fine, there is no evidence in this record showing or tending to show that the defendant's equipment was defective or that the defendant's employee negligently operated it. Therefore, the conclusion is that the evidence offered is insufficient to show actionable negligence on the part of the defendant.

For reasons stated, the judgment below is

Affirmed.

JAMES W. STARBUCK, ALBERT CIANCIOSE, WILLIAM E. SINGLETON, DONALD G. GARDNER AND VERNON A. CARPENTER AND ALL OTHER CITIZENS, TAXPAYERS, QUALIFIED ELECTORS OR RESIDING OR OWNING PROPERTY IN THAT PARTICULAR AREA OR TERRITORY HEREINAFTER DESCRIBED AS THE TOWN LIMITS OF THE TOWN OF HAVELOCK WHO WILL COME IN, MAKES THEMSELVES PARTIES AND CONTRIBUTE TO THE EXPENSE OF THIS ACTION, v. THE TOWN OF HAVELOCK, GEORGE GRIFFIN, MAYOR; CLAY WYNNE, COMMISSIONER; JESSE LEWIS, COMMISSIONER; NORWOOD SANDERS, COMMISSIONER; IRVING BECK, COMMISSIONER.

(Filed 16 June, 1961.)

1. Appeal and Error § 36—

While motion for diminution of the record will lie to correct the record and make it conform to what transpired in the lower court, such motion will not lie when it is sought to correct stipulations, not on the ground that the stipulations were not as filed in the lower court, but on the ground that they did not state what movant intended.

2. Elections § 10—

An election will not be disturbed for irregularities which are insufficient to alter the result, and the stipulations of the parties in this case, together with the lack of evidence of any irregularities sufficient to disturb the result, warrant nonsuit, other questions have been rendered moot by an act of the General Assembly.

APPEAL by plaintiffs from *Campbell, J.*, October-November, 1960 Civil Term, CRAVEN Superior Court.

Civil action by the plaintiffs, citizens and taxpayers of the Town of Havelock, Craven County, against the mayor and commissioners to have the court declare the election of officials and the adoption of the incorporation invalidated for failure to conduct the election according to the requirements of the incorporating Act, Ch. 952, Session Laws of 1959. For further details, see *Starbuck v. Havelock*, 252 N.C. 176, 113 S.E. 2d 278. After the opinion in that case was handed down, the plaintiff amended the complaint by making the Craven County Board of Elections an additional party defendant and alleging (1) a proper notice of the election was not given; (2) "the election officials and the polling places were not designated by notice," (3) "the election was conducted outside the area to be incorporated," (4) "the election officials incorrectly, ill-advisedly, and illegally disqualified a large group of citizens in the military service from applying to register by false statements given to the press," (5) that the individual defendants, mayor and commissioners are attempting to carry out the municipal functions, making contracts, incurring debts, setting up a budget, and collecting taxes. The prayer is that the election be declared void.

The evidence disclosed the corporate limits of Havelock as fixed by Ch. 952, Session Laws of 1959, did not include all of Township No. 6 (Cherry Point voting precinct) but that the registration books were kept open and the election was held in the Havelock Elementary School building located just across the street but outside the corporate limits. However, all recent regular elections were held in this same building and all the voters of the Cherry Point precinct were accustomed to vote there.

The evidence further disclosed that some members of the Armed Forces located at Cherry Point did not attempt to register and vote because of reports military personnel situated within the limits under military orders were not entitled to vote. There was no evidence that more than two or three attempted to register.

The parties stipulated:

> "9. The call for the election to effectuate an incorporation and elect a Mayor and five Commissioners for the Town of Havelock was carried out as directed by Sections 4, 5 and 6 of Chapter 952 of the Session Laws of 1959.
>
> "10. The Craven County Board of Elections named the registrars and judges of election, location of polling place, time for registration, date of elections and hours of voting as directed by Section 4 and Section 6 of Chapter 952 of the Session Laws of 1959."

At the conclusion of the plaintiffs' evidence the court entered judgment of nonsuit, from which the plaintiffs appealed.

Charles L. Abernethy, Jr., for plaintiffs, appellants.

A. D. Ward, Kennedy W. Ward, for Town of Havelock, et al, defendants, appellees.

Laurence A. Stith, for Craven County Board of Elections, defendants, appellees.

HIGGINS, J. The plaintiffs filed a motion here to correct "stipulations nine and ten as reported in the statement of facts," not upon the ground the stipulations are not as filed in the court below, but on the ground they do not state what the plaintiffs intended to agree to. Motions suggesting diminution of the record on the ground the case on appeal does not conform to the record below will lie, but when the stipulations are filed with the court below and are correctly certified here, we are bound by them. Moreover, a successful challenge to an election must show that irregularities occurred which were suf-

ficient to upset the result. *Overton v. Commissioners,* 253 N.C. 306, 116 S.E. 2d 808.

Stipulations 9 and 10, together with the lack of evidence of any irregularities sufficient to disturb the result, required nonsuit. The questions otherwise are rendered moot by an Act of the General Assembly ratified April 18, 1961, entitled, "An Act to Ratify and Validate the Creation of the Town of Havelock and to Confirm and Validate the Acts of the Mayor and Commissioners of Said Town."

On the basis of the record here, the nonsuit in the court below is Affirmed.

CLAUDE R. GOLDING v. W. C. CASSTEVENS.

(Filed 16 June, 1961.)

Contracts § 29—

The controversy between the parties was whether work done by the contractor after payment of the contract price was extra work for which he should be paid a stipulated sum per hour in accordance with the terms of the agreement, or whether it was work necessary to complete the project in accordance with the specifications, payment having been made prior to the completion of the project upon the contractor's promise to complete it. *Held:* An instruction that it was immaterial whether the original specifications were fulfilled and that the issue was whether the owner owed the contractor for any extra work done on the project, must be held for prejudicial error.

APPEAL by defendant from *Olive, J.,* November 1960 Civil Term of SURRY.

Plaintiff seeks to recover $1309 for extra work at a rate specified in a contract with defendant.

Defendant admitted the contractual relationship fixing the rate of pay for extra work. He denied the work for which plaintiff sought payment was in fact extra, alleging it was merely work done in the performance of the basic contract.

The case was submitted to a jury on the single issue as to the amount, if any, owing plaintiff. The jury answered the issue in favor of plaintiff. Judgment was entered thereon and defendant appealed.

Woltz and Faw for plaintiff appellee.

Frank Freeman for defendant appellant.

RODMAN, J. Defendant desired to dam a stream and create a pond. For that purpose he and plaintiff entered into a contract which provided: "The base of this dam is 170 feet wide at the bottom. On the water side it is to be sloped 2 feet to 1 foot. The back side will be sloped 3 to 1. The total height of this dam will be 23 feet leaving the top level so it can be used for a roadway. The spillway will be graded to my satisfaction.

"If there is any extra work it will be done on an hourly basis at the rate of $11.00 per hour. The base bid for this dam will be $1,100.00."

Defendant paid plaintiff the contract price for constructing the dam. Plaintiff testified that at the time the payment was made the work of constructing the dam had been completed in accordance with the contract specifications, and defendant then instructed him to start working by the hour hauling more dirt and increasing the height of the dam. In addition to enlarging the dam, he subsoiled some land and did other extra work. Plaintiff rendered defendant a bill for $1893 for extra work, computed as follows:

"49 hrs. subsoiling @ $9.00	$ 441.00
132 hrs. @ $11.00 per hour	1452.00
(Changing creek, filling creek bed, panning dirt in bottom, leveling barn place and *work on dam.*) (Emphasis supplied)	
	$1893.00"

Defendant paid plaintiff $584 for subsoiling and items claimed other than "work on dam."

Defendant testified he paid the contract price for constructing the dam before that work was completed and upon the promise and assurance by plaintiff that it would be completed in accordance with the contract. He denied that he authorized plaintiff to perform any extra work on the dam.

Plaintiff's right to recover was, because of conflict in the evidence, dependent upon the answer to this question: Had the dam been completed to conform to contract specifications when the $1100 was paid? If the jury should answer that question in the affirmative, plaintiff would be entitled to recover for the number of hours of extra work performed at $11 per hour. If the jury should accept defendant's contention, plaintiff would not be entitled to recover any sum. If the jury should find that a part of the work claimed as extra work was necessary to bring the dam up to contract specifications, plaintiff would not be entitled to recover for that portion, but defendant would

be liable for work done over and beyond the work necessary to complete the contract in accordance with specifications.

Appellant assigns as error the following portion of the charge: "The Court charges you as a matter of law that the evidence is uncontradicted that a written contract was entered into by the plaintiff and the defendant and that the defendant paid to the plaintiff the amount specified in this written contract for the work done according to specifications in the contract; and, therefore, as a matter of law the Court holds that that is not at issue as to whether or not the original specifications were fulfilled; it is only a matter as to whether the defendant owes the plaintiff anything for extra work done on the dam."

The vice of the charge is apparent. There could be no extra work by enlarging the dam until it had been completed to contract dimensions.

The fact that defendant, relying on plaintiff's promise to perform, paid before performance was complete would not obligate him to pay again when performance was complete nor prevent him from recovering the payments made if plaintiff failed to comply with his promise to perform. *Wells v. Foreman*, 236 N.C. 351, 72 S.E. 2d 765; *Sparrow v. Morrell & Co.*, 215 N.C. 452, 2 S.E. 2d 365.

New trial.

FARMERS COOPERATIVE EXCHANGE, INC. v. MAURICE TRULL.

(Filed 16 June, 1961.)

1. Courts § 3: Venue § 8—

The Superior Court is a court of statewide jurisdiction, and a motion to remove from the Superior Court of one county to the Superior Court of another county does not present a question of jurisdiction.

2. Venue § 4—

A motion for change of venue for the convenience of witnesses rests in the sound discretion of the trial court, and its ruling thereon is not subject to review except for manifest abuse for such discretion. G.S. 1-83(2).

3. Same—

When motion for change of venue is allowed but the clerk fails to transmit the record, a motion in that court at a later term to rescind the order of removal and to reactivate its jurisdiction is addressed to the sound discretion of the court, and the refusal of the motion and the entry of an order of removal in accordance with the prior order will not be disturbed in the absence of abuse of discretion.

COOPERATIVE EXCHANGE *v.* TRULL.

APPEAL by plaintiff from *Carr, J.*, First April Regular Civil Term 1961 of WAKE.

Action by plaintiff, which has its principal offices located at Raleigh, Wake County, to recover from defendant, a resident of Union County, for merchandise sold and delivered by it to him from its branch store at Monroe, Union County.

The summons was issued on 24 May 1960, and on the same day the complaint was duly filed in the office of the clerk of the superior court of Wake County.

Defendant was granted an extension of time in which to answer. He filed his answer within due time on 14 July 1960, admitting all the allegations of the complaint, and pleading a counterclaim against plaintiff for damages for breach of an alleged special warranty by plaintiff in respect to the germination of peas sold and delivered to him by plaintiff.

At the First October Regular Civil Term 1960 of Wake County superior court defendant filed a written motion to remove the case for trial to Union County on the ground that such removal would promote the convenience of witnesses and the ends of justice. Defendant supported his motion by an affidavit of one of his counsel setting out the pertinent facts. Plaintiff filed a counter affidavit. Judge Henry A. McKinnon, Jr., presiding at that term entered an order in his discretion allowing defendant's motion, and ordering the removal of the case from Wake County to Union County for trial.

On 22 February 1961 plaintiff filed a written motion in the superior court of Wake County to vacate its order of removal of the case to Union County for trial, on the ground that on 20 February 1961 a civil term of Union County superior court convened, which was the next civil term of that court after the order of removal was entered to which this case could reasonably be removed and docketed for trial, and that defendant had failed and neglected to have a transcript of the record of the case transmitted to the superior court of Union County. This motion came on to be heard before Judge Leo Carr presiding at the First April Regular Civil Term 1961 of Wake County superior court. Judge Carr, after finding the relevant facts, entered an order in his discretion denying plaintiff's motion and ordering that the record of the case be sent to the superior court of Union County for trial, as ordered by Judge McKinnon.

From this order plaintiff appeals.

L. Bruce Gunter for plaintiff, appellant.

R. B. Templeton, Davis & Brown By Allen W. Brown for defendant, appellee.

PARKER, J. The superior court of North Carolina is one court having statewide jurisdiction. *Casstevens v. Wilkes Telephone Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94; *Lovegrove v. Lovegrove*, 237 N.C. 307, 74 S.E. 2d 723; *Rhyne v. Lipscombe*, 122 N.C. 650, 29 S.E. 57.

Defendant's motion for the removal of the case from Wake County superior court to the superior court of Union County for trial to promote the convenience of witnesses and the ends of justice, made pursuant to the provisions of G.S. 1-83, 2, presents a question of venue, not jurisdiction, is within the sound discretion of the trial judge, and is not subject to review except for manifest abuse of such discretion. *Howard v. Coach Co.*, 212 N.C. 201, 193 S.E. 138; McIntosh, N. C. Practice & Procedure, 2nd Ed., Vol. 1, p. 437.

Judge McKinnon in his discretion entered an order allowing defendant's motion for removal at the First October Regular Civil Term 1960 of Wake County superior court. However, the clerk of the superior court of Wake County failed to transmit the record of the case to the superior court of Union County as directed by G.S. 1-87, nor did the defendant have it transmitted. After a civil term of the superior court of Union County had convened next after the entering of Judge McKinnon's order of removal, plaintiff filed a written motion in the superior court of Wake County to vacate Judge McKinnon's order of removal.

This Court said in *Jones v. Brinson*, 238 N.C. 506, 78 S.E. 2d 334: "In the event the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice may be reactivated for exclusive control over the cause." To the same effect see *Fisher v. Mining Co.*, 105 N.C. 123, 10 S.E. 1055. In *Cline v. Manufacturing Co.*, 116 N.C. 837, 21 S.E. 791, the same rule of law is stated, though the judge there struck out the order of removal.

Whether or not the dormant jurisdiction of the superior court of Wake County should be reactivated and Judge McKinnon's order of removal stricken out was a matter within the sound discretion of Judge Carr. Judge Carr in his sound discretion denied plaintiff's motion to strike out Judge McKinnon's order of removal and his order is not subject to review as no manifest abuse of discretion on his part is shown or appears. In fact, plaintiff does not contend that Judge Carr abused his discretion.

The order of Judge Carr is

Affirmed.

BRANCH BANKING AND TRUST COMPANY v. BANK OF WASHINGTON, WASHINGTON, NORTH CAROLINA.

(Filed 7 July, 1961.)

1. Appeal and Error § 49—

Upon waiver of jury trial, the court's findings of fact, if supported by competent evidence, are as conclusive as the verdict of a jury.

2. Same—

A finding of fact to which no exception is taken is presumed to be supported by competent evidence.

3. Bills and Notes § 10—

In regard to checks and in regard to drafts drawn on itself by the drawer, G.S. 25-143 and G.S. 25-144 apply, and the bank upon which the instrument is drawn has twenty-four hours after presentment in which to decide whether or not it will pay the instrument; but as to drafts drawn by a creditor against his debtor, these statutes do not apply, nor does G.S. 25-94 apply when the drawer does not have an account with the bank at which the instrument is payable.

4. Same: Banks and Banking § 9—

Drafts drawn by a creditor against his debtor were deposited in the drawer's bank for collection, and sent by it, marked "no protest," to a second bank for collection, which second bank in turn sent them to a third bank in which the payor had an account. The third bank presented same to the payor, who neither paid the drafts nor accepted them, and the third bank held the drafts for more than a week before returning them to the second bank. *Held:* The payor's bank may not be held liable on the drafts on the theory that its delay in returning the unpaid drafts constituted a constructive acceptance of the drafts by it.

5. Bills and Notes § 10—

Where a creditor draws a draft on its debtor in another city, which draft is sent for collection through successive banks, it *is held* that prior to acceptance by the payor, the payee or holder of the bill must look to the drawer for his protection, since the liability of the payor or drawee to the payee or holder does not accrue until he makes a valid acceptance to one who is entitled to enforce the engagement contained in the acceptance, in which event the acceptor engages to pay the instrument according to the tenor of his acceptance.

6. Bills and Notes § 11—

Where a draft has the words "NO PROTEST" stamped on it, the successive endorsers remain liable each to the prior endorser notwithstanding failure to make formal protest, presentment, or notice of dishonor. G.S. 25-118, G.S. 25-116, G.S. 25-117.

7. Bills and Notes § 10: Banks and Banking § 9— Bank acting as agent for collection may not hold drawee's bank liable for negligence in failing to collect or return draft within reasonable time.

The seller drew drafts for the purchase price of goods sold and de-

posited the drafts for collection in a bank in which he had an account. This bank endorsed the drafts to another bank for collection. The second bank in turn sent the drafts as a "cash item" to the bank in which the purchaser had its account. The purchaser neither accepted nor paid the drafts, and more than a week after its receipt of the drafts, the purchaser's bank returned them to the second bank upon the second bank's demand for action. The second bank returned the drafts to the seller's bank, but the seller's bank refused to reverse the credit on the ground of the delay in notice of nonpayment. The second bank acknowledged its liability to seller's bank for the amount of the drafts, and instituted action against the purchaser's bank. *Held:* The purchaser's bank may not be held liable by the second bank on the ground of negligence in failing to return the drafts promptly when they were not paid, since the second bank suffered no loss by any negligence in this respect for the reason that the second bank was not a drawee or acceptor and had the right to charge the drafts back to the seller's bank notwithstanding its admission to the contrary, and therefore it was not the real party in interest, G.S. 1-57, any loss suffered by the seller's bank on account of the negligence of the purchaser's bank not arising out of contract and not being assignable.

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

PARKER, J., dissenting.

HIGGINS, J., joins in dissent.

APPEAL by plaintiff from *Hooks, Special Judge,* September Civil Term, 1960, of WILSON.

Plaintiff and defendant are North Carolina banking corporations. Plaintiff's principal office is in Wilson, North Carolina, and defendant's principal office is in Washington, North Carolina.

Plaintiff's action is to recover the face amount of each of eight drafts, a total of $5,569.26, plus interest.

Plaintiff, in substance, alleged: (1) It is "the owner and holder for value" of said drafts. (2) Plaintiff forwarded each draft, "as a Cash Item," to defendant "for collection and return of proceeds." (3) Each draft "was attached to and formed a part of a Cash Letter which instructed the defendant to wire non-payment of items of $1,000.00 and over; to return promptly all unpaid items; and stating that the defendant would be held liable for loss in delay in returning papers." (4) Defendant failed (a) to collect said drafts, (b) to follow plaintiff's instructions, (c) to advise plaintiff of nonpayment, (d) to answer plaintiff's inquiries relating thereto. (5) Defendant held said drafts in its possession until plaintiff made specific demand therefor, "which resulted in their return on February 2, 1960, with the advice that payment was requested and payment was refused."

Plaintiff alleged defendant, by holding each of said drafts for more than twenty-four hours without receiving payment thereof or without

returning it to plaintiff, accepted such draft and is liable to plaintiff for the amount thereof.

Plaintiff alleged, alternatively, if it should be determined defendant did not accept the drafts, defendant is liable to plaintiff *for the amount thereof* as damages on account of defendant's negligence, alleging defendant knew or should have known Washington Hog Market was in serious financial difficulties.

Answering, defendant admitted plaintiff forwarded the drafts to it for collection and return of proceeds, accompanied by written instructions; that defendant, "in an effort to make collection thereof," held each draft more than twenty-four hours without receiving payment from the drawee; that defendant, after diligent effort, was unable to make collection from Washington Hog Market, the drawee; and that, "upon written instructions from plaintiff," it returned the drafts to plaintiff on February 2, 1960, advising plaintiff that payment had been requested and refused. Except as stated, defendant denied the material allegations of the complaint.

As a further answer and defense, defendant, in substance alleged: Plaintiff forwarded the drafts to defendant for collection from Washington Hog Market. Defendant presented the drafts to Washington Hog Market. Defendant handled the drafts in the same manner it had handled prior drafts of like nature forwarded to it by plaintiff for collection. Defendant, by holding said prior drafts for an equal or greater length of time, had collected from Washington Hog Market and remitted to plaintiff. Plaintiff, by acquiescing in this course of dealing, is estopped to maintain this action. If defendant was negligent, which it expressly denied, plaintiff has suffered no loss on account thereof.

The parties waived jury trial. G.S. 1-184. Both plaintiff and defendant offered evidence. The court, as provided by G.S. 1-185, entered judgment, based on findings of fact and conclusions of law set forth therein, which, omitting preliminary recitals, is set out below.

"FINDINGS OF FACT

"(1) The Plaintiff, Branch Banking & Trust Company, is a North Carolina banking corporation with its main office in Wilson, North Carolina. The Defendant, Bank of Washington, is a North Carolina banking corporation with its main office in Washington, North Carolina, Beaufort County. For convenience the Plaintiff will hereafter be referred to as 'The Branch Bank.'

"(2) The Branch Bank is the holder for collection of eight drafts, drawn upon the Washington Hog Market by the H & N Hog Market payable to the order of the Bank of Halifax and en-

dorsed by it as will herein appear. Each of the eight drafts bear different dates and are in different sums. All eight drafts were drawn in the same manner and the following is an example of the drafts and was the first of the eight drafts:

"NO PROTEST
CUSTOMER'S DRAFT

THE BANK OF HALIFAX

Weldon, N. C. 12/23 1959
Pay to the order of
The Bank of Halifax $1006.51
One Thousand Six and 51/100 ..... Dollars
Value received and charge the same to account of

To WASHINGTON HOG MARKET)
THE BANK OF WASHINGTON)
WASHINGTON, N. C.)
Inv. 62722

H & N HOG
MARKET
R. Boyd Robinson

(Reverse side of Draft)

Dec. 24, 1959 — Pay to the order of any BANK, BANKER OR TRUST CO. All Prior Endmts Guaranteed — The Bank of Halifax, Weldon, N. C. J. W. Brown, Cashier — 66-911. Pay to the order of any BANK, BANKER OR TRUST CO. Prior endorsements guaranteed. Dec. 28, 59 — Branch Banking & Trust Co., Wilson, N. C. 66-112.

"(3) Each of the eight drafts had attached to it an Invoice of H & N Hog Market, Weldon, N. C., showing the customer's name to be Washington Hog Market and each Invoice carried the same date and the amount as the draft to which it was attached. The following is an example of the Invoices attached to the drafts and was the Invoice attached to the draft set out in paragraph (2) above:

H & N Hog Market
Weldon, N. C.

Customer's
Order No. ..... Date: 12/23 1959
Name Washington Hog Market
Address .....

Sold By Cash C.O.D. Charge On Acct. Mdse. Retd.

Quan.	Description		Price	Amount
15	Shoats	1774	11.00	195 14
2	140-160	284	11.50	32 89
25	Tops	3442	13.00	707 46
1	240-270	268	11.50	30 82
1	Sow	216	9.50	20 52
1	160-180	164	12.00	19 68
				1006 51

Paid out

(Pay to the order —
(Bank, Banker or —
(Prior Endorsements —
(Dec. 28
(Branch Banking & T
(66-112 Wilson, N. C.

ALL claims and returned goods MUST be accompanied by this bill.

62722 Recd. by _____

"(4) In addition to the draft set out in paragraph (2) above, the Branch Bank is the holder for collection of the following drafts, all of which followed the same form as set out in paragraph (2) above, bearing the same endorsement on the reverse side, with the same style of Invoices attached as set out above, with the exception of the dates and amounts which are stated hereafter:

Draft No. 2: January 2, 1959 (60) in the sum of	$1063 42
Draft No. 3: January 11, 1960 in the sum of	732 67
Draft No. 4: January 14, 1960 in the sum of	197 23
Draft No. 5: January 15, 1960 in the sum of	889 55
Draft No. 6: January 18, 1960 in the sum of	1085 59
Draft No. 7: January 21, 1960 in the sum of	384 43
Draft No. 8: January 23, 1960 in the sum of	209 86

"(5) On the day that each of the above drafts were dated or the day following said date, H & N Hog Market deposited said drafts with the payee, the Bank of Halifax subject to the following contract or agreement: 'In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.'

"(6) After receiving each of the drafts, the Bank of Halifax immediately forwarded the same to the Branch Bank, after endorsing each of said drafts as indicated in finding of fact #2 above. Each of said drafts was forwarded to the Branch Bank with a letter of transmittal from the Bank of Halifax containing the following provision: 'We enclose the following items for collection and remittance — Credit:' The drafts were forwarded by the Bank of Halifax to the Branch Bank subject to the following agreement which had been executed between these two Banks:

'In receiving items for deposit or collection, the Branch Banking & Trust Company acts only as depositor's collecting agent, until actual final payment in cash or solvent credits; and when such items are credited to depositor's account it is with the understanding that same is subject to final payment and that any such items may be charged back at any time before final payment, and that until final payment, the Branch Banking & Trust Company may refuse payment of any check or draft drawn against such uncollected items. The Branch Banking & Trust Company's liability is limited to the exercise of due care. Unless instructions to the contrary are given when items are deposited, the Branch Banking & Trust Company or its correspondents, may send same direct to the Banks on which they are drawn, or through intermediate banks, and may accept drafts or credits as conditional payment, in lieu of cash; and the Branch Banking & Trust Company will not be held liable for failure, default or neglect of any such payor bank or of

any duly selected correspondent, or for losses in transit; and no such correspondent shall be held liable except for its own negligence. Items in Wilson are credited subject to final payment through the Wilson Banks and the Branch Banking & Trust Company may charge back any item drawn on itself which is not good at close of business on day of deposit.'

"The Bank of Halifax was given credit for the drafts upon their receipt by the Branch Bank. The Branch Bank received each of the drafts from the Bank of Halifax the day following the forwarding of the same.

"(7) The Branch Bank forwarded said drafts to the Bank of Washington with its letter of transmittal on a form containing the following provisions:

'We enclose for collection and return of proceeds as listed below. Deliver documents only on payment. Correspondents will be held liable for loss resulting from delay in returning papers.

'Return promptly all unpaid items.
Please report by date of letter.
Wire non-payment of items of $1,000.00 and over.
Do not protest items $1,000.00 or under, or those bearing this stamp or similar authority of a preceding endorser.'

On the above form the Branch Bank typed the words 'Cash draft,' followed by the amount of each of said drafts.

"(8) When the drafts were received by the Bank of Washington, in accordance with its general custom in handling drafts of this nature, they were treated as collection items. The Bank of Washington had no authority from Washington Hog Market to honor the said drafts and each of them had to be presented to the Washington Hog Market for acceptance before the Bank of Washington had authority to pay the same. From the face of the drafts and the Invoices attached thereto, the Court finds that the drawer was H & N Hog Market, the seller of the hogs, upon Washington Hog Market, the drawee, the buyer of the hogs represented by each draft and Invoice.

"(9) Upon receipt of each of the drafts by the Bank of Washington, it was presented to Washington Hog Market for acceptance, and for payment thereof. The Washington Hog Market did not pay said drafts when called upon for payment, nor did it refuse to pay the same. The Bank of Washington held all of the eight drafts until February 2, 1960. The Bank of Washington was unable to collect any of the said drafts.

"(10) In the meantime the Branch Bank sent to the Bank of Washington three 'Tracers' on a form containing the following:

'Branch Banking & Trust Company
Wilson, N. C.

Please report on our: Cash Letter
Collections

Date

Amount

1/13/60 Cash draft Washington Hog Market

$732.67

Please Advise
Branch Banking & Trust Company.'

"The Branch Bank did not receive any response from the Bank of Washington as to any of its letters of transmittal or its 'Tracers.'

"On February 1, 1960, the Assistant Cashier of the Branch Bank addressed a letter to the Cashier of the Bank of Washington which read in part: 'According to our records our cash letters to you consisting of drafts drawn on Washington Hog Market is *(sic)* still unpaid:

"'We would appreciate you presenting these drafts for payment and if not paid return to us so we might clear our records.' This letter was received by the Bank of Washington on February 2, 1960, and on that same date the Bank of Washington returned to the Branch Bank the drafts in question.

"(11) On each occasion when a 'Tracer' was received from the Branch Bank by the Bank of Washington, the defendant again promptly called upon Washington Hog Market for payment of the drafts and the same were not paid nor did the said Hog Market refuse to pay the same.

"(12) On February 5, 1960, the Bank of Washington again received all of said drafts from the Branch Bank accompanied by a written request reading in part as follows: 'We enclose for collection and return of proceeds as listed below,' and then followed a listing by amounts of the eight drafts referred to in the complaint. The defendant Bank again called upon the Washington Hog Market for payment of the drafts, and being unable to collect the same, finally returned the same to the plaintiff on February 17, 1960.

"(13) For several months prior to the receipt of the drafts in question, the Bank of Washington had received from the Branch Bank numerous drafts, such as the ones in question, on Washington Hog Market, some of which were drawn by H & N Hog

Market and some by other livestock dealers. Upon receipt of such drafts the Bank of Washington promptly called upon Washington Hog Market for payment and it was necessary for the Bank of Washington to hold such drafts for periods of time as long as twenty days in order to make collection and remit the same to the Branch Bank.

"(14) During the period from December 28, 1959, through February 2, 1960, the daily bank balance of Washington Hog Market, Inc., with the Bank of Washington ranged from a maximum deposit of $36,085.76 to as low as an overdraft of $15,186.95 on one particular day. Also during the period from December 28, 1959, through January 29, 1960, the Bank of Washington had received and was holding daily for collection drafts drawn by various livestock markets upon the Washington Hog Market exceeding $100,000.00. Upon calling upon Washington Hog Market for payment of each of said drafts, the Washington Hog Market would select the draft or drafts which it was willing to accept and pay at that particular time. The Bank of Washington promptly remitted payments on the drafts which were accepted and paid by Washington Hog Market.

"(15) Washington Hog Market, Inc. is now in bankruptcy.

"(16) At all times throughout the course of dealing with these drafts from December 28, 1959, through February 2, 1960, the Washington Hog Market, Inc. was insolvent. This fact was not known to the Bank of Washington at the time it received said drafts.

"(17) Following the return of the drafts in question to the Branch Bank by the Bank of Washington, the Branch Bank charged back to the Bank of Halifax the face amount of all eight drafts and returned the said drafts to the Bank of Halifax. The Bank of Halifax refused to accept the return of the drafts, and in turn forwarded the same back to the Branch Bank, which is now the holder of the same.

"(18) The Bank of Washington acted at all times in good faith in its efforts to collect the drafts in question. By reason of the prior course of dealings between plaintiff and defendant in the handling of these and other similar drafts for collection from this Hog Market, the Bank of Washington did not convert these drafts by failing to return them promptly to the Branch Bank.

"(19) The Branch Bank was not damaged by the conduct of the Bank of Washington in attempting to collect the drafts for the reason that Branch Bank has offered no evidence tending to

establish that the drafts would have been paid except for the conduct of defendant Bank.

"(20) The Branch Bank was not the owner of said drafts, but holder thereof as an agent for collection.

"Upon the foregoing findings of fact, the Court reaches the following:

"CONCLUSIONS OF LAW

"(1) The Washington Hog Market and not the Bank of Washington was the drawee in all the drafts involved herein.

"(2) The Bank of Washington did not accept the said drafts.

"(3) The Branch Bank has not been damaged by the conduct of the Bank of Washington in attempting to collect the drafts.

"(4) The Branch Bank is not the real party in interest and not entitled to maintain this action;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's action be, and the same hereby is dismissed, and the costs taxed against the plaintiff."

Plaintiff excepted (1) to designated findings of fact and conclusions of law made by the court, (2) to the court's refusal to make the findings of fact and conclusions of law requested by plaintiff, (3) to the judgment, and appealed.

Carr & Gibbons for plaintiff, appellant.

Finch, Narron, Holdford & Holdford and Rodman & Rodman for defendant, appellee.

BOBBITT, J. Upon waiver of jury trial, the court's findings of fact, if supported by competent evidence, are as conclusive as the verdict of a jury. Moreover, a finding of fact to which no exception is taken is presumed to be supported by competent evidence. Constitution of North Carolina, Article IV, Section 13; *Goldsboro v. R. R.*, 246 N.C. 101, 107, 97 S.E. 2d 486, and cases cited. Plaintiff's assignments of error must be considered in the light of these well established legal principles.

Plaintiff assigns as error the court's finding of fact and legal conclusion that Washington Hog Market, not defendant, was the drawee in the drafts, and the court's legal conclusion that defendant did not accept the drafts. Plaintiff contends defendant was in fact and in law the drawee, accepted them, actually or constructively, and is obligated *on the drafts* to plaintiff as owner and holder thereof.

Under G.S. 25-143, *"(t)he drawee* is allowed twenty-four hours

after presentment in which to decide whether or not he will accept the bill." (Our italics) Under G.S. 25-144, "(w)here *a drawee* to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." (Our italics) Plaintiff contends defendant's failure to pay or return the drafts within twenty-four hours after it received them constituted acceptance of the drafts by defendant. This contention assumes defendant was the drawee.

Washington Hog Market purchased hogs from H & N Hog Market. H & N Hog Market asserted Washington Hog Market was indebted to it, for hogs listed on the invoices, in the amounts for which the drafts were drawn.

H & N Hog Market had no account with defendant. Defendant was not indebted or otherwise obligated to it. Washington Hog Market, which had an account with defendant, had not authorized defendant to charge these drafts or any drafts to its account.

A bill of exchange is defined as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." G.S. 25-133. Absent evidence of special arrangements, the reasonable inference is that a draft is addressed to a party obligated to the drawer to make such payment.

A check is defined as "a bill of exchange drawn on a bank payable on demand." G.S. 25-192. It is an order to the bank on which it is drawn to pay the amount thereof and charge it to the drawer's account. In respect of a check, the bank on which it is drawn is the drawee; and, when presented to the drawee, the provisions of G.S. 25-143 apply.

G.S. 25-94, to which plaintiff directs our attention, provides: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." But this provision contemplates a situation where the drawer of the instrument has or purports to have an account with the bank at which the instrument is payable.

To support its said contention, plaintiff cites *Mt. Vernon Nat. Bank v. Canby State Bank* (Oregon), 276 P. 262, 63 A.L.R. 1133. In that case, the drawer drew a draft *on itself*, payable at a bank with which the drawer had an account. The opinion states: "Although in form a draft, it has all the essential elements of a check." Again: "When *the drawer* made this check payable at the Canby State Bank, it was

equivalent to an order on that bank to pay the same *and charge to its account.*" (Our italics) Decisions relating (1) to checks, or (2) to drafts where the drawer draws the draft *on itself,* payable by or at a bank *where the drawer has an account,* where the bank, upon payment, can charge the amount thereof to the account of its depositor, are not relevant to the present factual situation.

It seems clear all parties understood the drafts were forwarded to defendant as collecting agent, not as drawee. The Vice-President of the Bank of Halifax testified: "I knew that these drafts were being drawn upon the Washington Hog Market. I knew that the Washington Hog Market had to accept and pay these drafts." Moreover, plaintiff forwarded the drafts to defendant "for collection and return of proceeds" and, by letter of February 1, 1960, requested defendant to present "these drafts for payment and if not paid return to us so we might clear our records."

Plaintiff contends, apart from G.S. 25-143 and G.S. 25-144, defendant's alleged negligence in failing to return the drafts promptly to plaintiff or notify plaintiff of their nonpayment by Washington Hog Market, constituted a constructive acceptance by defendant of the drafts. The significance of defendant's negligence, if any, is discussed below. Presently, it is sufficient to say: If defendant was not the drawee, it cannot be held liable *on the drafts* on the theory that it constructively accepted said drafts as drawee. The court's legal conclusion that defendant "did not accept the said drafts," assigned as error by plaintiff, was correct.

A drawee (unless also the drawer) becomes liable for the payment of a draft only upon his acceptance thereof. G.S. 25-68. "Until the instrument is accepted, the payee or holder of the bill must look to the drawer for his protection. The liability of the drawee to the payee or holder accrues when he makes a valid acceptance of the bill and when it is in the possession or is delivered to one who is entitled to enforce the engagement contained in the acceptance. The legal intendment of the acceptance is that the acceptor engages to pay the instrument according, but only according, to the tenor of his acceptance. It is, in short, a promise to pay." 8 Am. Jur., Bills and Notes § 524; 10 C.J.S., Bills and Notes § 171; G.S. 25-67.

Washington Hog Market, when notified by defendant of its receipt thereof for collection, did not pay or otherwise accept the drafts. Whatever its indebtedness or liability to H & N Hog Market for purchase price for hogs, Washington Hog Market is not liable to anybody *on the drafts* absent its acceptance thereof.

Under the circumstances, the evidence was amply sufficient to support the court's findings of fact and legal conclusions that the drawee

in each of these drafts was Washington Hog Market; that the drafts were forwarded to defendant for collection from Washington Hog Market, not for acceptance by defendant as drawee; and that defendant did not *accept* the drafts and is not liable *thereon.* In a strikingly similar factual situation, it was so held by the Supreme Court of Texas in *Tyler Bank & Trust Company v. Saunders,* 317 S.W. 2d 37.

Having reached the conclusion defendant is not liable to plaintiff *on the drafts,* we consider now whether defendant is liable to plaintiff *for the amount* of the drafts as damages caused by the alleged negligence of defendant. In this connection, it is noted: While the court found defendant acted in good faith in its efforts to collect the drafts, to which plaintiff excepted, no finding of fact was made as to whether defendant was negligent. Decision was based on a finding of fact and legal conclusions, to which plaintiff excepted, (1) that plaintiff had not been damaged by defendant's conduct, and (2) that plaintiff is not the real party in interest and therefore cannot maintain this action.

The author of the Annotation in 19 A.L.R. 555, *556,* citing decisions from many jurisdictions, says: "Despite expressions to be found in some cases to the effect that the measure of damages for breach of duty by a bank in respect to the collection of commercial paper is the face of the paper involved, the true rule, supported by the overwhelming weight of authority, is that the damages are measured by the actual loss suffered by the owner of the paper, in consequence of the negligence or misconduct of the bank; at least, in the absence of bad faith, or positive wrongdoing, or failure to return the paper." In support of this statement, these North Carolina decisions are cited: *Stowe v. Bank,* 14 N.C. 408; *Bank v. Kenan,* 76 N.C. 340; *Bank v. Trust Co.,* 172 N.C. 344, 90 S.E. 302, and on subsequent appeal, *Bank v. Trust Co.,* 177 N.C. 254, 98 S.E. 595.

We think the evidence amply sufficient to support the court's finding of fact that defendant acted in good faith in its efforts to collect the drafts. There is no evidence of positive wrongdoing on the part of defendant. Defendant returned the drafts to plaintiff immediately when requested to do so. The drafts were presented by defendant to Washington Hog Market. Negligence, if any, on the part of defendant, consists in the failure to notify plaintiff promptly of its inability to collect the drafts from Washington Hog Market.

H & N Hog Market was a regular customer of the Bank of Halifax. When each draft was drawn, H & N Hog Market had nothing more than a creditor's claim against Washington Hog Market. The draft procedure was adopted as a method of collecting the debt.

When the drafts were deposited in the Bank of Halifax, the account

of H & N Hog Market was credited with the amount thereof subject to the terms and provisions of the agreement set forth in Finding of Fact #5. It was agreed the Bank of Halifax was to act "only as depositor's collecting agent" and assumed "no responsibility beyond the exercise of due care." It was further agreed: "All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence."

The Bank of Halifax, a regular customer of plaintiff, stamped its endorsement on the drafts and promptly forwarded them to plaintiff. Upon receipt, plaintiff credited the account of the Bank of Halifax with the amount thereof subject to the terms and provisions of the agreement set forth in Finding of Fact #6. It was agreed plaintiff was to act "only as depositor's collecting agent, until actual final payment in cash or solvent credits; and when such items are credited to depositor's account it is with the understanding that same is subject to final payment and that any such items may be charged back at any time before final payment, and that until final payment, the Branch Banking & Trust Company may refuse payment of any check or draft drawn against such uncollected items." It was further agreed: "Branch Banking & Trust Company's liability is limited to the exercise of due care." Again: ". . . Branch Banking & Trust Company will not be held liable for failure, default or neglect of any such payor bank or of any duly selected correspondent, or for losses in transit." Plaintiff promptly forwarded the drafts to defendant "for collection and return of proceeds."

There is no evidence of negligence on the part of the Bank of Halifax. Nor is there evidence of negligence on the part of plaintiff. No reason appears why plaintiff was not legally entitled to charge the amount of these uncollected and unaccepted drafts to the Bank of Halifax, or why the Bank of Halifax, in turn, was not legally entitled to charge the amount thereof to H & N Hog Market. Indeed, they were entitled to do so under the express terms and conditions of the agreements under which credit had been given. The credits given "were purely temporary and conditional." *American Barrel Co. v. Commissioner of Banks* (Mass.), 195 N.E. 335.

Since the drafts were neither paid nor accepted by the drawee, the only persons liable *thereon* were these: Bank of Halifax, as endorser, was liable thereon to plaintiff; and, in turn, H & N Hog Market, the drawer, was liable thereon to the Bank of Halifax. Apart from the express agreements under which the drafts were deposited and credited, the words "NO PROTEST," were plainly printed on each draft. Thus,

the drawer (H & N Hog Market) and initial endorser (Bank of Halifax) remained liable thereon notwithstanding a failure to make formal protest, presentment or notice of dishonor. G.S. 25-118; G.S. 25-116; G.S. 25-117; *Shaw v. McNeill,* 95 N.C. 535; *Pearson v. Westbrook,* 206 N.C. 910, 174 S.E. 291; Daniel on Negotiable Instruments, Seventh Edition, Vol. II, § 1262.

Plaintiff concedes it received the drafts originally *as agent for collection* and was not, originally, the real party in interest under G.S. 1-57. *Bank v. Rochamora,* 193 N.C. 1, 136 S.E. 259; *Worth Co. v. Feed Co.,* 172 N.C. 335, 90 S.E. 295; *Bank v. Exum,* 163 N.C. 199, 79 S.E. 498. It contends it became the owner and holder of the drafts and the real party in interest by reason of its admission of liability to the Bank of Halifax under the circumstances set forth below.

On February 1, 1960, plaintiff requested defendant to present "these (listed) drafts for payment and if not paid return to us so we might clear our records." On February 2, 1960, defendant, upon receipt of plaintiff's letter, returned the drafts to plaintiff. Thereupon, as plaintiff's President testified, plaintiff "undertook to charge them back to the Bank of Halifax." Again: "The Bank of Halifax refused to accept the charge." The Bank of Halifax returned the drafts to plaintiff. On February 5, 1960, plaintiff's Vice-President wrote defendant, addressing the letter to defendant's Cashier. This letter, in part, reads: "Our depositor has refused to accept these items, due to the length of time they were held by you. Please forward us your check less your usual charge in payment of these items." Plaintiff enclosed with said letter a "Letter of Transmittal" dated February 5, 1960, on which the drafts were listed, in which it was stated the drafts were enclosed "for collection and return of proceeds."

Plaintiff made its first demand on defendant for payment after plaintiff's customer, Bank of Halifax, "refused to permit us to return the drafts . . . on account of the passage of time." "(S)ome time later," so plaintiff's President testified, when asked "a point-blank question," plaintiff "admitted its liability on the drafts to the Bank of Halifax." This stipulation appears in the case on appeal: ". . . the Bank of Halifax declined to accept these items to be charged back to its account by the Branch Banking and Trust Company on the ground of the delay involved." This statement of plaintiff's President is of interest: "The Branch Bank does not assert any claim against the Bank of Halifax or the drawer of these drafts *at this time.*" (Our italics)

It is understandable that plaintiff would be disposed to acquiesce in the contention of the Bank of Halifax, its customer, and the Bank of Halifax would be disposed to act in the interests of H & N Hog Market, its customer. However, nothing in the record indicates the

collected balance in the account of the Bank of Halifax with plaintiff was less than the amount of the drafts. Nor does it appear that the collected balance in the account of H & N Hog Market with the Bank of Halifax was less than the amount of the drafts. The Vice-President of the Bank of Halifax testified: "I had no suspicions about its (H & N Hog Market) financial condition. They were regular customers of our bank. They were solvent at the time as far as I know. We did not call them or attempt to charge these items back to our customers, the H & N Hog Market."

When plaintiff "admitted its liability" to the Bank of Halifax, absolutely or tentatively, it admitted a liability that did not exist. Its gratuitous admission of liability conferred no legal rights on plaintiff. The Bank of Halifax had no legal right to maintain an action against defendant *on the drafts*. Any right of action the Bank of Halifax had against defendant was for such loss, if any, *as it suffered* on account of defendant's negligence. Such an action, "not arising out of contract," was not assignable. G.S. 1-57.

Plaintiff's legal rights were neither increased nor decreased by reason of its said admission of liability. Any right of action it had or now has against defendant was and is for such loss, if any, *as it suffered* on account of defendant's negligence. No such loss is alleged or shown. This action is by plaintiff, as the alleged owner and holder of the drafts, to recover the amount thereof. Loss resulting from plaintiff's gratuitous admission of nonexistent liability to the Bank of Halifax cannot be considered a loss proximately caused by defendant's negligence.

Each of the cases cited by plaintiff is factually distinguishable. It is deemed sufficient to consider in detail only *Trust Co. v. Bank*, 166 N.C. 112, 81 S.E. 1074, and on subsequent appeal, *Trust Co. v. Bank*, 167 N.C. 260, 83 S.E. 474, referred to in plaintiff's brief as the leading case and as setting forth the grounds on which "plaintiff framed its complaint."

In *Trust Co. v. Bank, supra* (166 N.C. 112), the plaintiff appealed from a judgment of nonsuit entered at the close of plaintiff's evidence. The judgment was reversed and the cause remanded for trial. As disclosed by plaintiff's evidence, the factual situation was as follows: (1) The action involved *a check* drawn on defendant (drawee) by Cone, its depositor. (2) The payee, Latham, Alexander & Co., was a customer of plaintiff. It deposited the check with plaintiff and was given immediate credit. (3) In accordance with their prior agreement, the payee drew out by his checks on plaintiff the amount of said deposit. (4) Defendant, after receipt of said check, did not pay it but held it for two days and then returned it, indicating it had been protested

for nonpayment, notwithstanding its customer had funds to his credit more than sufficient to pay the check. (5) At or about the time defendant received the check, it also received word its depositor had attempted to commit suicide; and thereupon, having ascertained its depositor's financial condition, defendant charged against its depositor's account the sum of $10,000.00 to cover a note in that amount due by its depositor to defendant. (6) Meanwhile, plaintiff's depositor went into bankruptcy. It had no funds on deposit with plaintiff out of which the check could be realized. (7) Defendant's depositor, the drawer of the check, was also insolvent. It is noted: *Plaintiff's depositor* had become bankrupt. Hence, plaintiff suffered actual loss because it could not charge back or otherwise collect from its depositor. None of the forwarding banks, which occupied the status of plaintiff herein, was a party to the action.

Plaintiff stresses these evidential facts: The drafts were forwarded by the Bank of Halifax to plaintiff along with numerous checks, "for collection and remittance—Credit." When forwarded by plaintiff to defendant, the drafts were designated Cash Drafts on the Letters of Transmittal. Plaintiff contends the drafts were forwarded in each instance as *cash items.*

Checks, when presented to a drawee bank for payment, are subject to the twenty-four hour rule prescribed by G.S. 25-143 and G.S. 25-144; but these drafts, forwarded to defendant for collection by it from Washington Hog Market, were not subject to the provisions of G.S. 25-143 and G.S. 25-144. It is noted that a draft may be payable "on demand or at a fixed or determinable future time." G.S. 25-133. The notation, "Cash Draft," indicates it is payable on demand.

Plaintiff's President testified: "*In our bank* cash items mean checks and other credit instruments that are received for immediate credit." (Our italics) He testified further: "*Our bank* had forwarded various other drafts prior to these drafts to the Bank of Washington drawn on the Washington Hog Market. The Bank of Washington would make remittance to us by sending us a bank draft. Until we received that bank draft we couldn't know whether the drafts had been paid by the Washington Hog Market or not." (Our italics)

Prior drafts, all of which were ultimately collected by defendant and remitted to plaintiff, had been held by defendant for various lengths of time before collected by defendant. In October and November of 1959, eight such drafts had been held by defendant, pending collection thereof from Washington Hog Market, for periods of time varying from fourteen to twenty days. Although plaintiff, by letter of February 10, 1960, after the present controversy had arisen, demanded that defendant pay to it the amount of the eight drafts now

in controversy "plus 6% interest for the length of time they have been held by you," nothing appears to indicate plaintiff ever called on defendant for the payment of 6% interest on prior (collected) drafts for the length of time they were held by defendant pending collection.

The term "cash item" is not defined by statute. If it has a *precise* meaning in banking circles, the evidence does not disclose such meaning. In our view, the evidence tending to identify these drafts by the label, "cash item," is competent for consideration, along with all other circumstances, as bearing upon whether defendant was negligent, in a properly constituted action by a party in interest, namely, a party who has suffered actual loss on account of the alleged negligence of defendant. Plaintiff having failed to establish it has suffered actual loss on account of the alleged negligence of defendant, such evidence, whatever its probative value, is not pertinent to present decision.

Plaintiff suggests defendant's negligence caused H & N Hog Market to sell and deliver hogs to Washington Hog Market and thereby suffer loss on account of the alleged negligence of defendant. We are not now concerned with whether H & N Hog Market has a cause of action against defendant grounded on negligence. Suffice to say, no person connected with H & N Hog Market testified. There is no evidence as to the time, terms or other circumstances of the sales by H & N Hog Market to Washington Hog Market. Nor is there evidence as to dealings, if any, between H & N Hog Market and Washington Hog Market during the time defendant held the drafts or subsequent thereto.

In *Grant County Deposit Bank v. McCampbell* (C.C. 6th), 194 F. 2d 469, 31 A.L.R. 2d 909, cited by plaintiff, similar drafts were considered. But there the action was by the *drawer of the drafts*, not by a forwarding bank, against the collecting bank and the drawee. This would seem to be the proper procedure. In such action, the facts as to the dealings and relationships between the drawer and the drawee would be fully disclosed.

We do not hold the evidence insufficient to support a finding of fact that defendant was negligent. As to an action grounded on negligence, decision here, as in the court below, is on the ground plaintiff has failed to show it has suffered actual loss on account of defendant's conduct, its gratuitous admission of liability to the Bank of Halifax under the circumstances here disclosed being insufficient to establish a loss proximately caused by defendant's negligence.

The conclusions reached require that the judgment of the court below be, and it is, affirmed.

Affirmed.

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

PARKER, J., dissenting. Branch Banking and Trust Company, hereafter called Branch Bank, received the drafts from the Bank of Halifax originally as an agent for collection. As such it was not originally the real party in interest under G.S. 1-57, and nothing else appearing would not be entitled to maintain this action. *Bank v. Rochamora,* 193 N.C. 1, 136 S.E. 259; *Worth v. Feed Company,* 172 N.C. 335, 90 S.E. 295; *Bank v. Exum,* 163 N.C. 199, 79 S.E. 498.

The 6th finding of fact in part is: "The Bank of Halifax was given credit for the drafts upon their receipt by the Branch Bank."

According to the agreement between Branch Bank and the Bank of Halifax, set forth in the 6th finding of fact, when the Branch Bank gave the Bank of Halifax credit for the drafts upon their receipt, it had the right of timely charge back if the drafts were not paid. Unquestionably, Branch Bank expected to receive prompt payment within twenty-four hours from the Bank of Washington or timely notice from the Bank of Washington of nonpayment of the drafts, which would have enabled it to reverse its credit to the Bank of Halifax, and charge the items back. According to the agreement between them, Branch Bank's liability to the Bank of Halifax is limited to the exercise of due care.

This is the 17th finding of fact: "Following the return of the drafts in question to the Branch Bank by the Bank of Washington, the Branch Bank charged back to the Bank of Halifax the face amount of all eight drafts and returned the said drafts to the Bank of Halifax. The Bank of Halifax refused to accept the return of the drafts, and in turn forwarded the same back to the Branch Bank, which is now the holder of the same."

The parties stipulated in a pre-trial conference as follows: "It is stipulated that the Bank of Halifax declined to accept these items to be charged back to its account by the Branch Banking and Trust Company on the ground of the delay involved."

J. E. Paschall, president of Branch Bank, testified as follows: "The Branch Banking and Trust Company did not notify the Bank of Halifax of the nonpayment of these items prior to their return by the Bank of Washington. The Branch Bank did not notify the Bank of Halifax because they were considered as paid. I know why we did not notify the Bank of Halifax. We did not notify them because we were looking to the Bank of Washington for payment. We were looking to the Bank of Washington for payment because of the lapse of time. The lapse of time was 24 hours plus mailing time and, after

that, we considered them paid. When these drafts were returned by the Bank of Washington to the Branch Banking and Trust Company, the Branch Banking and Trust Company undertook to charge them back to the Bank of Halifax. The Bank of Halifax refused to accept the charge. The Branch Bank admitted its liability on the drafts to the Bank of Halifax. This admission of liability was when I was asked a pointblank question. The conversation that took place was some time later. I don't remember just exactly when, but we admitted it as soon as we found out they did not accept them. The Bank of Halifax refused to permit us to return the drafts as soon as the drafts got back to them on account of the passage of time. They claim that the drafts were paid or they thought they were paid. Of course, we knew that they were correct. We had received the drafts back from the Bank of Washington before the Bank of Halifax made that decision because they thought they were paid. The Branch Bank does not assert any claim against the Bank of Halifax or the drawer of these drafts at this time."

Fletcher H. Gregory, Jr., vice president of the Bank of Halifax, testified: "On February 2, 1960, the Branch Bank undertook to charge these drafts to our account. They returned the drafts to us. We did not accept the drafts. We did not accept the drafts *(sic)*. In the absence of notice to the contrary, we considered that the transactions were closed and that the drafts had been finally paid and that we had final credit at the Branch. We had entered into a deposit arrangement at the Branch Banking and Trust Company under the terms of which items were deposited subject to final payment. We did not accept this charge back under the terms of that arrangement because we considered that final payment had been made. When the Branch Bank returned these drafts to the Bank of Halifax, we did not undertake to charge them back to the account of the H & N Hog Market. We did not call on the H & N Hog Market for all of them. The Branch Banking and Trust Company has admitted liability to the Bank of Halifax on these drafts. The Branch Banking and Trust Company paid the Bank of Halifax for these drafts."

Appellant states in its brief: "However it be viewed, whether under the deposit agreement or under the terms of the Negotiable Instruments Act, the plaintiff lost its right to charge the drafts back to its forwarder on account of the lapse of time. Thereupon, it admitted its liability."

The majority opinion states: "No reason appears why plaintiff was not legally entitled to charge the amount of these uncollected and unaccepted drafts to the Bank of Halifax or why the Bank of Halifax, in turn, was not legally entitled to charge the amount thereof to H

& N Hog Market. Indeed, they were entitled to do so under the express terms and conditions of the agreements under which credit had been given. The credits given 'were purely temporary and conditional.'" The majority opinion cites in support of the above statement *American Barrel Co. v. Commissioner of Banks,* 290 Mass. 174, 195 N.E. 335. As I read this case, it does not support the above statement. The facts in the *Massachusetts* case are entirely different, in that the vital point here of the long delay by Branch Bank to notify the Bank of Halifax of the nonpayment of the drafts was not presented in the *Massachusetts* case, and that opinion doesn't even mention such a point.

The majority opinion further states: "When plaintiff 'admitted its liability' to the Bank of Halifax, absolutely or tentatively, it admitted a liability that did not exist. Its gratuitous admission of liability conferred no legal rights on plaintiff."

I do not agree with the two above statements quoted from the majority opinion. In my opinion, Branch Bank's admission of liability to the Bank of Halifax is based upon the fact that Branch Bank realized it had breached its agreement with the Bank of Halifax to exercise due care, which exercise of due care means it was the positive legal duty of Branch Bank to notify in apt time the Bank of Halifax of the nonpayment of these drafts, so that the Bank of Halifax could protect itself against H & N Hog Market, to whom it is reasonable to infer from the findings of fact the Bank of Halifax had paid the face value of the drafts after it had not heard of their nonpayment for such a long time from Branch Bank.

The drafts here constitute commercial paper in the strictest sense, and must be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. *Goodman v. Simonds,* 20 How. (U.S.) 343, 15 L. Ed. 934, 941. The office of these drafts was to collect for the drawer, H & N Hog Market, Weldon, North Carolina, from the drawee, Washington Hog Market, at the Bank of Washington, Washington, North Carolina, money to which the former may be entitled. 7 Am. Jur., Bills and Notes, Section 6 — Bills of Exchange and Drafts.

These drafts are cash items. "Cash items, in banking phraseology, mean notes, checks, or memoranda in the paying teller's possession at the close of a day's work which he, for the time being, treats as cash in order to make his books balance." *Green v. Farmers & Merchants State Bank,* Tex. Civ. App., 100 S.W. 2d 132, 138. To the same effect, *La Monte v. Mott,* 93 N.J. Eq. 255, 116 A. 269, affirming 93 N.J. Eq. 229, 107 A. 462, 469.

This is the court's 7th finding of fact: "The Branch Bank forwarded

said drafts to the Bank of Washington with its letter of transmittal on a form containing the following provisions: 'We enclose for collection and return of proceeds as listed below. Deliver documents only on payment. Correspondents will be held liable for loss resulting from delay in returning papers. Return promptly all unpaid items. Please report by date of letter. Wire nonpayment of items of $1,000.00 and over. Do not protest items $1,000.00 or under, or those bearing this stamp or similar authority of a preceding endorser.' On the above form the Branch Bank typed the words 'Cash draft,' followed by the amount of each of said drafts."

The drawee, Washington Hog Market, is allowed twenty-four hours after presentment of these drafts to it by the Bank of Washington in which to decide whether or not it will accept these drafts. G.S. 25-143.

G.S. 25-96 reads: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

G.S. 25-111 reads: "Where the person giving and the person to receive notice reside in different places the notice must be given within the following times: (1) If sent by mail it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter; (2) if given otherwise than through the post office, then within the time that notice would have been received in due course of mail if it had been deposited in the post office within the time specified in the last subdivision."

The machinery, which is set up by modern banking to facilitate the flow of commercial, negotiable instruments, is geared to these statutes.

Branch Bank by its long delay in notifying the Bank of Halifax of the nonpayment of these drafts lost its right to charge the drafts back to the Bank of Halifax under its agreement, and also lost its right to proceed against its forwarder, the Bank of Halifax, on its endorsement by virtue of the sections of our Negotiable Instruments Act above quoted. Due to its long delay, and at this point, Branch Bank became the owner and holder of these drafts for value.

In my opinion, the evidence and the findings of fact clearly show that Branch Bank is the owner and holder for value of these drafts in the amount of their face value $5,569.26 which it has paid to its forwarder, the Bank of Halifax, and which it realizes it cannot recover from the Bank of Halifax because it breached its duty with the Bank of Halifax to exercise due care, and is entitled to maintain this

action against the Bank of Washington based upon negligence. *American National Bank v. Savannah Trust Company,* 172 N.C. 344, 90 S.E. 302; same case, 177 N.C. 254, 98 S.E. 595; Annotation, 6 A.L.R. 618.

In my opinion, the 3rd conclusion of law of the trial judge: "The Branch Bank has not been damaged by the conduct of the Bank of Washington in attempting to collect the drafts," and his 4th conclusion of law: "The Branch Bank is not the real party in interest and not entitled to maintain this action," are not supported by the findings of fact, and are erroneous and unrealistic. Unless Branch Bank can recover from the Bank of Washington, it will lose $5,569.26, the face value of these drafts.

Plaintiff alleges alternatively: "13. Even if it should be determined that the defendant did not accept said drafts, nevertheless, the defendant negligently failed in its duty as collecting agent to collect said drafts promptly or to return them promptly. The defendant extended credit to the Washington Hog Market, contrary to the plaintiff's instructions, by not requiring the prompt payment of said drafts upon presentment, although it knew or should have known, and is charged with the knowledge that the said Washington Hog Market was then in serious financial difficulties. The acts of the defendant as herein alleged constituted negligence in the performance of its duty to the plaintiff, as a result of which the plaintiff has been damaged in an amount equal to the face amount of said drafts, to wit, the sum of $5,569.26."

Defendant alleged as a further answer and defense a plea of estoppel, as set forth in the majority opinion.

The majority opinion states near its close: "We do not hold the evidence insufficient to support a finding of fact that defendant was negligent."

In my opinion, the facts found by the trial judge show as a matter of law that the defendant was negligent, and that such negligence has proximately caused Branch Bank a loss of $5,569.26, the face value of the drafts. I am further of opinion that the findings of fact show that Branch Bank is not estopped to maintain this action against the Bank of Washington.

The rapid flow of cheques, drafts and other commercial paper is vital to modern business and modern banking. The requirement that payment must be made or notice of dishonor given within the established and allowable time is essential to present day operations of business and of banking. To hold, as the majority opinion seems to hold, that a receiving bank is permitted to charge a cash item back to its customer, who has in all probability, paid such amount to its

depositor, days and weeks after its dishonor, will create utter confusion, and tend to impair, and hamper our credit system and the operations of banking. As appellant aptly says in its brief: "a time honored maxim among bankers warns, 'Never let the sun set on a Cash Item.'"

My vote is to remand the case back to the lower court to reverse the judgment below, and to enter conclusions of law upon the facts found, as set forth above, and then to enter judgment for the plaintiff.

HIGGINS, J., joins in dissenting opinion.

C. L. GILLIKIN v. ATLANTIC & EAST CAROLINA RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 7 July, 1961.)

1. Carriers § 6½—

Where the Interstate Commerce Commission imposes certain conditions solely upon the carrier acquiring control of another carrier through capital stock ownership, only the purchasing carrier is liable to the employees upon the stipulated conditions, and nonsuit is properly allowed as to the other carrier in an employee's action against both carriers to recover compensation due him under the conditions.

2. Appeal and Error § 38—

Assignments of error not set out in appellants' brief and in respect to which no reason or argument is stated or authority cited will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

3. Carriers § 6½—

Where the Interstate Commerce Commission approves the acquisition of control of one carrier by another through capital stock ownership, it is required to impose a fair and equitable arrangement to protect the interests of the railroad employees affected. 49 U.S.C.A. 5(2).

4. Same—

Where the Interstate Commerce Commission approves the acquisition of control by one carrier of another carrier through capital stock ownership, upon conditions that any employee of either carrier should be compensated for a stated period of time for loss of employment resulting from such employee being put in a worse position with respect to his employment by reason of the acquisition of the control, it *is held* that an employee is entitled to recover upon such conditions regardless of whether his loss of employment is due to the abolition or consolidation of jobs or to the use of modern and improved facilities, requiring fewer employees to do the work.

5. Courts § 19—

The courts of this State have jurisdiction of an action by a railroad employee to recover upon conditions imposed by the Interstate Commerce Commission for the protection of employees from loss of employment resulting from the merger of carriers or the acquisition of one carrier by another, there being nothing in the record to show the matter is in the purview of an exclusive arbitration of agreement.

APPEAL by defendants from *Joseph W. Parker, J.*, October Civil Term 1960 of LENOIR.

Civil action brought by plaintiff, a former employee of Atlantic and East Carolina Railway Company, against Atlantic and East Carolina Railway Company and Southern Railway Company to recover damages for loss of employment, the cause of action being based upon certain conditions in favor of employees imposed upon Southern Railway Company by the Interstate Commerce Commission as conditions to its approval and authorization of Southern Railway Company's application to acquire control of Atlantic and East Carolina Railway Company through capital stock ownership of the latter.

A jury was duly chosen, sworn and impanelled to try the issues arising on the pleadings. While the defendants were offering testimony, "the parties agreed that a juror be withdrawn and a jury trial waived and that the Judge be authorized to answer the issues with the same force and effect of the verdict of the jury." Whereupon, the judge "upon all the evidence offered, being of the opinion that each of the issues submitted should be answered as follows, finds the facts to be and answered the said issues as follows":

"1. Was the plaintiff, as an employee of the defendant, Atlantic and East Carolina Railway Company, put in a worse position with respect to his employment as a result of the acquisition of control of the defendant, Atlantic and East Carolina Railway Company, by the defendant, Southern Railway Company, through the acquisition of stock?

Answer: Yes.

"2. Was plaintiff's job, as an employee of the defendant, Atlantic and East Carolina Railway Company, abolished on October 4, 1957, as a result of the acquisition by the defendant, Southern Railway Company, of the Atlantic and East Carolina Railway Company, through the acquisition of ownership of stock?

Answer: Yes.

"3. Was the plaintiff, as an employee of the defendant, Atlantic and East Carolina Railway Company, put in a worse position with respect to his employment, or was his job as an

employee of the said Company abolished on October 4, 1957, as a result of a unification, consolidation, merger or pooling of previously separate facilities, operations or services of Atlantic and East Carolina Railway Company and Southern Railway Company?

Answer: No.

"4. What amount, if any, is plaintiff entitled to recover of the defendant, Atlantic and East Carolina Railway Company?

Answer: $508.20.

"5. What amount, if any, is plaintiff entitled to recover of the defendant, Southern Railway Company?

Answer: $508.20."

From judgment entered that plaintiff recover from defendants, jointly and severally, the sum of $508.20 and the costs, both defendants appeal.

Jones, Reed & Griffith for plaintiff, appellee.

Joyner, Howison & Mitchell and John G. Dawson for defendants, appellants. Of counsel for appellants: Henry L. Walker, R. Allan Wimbish and James I. Hardy.

PARKER, J. Prior to 12 February 1957 Southern Railway Company, hereafter called Southern, applied by petition to the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act, 49 U.S.C.A., Section 5(2), for authorization and approval of the acquisition by it of control of Atlantic and East Carolina Railway Company, hereafter called Atlantic, through ownership of the latter's capital stock.

The Interstate Commerce Act, 49 U.S.C.A., Section 5(2), provides that it shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph for two or more carriers to merge, or for any carrier to acquire control of another through ownership of its stock or otherwise, etc.

Section 5(2) (f) provides in relevant part: "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position

with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

The Interstate Commerce Act, 49 U.S.C.A., Section 5(9), provides: "The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), of this section, as it may deem necessary or appropriate."

The parties stipulated: "Order of Interstate Commerce Commission in 'Finance Docket No. 18698, Camp Lejeune Railroad Company, et al, Securities and Operation, etc.,' (295 I.C.C. Finance Reports 511), authorizes the acquisition by the defendant, Southern Railway Company of control of the defendant, Atlantic and East Carolina Railway Company, through the acquisition of stock, was entered on February 12, 1957, and became effective fifteen days thereafter, or on February 27, 1957."

The Interstate Commerce Commission in its order in Finance Docket No. 18698, Camp Lejeune Railroad Company, et al., Securities and Operation, etc., 295 I.C.C. Finance Reports 511, approving and authorizing, subject to prescribed conditions, acquisition by Southern of control of Atlantic through ownership of capital stock of the latter, says in relevant part: "Under section 5(2) (b) of the act, it is our duty to find, among other things, that the proposed transaction is consistent with the public interest, and, as we deem necessary, we may make our approval subject to whatever modifications of the proposed terms and conditions we find just and reasonable. . . . At the hearing, organizations representing employees of the Coast Line and the East Carolina had been permitted to intervene. Although they objected to the granting of the application because of the detriment to the carrier employees that allegedly would result, the objections on account of the East Carolina employees were withdrawn in view of the Southern's statements that they would agree to the imposition of the so-called North Western conditions. While there has been no showing of adverse effect on employees of the carriers directly involved in the transactions, nevertheless, as is customary in instances of approval of transactions under section 5(2), we will make our approval herein subject to the imposition of the same conditions for the protection of adversely affected railway employees as were imposed in Chicago & N. W. Ry. Co. Merger, 261 I.C.C. 672."

The parties further stipulated that for the purposes of this trial the consummation of the acquisition by Southern of control of At-

lantic through ownership of the capital stock of the latter by Southern was made 19 September 1957.

The Interstate Commerce Commission on 29 September 1958 issued a supplemental order in Finance Docket No. 18698, Camp Lejeune Railroad Company, et al., Securities and Operation, etc., which was introduced in evidence by plaintiff as his Exhibit 3, and is as follows:

"Finance Docket No. 18698

CAMP LEJEUNE RAILROAD COMPANY, ET AL., SECURITIES AND OPERATION, ETC.

"*It appearing,* That by report and order on reconsideration in the above-entitled proceeding, dated February 12, 1957, 295 I.C.C. 511, the Commission authorized acquisition by the Southern Railway Company of control of the Atlantic and East Carolina Railway Company through the ownership of capital stock, subject to the same conditions for the protection of railway employees as were imposed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672;

"*It further appearing,* That by order of the Commission dated July 25, 1958, the Railway Labor Executives' Association was permitted to intervene herein and to file a petition for further hearing, reconsideration, and supplemental order, for the purpose of introducing evidence concerning the adverse effect of the acquisition of such control by Southern Railway Company on the employees of the Atlantic and East Carolina Railway Company and requesting the imposition of the same conditions for the protection of such employees as were prescribed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177;

"*It further appearing,* That the Southern Railway Company has filed a reply to said petition in which it admits that since acquisition by it of control of the Atlantic and East Carolina Railway Company employees of the latter have been displaced or otherwise adversely affected in connection with which dispute has arisen between the carrier and the employees involved as to whether they are protected by the prescribed conditions;

"*It further appearing,* That the conditions prescribed as aforesaid for employee protection in said proceeding contain no provision for adjudicating disputes arising with respect to the interpretation of such conditions and the only recourse other than through the procedure here involved is to resort to the courts;

"*It further appearing,* That the Commission's usual practice where it is known that employees will be adversely affected by a transaction such as involved in this proceeding and in the absence

of agreement by the parties to the contrary, is to prescribe the conditions set forth in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177, which sets up appropriate procedures with respect to the settlement of disputes arising from such conditions; and

"*It further appearing,* That the conditions previously imposed herein are inadequate and impose an unnecessary burden upon employees who may have been or are adversely affected by the transaction, and that such employees should have the benefit of the same procedure for settling controversies with respect to the protection intended to be afforded as usually obtains in cases of this nature;

"*It is ordered,* That the aforesaid petition to the extent that it requests reconsideration and a supplemental order, be, and it is hereby, granted;

"*It is further ordered,* That the aforesaid order on reconsideration dated February 12, 1957, be, and it is hereby, modified to provide that the approval and authorization of the acquisition by the Southern Railway Company of control of the Atlantic and East Carolina Railway Company through the ownership of capital stock shall be subject to the same conditions for the protection of railway employees as were imposed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177; and

"*It is further ordered,* That the aforesaid petition for further hearing, reconsideration and supplemental order, except to the extent granted hereinabove, be, and it is hereby, denied."

Apparently, this supplemental order has not yet been issued in a bound volume.

Plaintiff introduced in evidence the decision of the Interstate Commerce Commission on 29 May 1946 in Finance Docket No. 15250, Chicago & North Western Railway Company et al Merger, 261 I.C.C. Finance Reports 672. This decision approved and authorized the merger of the properties of the Escanaba, Iron Mountain and Western Railroad Company into the Chicago & North Western Railway Company for ownership, management, and operation, subject to the following prescribed conditions: "During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this section shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order —"

Plaintiff introduced in evidence the decision of the Interstate Commerce Commission on 17 May 1944 in Finance Docket No. 14221, Oklahoma Railway Company Trustees Abandonment of Operation, Etc., 257 I.C.C. Finance Reports 177. In this proceeding a certificate was issued permitting abandonment of operation in interstate and foreign commerce by Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company of lines of railroad in Oklahoma, Canadian, Logan, and Cleveland Counties, Oklahoma, and a joint purchase by the Atchison, Topeka and Santa Fe Railway Company and Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company, of portions of, and acquisition of, joint trackage rights over a portion of lines of the Oklahoma Railway Company, acquisition of trackage rights by the Santa Fe and Rock Island over lines of each other, and individual purchases by the two said carriers of other portions of the railroad property of the Oklahoma Railway Company was approved and authorized, and conditions were prescribed. The Commission said in its decision: "The proposed abandonment of operation in interstate commerce by the Oklahoma and the proposed purchases, *et cetera,* by the Santa Fe and the Rock Island constitute an inseparable plan for the unification of railroad facilities. Therefore, we must prescribe conditions in accordance with the provisions of section 5 (2) (f) of the act." The relevant prescribed conditions are: "4. If, as a result of the abandonment of operation herein permitted and the purchases et cetera, herein authorized, hereinafter referred to as the transaction, any employee of Robert K. Johnston and A. C. DeBolt, trustees of the Oklahoma Railway Company, of The Atchison, Topeka and Santa Fe Railway Company, or of Joseph B. Fleming and Aaron Colnon, trustees of The Chicago, Rock Island and Pacific Railway Company, hereinafter respectively referred to as the Oklahoma, the Sante Fe, and the Rock Island, and collectively as the carriers, is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. The latter compensation is to be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12

months in which he performed services immediately preceding the date of his displacement as a result of this transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). . . . The period during which this protection is to be given, hereinafter called the protective period, shall extend from the date on which the employee was displaced to the expiration of 4 years from the effective date of our order herein; provided, however, that such protection shall not continue for a longer period following the effective date of our order herein than the period during which such employee was in the employ of the carriers prior to the effective date of our order.

"5. If, as a result of the transaction herein approved, any employee, hereinafter referred to as a dismissed employee, of the carriers is deprived of employment with said carriers because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as result of the transaction herein approved, he shall be accorded a monthly dismissal allowance equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of this transaction. This allowance shall be made during the protective period to each dismissed employee while unemployed, provided, however, that no such allowance shall be paid to any Oklahoma employee who fails to accept employment, with seniority rights in Oklahoma City, Okla., with the Santa Fe or Rock Island, if either of said two last-named carriers offers him a position, the duties of which he is qualified to perform.

"8. In the event that any dispute or controversy arises with respect to the protection afforded by the foregoing conditions Nos. 4, 5, 6, and 7, which cannot be settled by the carriers and the employee, or his authorized representatives, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedures, expenses, et cetera, shall be agreed upon by the carriers and the employee, or his duly authorized representatives."

Plaintiff testified in substance: He was an employee of Atlantic from 20 September 1955 to 4 October 1957, when he was laid off. During that time his general duties were as lead mechanic keeping up the diesel engines. He was making $1.83 an hour. Since he was laid off, he has been offered no employment by Atlantic or Southern. For a period of ten months after he was laid off he made $2,640.20, including unemployment compensation. If he had continued as an employee of

Atlantic, he would have earned during this ten-month period $3,148.40. His position was worsened by being laid off by Atlantic for the ten-month period after he was laid off in the sum of $508.20. He did some work in May 1957 on Navy cars.

H. P. Edwards testified in substance for plaintiff: From 1 September 1939 until 31 August 1957 he served as president, general manager, and chairman of the board of Atlantic — the entire time Atlantic operated the railroad. Plaintiff was employed in Atlantic's maintenance department in New Bern as diesel machinist. The function of the maintenance department was to maintain locomotives, cars, and all classes of equipment. This maintenance is absolutely necessary to the operation of a railroad. Plaintiff's employment as a machinist in the maintenance department of Atlantic would not have terminated, if control of Atlantic had not been acquired by Southern. Atlantic had 14 employees in its mechanical department when Southern acquired control. It retained 5. If Southern had not acquired control of Atlantic, it would not have discontinued its shops at New Bern for maintenance of the railroad. Since Southern acquired control of Atlantic, it sold the machinery in the shops, tore down one building, rented some of them, but does some maintenance there. Mr. Radford succeeded him as general manager of Atlantic in September 1957. Mr. Harry DeButts, president of Southern, succeeded him as president of Atlantic. Edwards testified: "I do not know of any of the maintenance work which was being done at the New Bern shops in the course of the operations of the Atlantic and East Carolina Railway prior to its control having been taken over by the Southern, being done along the road or anywhere else along the road between Goldsboro and Morehead City."

Edwards testified in substance on cross-examination: Atlantic by special contract did general repairs to place U. S. A. X tank cars in good operating condition in its maintenance department in New Bern. He didn't know whether plaintiff worked on these tank cars. For ten years prior to 1957 there had been a steady decline in Atlantic's employees in its maintenance department. Atlantic had no steam locomotive for six months prior to September 1957. Atlantic had a storehouse in New Bern in which a large amount of supplies and stores and parts were kept in September 1957. There were some parts for steam locomotives: he didn't know how much. These parts had very little value. None of the 14 employees in the mechanical department were included in the list of employees in connection with the storehouse. There were employed in the storehouse one storekeeper and a clerk.

Mrs. Marjorie M. Edwards testified in substance for plaintiff: She

was employed for six years by Atlantic as a clerk in its car accounting office in New Bern. Her employment was terminated on 1 October 1957. She received the following letter:

"ATLANTIC AND EAST CAROLINA RAILWAY CO.
Washington 13, D. C.
December 6, 1957. t/s
H-342-E-57

"Mrs. Marjorie M. Edwards,
1804 National Avenue
New Bern, North Carolina

Dear Mrs. Edwards:
"Referring to your letter of November 9 to Mr. W. C. Radford, General Manager at New Bern, North Carolina saying you were enclosing — 'bill vs. Southern Railway Company and the Atlantic and East Carolina Railway Company for compensation I have lost from October 1st to October 31st, 1957 as result of my job being abolished, resulting from the Southern Railway's purchase of the A & E C Rys. capital stock;' My investigation develops that you were employed as a Clerk in the office of Car Accountant, and that the job you held was covered by the Agreement in effect between this Company and the Brotherhood of Railway and Steamship Clerks. I further find that your job was abolished as result of your work being transferred to and taken over by employees in the office of the Superintendent of Car Service, Southern Railway Company, Atlanta, Ga.
"Under the circumstances, you are entitled to protection contained in the Interstate Commerce Commission's Order which imposed the same conditions for the protection of adversely affected railway employees as were imposed by the Commission in Chicago and Northwestern Railway Company Merger 261 I.C.C. 672, and I am therefore issuing instructions that you be afforded the protection prescribed in the Order. You understand, of course, that any money you have received as unemployment compensation since your job was abolished will be deducted.

Very truly yours,
(s) L. G. TOLLESON
Director of Labor Relations."

She received a second leter from Tolleson dated 30 December 1957, which is in the record, setting forth in detail what information would be required to determine the amount of her monthly dismissal al-

lowance, and stating that after this information had been obtained, there would be prepared and sent to her a draft or voucher in her favor covering the net amount due as dismissal allowance for the months of October, November, and December 1957, which would bring her account up to date, and that for subsequent months in which she was eligible to receive such allowances, such payments, less required deductions, would be made to her on a monthly basis upon receipt from her by Mr. Bergelt of signed statements as to her employment status during the preceding months. She has received, and is still receiving such payments in accordance with the terms of those two letters.

Defendants had one witness, Archie Adams, who testified in substance: He was employed by Atlantic as trainmaster and general foreman at New Bern on 1 October 1957, and has had that employment since then. He had charge of the operation and movement of trains and of the mechanical department. For ten years he had worked for various railroads, and was experienced in the work he was employed by Atlantic to do. When he began work at New Bern on 1 October 1957, his first undertaking was to survey the field, and plan future operations. The storeroom had an over abundance of obsolete parts, such as steam engine parts, though it had no steam engines, a big accumulation of coal, sand, and had equipment all over the grounds that was obsolete and no longer wanted. He found Atlantic was making repairs to Army tank cars, and Navy tank cars, which a railroad independently operating has not the men to do. It was extra work set up in a field to do this type of work. The equipment and tools it would take would not justify the railroad to do the work. He got in touch with the U. S. Army Transportation in St. Louis, and told them since this contract had been signed, we had to assume the obligation to continue if they desired to hold us to it. After a conversation with them, they wanted us to do it any way we could. He told them the shop was not set up efficiently to do it. They then issued permission, if he wanted to, to let it go to the shop in Knoxville, Tennessee. He discontinued the work. On 5 October 1957 plaintiff was laid off. After laying off the men on 5 October 1957, he had for the maintenance of equipment two car men (mechanics), one foreman, and one laborer. The first thing he did was to abandon some of the buildings, and move into one building, so that they wouldn't have men going from several buildings, and the foreman wouldn't have to watch in several buildings. He abandoned the storeroom, the electrical shop, the machine shop and roundhouse, and put all the equipment into one building. He immediately ordered two 75-ton air-jacks. These air-jacks work from compressed air. These air-jacks are used to jack the end of a

car when it is necessary to replace wheels or do any work required, to pull tracks out from under the end of the car. When he arrived there were two 50-ton mechanical jacks, and they have a long lever so that in jacking this it takes two men on the levers, working them, that is two to a jack. You could jack possibly one side a while, and then the other, but that takes considerable time, and has danger in the operation. When he speaks of two jacks, he means one under each side. Air-jacks require two men to operate them, and take 2 or 3 minutes for a lifting operation, whereas mechanical jacks require 4 men to operate them, and take 30 or 40 minutes for a lifting operation.

Atlantic assigns as errors the judge's failure to nonsuit plaintiff's action against it, and the judgment entered permitting plaintiff to recover from it the sum of $508.20. These assignments of error are good. All the evidence shows that Atlantic was not a party to the proceedings in which the Interstate Commerce Commission imposed the employees' protection conditions upon which this action is based. Those proceedings were initiated upon application by Southern, the authority granted by the Commission was granted to Southern, and the employees' protection conditions attached to the authorization of Southern's application to acquire control of Atlantic through capital stock ownership of Atlantic were imposed upon Southern, not upon Atlantic. These conditions imposed upon Southern do not bind Atlantic. *McDow v. Louisiana Southern Railway Company,* 219 F. 2d 650. Plaintiff concedes in his brief that he cannot maintain his action against Atlantic, and that the judgment as to Atlantic should be reversed.

Southern has in the record five assignments of error to the admission of evidence over its objections. These assignments of error are not set out in appellants' brief, and in respect to them no reason or argument is stated or authority cited. They will be taken as abandoned by appellants. Rule 28, Rules of Practice in the Supreme Court, 221 N.C. 544, 562-3; *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 98 S.E. 2d 852.

Southern's basic contention is that the superior court erred in permitting plaintiff to recover from it in this action based upon the employees' protection conditions imposed by the Commission upon Southern as a condition of its approval and authorization of Southern's application for control of Atlantic through capital stock ownership of Atlantic, because the employees' protection conditions imposed protect employees against loss of employment caused by a unification, consolidation, merger or pooling of previously separate facilities, operations or services of those railroads, and not from other causes, such as the abolishing of a position through modernization or improved facilities by the purchasing railroad. Southern further contends that

Mrs. Marjorie M. Edwards came within the scope and purpose of the employees' protection conditions because her work with Atlantic was consolidated with the work of similar employees of Southern in Atlanta, Georgia, which would not have occurred if Southern had not acquired control of Atlantic. On the other hand, plaintiff's job was abolished because of modernization of equipment and improved procedure, and he does not come within the scope and purpose of the employees' protective conditions imposed upon Southern. In brief, Southern contends the evidence in the instant action as to the cause of plaintiff's loss of employment does not come within the intent and purpose of the Commission's prescribed conditions in the North Western and Oklahoma cases. Southern's argument and contention that plaintiff's evidence and the judge's answers to the issues do not bring him within the scope and purpose of the employees' protective conditions imposed upon Southern are not convincing.

Southern contends that the above contention is based upon its assignments of error as to the overruling of its demurrer to the complaint, as to the court's failure to nonsuit plaintiff's action, as to the court's fixing of Issues 1 and 2 and his answers thereto, as to the court's failure to enter a judgment for the defendants on the third issue, and as to the judgment signed.

Southern's application under the Interstate Commerce Act, 49 U.S.C.A., Section 5(2), was not one "for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership," but was one for Southern, a carrier, "to acquire control of another (Atlantic) through ownership of its (Atlantic's) stock." As a condition of its authorization and approval of Southern's application, the Interstate Commerce Commission was required to act under the Congressional mandate set forth in the Interstate Commerce Act, 49 U.S.C.A., Section 5(2) (f) and to require "a fair and equitable arrangement to protect the interests of" Atlantic's employees affected, and was required to "include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

Section 5(2) (f), as it now appears, was enacted as part of the

Transportation Act of 1940. A brief outline of the occurrences which led to the enactment of those sections on railroad consolidation, of which Section 5(2) (f) is a part, is contained in the Appendix to the Court's opinion in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315, 98 L. Ed. 710, 724. The legislative history of Section 5(2) (f) is set forth in *Railway Labor Exec. Asso. v. United States*, 339 U.S. 142, 94 L. Ed. 721, in which case the Court says: "The legislative history of Section 5(2) (f) shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations."

Brotherhood of Maintenance of Way Employees v. United States, 189 F. Supp. 942, was an action to enjoin and set aside an order of the Interstate Commerce Commission approving a railroad merger. The question in issue was whether the conditions attached to the merger for the protection of the employees of the two railroads satisfied the Congressional mandate embodied in Section 5(2) (f) of the Interstate Commerce Act. Plaintiff's contention was that *anything* short of actual continued employment is violative of the language and intendment of Section 5(2) (f) with respect to the phrase therein "being in a worse position with respect to their employment." A statutory three-judge court held: The statute providing that a railroad merger shall not result in railroad employees being in a "worse position with respect to employment" permits the granting of compensatory protection to employees in event of their displacement or discharge, and does not require that each employee be retained in employment status. The temporary restraining order was set aside, and the complaint dismissed.

Brotherhood of Maintenance of Way Employees v. United States, supra, was affirmed by the United States Supreme Court on 1 May 1961, 366 U.S. 169, 6 L. Ed. 2d 206. The majority opinion gives a somewhat detailed legislative history of the enactment of Section 5(2) (f) and of the statements of Members of Congress when it was being considered, and concludes with this language: "In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct." Mr. Justice Douglas dissenting said: "I would read the *proviso* as meaning that nothing less than four-year employment protection to every employee would satisfy the Act, though not necessarily a four-year protection in his old job."

As a condition of its authorization and approval of Southern's application to acquire control of Atlantic through capital stock owner-

ship of the latter, the Commission first imposed on Southern for the protection of Atlantic's employees the terms and conditions set forth in the North Western case. Later, on 25 July 1958, the Commission issued an order permitting the Railway Labor Executives' Association to intervene in the proceeding initiated by Southern, and to file a petition for further hearing, reconsideration and supplemental order, for the purpose of introducing evidence concerning the adverse effect of the acquisition of control of Atlantic through capital stock ownership of Atlantic by Southern on the employees of Atlantic, and of requesting the imposition on Southern of the same conditions for the protection of Atlantic's employees as were prescribed in the Oklahoma case. Southern filed a reply to the permitted petition in which it admitted that since acquisition by it of control of Atlantic, employees of Atlantic have been displaced or otherwise adversely affected, in connection with which dispute has arisen between it and the employees involved as to whether they are protected by the prescribed conditions. On 29 September 1958 the Commission, acting under the authority vested in it by 49 U.S.C.A., Section 5(9), modified its former order and provided "that the approval and authorization of the acquisition by the Southern Railway Company of control of the Atlantic and East Carolina Railway Company through the ownership of capital stock shall be subject to the same conditions for the protection of railway employees as were imposed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177."

The terms and conditions imposed upon Southern in the North Western Case are a paraphrase of the mandatory provisions to protect employees set forth in Section 5(2) (f), and provided as a condition of its approval and authorization of Southern's application to acquire control of Atlantic through capital stock ownership that such acquisition shall not result in employees of Atlantic "being in a worse position with respect to their employment" during a certain period there specified. The language of the statute and the words of the prescribed conditions in the North Western case are broad and extensive, and do not mean that the statute and the prescribed conditions protect Atlantic's employees only against "being in a worse position" as a result of a unification, consolidation, merger or pooling of previously separate facilities, operations or services of Atlantic and Southern, but do mean that they protect Atlantic's employees from being put in a worse position with respect to their employment as a result of Southern's acquisition of control of Atlantic for a certain specified period of time. The prescribed conditions in the Oklahoma case for the protection of Atlantic's employees give substantially similar protection to Atlantic's employees, which conditions are set forth in more detail than

in the North Western case, and also provide for an arbitration procedure.

This evidence is uncontradicted: Southern took over control of Atlantic on 1 October 1957. Plaintiff, who was an employee of Atlantic from 20 September 1955 to 4 October 1957 as lead mechanic keeping up Atlantic's diesel engines, was laid off by Atlantic on 4 October 1957. Since he was laid off, he has been offered no employment by Atlantic or Southern. For a period of ten months after he was laid off he made $2,640.20, including unemployment compensation. If he had continued as an employee of Atlantic, he would have earned during this ten-month period $3,148.40. His position was worsened by being laid off by Atlantic for this ten-month period in the sum of $508.20. Plaintiff's employment as a machinist in the maintenance department of Atlantic would not have been terminated, if control of Atlantic had not been acquired by Southern. If Southern had not acquired control of Atlantic, Atlantic would not have discontinued its shops at New Bern for maintenance of the railroad. It is manifest that Southern's acquisition of control of Atlantic resulted in plaintiff being deprived of his employment with Atlantic four days after Southern took control of Atlantic, and "being in a worse position with respect to his employment," and that this was a violation by Southern of the conditions imposed upon it by the Commission for the protection of Atlantic's employees, and this is true even though plaintiff's job was abolished because of modernization of equipment or improved facilities by Southern, the purchasing railroad. This uncontradicted evidence fully supports the judge's findings of fact and answers to the first two issues and the fifth issue. It seems that the trial judge was of opinion that the transaction here was an acquisition of control of Atlantic by Southern through capital stock ownership of the former, and not a unification, consolidation, merger, or pooling of Atlantic's and Southern's previously separate facilities, operations, or services, and that is the reason why he answered the third issue No. However that may be, in our opinion, the judge's consideration of and answer to the third issue was supererogatory, because his findings of fact and and answers to the first, second and fifth issues are decisive of plaintiff's right to recover from Southern under the mandatory provisions of Section 5(2) (f), support the judgment that plaintiff recover $508.20 from Southern, and this is true, even though the judge answered the third issue No. Defendants make no contention that if plaintiff is entitled to recover, $508.20 is not the proper amount of recovery.

Defendants in their brief have not challenged the jurisdiction of the State court. The State court seems to have jurisdiction here. 11

Am. Jur., Commerce, Section 156, Jurisdiction of State courts; Annotation, 64 A.L.R. 333.

Neither have defendants contended that the arbitration procedure set forth in the Oklahoma case is compulsory. It seems to be optional. There is nothing in the record to indicate the formation of an arbitration committee as provided for in the Oklahoma case.

All of Southern's assignments of error are overruled.

The judgment that plaintiff shall recover $508.20 from Atlantic is reversed, and a judgment will be entered below nonsuiting plaintiff's action against Atlantic. The judgment that plaintiff shall recover $508.20 from Southern is affirmed, but the judgment will be modified to the extent that plaintiff's recovery shall be from Southern alone.

Judgment as to Atlantic and East Carolina Railroad — Reversed.

Judgment as to Southern Railroad — Affirmed.

WELCOME WAGON INTERNATIONAL, INC. v. EVELYN L. PENDER.

(Filed 7 July, 1961.)

1. Pleadings § 12—

In passing upon a demurrer, the allegations of fact must be accepted as true.

2. Contracts § 7—

Provisions in a contract of employment that after the termination of the employment the employee should not engage in business in competition with the employer are valid and enforceable provided the restrictions are reasonable both as to territory and time.

3. Same—

While a contract of an employee not to engage in competition with the employer after the termination of the employment may not be reformed or modified by the courts in regard to the territory or time stipulated in the agreement in order to reduce them to that which is reasonable and enforceable, where the contract itself stipulates disjunctively territories of varying sizes, the court will take notice of the division the parties themselves have made, and will enforce the contract within a stipulated territory which is patently reasonable, in this case a single city.

4. Same—

Where the employment entails personal contacts by the employee with the patrons or customers of the employer and the acquisition by the employee of information as to plans, methods, and procedures for the

conduct of the business, a provision in the contract of employment that the employee should not engage in business in competition with the employer within a prescribed territory for a period of five years after the termination of the employment cannot be held void on the ground that the period of time stipulated is unreasonable or excessive.

BOBBITT, J. dissenting.

PARKER and RODMAN, JJ., join in dissent.

APPEAL by plaintiff from *Bickett, J.,* December, 1960 Civil Term, CUMBERLAND Superior Court.

The plaintiff, a Delaware corporation, instituted this civil action (1) to restrain the defendant from further violating her covenant not to engage in the plaintiff's particular line of business for five years from the termination of her employment, and (2) to recover $3,500 liquidated damages resulting from breach of the restrictive covenant. The covenant was a part of the written contract of employment which, among other provisions, contained the following:

"The Company employs the Hostess and the Hostess accepts the employment, to act for it in the capacity of Hostess in Fayetteville, North Carolina, and the surrounding trade territory;

. . . .

"The Company, through its duly authorized and trained members, will impart the required instructions and training to enable the Hostess to successfully operate the service according to the proven successful methods of operation and will supply the Hostess with printed, typewritten and mimeographed manuals, instruction books, and other literature for her guidance. The Company will also furnish sales presentations, sales letters and other material to assist in securing and retaining the patronage of prospective subscribers and will, through its paid Field Representatives, give personal sales and supervision assistance and through its trained correspondence staff will give every possible courteous and efficient cooperation and aid. . . .

"The Hostess agrees to devote her entire time and attention to the business of the Company, and at all times work under its rules, regulations and instructions, and perform and discharge all the duties incident to said position as contemplated by the service which the Company is rendering to subscribers, and in accordance with the special training which she receives, among which duties will be to secure from all available sources and names of mothers and new-born babies; Girls who have reached their 16th birthday; Those whose engagements have recently been announced; Local Families moving from one home to an-

other; Newcomers moving into the city; and to call upon them and present gifts and literature from said subscribers to cooperate with said subscribers whom the Company is serving in every reasonable way so as to make the service rendered by the Company effective and efficient. She will lend her assistance in every reasonable way to building up the business and maintaining the service of the Company, and she will exert her efforts toward procuring prospective subscribers' contracts for the Company. . . .

"Now, therefore, for and in consideration of this employment, and the compensation to be earned and paid to the Hostess hereunder, said Hostess covenants and agrees that she will not during the term of this employment, and for a period of five whole years thereafter, engage directly or indirectly for herself or as agent, representative or employee of others, in the same kind or similar business as that engaged in by the Company (1) in Fayetteville, North Carolina, or (2) in any other city, town, borough, township, village or other place in the State of North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, town, borough, township, village or other place in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, town, borough, township or village in the United States in which the Company has been or has signified its intentions to be, engaged in rendering its said service.

"Said Hostess also agrees that she will not, during the term of her employment by the Company, and for five whole years thereafter, divulge to any person, not an employee of the Company, any trade secret, plan or method of operation, or special information employed in or conducive to the Company's business, and which may come to her knowledge in the course of, or by reason of, her said employment.

"A breach of the foregoing good-will clause of this contract by the Hostess would result in substantial damages to the Company, but same might be incapable of exact proof. Therefore, if the Hostess should breach said clause, she will pay the Company, as liquidating damages, the sum of $3,500 for each and every city, town, borough, township, village, province or other place in which she commits said breach, it being agreed that the above sum is reasonable and fair. It is agreed and understood, however, that this provision for liquidated damages is cumulative and does not exclude the remedy by injunction or other remedy the Company may be entitled to."

The plaintiff alleged the defendant performed the contract until September 22, 1958, at which time she resigned. "That said business was successful and remunerative to the plaintiff," and for the years 1950 through 1958 the plaintiff received more than $55,000 from the business in Fayetteville.

The plaintiff further alleged:

> "That shortly after termination of her employment with the plaintiff, the defendant commenced a flagrant and systematic violation of the covenant and condition set forth in her said contract with the plaintiff and hereinabove set forth in that she entered into the same or similar kind of business to that of the plaintiff in Fayetteville, North Carolina, where she had been over a period of ten (10) years employed by the plaintiff and has continued to engage in the flagrant and systematic violation of said contract, employing the methods, plans and systems invented and used by the plaintiff and its predecessors in its business and imparted to the plaintiff in the course of her employment, and has used, and is using the knowledge she gained as to all of plaintiff's plans, methods, procedures and trade secrets for the purpose of establishing and operating an identical business of her own in the City of Fayetteville, North Carolina, in violation of the express terms and provisions of her contract with the plaintiff, under the style of 'Fayetteville Hospitality Service.'
>
> "That the defendant has also in an unfair manner approached all the subscribers or sponsors of the plaintiff in Fayetteville, North Carolina, who had contracts with the plaintiff and has solicited said sponsors to abandon their contracts with the plaintiff and to transfer their business to the defendant and has persuaded all of the customers, sponsors and subscribers of the plaintiff's business to leave the plaintiff and sign contracts with her."

The defendant filed a demurrer to the complaint upon two grounds: (1) The contract was without consideration. (2) It was void as against public policy for that the restrictions were unreasonable as to length of time and extent of territory. The court sustained the demurrer, entered judgment dismissing the action, from which the plaintiff appealed.

Egbert L. Haywood, Emery B. Denny, Jr., of Haywood & Denny, for plaintiff, appellant, Walter P. Armstrong, of counsel.

Tally, Tally, Taylor & Strickland, By: Nelson W. Taylor and Jesse M. Henley, Jr., for defendant, appellee.

HIGGINS, J. In passing on the demurrer this Court must accept as true the facts alleged. Hence, for the purposes of the present hearing these facts are deemed established: (1) The parties entered into a written contract. (2) The mutual covenants furnished valuable consideration for it. (3) The defendant observed the terms of the contract for more than eight years during which the plaintiff received more than $55,000. (Whether this amount is the total, or the share of each party, is not clear.) (4) The defendant resigned effective September 22, 1958. (5) Immediately thereafter, all of plaintiff's customers cancelled their contracts. (6) The defendant immediately continued her operation as before except for herself rather for the plaintiff. (7) The defendant is now using the same methods and continuing the same operation in violation of the restrictive covenant in her contract.

The defendant admits the violation. She says, by way of her only defense, the contract is void because it is unreasonable as to time and territory. Our general rule is that the Court will enforce such a contract only if it is reasonable both as to the territory and the time limitations. In determining these questions the Court must take the contract as the parties made it. *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431; *Noe v. McDevitt,* 228 N.C. 242, 45 S.E. 2d 121.

The court is without power to vary or reform the contract by reducing either the territory or the time covered by the restrictions. However, where, as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable and refuse to enforce them in the divisions deemed unreasonable. It is patent that division (1) — Fayetteville — is not unreasonable. Likewise it appears that divisions (3) and (4) — any city or town in the United States in which the plaintiff is doing, or intends to do business — are unreasonable and will not be enforced. Whether (2) is reasonable is for the chancellor. "Where the territory embraced in restrictive covenants is unreasonable, but is expressed in divisible terms, i.e., in terms of local geographical or governmental units, the majority of the courts enforce the covenant in as many of the units as are reasonable and disregard the remainder." 26 N.C.L.R. (1947-48) p. 403, citing 5 Williston on Contracts, 1659 (Revised Ed. 1937-47 Cumulative Supplement); *Roane v. Tweed* (Del) 89 A. 2d 548; 41 A.L.R. 2d 1; *Welcome Wagon v. Haschert* (Ind.) 127 N.E. 2d 103; 17 C.J.S., Contracts, § 289 (a); *Hauser v. Harding,* 126 N.C. 295, 36 S.E. 586.

The defendant stressfully contends the time period (five years) after separation from the plaintiff's employment is unreasonable and renders the contract void. She relies heavily on *Welcome Wagon v.*

Morris, decided by the U. S. Court of Appeals for the Fourth Circuit and reported in 224 Fed. 2d 693. While there are minor factual differences between this and the *Morris* case, nevertheless we confine comment to the simple statement that, in our opinion, that decision does not follow the general rule and is not based on the sounder reasoning. The general rule is stated in 9 A.L.R., p. 1468: "It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." *Baumgarten v. Broadway,* 77 N.C. 8; *Baker v. Cordon,* 86 N.C. 116; *Cowan v. Fairbrother,* 118 N.C. 406, 24 S.E. 212; *Kramer v. Old,* 119 N.C. 1, 25 S.E. 813; *King v. Fountain,* 126 N.C. 196, 35 S.E. 427; *Hauser v. Harding, supra; Jolly v. Brady,* 127 N.C. 142, 37 S.E. 153; *Anders v. Gardner,* 151 N.C. 604, 66 S.E. 665; *Wooten v. Harris,* 153 N.C. 43, 68 S.E. 898; *Faust v. Rohr,* 166 N.C. 187, 81 S.E. 1096; *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603; *Bradshaw v. Millikin,* 173 N.C. 432, 92 S.E. 161; *Mar-Hof Co. v. Rosenbacker,* 176 N.C. 330, 97 S.E. 169.

The foregoing cases in the main refer to covenants ancillary to contracts of sale, etc. See 36 Am. Jur., § 58, p. 537, *et seq.* The courts likewise recognize as valid contracts not to engage in competition with employer after termination of service. 36 Am. Jur., § 79, p. 555, *et seq.* In *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315, this Court held: "At least where the character of the business and the nature of the employment are such that the employer requires such protection, an agreement by an employee not to engage in business in competition with the employer after the termination of the employment, is valid if it is reasonable under the circumstances." The same rule is approved in *Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154. In *Comfort Spring Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473, the Court recognized, as valid, the rule in the *Scott* and *Moskin* cases but refused to restrain the defendant because of plaintiff's failure to allege sufficient material facts *Beam v. Rutledge,* 217 N.C. 670, 9 S.E. 2d 476; *Delmar Studios v. Goldston,* 249 N.C. 117, 105 S.E. 2d 277.

In the cases cited and others, restrictive covenants have been approved for periods ranging from one to 20 years, and in one instance for the life of the covenanter. For list of cases, see N.C.L.R., Vol. 38, p. 396 (1959-60). Research has not disclosed, and the defendant has not cited, any decision of this Court in which five years duration has been declared sufficient to avoid a restrictive covenant. According to the allegations, the plaintiff was established in business at the time the defendant executed the written contract and entered plaintiff's employment. She resigned after receiving the benefits for several years, began a competitive business immediately, and took with her all of plaintiff's customers. In short, she took over plaintiff's business. The actual result appears to furnish a valid reason for the covenant. "There is no ambiguity in the restrictive covenant. It was inserted for the protection of the plaintiff, and to inhibit the defendant, for a limited time, from doing exactly what he now proposes to do. *Exterminating Co. v. Wilson, ante,* 96. The parties regarded it as reasonable and desirable when incorporated into the contract. Subsequent events, as disclosed by the record, tend to confirm, rather than refute, this belief." *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352.

Upon the allegations of the complaint, which the proof may or may not sustain, the court should have overruled the demurrer, permitted the defendant to answer, and continued the restraining order to the hearing. The judgment of the court below is

Reversed.

BOBBITT, J., dissenting. The demurrer admits, solely for the purpose of testing the sufficiency of the complaint, plaintiff's factual allegations. Defendant's conduct, under the facts alleged, was and is in violation of the terms of the restrictive covenant. The only question for consideration is whether the restrictive covenant is valid and enforceable.

Covenants restricting employment tend to lessen the opportunity of the person so restricted to earn a livelihood and to deprive the community of the benefit of competition. *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603. Such covenants "are looked upon with disfavor in modern law." *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543. They are upheld only if founded on a valuable consideration, are reasonably necessary to protect the legitimate interests of the covenantee, do not impose unreasonable hardship upon the covenantor, and do not unduly prejudice the public interest. *Paper Co. v. McAllister,* 253 N.C. 529, 117 S.E. 2d 431, and cases cited; *Comfort Spring Corp. v. Burroughs,* 217 N.C. 658, 9 S.E. 2d 473; 17 C.J.S., Contracts § 254; 28 Am. Jur., Injunctions § 105; Restatement, Contracts § 516(f). To be

upheld, such a restrictive covenant must be reasonably limited both in respect of time and territory. *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352.

"Covenants by employees not to compete with their former employer are more carefully scrutinized by the courts, and relief more readily denied, than similar covenants ancillary to the sale of a business, since enforcement of the former may deprive the covenantor of the means of livelihood." 28 Am. Jur., Injunctions § 105; 17 C.J.S., Contracts § 254; 41 A.L.R. 2d 30-33; 43 A.L.R. 2d 111-115; Restatement, Contracts § 515, Comment b; 38 N.C.L.R. 399.

In *Kadis v. Britt, supra, Seawell, J.,* says: "From the beginning the argument against restraint of employment was—and still is—more powerful than those based on the evils of monopoly incident to restrictions in sales contracts." Ordinarily, in respect of sales contracts, the seller and the purchaser are in equal bargaining positions. The seller's covenant not to compete enables him to obtain full value for his business and good will. On the other hand, a prospective employee accepts employment on the terms offered or not at all. The prospective employee receives no additional compensation or benefit on account of the restrictive covenant he is required to execute.

While there is authority for the enforcement of a restrictive covenant *for such portion* of the stipulated time and *within such portion* of the stipulated territory *as the court may deem reasonable, Roane v. Tweed* (Del.), 89 A. 2d 548, 41 A.L.R. 2d 1, this Court is committed to the view that such a covenant must be upheld as written or not at all, that "it must stand or fall integrally." *Noe v. McDevitt,* 228 N.C. 242, 245, 45 S.E. 2d 121; *Paper Co. v. McAllister, supra.* Our rule, as stated in the majority opinion, is that "the Court must take the contract as the parties made it."

Covenants in *employment* contracts have been upheld by this Court where the restriction was for (1) three years, *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315, (2) two years, *Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154, (3) two years, *Exterminating Co. v. Wilson,* 227 N.C. 96, 40 S.E. 2d 696, (4) twelve months, *Sonotone Corp. v. Baldwin, supra.*

In *Beam v. Rutledge,* 217 N.C. 670, 9 S.E. 2d 476, the restrictive covenant was a provision in a partnership contract between plaintiff, an established eye, ear and throat specialist, and defendant, a newcomer to the community, in which defendant agreed, in the event of a dissolution of the partnership, that he would not practice medicine in Lumberton, or within one hundred miles of Lumberton, for a period of five years. This Court affirmed the continuance of a temporary restraining order to the final hearing.

The opinion of *Stacy, C.J.*, in *Beam v. Rutledge, supra,* includes the following: "It is not to be overlooked that cases arising out of the conventional relation of master and servant, or employer and employee, are not wholly applicable to a situation like the present. (Citation) The attendant circumstances are different. A workman 'who has nothing but his labor to sell and is in urgent need of selling that' may readily accede to an unreasonable restriction at the time of his employment without taking proper thought of the morrow, but a professional man who is the product of modern university or college education is supposed to have in his training an asset which should enable him adequately to guard his own interest, especially when dealing with an associate on equal terms.

"The line of demarcation, therefore, between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this line shall be in any given situation is to be determined by the rule of reason. Of necessity, no arbitrary standard can be established in advance for the settlement of all cases."

"Enforceability of restrictive covenant, ancillary to employment contract, as affected by duration of restriction," is the subject of an exhaustive annotation appearing in 41 A.L.R. 2d 15-222. Restrictive covenants not to compete limited in duration to exactly five years were held reasonable in decisions cited and discussed on pages 199-207 and were held unreasonable in decisions cited and discussed on pages 207-211.

"Where the facts are established, reasonableness of restraint is a matter for the court." *Noe v. McDevitt, supra.* To determine whether the restrictions plaintiff sought to impose on defendant were reasonably necessary for the protection of plaintiff's legitimate interests and not unduly oppressive on defendant, the nature of their contractual relationship must be considered.

The covenants imposing restrictions on defendant constitute a major portion of the contract. In addition to those quoted in the statement of facts preceding the majority opinion, paragraph 10 of the contract provides:

> "10. It is understood and agreed that Thomas W. Briggs, of Memphis, Tennessee, the President and principal stockholder of this Company, is also operating as an individual under the trade name of The Welcome Wagon Service Company the same kind of service in all the Provinces in the Dominion of Canada. Therefore, as a further consideration for this employment, the Hostess covenants and agrees that she will not, during the term of this

employment, and for a period of five whole years thereafter, engage directly or indirectly, for herself or as representative or employee of others, in the same kind or similar business as that engaged in by the said Thomas W. Briggs individually, in any of the cities, towns, boroughs, townships or provinces in the Dominion of Canada."

The contract, while repeatedly referred to therein as an employment contract, does not establish the conventional relationship of employer and employee. Under its terms, the parties agreed to engage in a cooperative venture; and in this cooperative venture defendant, as indicated below, was required to bear the major portion of the financial risk.

Under the contract, defendant was obligated, *inter alia,* as follows:

1. To pay "all local expenses, including the cost of procuring names, telephone, automobile, stamps, printing of Mayor's letters and Hostess folders."

2. To procure "at her own expense, necessary standard call equipment; i.e., a basket attractively arranged to present the subscribers' gifts and literature."

3. To pay one-half of the amount of any license or privilege fee that might be required.

4. To provide an automobile for her use as a "Welcome Wagon," and to pay for the gas, oil and upkeep.

In full compensation for her services *and expenses,* defendant was to receive "a sum equivalent to 50% of the gross receipt *(sic)* from calls made by her, or 10% if made by her Assistant in the above described territory, said commissions to be payable monthly."

Under the contract, plaintiff's principal obligations were as follows:

1. To pay one-half of the amount of any license or privilege fee that might be required.

2. To supply defendant "with printed, typewritten and mimeographed manuals, instruction books, and other literature for her guidance"; to "furnish sales presentations, sales letters and other material to assist in securing and retaining the patronage of prospective subscribers"; to "give personal sales and supervision assistance" through "its paid Field Representatives" and its "trained correspondence staff."

In addition, plaintiff agreed to "keep the books, render statements, assist in collections, furnish all stationery, report forms, contract forms, survey analyses and all necessary research data" and to "supply the subscribers with especially prepared merchandising plans of application, sample customer control record forms and model sales letters for the subscribers' use."

Plaintiff alleges it gave defendant, at its offices and at its expense, a special course of instruction and training "for a period of ten days to two weeks." (Presumably, this was deemed a sufficient time for the proper instruction and training of a new hostess.)

The contract bears the legend, "KEY HOSTESS CONTRACT." Obviously, the success or failure of the venture depended upon defendant's personality, character, contacts, diligence, etc. Plaintiff was not obligated, unconditionally, to pay salary, wages or other compensation for defendant's services. Defendant was to receive 50% of the gross receipts of the venture and to pay therefrom all expenses incurred in connection with her activities. (Plaintiff's contribution was largely in the field of advice and guidance, for which plaintiff was to receive 50% of the gross receipts. Since defendant's efforts proved successful, the venture, until defendant's resignation, proved "highly remunerative" to plaintiff.)

This pertinent question arises: Is plaintiff seeking to retain such good will as it had before defendant became the Key Hostess in Fayetteville or is plaintiff seeking to capture and retain good will generated by defendant and largely, if not wholly, personal to her?

Plaintiff alleges its plan of operation is "novel and original." Even so, it is quite simple. Obviously, a person who had never been associated with plaintiff could easily and quickly acquire knowledge of all essential features of plaintiff's plans and methods of operation. A new hostess could be fully and quickly instructed and trained.

Plaintiff alleges defendant, in violation of the covenant, is now using plaintiff's "trade secrets" as well as its plans and methods of operation. The allegations do not suggest, even in a general way, the nature of plaintiff's so-called "trade secrets." "A trade secret is a new process, mechanism, or compound known only to its owner and those employees to whom it has necessarily been confided." 43 C.J.S., Injunctions § 148. Nothing of this sort is alleged or intimated. Indeed, the essential features of plaintiff's plans and methods of operation are now a matter of common knowledge.

Each party had the right to terminate the contract at anytime by giving two weeks notice. The covenant restricts defendant for "five whole years" without reference to the length of time the relationship under the contract continued.

Defendant's contract with plaintiff terminated September 22, 1958. This action was instituted October 26, 1960, more than two years thereafter. Plaintiff does not now have a hostess in Fayetteville.

The restriction is not limited to the solicitation by defendant of those who were subscribers to plaintiff's services while defendant was associated with plaintiff. It deprives defendant of the right to engage

in the same or similar kind of business as that in which plaintiff is engaged in the United States and in which Thomas W. Briggs, individually, is engaged in Canada.

Judge Bickett held the restrictive covenant void "for that the length of time, five years, after the employee leaves Welcome Wagon, is entirely too long to be reasonably necessary to protect Welcome Wagon and is unreasonably oppressive on the former employee, and that the territory covered in the Contract . . . is too vast and likewise unreasonable."

In *Welcome Wagon v. Morris,* 224 F. 2d 693, decided (1955) by the Court of Appeals of the Fourth Circuit, the present plaintiff sought to enforce a restrictive covenant almost identical to that now under consideration. The restrictive covenant was held void and unenforceable, because unreasonable in respect of both time and territory, when judged by the criteria established by North Carolina decisions.

I agree with Judge Bickett and the Court of Appeals that "five whole years" is entirely too long to be reasonably necessary to protect plaintiff's legitimate interests. It would be reasonable to restrict defendant from engaging in a competitive business in Fayetteville for such time as would be reasonably required to enable plaintiff to engage a new hostess, to give her sufficient instruction and training, to give her ample opportunity to contact the subscribers, and generally to establish and identify herself in the Fayetteville area as the Welcome Wagon Hostess. It would seem this could be accomplished, if at all, within three years or less. If defendant were restricted from engaging in a competitive business for a maximum of three years from the termination of her contract with plaintiff, this would seem sufficient to fully protect plaintiff's legitimate interests. In my opinion, to so restrict her for "five whole years" is unreasonable and harsh.

This Court has not upheld as reasonable a covenant restricting competition for five years after the termination of an employment contract. True, as stated in the majority opinion, no decision of this Court has declared a covenant in an employment contract void on the ground five years is an unreasonably long time. In my opinion, the factual situation here considered affords an appropriate basis for a positive declaration to that effect.

Moreover, I agree with Judge Bickett and the Court of Appeals that the territory covered by the restrictive covenant is too vast and likewise unreasonable.

The majority opinion, in upholding the restriction as to Fayetteville, applies in substance the so-called "blue pencil" rule. See Williston on Contracts, Revised Edition, Vol. V, § 1659. While simple and convenient, this rule, in my opinion, is unsound. Simply stated, the rule

as applied here is this: If defendant were restricted from competition with plaintiff throughout the United States and Canada, the restriction would be held wholly unreasonable and void and would not be enforced in Fayetteville; but if defendant is restricted from competition in Fayetteville *or* elsewhere in the United States and Canada, the restriction will be enforced in Fayetteville. In other words, if offered a choice of separately described territories, the court will enforce the restriction if it can find an alternative in respect of territory it deems reasonable; but the court will not, on its own initiative, designate what, within a larger boundary, constitutes a reasonable territory. Under this rule, legality is made to depend upon form rather than substance.

Under the "blue pencil" rule, the court will not divide territory but will divide what is essentially a single restrictive covenant. The restrictive covenant, according to its terms, applies to all territory described therein in exactly the same manner it applies to Fayetteville. Indeed, the provision as to liquidated damages if defendant should breach the "good-will clause" provides that plaintiff must pay "the sum of $3,500 for each and every city, town, borough, township, village, province or other place in which she commits said breach."

Too, if the "blue pencil" rule is adopted, there would seem no reason why the court should not uphold a provision it deems reasonable in respect of time if worded in the alternative, for example, a provision restricting competition (1) for one year, or (2) for two years, or (3) for three years, or (4) for four years, and so on *ad infinitum.*

In *Paper Co. v. McAllister, supra,* a similar factual situation was considered. McAllister, a salesman, was engaged exclusively in the sale and distribution of paper products. The covenant, for a period of three years after the termination of his contract, restricted him from engaging "in the manufacture, sale *or* distribution of paper or paper products within a radius of 300 miles of any office or branch of the Henley Paper Company or its subsidiary divisions." (Our italics) One ground on which the covenant was held unreasonable and void as imposing an undue hardship was that it restricted McAllister from engaging, directly or indirectly, in the *manufacture* of paper or paper products. I concurred in this view. There the restriction was phrased in the alternative. If we had applied the "blue pencil" rule, we would have disregarded the word "manufacture" and would have enforced the provision to the extent it related to sales and distribution.

In testing the reasonableness of a covenant restricting competition after termination of employment, the impact upon the employee so restricted should receive due consideration. The covenant, in its en-

tirety, hangs over him. He cannot foresee whether a court, at the end of protracted litigation, will enforce the covenant as written or only within a segment of the territory therein explicitly described. I am impressed by this dictum of *Lord Moulton* in *Mason v. Provident Clothing and Supply Company, Limited,* Law Reports, 1913 Appeal Cases 724, 745: "It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master."

The majority opinion stresses the allegations of paragraph 26 of the complaint, *viz:*

> "26. That prior to the employment of the defendant in 1948, plaintiff had an established business in the City of Fayetteville, a good name and was performing a useful, valuable and praiseworthy service to the community of Fayetteville, North Carolina and certain of its merchants."

While the complaint alleges in detail the fees collected by plaintiff during the years 1949-1960, it contains no allegations as to the success or failure of plaintiff's business prior to 1949. Was plaintiff engaged in business in Fayetteville *immediately* preceding defendant's employment by or her association with plaintiff?

It will be observed that paragraph 26, quoted above, refers to the employment of defendant by plaintiff in *1948.* The contract is dated August 19, 1949. Paragraph 16 of the complaint alleges defendant entered into her duties *as hostess* of plaintiff in Fayetteville in the Fall of 1949. Paragraph 17 alleges defendant remained in the employment of plaintiff from the Fall of 1949 to the early part of September, 1958. It may be the reference in paragraph 26 to 1948 is an inadvertence. As plaintiff's allegations now stand, they indicate defendant was employed by plaintiff in 1948 but did not become hostess until the contract of August 19, 1949, was executed. Plaintiff's allegations suggest that the contract of August 19, 1949, was or may have been executed after defendant, under employment by or in association with plaintiff, had become thoroughly familiar with plaintiff's methods of operation. While I do not base my dissent on this ground, I suggest that, as the allegations now stand, the covenant in the contract of August 19, 1949, is or may be void for lack of consideration. *Kadis v. Britt, supra; Paper Co. v. McAllister, supra.*

For the reasons stated, I vote to affirm Judge Bickett's judgment.

PARKER and RODMAN, JJ., join in dissenting opinion.

PITT & GREENE ELECTRIC MEMBERSHIP CORPORATION v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 7 July, 1961.)

1. Electricity § 2—

A power company and an electric membership corporation are free to compete in rural areas unless restricted by some valid stipulation in a contract between them.

2. Contracts § 12—

The interpretation placed upon a contract by the parties themselves prior to controversy will be given consideration by the courts in construing the agreement.

3. Electricity § 2— Contract held not to preclude power company from constructing line across line of membership corporation to serve customers more than 300 feet from line of membership corporation.

The contract in suit between a power company and an electric membership corporation provided in the article relating to service facilities under (a) that neither party should furnish service to anyone who was then a customer of the other or who could be served by the other by extension of existing facilities not exceeding 300 feet, and under (b) provided that neither should duplicate the other's facilities except insofar as duplication should be necessary to transmit energy between unconnected points on its line, but that no service should be rendered from such lines in competition with the other. Neither party had objected that the distribution lines of the one crossed the distribution lines of the other at points other than the point in question, and had done so for a number of years prior to the controversy. *Held:* The subsections of the service facilities article of the contract must be construed *in pari materia*, and be interpreted with regard to the interpretation placed upon the agreement by the parties themselves prior to the controversy, and the agreement does not preclude the power company from constructing an extension to its distribution line to cross at approximately a right angle the distribution line of the membership corporation in order to serve customers and prospective customers more than 300 feet from the distribution lines of the membership corporation, although the power company could not serve any customers within 300 feet of the established line of the membership corporation.

4. Same— Public policy in regard to duplication of power lines is a legislative and not a judicial question.

An electric membership corporation is not required to obtain a certificate of convenience and necessity from the Utilities Commission before construction of facilities for serving its members, G.S. 62-101, and may compete with a power company for customers in rural areas subject only to the contractual restrictions between them, and therefore, in the absence of any order of the Utilities Commission, whether it is against public policy to permit a power company to construct a line across that of a membership corporation is a question for legislative action, and cases decided upon controversy between power companies subject to regulations by a public service commission are inapposite.

MEMBERSHIP CORP. *v.* LIGHT CO.

APPEAL by plaintiff from *Mintz, J.*, January 9 Term, 1961, of GREENE.

Plaintiff, an electric membership corporation, seeks to enjoin defendant, a public utility corporation, "from constructing any extension of its electric facilities, and from furnishing electric service to any person, — alongside of or near to North Carolina Highway #91, between the present terminus of defendant's facilities located approximately 1500 feet south of plaintiff's substation adjacent to said highway north of the Town of Snow Hill, and plaintiff's distribution line where same crosses said highway near the Walter Heath residence, approximately 3,200 feet north from said substation."

North Carolina Electric Membership Corporation, of which plaintiff is a member, was granted leave to appear as *amicus curiae*.

The court based its judgment on stipulated facts.

Plaintiff, since its incorporation in 1937 under G.S. 117-6 *et seq.*, has furnished electric service to its members in certain rural sections of Pitt, *Greene*, Lenoir, Wayne and Wilson Counties.

Prior to 1937 and until its merger with defendant, effective February 29, 1952, the Tide Water Power Company (Tide Water), a public utility corporation, had supplied electricity to the Town of Snow Hill and various sections of Greene and other counties in eastern North Carolina; and, since said merger, defendant has continuously supplied electricity in the sections formerly served by Tide Water.

Plaintiff and defendant entered into a contract under date of January 5, 1956, which provides for the sale by defendant to plaintiff of all power and energy required for plaintiff's electric system in excess of that purchased by plaintiff from the United States of America (generated in the Government's plant at John H. Kerr Reservoir), at rates set forth on an attached schedule relating to the sale of electricity "to a nonprofit rural electric membership corporation for sale to ultimate consumers." Article 8 of this contract provides:

> "(a) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall distribute or furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from the other, or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of lines not exceeding three hundred feet in length.
>
> "(b) Neither party, unless ordered so to do by a lawful order issued by a properly constituted authority, shall duplicate the other's facilities, except insofar as such duplication shall be necessary in order to transmit electric energy between unconnected

points on its lines, but no service shall be rendered from such interconnecting facilities in competition with the other party."

A prior contract of July 1, 1951, superseded by said contract of January 5, 1956, contained provisions identical to those set forth in said Article 8. The record is silent as to whether said contract of January 5, 1956, was submitted to and approved by the North Carolina Utilities Commission. The prior contract of July 1, 1951, entered into by plaintiff and Tide Water, was drafted in accordance with a form contract approved by the Utilities Commission.

Three maps (Exhibits D, E and F) of an area of Greene County approximately two miles north of the Town of Snow Hill are attached to and made a part of the "Stipulations of Fact." North Carolina Highway #91 extends north-south through the area shown on these maps. These maps show: (1) Distribution lines constructed by Tide Water prior to 1937 and in continuous use therafter by Tide Water and by defendant. (2) Distribution lines constructed by plaintiff prior to 1952. (3) A substation, a 33 KV transmission line and distribution lines constructed by plaintiff in 1955. (4) A distribution line to the school site, referred to below, constructed after this action was commenced under a no-prejudice stipulation. (5) The location of the line defendant proposes to construct, and which plaintiff seeks to enjoin, along Highway #91.

In general, defendant's present lines, all of which were constructed prior to 1937, are west of Highway #91. The only material exception is a line along Highway #91, the northern terminus of which is approximately 1500 feet south of where plaintiff constructed its substation in 1955.

In general, the lines constructed by plaintiff prior to 1952 are east of Highway #91. The lines of plaintiff and defendant then and now surround the area shown on said maps.

The factual situation established by the stipulations cannot be stated in detail except by repeated references to said maps. The facts stated below, based on an analysis of the stipulations and maps, are sufficient to indicate the question for decision on this appeal.

The substation constructed by plaintiff in 1955 is on the west side of and adjacent to Highway #91. The 33 KV transmission line constructed by plaintiff in 1955 extends east (crossing Highway #91) from the substation; and a distribution line constructed by plaintiff in 1955 extends east (crossing Highway #91) from the substation. These lines cross property on which the Greene County Board of Education is constructing a Central High School. The school property

is on the east side of Highway #91. At the time this action was commenced, the Board of Education had not applied either to plaintiff or to defendant for electricity for the school. Subsequent to the commencement of this action, the Board of Education applied to plaintiff for permanent electric service. At the request of the contractor, "and without prejudice to the parties in this action," plaintiff constructed a distribution line to the school site to provide power during the construction period.

The terminus of defendant's existing distribution line on Highway #91 is 428 feet south of the southern boundary of the school property.

The terminus of one of plaintiff's distribution lines is on Highway #91, 3200 feet north of the point where the lines emanating from plaintiff's substation cross Highway #91 and approximately 1829 feet north of the northern boundary of the school property.

Presently, neither plaintiff nor defendant has any distribution line *along* Highway #91 between the points described in the two preceding paragraphs.

John S. Harper, Jr., owns property on both sides of Highway #91. The portion on the west side has been surveyed, subdivided and staked off into building lots. The portion on the east side adjoins the northern boundary of the school property. Harper plans to subdivide this portion of his property. Harper has requested defendant to construct a distribution line and provide electric service to his property.

Defendant proposes to construct (extend) a distribution line from a point on Highway #91 428 feet south of the southern boundary of the school property and running north, generally with Highway #91, a distance of 3,854 feet, the northern terminus to be 817 feet south from the terminus of plaintiff's said distribution line on Highway #91. Defendant has obtained all necessary easements for such construction. If constructed by defendant, this (extended) distribution line will cross, near Highway #91, plaintiff's lines emanating and extending east from the substation and crossing Highway #91.

Plaintiff alleges the construction by defendant of said proposed distribution line would constitute a violation of the provisions of Article 8 of their contract of January 5, 1956, and should be enjoined.

Reference will be made in the opinion to other stipulated facts.

The judgment entered by Judge Mintz (1) denies the injunctive relief sought by plaintiff, (2) dissolves the temporary restraining order theretofore issued, and (3) taxes plaintiff with the costs. Plaintiff excepted to the judgment and to each of the court's conclusions of law set forth therein and appealed.

Lewis & Rouse and J. A. Jones for plaintiff, appellant.

I. Joseph Horton, A. Y. Arledge and W. Reid Thompson for defendant, appellee.

William T. Crisp for North Carolina Electric Membership Corporation, amicus curiae.

BOBBITT, J. Statutory provisions relating to electric membership corporations and to public utility corporations are set forth and discussed in *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812, and in *Membership Corp. v. Light Co.*, 253 N.C. 610, 117 S.E. 2d 764.

In *Light Co. v. Electric Membership Corp.*, 211 N.C. 717, 192 S.E. 105, decided in 1937, this Court held that an electric membership corporation and a public utility corporation were free to compete in rural areas. Unless restricted by the provisions of Article 8 of their contract of January 5, 1956, plaintiff and defendant may continue to do so.

Article 8, entitled "Service Facilities," consists of the two paragraphs designated (a) and (b). The restrictions imposed thereby apply equally to plaintiff and defendant. Judge Mintz, in Conclusion of Law No. 3, construed Article 8 as follows:

> "Clause (a) prohibits either party unless ordered to do so by a lawful order issued by a properly constituted authority from supplying electric service to anyone who, at the time of the proposed service, is receiving electric service from the other or whose premises are capable of being served by the existing facilities of the other without extension of its distribution system other than by the construction of lines not exceeding three hundred feet in length.
>
> "Clause (b) must be construed *in pari materia* with clause (a), and clause (b) prohibits either party, unless ordered to do so by a properly constituted authority, from constructing duplicating facilities within 300 feet of the lines of the other, except insofar as such construction within such 300-foot zone shall be necessary to transmit electric energy between unconnected points on its lines, and except for crossing of the lines of the other; but no service shall be rendered from such interconnecting facilities or crossing lines in competition with the other party, that is, no service shall be furnished from such interconnecting facilities or crossing lines to any applicant whose premises are capable of being served by the existing facilities of the other without ex-

tension of its distribution system other than by the construction of lines not exceeding three hundred feet in length.

"There is no prohibition in the contract against either party furnishing electricity to any location which is more than 300 feet from the existing lines of the other, nor is there any prohibition in the contract against either party constructing any facilities at places more than 300 feet from the existing facilities of the other."

Whether the construction by defendant of its proposed line would violate the provisions of Article 8 is, as stated in plaintiff's brief, "the heart of the lawsuit."

Defendant is subject to the supervision and jurisdiction of the Utilities Commission. The clause, "unless ordered so to do by a lawful order issued by a properly constituted authority," indicates the parties were advertent to statutory provisions vesting in the Utilities Commission all power necessary *to require and compel* defendant to provide and furnish reasonable electric service to the citizens of this State. G.S. 62-30.

Defendant, if its proposed extension is constructed, will have no right to distribute electric energy therefrom to anyone now served by plaintiff or whose premises can be served by plaintiff from its existing facilities or extensions thereof not exceeding 300 feet. Plaintiff does not allege defendant proposes to do so. Defendant disavows intent to do so.

Paragraph (a) defines the specific area in which the right to compete is restricted. The right of each party to continue to compete in areas more than 300 feet from the existing facilities of the other is clearly implied.

Plaintiff contends paragraph (b) is a separate and independent contractual provision; that, when so construed, the construction of defendant's proposed extension would duplicate plaintiff's facilities within the meaning of paragraph (b); and that such duplication is not necessary in order to transmit electric energy between unconnected points on defendant's lines.

In determining the meaning of Article 8, consideration must be given the interpretation heretofore placed thereon by the parties. *Power Co. v. Membership Corp., supra.*

It was stipulated: "The lines of plaintiff and defendant cross at various points, and the plaintiff and the defendant have always understood and agreed that the crossing of the lines of the one by the other does not *per se* constitute a violation of the terms of the contract between the parties."

Moreover, the stipulated facts disclose: (1) Lines constructed by plaintiff prior to 1952 then and now cross at two points lines con-

structed by Tide Water prior to 1937 and in use continuously thereafter by Tide Water and by defendant. (2) In 1955, when plaintiff constructed its substation, it then constructed, in addition to the lines extending east (crossing Highway #91) therefrom, a distribution line extending southwest from the substation. This distribution line then and now crosses a distribution line constructed by Tide Water prior to 1937 and in use continuously thereafter by Tide Water and by defendant; and, at the nearest point, this distribution line was and is only 856 feet from *another line* of defendant constructed by Tide Water prior to 1937.

It is noted: Defendant's proposed extension will not parallel but will cross (approximately at right angles) the lines (extending east from the substation) constructed by plaintiff in 1955. It will not be within 300 feet of plaintiff's existing facilities except in the immediate area where it crosses plaintiff's said lines. While it would involve greater distance and cost, defendant (as shown by the maps) could reach the particular area in which the Harper property is located without crossing any line of plaintiff. The line defendant proposes to construct is an extension of a line constructed by Tide Water prior to 1937 and in use continuously thereafter by Tide Water and by defendant.

Ordinarily, plaintiff concedes, either party may construct a line over or under a previously constructed line of the other. Plaintiff contends defendant cannot do so in order to compete with plaintiff in an area where adequate service can be provided by plaintiff, at less construction cost, *by an extension* of plaintiff's previously constructed facilities. To do so, plaintiff contends, would constitute a duplication of its facilities within the meaning of paragraph (b). However, in our opinion, the reference in paragraph (b) to "the other's facilities" refers to the other's *existing* facilities; and paragraph (b) prohibits service from "interconnecting facilities in competiton with" the existing facilities of the other party. We find nothing in paragraph (b) that suggests either party cannot construct a line over or under a line of the other for the purpose of distributing electric energy in an (undefined) area more than 300 feet from such other party's existing facilities because such other party *may, by extension of its existing facilities,* provide adequate service therein. Obviously, the only reason either party would construct such a line would be to supply electric energy to customers, present or prospective.

It seems clear that all of Article 8 relates to the area defined in paragraph (a), an area not exceeding 300 feet from existing lines of plaintiff or defendant; that paragraph (a) prohibits *competitive service* in this area; and that paragraph (b) prohibits the construction of

facilities in this area except when necessary to provide service beyond its limits. The construction by plaintiff in 1955 of a distribution line crossing a distribution line previously constructed by defendant indicates plaintiff as well as defendant has so interpreted and understood the provisions of Article 8.

In our opinion, paragraphs (a) and (b), both under the caption, "Service Facilities," are *in pari materia* and must be construed together; and, when so construed, the restriction imposed upon a party who constructs an interconnecting facility, that is, one that crosses over or under a previously constructed line of the other, is that it may not distribute electric energy therefrom to anyone served by the other or whose premises can be served by the other from its existing facilities or extensions thereof not exceeding 300 feet.

Plaintiff contends this construction of Article 8 contravenes sound public policy. Suffice to say, public policy is for legislative determination. Decision on this appeal depends solely on whether defendant's proposed extension would violate the provisions of Article 8.

Plaintiff does not allege or contend defendant's proposed line, in crossing over or under plaintiff's lines, will be so constructed as to create a threat to workmen servicing plaintiff's lines or otherwise create a dangerous condition. *Intermountain R. E. Ass'n v. Colorado Central P. Co.* (Colo.), 307 P. 2d 1101, cited by plaintiff, is not in point. There the court restrained a "rural electric association" from erecting poles so close to those of the power company that the crossbars overlapped, thereby energizing the lines of the power company (then under construction) and creating a threat to the safety of workmen on the power company's line.

Plaintiff cites *Kentucky Utilities Co. v. Public Service Com'n* (Ky.), 252 S.W. 2d 885. There the East Kentucky Rural Electric Cooperative Corporation applied to the Public Service Commission of Kentucky, under Section 278.020 of Kentucky Revised Statutes, for a certificate of convenience and necessity authorizing construction of a steam generating plant and transmission lines for the purpose of supplying electric energy to the distribution systems of the local rural electric cooperative associations throughout the state. The application was opposed by the public utility corporations then supplying the electric energy to the cooperatives. The discussion in the court's opinion with reference to the duplication of facilities must be considered with reference to this factual situation. The significant fact is that the court was reviewing an order of the Public Service Commission. Under Kentucky statutes, the applicant and the local rural electric cooperative associations were subject to the general supervision and jurisdiction of

the Public Service Commission. K.R.S., Section 279.210, Sections 278.010-278.450, inclusive, and Section 278.990.

United Fuel & Gas Co. v. Public Serv. Commission (W. Va.), 138 S.E. 388, 52 A.L.R. 1104, cited by plaintiff, is not in point. There, the controversy was between two public utility corporations, both subject to the supervision and jurisdiction of the Public Service Commission. The court reversed the Commission's order on the ground it was unreasonable, unjust and arbitrary. The Commission's order *compelled* one public utility corporation, at great expense, to provide service to a customer then satisfactorily and amply served by the other public utility corporation.

This Court has held that an electric membership corporation is not required (by G.S. 62-101), "before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation of said facilities." *Light Co. v. Electric Membership Corp., supra; Membership Corp. v. Light Co., supra,* and cases cited; G.S. 117-27. Decisions involving a controversy before a public service commission or utilities commission, between an electric membership corporation and a public utility corporation, when both are subject to the supervision and jurisdiction of such commission, are not in point.

Whether plaintiff as well as defendant *should* be subject to the supervision and jurisdiction of the Utilities Commission is for legislative consideration and determination. Now, as heretofore, plaintiff and defendant are competitors in rural areas; and their rights to compete are limited only by the provisions of Article 8 of their contract of January 5, 1956. Except as provided therein, a prospective user of electric energy is at liberty to determine whether he will become a member and customer of plaintiff or a customer of defendant.

In connection with its contention that the interpretation we place upon Article 8 will result in wasteful construction of duplicating facilities, plaintiff suggests: "Each party will extend its lines unnecessarily so that its lines will be in place for future consumer demands, which may or may not materialize." Plaintiff contends this is what defendant, by its proposed extension, is attempting to do. It seems appropriate to call attention to this stipulated fact: Plaintiff has never had any member and services no one with electricity along the lines constructed by it in this area in 1955 except the school contractor.

Whether the Utilities Commission has authority, in a properly constituted proceeding, to prohibit the construction by defendant of a proposed extension, if it should determine on competent evidence that

such construction would be an unnecessary and wasteful investment of defendant's funds, is not presented for consideration on this appeal.

As to furnishing electric energy to the school, this explanation seems appropriate: The area defendant will serve from its proposed extension is more than 300 feet from any of plaintiff's existing facilities. The maps show the distance from defendant's proposed extension to the nearest portion of the school building to be 460 feet plus the width of Highway #91. Before the line now furnishing power to the school contractor was constructed, the distance from plaintiff's existing lines to the nearest portion of the school building, according to the maps, was substantially more than 460 feet. Hence, the school site was in free territory; and, since the School Board has applied to plaintiff for permanent service, defendant concedes plaintiff's right to provide such service.

Having reached the conclusion the construction of defendant's proposed extension would not constitute a violation of the provisions of Article 8, the judgment of the court below is affirmed.

Affirmed.

ELIZABETH FALK ANDREWS v. EVANDER GRAHAM, HECTOR GRAHAM, JOHN HUGHES, KOSSUTH FALK, VIRGINIA F. (GINNY) KIRKPATRICK, NUNA F. BROWN, EFFIE F. OWENS, JAMES FALK, JR., ELIZABETH McQ. DOARES, LAURIN McQUEEN, DONALD McQUEEN, RAYMOND McQUEEN, OLGA F. MONROE, ELSA F. BRACEY, ALTON ANDREWS, RALPH ANDREWS, RUBY A. ROBINSON, J. L. FALK, EARL C. FALK, ALBERT FALK, GUYON FALK, BOYD FALK, HOWARD FALK, CLOVIS FALK, EVELYN F. RIGGS, MARGARET FALK, GEORGIA F. CONNELL, GERTRUDE F. SMELLEY, ELIZABETH F. SMELLEY, JANICE F. TOOMBS, SALLY HUGHES, EFFA HUGHES, AND THE UNKNOWN HEIRS-AT-LAW OF O. C. FALK, DECEASED; AND CHARLES G. McLEAN, GUARDIAN AD LITEM FOR ANY AND ALL PERSONS WHO ARE, OR MAY BE, NOT NOW IN BEING OR UNDER DISABILITY OR WHOSE NAMES AND RESIDENCES NOT NOW KNOWN, WHO MAY, TO SOME DEGREE OR EXTENT, BE OR BECOME INTERESTED IN THE REAL PROPERTY, THE SUBJECT OF THIS ACTION.

(Filed 7 July, 1961.)

1. Wills § 33—

Where a will devises lands for life to a named person with remainder in fee to another person, and the life tenant dies during the life of testator, the remainderman takes the fee upon the death of testator, nothing else appearing.

2. Wills § 27—

The primary objective in the construction of a will is to ascertain the intent of the testator as expressed in the language of the instrument construed in the light of the conditions and circumstances confronting testator at the time he executed the instrument.

3. Same—

In reconciling apparently conflicting provisions of a will, greater regard will be given to the dominant purpose of testator rather than to the use of any particular words by him.

4. Wills § 33— Devisee held to take the fee under the language of this will, subject only to the interest of named persons in income from the estate.

One of testator's sisters and one of his nieces lived with him as members of his family. The will devised testator's entire farm to this sister for life with remainder in fee to the niece. By subsequent item the will bequeathed all farm implements and personal property used in connection with the operation of the farm to the sister for life and after her death to the niece, together with the income from a part of the farm. By a third item, the will devised all income from the remaining portion of the farm to other named nieces so long as they might live and remain unmarried, with further provision that upon the death of the named nieces and upon the death of the first named niece without issue of her body, the income from the farm should be equally divided between such of testator's nieces as should be living and unmarried. *Held:* The items of the will are not in irreconcilable conflict, and the will devised the fee in the entire lands after the sister's life estate to the niece first named, subject only to the lifetime interest in the income to the named nieces, no later item of the will purporting to dispose of the fee.

5. Wills § 27—

The rule that a later provision of a will prevails over an earlier provision applies only where the provisions are wholly inconsistent and incapable of reconciliation.

6. Wills § 29—

It will be presumed that testator did not intend to die intestate as to any portion of his estate.

APPEAL by defendants Evander Graham, Laurin McQueen and Donald McQueen from *Hall, J.*, September Term, 1960, of ROBESON.

Civil action, under Declaratory Judgment Act (G.S. 1-253 *et seq.*), for construction of a will, submitted on an agreed statement of facts.

O. C. Falk, a resident of Roberson County, died in September, 1926. His will, dated November 30, 1921, was duly probated in Robeson County.

Decision requires the construction of these dispositive provisions:

"FIRST: I devise my farm on which I now reside, containing

two hundred and sixty-five acres, more or less, and located in Alfordsville Township, Robeson County, North Carolina, to my sister, Elizabeth Falk, for and during her natural life, the remainder in fee to my niece, Elizabeth Falk.

"SECOND: I bequeath to my sister, Elizabeth Falk, all of my live stock, farming utensils and all other personal property used on and in connection with the operation of my farm during her life and after her death to my said niece, Elizabeth Falk, together with all the income from that part of the estate located on the east side of the road leading from Maxton to McKinnis' bridge, it being my desire that that part of my estate shall remain intact for the use of my sister and niece, and it is my further desire that the grove of trees in front of the home and in the back lots and barn-yard shall not be cut down nor destroyed. It is my further desire that my said niece Elizabeth Falk shall have her home upon and her support from the said home place at all times and I hereby charge the said estate with a lien to enforce her rights to a home and support thereon.

"THIRD: I devise and bequeath, after the death of my sister, Elizabeth Falk, all the income from my said farm lands lying on the west side of the road leading from Maxton to McKinnis' bridge, to be equally divided between my nieces, Kossuth Falk, Sallie Hughes, Effa Hughes, Effie Mary Graham, Bell Graham, Alice Graham, Anna Graham and Maggie Graham, so long as they may live and remain unmarried, and in the event one or more of said nieces shall die or shall marry, then and in that event the said income shall be equally divided between those living and unmarried. And in the event my niece Elizabeth Falk, shall die without issue of her body, after the death of my sister, Elizabeth Falk, then the income from that part of my estate on the east side of the Maxton to McKinnis' bridge road shall also be equally divided between such of my said nieces as shall be living and unmarried."

O. C. Falk had no lineal descendants. He was never married. He had four brothers and four sisters, including his sister, Elizabeth Falk, all of whom are now dead. His heirs at law are the lineal descendants of six of his brothers and sisters. All living named defendants were served personally or by publication. Unknown heirs at law are represented herein by Charles G. McLean, Guardian *ad litem*.

A joint answer was filed by defendants Evander Graham, Donald McQueen and Laurin McQueen. Evander Graham is a son of Mary Jane Falk Graham, a sister of O. C. Falk, who had predeceased him.

Donald McQueen and Laurin McQueen are sons of Sally Falk McQueen, a deceased sister of O. C. Falk. An answer was filed by the guardian *ad litem*. The other defendants did not answer.

For more than twenty years prior to his execution of the will, Elizabeth Falk, his sister, and Elizabeth Falk, his niece, were members of the household of O. C. Falk. Subsequent to his execution of the will, but prior to the death of O. C. Falk, his sister, Elizabeth Falk, died.

Kossuth Falk, Sally Hughes, Effa Hughes, Effie Mary Graham, Bell Graham, Alice Graham, Anna Graham and Maggie Graham, nieces of O. C. Falk and named in the "THIRD" item of his will, are now dead.

At the time of his death, O. C. Falk owned a farm containing 265 acres, more or less, in Alfordsville Township, Robeson County. The farm is divided by a road leading from the Town of Maxton to McKinnis Bridge, running generally in a north-south direction. At the time of the death of O. C. Falk, his niece, Elizabeth Falk, now plaintiff Elizabeth Falk Andrews, was over thirty years of age and was unmarried. She had been in exclusive possession of the entire farm of 265 acres, more or less, continuously, up to and including the date this action was commenced, "receiving therefrom all the rents and profits, subject, however, to the will of O. C. Falk."

Judge Hall's judgment concludes as follows:

> "And the court, after consideration of the arguments of counsel, the facts of this case, the wording of said Last Will and Testament, and the intent of the testator, being of the opinion and concluding that the real property described in said Last Will and Testament was devised to the testator's niece, Elizabeth Falk, (now Elizabeth Falk Andrews, the plaintiff in this case), in fee simple.
>
> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff, Elizabeth Falk Andrews, under and by virtue of the Last Will and Testament of O. C. Falk, deceased, is the owner in fee simple of all the real property described in said Last Will and Testament.
>
> "It is FURTHER ORDERED, that the defendants pay the costs of this action to be taxed by the Clerk."

Defendants Evander Graham, Laurin McQueen and Donald McQueen excepted and appealed.

J. H. Barrington, Jr., for plaintiff, appellee.

King & Cox for defendants Evander Graham, Laurin McQueen and Donald McQueen, appellants.

BOBBITT, J. In the "FIRST" item, O. C. Falk devised a life estate *in his entire farm* of 265 acres, more or less, to his sister, Elizabeth Falk, for life, and "the remainder in fee" to his niece, Elizabeth Falk. The devise of the life estate to his sister, Elizabeth Falk, lapsed upon her death during the lifetime of O. C. Falk. Nothing else appearing, Elizabeth Falk, testator's niece, now plaintiff Elizabeth Falk Andrews, became the sole owner of the entire farm in fee upon the death of O. C. Falk.

Appellants contend the provisions of the "SECOND" and "THIRD" items are in irreconcilable conflict with the provisions of the "FIRST" item. They contend plaintiff, under the provisions of the "SECOND" and "THIRD" items, upon the death of Elizabeth Falk, testator's sister, acquired no interest in the part of testator's farm lying on the west side of the road; and, as to the part on the east side of the road, plaintiff acquired title thereto in fee only if she should die leaving issue surviving. They contend that, subject to the (lapsed) life estate of Elizabeth Falk, testator's sister, and the (lapsed) devises to the eight named nieces so long as they lived and remained unmarried, all of whom are now dead, title to the part on the west side vested in the persons who were heirs at law of O. C. Falk as of the date of his death; and, if plaintiff should die without leaving issue surviving, the part on the east side of the road will vest in the persons who are heirs at law of O. C. Falk as of the date of plaintiff's death. Thus, appellants contend that, subject to the life interests devised to the testator's sister and to his eight named nieces, O. C. Falk died intestate as to the part of the farm on the west side of the road, and died intestate as to the part on the east side of the road, subject to a life estate in favor of plaintiff, if plaintiff should die without issue surviving.

In the construction of a will, the court's primary objective is to ascertain the intent of the testator, as expressed in the will, in the light of the conditions and circumstances existing at the time he executed the will. *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E. 2d 246, and cases cited. When undertaking to reconcile apparently conflicting provisions "greater regard must be given to the dominant purpose of a testator than to the use of any particular words." *Trust Co. v. Waddell*, 234 N.C. 454, 461, 67 S.E. 2d 651; *Trust Co. v. Wolfe*, 245 N.C. 535, 537, 96 S.E. 2d 690.

Clearly, the dominant purpose of O. C. Falk was to provide for his sister, Elizabeth Falk, and for plaintiff. They had lived with him as members of his household, for more than twenty years next preceding the execution of his will.

Since Elizabeth Falk, testator's sister, predeceased him, and since the eight named nieces for whom provision was made in the "THIRD"

item "so long as they may live and remain unmarried" are now dead, their interests lapsed. Provisions relating to them are now relevant only as they may aid in ascertaining the intent of the testator.

In the "SECOND" item, the testator bequeathed to his sister, Elizabeth Falk, for life, and after her death to plaintiff, "all of (his) live stock, farming utensils and all other personal property used on and in connection with the operation of (his) farm." This suggests the testator intended his said sister and plaintiff should continue to operate the farm. Apart from said bequest of the means of operating the farm, it would seem the testator, by the provisions of the "SECOND" item, intended primarily to assure plaintiff a home upon and support from the home place, the part of the farm on the east side of the road, during the lifetime of Elizabeth Falk, the testator's sister. True, the "SECOND" item refers to the income from the part of the farm on the east side of the road. However, no provision thereof purports to dispose of the income from the part of the farm on the west side of the road.

The "THIRD" item contains the provisions providing for a division of income between the eight named nieces "so long as they may live and remain unmarried." These provisions come into play after the death of Elizabeth Falk, testator's sister. No provision of the "THIRD" item purports to devise the fee. The provisions of the "THIRD" item are in conflict with the provisions of the "FIRST" item only to the extent of the lifetime provisions made for the named eight nieces.

Appellants contend the "THIRD" item, providing for the division of income equally between those of the eight named nieces who are living and unmarried, vested in them a life estate in the part of the farm on the west side of the road and a life estate in the part on the east side of the road if plaintiff should die "without issue of her body." In support of this contention, appellants cite *Knox v. Knox*, 208 N.C. 141, 148, 179 S.E. 610. The rule on which they base this contention has been stated succinctly as follows: "A gift for life of the rents, profits, or income from property creates a life estate, but not where other language employed by the testator indicates another intention, as when the testator has made other disposition of the property." 96 C.J.S., Wills § 889. Whether the eight named nieces acquired a life estate, entitling them to possession, or a right to receive the income from the owner of the fee, need not be determined. Their interests, whatever their precise nature, terminated upon their deaths.

Appellants assert that, in the construction of a will, a later provision prevails over an earlier provision. But this general rule of construction applies only where the provisions are "wholly inconsistent and in-

capable of reconciliation." *Bank v. Corl*, 225 N.C. 96, 101, 33 S.E. 2d 613, and cases cited; 57 Am. Jur., Wills § 1128; 95 C.J.S., Wills § 621(b). In our opinion, and we so decide, the later provisions of O. C. Falk's will are not in irreconcilable conflict with the provisions of the "FIRST" item thereof.

It is presumed, under another general rule of construction, "that the testator intended not to die intestate as to any part of his estate." *Armstrong v. Armstrong*, 235 N.C. 733, 736, 71 S.E. 2d 119, and cases cited; 57 Am. Jur., Wills § 1158; 95 C.J.S., Wills § 615.

In the "FIRST" item, O. C. Falk devised the "remainder in fee" in his entire farm, after the life estate of Elizabeth Falk, his sister, to plaintiff. Having so devised the "remainder in fee" in his entire farm, later provisions may be considered in conflict only to the extent they purport to make a different disposition of the testator's farm. But no later provision purports to dispose of the fee. The provision in the "THIRD" item for the eight nieces named therein is for "so long as they may live and remain unmarried." To accept appellants' contention that O. C. Falk died intestate as to the part of the farm on the west side of the road and that he died intestate as to the part on the east side of the road, in the event plaintiff should die without issue surviving, would require us to ignore the explicit and unequivocal provisions of the "FIRST" item. To do this, in our opinion, would not effectuate, but would thwart, the intent of the testator.

Appellants contend the last sentence in the "THIRD" item vests in plaintiff a defeasible fee, contingent on her death with issue surviving; and, since there is no limitation over if she should die without issue surviving, in such event the land descends to the testator's heirs at law. (Incidentally, the provision, "And in the event my niece Elizabeth Falk, shall die without issue of her body, after the death of my sister, Elizabeth Falk," refers only to income from the part of the farm on the east side of the road.)

Decisions cited by appellants to support said contention, namely, *Rees v. Williams*, 165 N.C. 201, 81 S.E. 286, and *Shuford v. Brady*, 169 N.C. 224, 85 S.E. 303, are not in point. This excerpt from the third headnote in *Rees v. Williams, supra*, indicates the factual situation to which such decisions apply: "A testator devised certain of his lands to his daughter J., without words of inheritance, by one item of his will, and by the next item of the will provided that in case J. died leaving issue, then to such issue and their heirs; but should J. die without issue surviving her, then to another daughter and a son of the testator, or their heirs, share and share alike." Here, the testator does not purport to dispose of the fee to any other person or persons upon the contingency of plaintiff's death without issue surviving. He

had already disposed of the fee in the "FIRST" item.

Decisions cited by appellants to support their contention that O. C. Falk died intestate as to the part of the property on the west side of the road and died intestate as to the part on the east side of the road if plaintiff should die without issue surviving, namely, *Jones v. Jones,* 227 N.C. 424, 42 S.E. 2d 620, and *McCallum v. McCallum,* 167 N.C. 310, 83 S.E. 250, are not in point. This excerpt from the second headnote in *McCallum v. McCallum, supra,* indicates the factual situation to which such decisions apply: "(A) devise of land for life to the testator's widow and to his daughters remaining unmarried, without further direction or limitation, expresses the testator's intent to provide the daughters a home so long as they remain single, and at their death unmarried and the death of the widow the lands will descend to his heirs at law." In explicit terms, the testator had devised a life estate and did not purport to dispose of the fee. Here, O. C. Falk disposed of the fee in the "FIRST" item.

When the will is considered as a whole, *Entwistle v. Covington,* 250 N.C. 315, 318, 108 S.E. 2d 603, we are of opinion, and so decide, O. C. Falk devised his entire farm of 265 acres, more or less, to plaintiff in fee simple subject only to the lifetime interests of Elizabeth Falk, his sister, and of the eight nieces named in the "THIRD" item. Hence, the judgment of the court below is affirmed.

Affirmed.

CITY OF REIDSVILLE v. CITIZENS DEVELOPMENT CORPORATION.

(Filed 7 July, 1961.)

1. Controversy Without Action § 2—

Where the parties submit a controversy to the court upon an agreed statement of facts and admissions in the pleadings, the facts stipulated and admitted are in the nature of a special verdict, and the court may not infer or deduce other facts.

2. Municipal Corporations § 17— Findings held insufficient to support adjudication of whether city was authorized to sell lands as surplus property.

Where, in a proceeding to authorize sale by the city, as surplus property, lands designated as "airport property," the facts agreed failed to disclose whether the land was purchased with the proceeds of a bond issue, whether any bonds against the property are presently outstanding, whether the entire tract was originally acquired for airport purposes, whether an airport is being operated on a portion of the original tract, with

the *locus* being surplus, whether an airport is being operated on separate property, or whether the city had maintained and abandoned the operation of an airport on the property, the findings are insufficient to support a judgment authorizing the city to sell the land as surplus property under G.S. 63-53(d) and G.S. 160-59.

3. Appeal and Error § 49—

Where the facts agreed in the submission of the controversy to the court are insufficient to support judgment, the cause must be remanded.

PARKER and HIGGINS, JJ., dissent.

RODMAN, J., concurring.

APPEAL by defendant from *Johnston, J.*, March 1961 Term of ROCKINGHAM.

This is a civil action instituted 7 February 1961 to require defendant to specifically perform its contract for purchase of the "Reidsville Airport Property."

The cause was submitted to the presiding judge upon an agreed statement of facts and the admissions in the pleadings.

The court entered judgment in pertinent part as follows:

"1. That on the 15th day of November 1960, the plaintiff adopted a resolution for the sale of its 'Airport Property,' subject to specified conditions and restrictions as are incorporated by reference in paragraph #4 of the plaintiff's complaint.

"2. That the City Council duly advertised as required by law said sale of real property at public auction, which was held on the 7th day of January 1961, subject to the restrictions and conditions set forth in the said resolution.

"3. That there was no fraud or arbitrary abuse of discretion on the part of the City Council in adopting the said resolution.

"4. That the Mayor and City Council of the City of Reidsville had the legal power and authority to sell its real property known as the 'Airport Property' in the manner prescribed in the said resolution of November 15, 1960.

"5. That said property is surplus city property no longer needed by the city and should be sold by the city. That said property is no longer needed for an airport. That said property is a mile from the city limits and is not needed for any Governmental or public purpose.

"6. That the City of Reidsville has no substantial need for the land it now owns and holds for Airport purposes. The city has no immediate use to which the said land can be reasonably put and there are no plans in prospect to which the said land could be reasonably devoted. That the disposal of said land in the manner done is to the best interest of the citizens and taxpayers of the City of Reidsville.

"NOW, THEREFORE, IT IS ORDERED that the defendant perform its purchase contract and agreement and pay to the plaintiff FORTY THOUSAND, FIVE HUNDRED ($40,500.00) DOLLARS, the remainder of the purchase price, with interest from the 6th day of February 1961 . . . ."

Defendant appeals.

Jule McMichael and T. M. Rankin for plaintiff, appellee.
Benjamin R. Wrenn for defendant, appellant.

MOORE, J. Plaintiff proposes to convey 155.52 acres of land known as the Reidsville Airport property, under authority of G.S. 63-53(d) and G.S. 160-59. On 15 November 1960 the City Council of the City of Reidsville adopted a resolution finding that the City "no longer had any need for . . . the Airport property," and ordering that it be sold at public auction subject to specific conditions and covenants restricting its use to industrial and commercial purposes. Due advertisement of the sale and the terms thereof was had. Defendant became the last and highest bidder at the price of $45,000, deposited ten per cent of the bid, and executed a contract in which it agreed to purchase the land according to the terms of sale and at the price bid. The sale was confirmed. Plaintiff executed and tendered to defendant a deed for the land containing the restrictions. Defendant refused to pay the balance of the purchase price and accept the deed. This action for specific performance was instituted and the judgment set out above was entered. Defendant excepts to the signing of the judgment.

The admissions in the pleadings and the facts stipulated are insufficient to support the findings and conclusions of the court that ". . . the Mayor and City Council of the City of Reidsville had the legal power and authority to sell its real property known as the 'Airport Property' . . . ," and that ". . . said property is surplus city property."

"Where, as here, a case is tried on an agreed statement of facts, such statement is in the nature of a special verdict, admitting there is no dispute as to the facts, and constituting a request by each litigant for a judgment which each contends arises as a matter of law on the facts agreed, and consequently the court is not permitted to infer or deduce further facts from those stipulated." *Sparrow v. Casualty Co.*, 243 N.C. 60, 62, 89 S.E. 2d 800. Where agreed facts are insufficient to determine the controversy, the cause will be remanded for further proceedings as the rights of the parties may require. *Guilford College v. Guilford County*, 219 N.C. 347, 349, 13 S.E. 2d 622.

It does not appear from the record whether the 155.52 acres known as the Airport property was acquired by the City of Reidsville from

funds realized from the bond issue approved by this Court in *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211 (1944), or by other means, whether there are presently any outstanding airport bonds, whether it is the entire tract originally acquired for airport purposes, whether an airport is now being operated on a portion of the original tract with the 155.52 acres being surplus property not needed in that connection, whether an airport is being operated on other and separate property and this tract is no longer necessary for airport purposes, whether Reidsville has even constructed, maintained, and operated an airport, or whether an airport was formerly operated and was before 15 November 1960 abandoned.

Quaere: Is the proposed sale subject to the provisions of G.S. 160-2, subsec. 6?

The judgment below is vacated and the cause is remanded for further proceedings and that sufficient evidence may be adduced to support a judgment determining the controversy.

Remanded.

PARKER and HIGGINS, JJ., dissent.

RODMAN, J., concurring. It is apparent from the briefs and oral argument that the parties hope for an affirmance of the judgment, thereby securing a declaration from this Court that the deed tendered defendant will vest good title subject to covenants restricting the use of the property to industrial purposes.

Neither the pleadings nor the facts stipulated suffice to give an answer to the crucial question seemingly presented by the appeal. That question is: May a municipal corporation which has, with the approval of the electorate, incurred a debt to provide airport service, by order of the city council cease to furnish such service, sell the property, and use the proceeds in such manner as the city council may desire?

The parties stipulated: "That said property is surplus city property no longer needed by the city and should be sold by the city. That said property is no longer needed for an airport. That said property is a mile from the city limits and is not needed for any Governmental or public Purpose." Do the parties by this stipulation mean this property is not needed as an airport, a public purpose, because this public purpose has been filled by other properties dedicated to that purpose or do they mean that the city council can set at nought the will of the people and contrary to their direction dispose of property which the electorate has directed the city to acquire for a specific public purpose?

As early as 1929 the Legislature granted municipalities authority

to acquire, own, and regulate airports or landing fields for the use of airplanes and other aircraft, c. 87, P.L. 1929, now G.S. 63-2. The statute declared an expenditure so made was for a public purpose. G.S. 63-5. This legislative declaration had judicial concurrence. *Goswick v. Durham,* 211 N.C. 687, 191 S.E. 728; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *Reidsville v. Slade,* 224 N.C. 48, 299 S.E. 2d 215 (presumably the property here proposed to be sold is the property involved in that litigation); *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803.

The complaint alleges that the city council purported to act under the authority given by G.S. 160-59, which provides: "The Governing body of any city or town shall have power at all times to sell at public outcry, after thirty days' notice, to the highest bidder, any property, real or personal belonging to any such town, and apply the proceeds as they may think best." This statute has been in effect since 1873. It has never been interpreted to authorize the sale of property purchased for a specific purpose when needed to accomplish that purpose. It permits the sale of such property as may not be needed in the continuing performance of the service undertaken. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484; *Winston-Salem v. Smith,* 216 N.C. 1, 3 S.E. 2d 328; *Southport v. Stanly,* 125 N.C. 464.

In 1945 the Legislature enlarged the authority of local governmental units to provide aeronautic facilities. C. 490, S.L. 1945, now in substance art. 6, c. 63, of the General Statutes. Section 6 of that Act, now G.S. 63-53, titled "Specific powers of municipalities operating airports," gives the municipality authority to (a) appoint an officer or board to supervise the construction and operation of the airport, (b) adopt rules and regulations for the efficient operation of the facility, (c) lease to private or other governmental agencies *for operation,* and (d) "sell or lease *any property,* real or personal, acquired for airport purposes and belonging to the municipality, which in the judgment of its governing body, *may not be required for* aeronautic purposes . . ." (Emphasis added.) Each part is predicated on the assumption of continuing service.

G.S. 63-48 defines the word "aeronautics" as "transportation by aircraft; the . . . operation, improvement, repair, or maintenance of airports . . ." G.S. 63-53 does not, in my opinion, authorize the city council to decide whether the municipality, having once undertaken to provide aeronautic facilities, should continue to provide such service. The statute presupposes the continuance of such service. The facts necessary to determine whether there is need for a particular service and the need for a particular piece of property to provide the service are not identical. The Legislature carefully limited the authority of

the governing authorities to a decision of what was not needed for the performance of the service. *Winston-Salem v. Smith, supra; Mullen v. Louisburg, supra.*

Municipalities have legislative permission to perform many public services, proprietary in nature. Illustrative are: playground and recreational facilities, G.S. 160-158; public parking lots, G.S. 160-200(31); market houses, G.S. 160-167; art galleries, G.S. 160-200(40); parks, G.S. 160-200(12); light and water to patrons outside as well as within the corporate limits, G.S. 160-255; public hospitals, G.S. 131-126.20; housing facilities, 157-42. Some of the services authorized are necessary expenses; others are not. Where the service is not a necessary expense, the governing authorities must permit the electorate to decide whether a debt shall be created to provide the service. When citizens of a municipality have voted to acquire properties needed to provide these services, the governing authorities are not authorized to defeat popular will by declaring the service no longer needed and in this manner obtain authority to sell on the theory that the property is surplus property. *Moore v. Gordon,* 122 S.W. 2d 239; *Bremerton Municipal League v. Bremer,* 130 P. 2d 367.

If the city fathers would sell the property and thereby disable the community from rendering the service as directed by the electorate, special legislative authority must be obtained. Perhaps the Legislature in its wisdom has already provided the means by which the governing authorities may act. They are authorized, *with the approval of a majority of the qualified voters of the town* to "sell or lease upon such conditions and with such terms of payment as the city or town may prescribe any waterwork . . . or any other public utility which may be owned by the city or town." G.S. 160-2(6).

An airport acquired and maintained by a municipality meets the test of a public utility as defined by our decisions. *Utilities Com. v. Water Co.,* 248 N.C. 27, 102 S.E. 2d 377; *Turner v. Public Service Co.,* 170 N.C. 172, 86 S.E. 1033. It has been so held when the specific question was presented. *S. v. Johnston,* 220 N.W. 273; *S. v. Jackson,* 167 N.E. 396; *Price v. Storms,* 130 P 2d 523; *S. v. Board of County Comrs.,* 79 N.E. 2d 698; *Jones v. Keck,* 74 N.E. 2d 644.

The facts stipulated are in my opinion insufficient to determine the right of the governing authority to order a sale. If the property is not needed for the operation of an airport, the mere fact that the city restricts the purchaser's right to use for a fixed period to industrial uses would not impair the title.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1961

FRED WEBB v. J. CLAUDE GASKINS, HESTER P. GASKINS, AND G. E. GRAIN MILLS, INC.

(Filed 20 September, 1961.)

1. Appeal and Error § 19—

An assignment of error not supported by exception duly noted in the record will not be considered on appeal.

2. Judicial Sales § 5; Judgments § 27; Receivers § 13—

Upon the hearing of a motion to set aside an order confirming sale of assets by a receiver and to vacate an order directing the payment of a claim by the receiver, the judge hearing the motion is required to find and state the ultimate facts but not the evidentiary facts.

3. Same; Appeal and Error § 49—

Upon the hearing of a motion to vacate the order of confirmation of the sale of assets by a receiver and to set aside an order directing the receiver to pay a specified claim, findings by the court that the matters set forth as the basis for the motion had theretofore been heard and adjudicated, all parties being present, that the order directing the payment of the claim was consented to by all parties, and that the motion to vacate and set aside was without merit and made solely for the purpose of delay, are findings of fact and are not reviewable conclusions or inferences of law.

4. Estoppel § 3—

Estoppel to object to a prior order entered in the cause may arise from expressed consent to the order.

5. Same—

Findings of fact to the effect the parties moving to set aside a prior order entered in the cause, confirming the sale of assets by the receiver and directing the receiver to pay a specified claim, had consented to the order directing payment and had not objected to the order of confirmation, and that at that time the parties knew or should have known the facts, *is held* sufficient to support the conclusion of law that movants are estopped to attack the order, the claim having been paid by the receiver pursuant to the order of the court and the rights of third parties having intervened.

6. Appeal and Error § 21—

A sole exception to an order of the court presents only whether the facts found or admitted are sufficient to support the order and whether the order is regular in form, and does not present for review the findings of fact or the evidence upon whch they are based.

7. Same—

In the absence of an exception, the findings of fact are presumed to be supported by evidence and are binding on appeal.

8. Trial § 49—

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and while such discretion is not arbitrary and must be exercised with due regard for the rights of all parties involved, measured by legal and equitable standards, where the record discloses that the trial court duly heard the evidence, made thorough investigation and found facts supporting the denial of the motion, no abuse of discretion is made to appear.

9. Judicial Sales § 5—

Vague charges of fraud are not sufficient to set aside a judicial sale.

APPEAL by defendants from *Cowper, J.*, 10 March 1961 Civil Term of PITT.

Civil action by the owner of one-half of the capital stock of G. E. Grain Mills, Inc., to dissolve the corporate defendant, and to have a receiver appointed to liquidate its assets, heard upon a motion by the defendants, the individual defendants are the owners of one-half of the capital stock of the corporate defendant, to vacate an order confirming the sale of the assets of the corporate defendant, and ordering by consent the payment of a claim of P. R. Markley, Inc., a creditor of the corporate defendant, in the sum of $21,989.20.

At the April Term 1960 Judge M. C. Paul entered by consent of plaintiff and the defendants an order appointing Charles H. Whedbee

as receiver to liquidate the assets of the corporate defendant. On 11 May 1960 Judge Paul entered an order directing the receiver to advertise and sell the real estate, grain elevators and grain mill, and the grain belonging to the corporate defendant, either by public or private sale, subject to the confirmation of the court.

On 8 July 1960 the receiver, pursuant to Judge Paul's order had a sale at public auction of the assets of the corporate defendant, resulting in total bids of $20,043.73 for the property sold separately; no bid was received when the property was offered for sale as a whole. The receiver recommended to the court that the sale be not confirmed. At the 22 August 1960 Mixed Term Judge Chester R. Morris entered by consent of the plaintiff and defendants an order that the sale on 8 July 1960 is not confirmed, and directing the receiver to sell the assets of the corporate defendant at public auction.

On 4 October 1960 the receiver, pursuant to Judge Morris' order, had a sale at public auction of the assets of the corporate defendant, resulting in total bids of $28,171.00 for the property. The receiver recommended to the court that the sale be confirmed. The defendants filed exceptions to the receiver's report, and requested that the sale be not confirmed.

At the January 1961 Term Judge Albert W. Cowper was on the bench, and at that term on 24 January 1961 he heard the recommendation of the receiver that the sale of 4 October 1960 be confirmed and the exceptions of the defendants to the receiver's report, and received a private bid by Fred Webb, Inc., and Associates for the purchase of all the assets of the corporate defendant in the sum of $32,500.00 He continued the hearing to 30 January 1961. On that date J. Claude Gaskins and Associates made a private bid for the property in the sum of $33,000.00. Whereupon, Fred Webb and Associates requested permission to raise the last bid. Then Judge Cowper entered an order reciting all interested parties being present in court and represented by counsel, and it having been agreed to by all the parties that the sale of the property of the corporate defendant should remain open for receipt of sealed bids by the court at 2:00 o'clock p.m. on Thursday, the 2nd day of February 1961, at which time sealed bids would be opened by the court and the highest bidder declared the purchaser and the sale confirmed to such purchaser upon the terms hereinafter provided, and then ordered as follows — we set forth only the parts relevant to this appeal — :

> "1. That sealed bids upon terms of cash for the purchase of all of the property, receivables, choses in action and rights of action of G. E. Grain Mills, Inc., against all others, being all of

the property of G. E. Grain Mills, Inc., excepting funds on hand in the hands of the Receiver, and excluding grain heretofore delivered by the Receiver, be received and opened by the court at 2:00 o'clock p.m. on Thursday, February 2, 1961, in the Superior Courtroom or Judge's Chambers in the Pitt County Courthouse. . . .

"3. That the highest sealed bid in compliance with the above provisions shall be declared the purchaser of said property and a sale of the property confirmed to such highest bidder."

This order was approved and consented to in writing by the Honorable Louis W. Gaylord, Jr., and the Honorable Lewis G. Cooper, attorneys for plaintiff, and the Honorable Albion Dunn, attorney for the defendants, all eminent members of the Pitt County Bar.

On 2 February 1961 Judge Cowper entering an order reciting the provisions of his order of 30 January 1961, and that at the time and place specified in his order of 30 January 1961 Fred Webb appeared and submitted a sealed bid in the amount of $57,200.00, together with a deposit of 25% of his bid, and the court found as a fact Fred Webb's bid was the highest bid submitted, whereupon the court ordered that Fred Webb is declared to be the purchaser of the assets of G. E. Grain Mills, Inc., as outlined in his order of 30 January 1961, and that the sale to him is confirmed upon the payment by him to the receiver of the balance of his bid.

On 6 February 1961 Judge Cowper in chambers at New Bern entered an order that the receiver now has on hand sufficient cash funds with which to pay all secured creditors and unsecured creditors of the corporate defendant, and certain receiver's expenses, etc., and that the receiver pay these creditors and receiver's expenses, specifically enumerating them.

On 13 February 1961 the Honorable Albion Dunn, attorney for the defendants, filed exceptions to the order of Judge Cowper of 6 February 1961 for the payment of certain claims, etc.

On 15 February 1961 Judge Cowper in chambers at New Bern, which is in the same judicial district as Pitt County, entered an order as follows:

"It appearing that Order was signed by said Judge on February 6, 1961, ordering the receiver to immediately pay the secured and unsecured claims listed in said order and the receiver's expenses, and that said order was later amended by consent to change the word 'sale' to 'bid,' on request of Honorable Albion Dunn, counsel for the defendants; and it further appearing that the audit of Edward C. Mooring, C. P. A., dated July 12, 1960, which was

made at the request of the receiver and the defendants and ordered by the court and without objection on the part of the plaintiff was filed in July, 1960, listing therein the secured and unsecured claims; that said audit was considered at various hearings held by the undersigned Judge in Greenville, North Carolina, during January and that no objection or exceptions were made to the payment of any claim except that of P. R. Markley, Incorporated, of Philadelphia, for the payment of $21,989.20, which is no longer being objected to and shall be paid by consent of parties.

"That on this date attorneys for the defendants have filed exceptions under G.S. 1-507.7 to the payment of certain claims, they being secured and unsecured items listed in the exceptions filed herein by the defendants and filed over the objection of the plaintiff, and it appearing to the court that G.S. 1-507.7 has as its primary purpose the protection of creditors but the court being of the opinion that it is to the best interest of all parties that the funds covering said items be paid into the Clerk of the Superior Court of Pitt County until the amount due has been properly determined. It is specifically noted that the objection to the payment of the L. W. Gaylord, Jr. claim has been withdrawn by the defendants and it is specifically noted that the Guaranty Bank mortgage in the amount of $7,000.00, plus interest, has already been paid; it being necessary to pay same in order for the purchaser of the assets of G. E. Grain Company to receive a good title.

"In respects to the claim of James & Speight and M. E. Cavendish, in the amount of $750.00, that this amount is not to be paid into the office of the Clerk of the Superior Court, if James & Speight and M. E. Cavendish satisfy counsel for defendants that the services rendered by them was rendered to G. E. Grain Mills, Incorporated, and in such event the receiver is directed to pay such claim.

"And it further appearing to the court, and the court finding as a fact that the sale of the assets of G. E. Grain Company to Fred Webb of Greenville at the bid price of $57,200.00 should be confirmed and will be confirmed upon the payment of the full purchase price into the hands of the receiver and that upon payment of said full purchase price he shall receive a clear title for said assets, and said sale is hereby affirmed upon the payment to the receiver of the purchase price as provided in the former order.

"And it further appearing upon the statement of the receiver that W. J. Lewis had received personal notice of this hearing and was not present and that his attorney was also notified and was not present, and it further appearing that the said W. J. Lewis

has filed a lien in the Office of the Clerk of the Superior Court of Pitt County, North Carolina, against the real estate owned by the corporate defendant, and it further appearing to the court, and the court finding as a fact that there may be some eventuality or condition existing whereby the said W. J. Lewis might be unavailable or unwilling to cancel his lien upon payment of the sum of $13,876.00 into the Office of the Clerk of the Superior Court of Pitt County;

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT, in its discretion, that immediately upon payment of the aforesaid sum of $13,876.00 into the hands of the Clerk of the Superior Court of Pitt County, North Carolina, said Clerk is authorized and empowered and directed to cancel said lien, and in which event said lien shall attach to the proceeds aforesaid and to be paid into the Office of the Clerk of the Superior Court of Pitt County."

On 22 February 1961 the receiver filed a report with Judge Cowper as follows:

"*FIRST:* (DELIVERY OF PROPERTY TO PURCHASER) That pursuant to and in obedience to an order signed in this cause on February 15, 1961, by the Honorable Albert W. Cowper, your Receiver proceeded to collect from Fred Webb the balance of the purchase price of the property in the total sum of $57,200.00 and your Receiver thereupon, as ordered by the court, proceeded to execute and deliver to the said Fred Webb a deed and a bill of sale for the property for which the said Webb was the high bidder and that these transactions were completed before the court-ordered deadline of February 17, 1961.

"*SECOND:* (PAYMENT OF L. W. GAYLORD, JR. CLAIM) That exceptions having been withdrawn to the payment of the L. W. Gaylord, Jr. claim in the amount of $302.76, your Receiver in obedience to said court order of February 15, 1961, proceeded to pay to said L. W. Gaylord, Jr. the sum of $302.76.

"*THIRD:* (PAYMENT INTO COURT OF W. J. LEWIS T/A W. J. LEWIS CONSTRUCTION CO. CLAIM) That, in obedience to said court order of February 15, 1961, your Receiver proceeded to pay into the hands of the Clerk of the Superior Court of Pitt County the sum of $13,876.00 and received from said Clerk a receipt for such payment; that your Receiver then, as ordered by the court, proceeded to secure a cancellation of the lien heretofore filed against the property of G. E. Grain Mills, Inc., in the above amount, said lien then attaching to the funds

paid into the hands of the Clerk, all to the end that the lien upon the property be removed and the purchaser delivered a title free of this lien as per the orders of this court.

"FOURTH: (DELIVERY TO CLERK OF GUARANTY BANK DEED OF TRUST AND NOTE) As directed by the court, your Receiver has turned over to the Clerk of the Superior Court the note and deed of trust from G. E. Grain Mills, Inc. to J. H. Waldrop, Trustee for Guaranty Bank and Trust Co., which note and the lien on G. E. Grain Mills, Inc.'s property had theretofore been paid by your Receiver under court order to the end that the lien upon the property represented by this deed of trust be removed and the purchaser delivered a title free of this lien as per the orders of this court, and received Clerk's receipt therefor.

"FIFTH: (PAYMENT INTO COURT OF $86.57 AS THE AMOUNT OF A CLAIM OF FRED WEBB, INC.) That your Receiver, in obedience to said order of February 15, 1961, has paid into the hands of the clerk of the Superior Court the sum of $86.57 and received a receipt from said Clerk for said amount, this representing a claim by Fred Webb, Inc., for interest alleged to have been paid for G. E. Grain Mills, Inc., to Markley, Inc.

"SIXTH: (PAYMENT INTO COURT OF $4,008.93 AS THE AMOUNT OF A CLAIM OF FRED WEBB, INC.) That your Receiver, in obedience to said order of February 15, 1961, has paid into the hands of the Clerk of the Superior Court the sum of $4,008.93 and received a receipt from said Clerk for said amount, representing a claim by Fred Webb, Inc., for money alleged to have been paid by it on behalf of G. E. Grain Mills, Inc., for grain purchased by G. E. Grain Mills, Inc., or for G. E. Grain Mills, Inc.

"SEVENTH: (PAYMENT INTO COURT OF $7,242.57 AS THE AMOUNT OF A CLAIM OF FRED WEBB, INC.) That your Receiver, in obedience to said order of February 15, 1961, has paid into the hands of the Clerk of the Superior Court the sum of $7,242.57 and received a receipt from said Clerk for said amount, representing a claim by Fred Webb, Inc., for storing grain for your Receiver during the pendency of this Receivership.

"EIGHTH: (PAYMENT INTO COURT OF $374.00 AS THE AMOUNT OF A CLAIM OF FRED WEBB, INC.) That your Receiver, in obedience of said order of February 15, 1961, has paid into the hands of the Superior Court the sum of $374.00 and received a receipt from said Clerk for said amount, representing a claim by Fred Webb, Inc. against G. E. Grain Mills.

for the alleged payment on behalf of G. E. Grain Mills, Inc., of certain freight charges."

The NINTH and TENTH paragraphs are not relevant on this appeal, and are omitted.

"WHEREFORE, YOUR RECEIVER RESPECTFULLY PRAYS THE COURT:

"1. That the court enter an order peremptorily setting for a trial before a jury under the heading of the original title of this action the matters of the disputed claims set out in paragraphs 3, 5, 6, 7 and 8, above, to the end that the claimant in each transaction may come into court and attempt to prove his claim before a jury and the disputant or disputants may then attempt to combat the payment or reduce the payment by offering proof to said jury or juries in opposition to said claim or claims as provided in G.S. 15-153 and clarified by *BLACK v. POWER CO.*, 158 N.C. 468, and affirmed in *SURETY CO. v. SHARPE,* 232 N.C. 98, particularly the paragraph numbered '2' in *Justice Ervin's* opinion."

Paragraphs 2, 3 and 4 of the order are not pertinent so far as this appeal is concerned, and are omitted.

Following this report of the receiver is an order by Judge Cowper permitting the Honorable Albion Dunn to withdraw as counsel of record for the defendants.

On 24 February 1961 the defendants by their attorney, Honorable David E. Reid, Jr., filed with Judge Cowper a motion that the order of Judge Cowper entered on 15 February 1961 confirming the sale of the assets of the corporate defendant, therein specified, to Fred Webb be set aside and vacated, and that the payment of the claim of P. R. Markley, Inc., in the sum of $21,989.20 be set aside, on the ground of newly discovered evidence, and that a new audit be had.

On 9 March 1961 plaintiff filed an elaborate reply to defendants' motion stating defendants are now complaining of matters and things which were within their personal knowledge, or should have been had they exercised proper diligence and prudence, before the order of confirmation of sale by Judge Cowper on 15 February 1961, and are seeking to reopen and relitigate matters and things adjudicated by the court when they were represented by eminent counsel, and that they should be estopped.

On 10 March 1961 Judge Cowper presiding over the Superior Court of Pitt County heard defendants' motion, and entered an order as follows:

"1. That the matters set forth in the motion have each heretofore been heard and adjudicated at which times the individual defendants were present in person and represented by learned counsel to wit, Honorable Albion Dunn, Esq., and Honorable John G. Dawson, Esq.

"2. That the sale of the assets and property of G. E. Grain Mills, Inc. on sealed bids was ordered by consent and the approval of all parties, the individual defendants having suggested such sealed bids, and the plaintiff being the highest bidder; his bid was confirmed on the second day of February, 1961, with the approval of the individual defendants and their counsel and no objections or exceptions were made thereto and thereafter, on the 15th day of February, 1961, said sale was finally confirmed and the plaintiff declared the purchaser, to which said order of February 15, 1961, no objection or exception was made. And immediately thereafter the purchaser made full payment of the purchase bid to the Receiver and the Receiver delivered said property to the purchaser.

"3. That the motion and efforts of the individual defendants to reopen and set aside said sale is without merit and done solely for the purpose of prolonging the liquidation of the defendant corporation and should not be considered.

"4. That no newly discovered evidence has been presented to the court; that the individual defendants had full knowledge of all matters set forth in the motion of February 24, 1961, and were well informed of the financial affairs of the defendant corporation and knew, or should have known, the value of its property. That the defendants and their counsel were furnished a copy of the audit made by Edward C. Mooring, C. P. A., immediately following July 12, 1960, and have heretofore made no objection thereto.

"5. That the claims of P. R. Markley, Inc., were considered and heard on January 24, January 30, and February 15, 1961, and were ordered paid by consent of all parties and their counsel and no objection or exception was made or entered to the order authorizing such payment and the Receiver has now paid said claims and the individual defendants are estopped from reopening the same, and notwithstanding such estoppel, no cause exists as to why they should be reopened.

"6. That the several allegations and conclusions contained in the motion filed February 24, 1961, are unsupported and are simply a restatement of argument and contentions heretofore considered, heard and adjudicated without objections or exceptions on the

part of the individual defendants.

"7. That the individual defendants are now estopped to further reopen any and all the matters set forth in the motion filed February 24, 1961.

"IT IS THEREUPON, in the discretion of the court, ORDERED that the motion filed February 24, 1961, be, and the same is hereby disallowed, and denied."

From the order entered by Judge Cowper on 10 March 1961, defendants appeal.

Lewis G. Cooper and Louis W. Gaylord, Jr., for plaintiff, appellee.
David E. Reid, Jr., for defendants, appellants.

PARKER, J. Defendants have assigned as errors all of the judge's findings of fact, except finding of fact number two. Defendants' assignments of error are not supported by any exception in the record, not even under the assignments of error. The only exception in the record is to the judgment.

This Court has universally held that an assignment of error not supported by an exception is ineffectual, and will not be considered on appeal. Our cases to that effect are legion. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223, and cases there cited; *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926; *Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496; *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *In re McWhirter,* 248 N.C. 324, 103 S.E. 2d 293; *S. v. Corl,* 250 N.C. 262, 108 S.E. 2d 613; *Tanner v. Ervin,* 250 N.C. 602, 109 S.E. 2d 460; *Watters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1.

This Court said in *Rigsbee v. Perkins, supra:* "And the rule is that only an exception previously noted in the case on appeal will serve to present a question of law for this Court to decide."

Defendants contend that the findings of fact numbers one and three are not findings of fact, but conclusions or inferences of law, and therefore are reviewable on appeal.

In finding facts the trial judge is required to find and state the ultimate facts, and not the evidentiary or subsidiary facts required to prove the ultimate facts. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639.

In our opinion, and we so hold, Judge Cowper's findings of fact numbers one and three are strictly findings of ultimate facts, and not conclusions or inferences of law.

Defendants further contend that Judge Cowper's order denying their motion to vacate the order of confirmation of sale, etc., was made

under a misapprehension of the law and the facts by Judge Cowper. This contention is without merit. Defendants in addition contend that the court below failed to give sufficient consideration as to whether or not the facts and circumstances growing out of the payment of the Markley claim from the assets of the corporate defendant constitutes fraud or other unfairness sufficient to have set aside the confirmation of the sale. There is no basis for such a contention, as clearly set forth and shown in Judge Cowper's finding of fact number five, which is strictly a finding of fact, with the exception of the words, "and the individual defendants are estopped from reopening the same," which is a conclusion of law.

Judge Cowper's designated finding of fact number seven, "that the individual defendants are now estopped to further reopen any and all the matters set forth in the motion filed February 24, 1961," is a conclusion of law. From Judge Cowper's findings of fact set forth in his order denying defendants' motion to vacate the order of confirmation, etc., and from the various orders entered, it would seem that the receiver, acting under unchallenged orders of the court, many consented to by the parties, has made payment to all, or nearly all, of the secured and unsecured creditors of the corporate defendant. Apparently innocent third parties have acquired rights in the property sold. Not only would it seem to be an impossibility to reinstate the matter in *status quo* before the order confirming the sale, but it would apparently place the receiver as an officer of the court in a hazardous position.

Estoppel to question or object to a thing done or a position taken by another may arise from express consent thereto. *Halliday v. Stuart,* 151 U.S. 229, 38 L. Ed. 141; *Lewis v. Wilson,* 151 U.S. 551, 38 L. Ed. 267; *Johnson v. King-Richardson Co.,* 36 F. 2d 675, 67 A. L. R. 1465; 19 Am. Jur., Estoppel, § 61, Consent. See *Miller v. Miller,* 200 N.C. 458, 157 S.E. 604. See Annotation 2 A. L. R. 2d, pp. 6-215, entitled "Estoppel of or waiver by parties or participants regarding irregularities or defects in execution or judicial sale." The fourth finding of fact shows that when defendants consented to the various orders they did not give their consent under an excusable misapprehension of the facts, but that they "were well informed of the financial affairs of the defendant corporation and knew, or should have known, the value of its property." It is written in 19 Am. Jur., Estoppel, § 62: "The doctrine of equitable estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he, or those by whose acts he is bound, has acquiesced." The findings of fact show that when the defendants acquiesced in the orders, they had full knowledge, or in

the exercise of due diligence should have had, full knowledge of the facts.

The judge's conclusion of law number seven is fully supported by the facts found. This is sufficient to uphold Judge Cowper's order denying defendants' motion as a matter of law and equity.

Defendants' exception to the order entered by Judge Cowper on 10 March 1961 raises the question whether an error of law appears on the face of the record proper. This includes the question whether the facts found and admitted are sufficient to support the order, and whether the order is regular in form. Such an exception does not present for review the findings of fact or the evidence upon which they are based. In the absence of an exception the findings of fact are presumed to be supported by the evidence, and are binding on appeal. *Beaver v. Paint Co.*, 240 N.C. 328, 82 S.E. 2d 113; *Suits v. Insurance Co.*, 241 N.C. 483, 85 S.E. 2d 602; *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242; *Coulbourn v. Armstrong*, 243 N.C. 663, 91 S.E. 2d 912; *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; Strong's N. C. Index, Vol. I, Appeal and Error, § 21, where numerous cases are cited.

Defendants in their brief say: "On February 24, the defendants filed a motion in the cause seeking to have the confirmation of the sale of the corporate assets set aside upon newly discovered evidence. . . ." Judge Cowper in his discretion denied the motion.

As long as the trial court has jurisdiction over a cause, it seems to be thoroughly settled law in this nation, including this jurisdiction, that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge, and that his ruling thereon may not be made ground for reversal on appeal unless the appellant can show a manifest abuse of judicial discretion. 39 Am. Jur., New Trial, Sections 157-163, both inclusive; 66 C.J.S., New Trial, pp. 500-505, where numerous cases, including ours, are cited. It would seem, and we so hold, that defendants' motion was addressed to the sound discretion of Judge Cowper: See 50 C. J. S., Judicial Sales, pp. 671-672. However, such discretion is not an arbitrary one, but judicial, and must be exercised with due regard for the rights of all parties involved measured by legal and equitable standards, and there must be a basis of fact or circumstance to justify the exercise thereof. *Sykes v. Blakey*, 215 N.C. 61, 200 S.E. 910; *Hensley v. Furniture Co.*, 164 N.C. 148, 80 S.E. 154.

Judge Cowper was thoroughly familiar with the facts, had had many hearings, and had entered several orders. Defendants at these hearings were represented by eminent counsel. The individual defendants owned one-half of the capital stock of the corporate defendant. The findings of fact clearly show that no sufficient grounds existed, such

as fraud, mistake or collusion which were unknown to the defendants, or which could not have been discovered by them in due diligence, at the time of confirmation of the sale and the decree by consent that the claim of P. R. Markley, Inc., should be paid, to vacate the order of confirmation and the decree by consent that the Markley claim should be paid. Vague charges of fraud are not sufficient to set aside a judicial sale. *Evers v. Watson,* 156 U.S. 527, 39 L. Ed. 520.

The findings of fact support Judge Cowper's conclusion of law, and they in turn support his order denying defendants' motion, which is regular in form. Nothing appears to show that Judge Cowper abused his discretion. No error of law appears on the face of the record proper.

The order below denying defendants' motion is

Affirmed.

STATE v. HERMAN H. COFFEY.

(Filed 20 September, 1961.)

1. Criminal Law § 159—

Assignments of error not brought forward in the brief will be deemed abandoned. Rule of Supreme Court No. 28.

2. Criminal Law § 79; Searches and Seizures § 1—

G.S. 15-27.1, proscribing the introduction of evidence obtained by illegal search, relates solely to evidence and not to substantive law, and does not alter the law as to when a search warrant is required, and therefore the statute does not render incompetent evidence obtained by a search without a warrant in those instances in which a warrant is not required.

3. Same—

Immunity to a search without a warrant is a personal right which may be waived, and where the husband of the owner of a car is an occupant therein and has the car's registration card in his possession, and the driver of the car consents to a search of the car by an officer, he may not object to the admission of evidence obtained by the search, since if he was a mere guest passenger he had no ground to object to the search, and if he had custody of the vehicle and joint control with the driver, his failure to assert his immunity to the search without a warrant amounts to a voluntary consent to the search.

4. Intoxicating Liquor § 13c—

Evidence tending to show that the husband of the owner of an automobile, with the registration card in his possession, was sitting therein

on the front seat with intoxicating liquor between his knees as the car was being driven by another in a direction away from the town in which the whiskey had been purchased that day, and that he directed the disposition of the car after the whiskey was found, *is held* sufficient to support an inference that he had custody of the car and was in at least joint control thereof, and therefore that he was in possession of the whiskey.

5. Criminal Law § 136—

Whether defendant has violated the terms of a suspended sentence is for the determination of the court and not a jury, and it is not required that the alleged violation of the suspended sentence be proved beyond a reasonable doubt but only that the evidence be sufficient to satisfy the judge, in the exercise of his sound discretion, that the defendant had violated such terms.

6. Same—

On appeal from an order of an inferior court putting into effect a suspended sentence, on the ground that defendant had been convicted of illegal possession of intoxicating liquor, the hearing in the Superior Court is *de novo*, and the Superior Court may hear evidence of the violation of the terms of suspension irrespective of any conviction, and its order activating the sentence upon its findings of violation of the terms of suspension is an independent order which is not predicated upon any findings of the inferior court.

7. Criminal Law § 92—

A motion to reopen the case for additional evidence is addressed to the sound discretion of the trial court, and where the record does not disclose any motion for continuance or for time to prepare for defense on the phase of the case to which the additional evidence relates, the contention that defendant was taken by surprise is untenable.

8. Criminal Law § 136—

Where a sentence is suspended upon condition that defendant not have intoxicating liquor in his possession for the period of suspension, the court may activate the sentence upon a finding that defendant had intoxicating liquor in his possession on a specified date, even though the criminal charge predicated upon such possession is still pending, since such possession would violate the terms of the suspension even though such possession was legal and did not violate any criminal law of the State.

APPEAL by defendant from *Clarkson, J.*, May 1961 Term of RUTHERFORD.

Defendant was convicted in the Recorder's Court of Rutherford County on 6 July 1959 on charges of possessing illicit liquor and possessing illicit liquor for the purpose of sale. Judgment was entered imposing a prison sentence for a term of 12 months. By and with the consent of defendant the prison sentence was suspended for a period

of 5 years upon conditions, among others, "(3) that he not have in his possession any intoxicating beverages . . . ; (4) that he be and remain of good behavior and not violate any of the criminal laws of North Carolina . . . ."

On 20 March 1961 the solicitor of Recorder's Court moved that the suspended sentence be put into effect, and offered evidence tending to show that on 3 March 1961 the sheriff of Rutherford County stopped a car, operated by Boyd Sisk, in which defendant was riding, and that defendant had a gallon of taxpaid whiskey "between his legs." The judge of Recorder's Court found as a fact that defendant "did on 3rd day of March 1961 have in his possession a quantity of intoxicating beverages," and entered judgment directing that defendant serve the prison sentence theretofore suspended. Defendant appealed to Superior Court.

The matter was heard in Superior Court during the May 1961 term. The court heard evidence with respect to the alleged possession of whiskey by defendant in the automobile on 3 March 1961, and took the matter "under advisement." Later in the term, on motion of the solicitor, the hearing was reopened and the court heard evidence to the effect that defendant on 23 December 1960 had in his possession three pints of whiskey in the home of Ben Johnson and was seen to carry the whiskey to a refrigerator and place it therein.

The court found facts in considerable detail, and finally, in summary, found as follows: ". . . . as a matter of law . . . the defendant, Herman H. Coffey, has wilfully violated the terms of the suspended sentence in the judgment of Recorder's Court of July 6, 1959, in that during the five years for which period the sentence of 12 months was suspended, that the defendant had in his possession intoxicating beverages, including whiskey, and the said wilful violation was committed in each of the two offenses set forth in the evidence and the finding of fact, namely, in the car driven by Boyd Sisk in which the defendant was riding with the whiskey between his knees and also the incident in which the defendant had three pints of whiskey in his hand taking them to the refrigerator in the Johnson home." Upon these findings the court entered judgment putting the suspended sentence into effect.

Defendant appealed and assigned errors.

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

Hamrick & Hamrick for the defendant.

MOORE, J. Defendant made eleven assignments of error based on

seventeen exceptions. Assignments 2, 5, 8, 10 and 11 are not brought forward in the brief and no reason or argument is stated or authority cited in support thereof, and they are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court. 221 N.C. 563.

With respect to the occurrence of 3 March 1961 when defendant was in the car driven by Boyd Sisk, defendant contends that the evidence is insufficient to support the finding that he was in possession of whiskey.

The evidence as to this incident is, in substance, as follows: In consequence of a phone call the sheriff of Rutherford County, on the night of 3 March 1961, went to the Shiloh Baptist Church which is located south of Rutherfordton on the Forest City-Tryon Road. About 20 or 30 minutes after his arrival there he stopped a car which was proceeding from the direction of Tryon toward Forest City. It was about 8:30 or 9:00 o'clock. Boyd Sisk was driving and defendant was in the front seat on the right. Sisk's wife and child occupied the rear seat. There was a gallon of taxpaid whiskey between defendant's legs. It was in a paper bag. The sheriff saw the bag but did not recognize it then as containing whiskey. He asked for permission to search the car, and Sisk gave permission. Defendant made no objection. The sheriff did not have a search warrant. He was on the driver's side and Sisk handed the bag to him. He opened the bag and found that it contained a gallon of taxpaid whiskey. The stamps on the containers were from the Tryon ABC store and were dated 3 March 1961. During that month the Tryon ABC store closed at 9:30 P.M. Defendant did not hand the whiskey to the sheriff. The sheriff testified: "I did not see him touch the whiskey, it was just between his legs." The car belonged to defendant's wife, and defendant had the registration card and showed it to the sheriff. It was in defendant's pocketbook. The sheriff took defendant in custody and asked him if Sisk might drive the car to Forest City. The sheriff testified: ". . . he (defendant) gave me permission to drive it." Defendant and Sisk lived in Forest City. They had been seen together on former occasions, and defendant had been seen in Sisk's home. Sisk had served prison sentences within two years of this date for violating the prohibition laws. Defendant had the reputation of "dealing in whiskey."

In the first place, defendant insists that the evidence with respect to the whiskey in the car was obtained as a result of an unlawful search and was therefore incompetent.

G.S. 18-6 provides that officers have no authority "to search any automobile . . . or baggage of any person without a search warrant . . . except where the officer sees or has absolute personal knowledge that there is intoxicating liquor . . . in such vehicle or baggage." It

is questionable as to whether this provision of the statute applies in the instant case. G.S. 18-6 relates to cases in which persons are "in the act of transporting, *in violation of law,* intoxicating liquor. . . ." (Emphasis added.) Here, there was no violation of law for there was only a gallon of taxpaid whiskey. G.S. 18-49. However, decision as to the competency of the evidence need not rest on this ground.

G.S. 15-27.1 provides: "No facts discovered or evidence obtained . . . without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action." To render evidence incompetent under the foregoing section, it must have been obtained (1) "in the course of . . . search," (2) "under conditions requiring a search warrant," and (3) without a legal search warrant. The purpose of this and similar enactments (G.S. 15-27) was "to change the law of *evidence* in North Carolina, and not the substantive law as to what constitutes legal or illegal search." Therefore a search that was legal without a warrant before these enactments is still legal, and evidence so obtained still competent. 30 N.C. Law Review 421. It will be noted that the statutes use the phrase "under conditions requiring a search warrant." No search warrant is required where the officer "sees or has absolute personal knowledge" that there is intoxicating liquor in an automobile. *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133. No search warrant is required where the owner or person in charge consents to the search. *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501.

In the instant case no search warrant was required. In the presence of defendant, the sheriff asked the driver, who was apparently in control and had apparent custody of the car, for permission to search. The driver consented and handed the sheriff the package of whiskey which was between defendant's legs. Defendant made no objection. If, as defendant contends in his brief, he was a mere guest passenger in the car, he had no ground to object to a search. *State v. McPeak, supra.* When request for permission to search was made, the sheriff did not know the car belonged to defendant's wife, that defendant was carrying the registration card and was exercising any control or had custody of the automobile. These matters were not made known to the sheriff until after the whiskey was placed in the sheriff's hands and he had inspected it. If, as the State contends, defendant had custody of the vehicle, and joint control thereof with Sisk, he failed to speak and assert his immunity to unreasonable search and seizure, which is a personal right, when he knew the driver, who was in apparent control, had consented to the search. Under the circumstances, defendant's

conduct amounted to a voluntary consent to search. No search warrant was required.

Defendant further contends that, even if the evidence is competent, it is insufficient to reasonably satisfy the court that he was in possession of the whiskey. He relies upon *State v. Ferguson,* 238 N.C. 656, 78 S.E. 2d 911. There, a car containing a case of illicit liquor was stopped by officers. The liquor was between the feet of the car owner who was riding in the rear seat. The driver and a passenger were in the front seat. The three were charged with the possession and transportation of intoxicating liquor. All were convicted. On appeal, this Court held that the evidence was sufficient to carry the case to the jury as to the driver and owner. But as to the passenger (Pringler Ferguson) the Court said: ". . . we are constrained to the view that the evidence does not make out a *prima facie* case against Pringler Ferguson. The evidence is silent in respect to when, where, or under what circumstances Pringler Ferguson entered the car. Nothing is shown respecting his or her relationship or association with the other occupants of the car — it does not even appear whether Pringler Ferguson is male or female. On this record he or she was a mere passenger in the automobile. That is not enough. To hold a mere passenger knowledge of the presence in the automobile of contraband whiskey is insufficient. (Citing cases.) The evidence must be sufficient to support an inference of some form of control, joint or otherwise, over the automobile or the liquor."

The evidence indicates that the defendant Coffey in the instant case was something more than a guest passenger. His position is more nearly analogous to that of the owner in the Ferguson case. Like her, he had the whiskey between his feet. She owned the car in which she was riding. Coffey was in his wife's car, with the registration in his billfold. His wife was not present. He directed the disposition of the car after the whiskey was found, and gave permission for the sheriff to drive it to Forest City. It is a reasonable inference that he had custody of the car and at least joint control. Coffey and Sisk had been seen together on prior occasions, and Coffey had been seen at Sisk's home. Sisk had served prison sentences within the two preceding years for prohibition law violations; and Coffey had the reputation of dealing in whiskey. The whiskey found in the car had been purchased on that date in Tryon; the car was proceeding from the direction of Tryon toward Forest City where both Coffey and Sisk lived. The whiskey was between Coffey's legs. At the time the sheriff stopped the car the liquor store in Tryon was still open. The evidence is sufficient to support an inference of control, joint or otherwise, by defendant over the automobile and the liquor. *State v. Ferguson, supra.*

A hearing to determine whether or not the terms of a suspended sentence have been violated is not a jury matter, but is to be determined in the sound discretion of the judge. The alleged violation need not be proven beyond a reasonable doubt. "All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Robinson,* 248 N.C. 282, 285, 103 S.E. 2d 376. Stated another way, "There must be substantial evidence of sufficient probative force to generate in the minds of reasonable men the conclusion that defendant has in fact breached the condition in question." *State v. Millner,* 240 N.C. 602, 605, 83 S.E. 2d 546. In our opinion, the evidence, when considered in the light of the foregoing rules of law, is sufficient to justify the court's finding that defendant had intoxicating beverages in his possession, actual or constructive, on 3 March 1961, in the automobile driven by Boyd Sisk.

Defendant contends further that the court erred in admitting and considering evidence relating to the alleged possession by defendant of three pints of whiskey in the home of Ben Johnson on 23 December 1960, for that (1) defendant was brought into Recorder's Court on a capias to answer with respect to the incident on 3 March 1961, and the Recorder's Court did not hear evidence as to the occurrence at Ben Johnson's house; (2) at the hearing in Superior Court the evidence was closed and the matter was taken under advisement, and the judge reopened the hearing and for the first time admitted evidence of the incident at Johnson's house, and (3) the incident at the Johnson house may not, as a matter of law, be the basis for activating the suspended sentence since defendant has been indicted for the offense alleged to have been committed then and there, the trial is pending, and his guilt or innocence has not been determined.

The evidence with respect to the occurrence at the Ben Johnson house is summarized as follows: The sheriff went to Johnson's home in Forest City about 9:00 or 9:30 P.M. on 23 December 1960. About the time the sheriff arrived a car stopped in the yard and three boys went inside. Through a window the sheriff saw the boys put a $10 bill on a table. Johnson gave them change and delivered to them a half gallon of whiskey. Defendant Coffey was in the room at the time. After the boys left Coffey asked Johnson how much more he thought he would need and if three pints would be enough. Coffey went in another room and returned with three pints of whiskey and placed it in the refrigerator. The sheriff later took the three pints from the refrigerator.

Where a sentence is suspended in an inferior court and is invoked

by the inferior court, "the defendant shall have the right to appeal therefrom to the superior court, and, upon such appeal, the matter shall be heard *de novo,* but only upon the issue of whether or not there has been a violation of the terms of the suspended sentence . . . ." G.S. 15-200.1 (S.L. 1951, c. 1038). On appeal from an order of an inferior court putting into effect a suspended sentence, the hearing in Superior Court *must* be *de novo,* and when the Superior Court merely finds that there was evidence to support the findings and order of the inferior court, and affirms the order, the cause must be remanded. *State v. Thompson,* 244 N.C. 282, 93 S.E. 2d 158. Since the hearing on appeal must be *de novo* in Superior Court, that court is not limited to the evidence heard in the inferior court, and may hear and consider any competent evidence so long as it bears on the "issue of whether or not there has been a violation of the terms of the suspended sentence."

It is true that the judge had reopened the case before the testimony as to the occurrence at the Johnson house was heard. However, all evidence was heard at the same term. A motion to reopen a case and hear additional evidence is a matter addressed to the sound discretion of the judge. *State v. Kirkman,* 252 N.C. 781, 782, 114 S.E. 2d 633; *State v. Hobbs,* 216 N.C. 14, 17, 3 S.E. 2d 431. No abuse of discretion has been made to appear. For the first time, defendant contends, in his brief and argument here, that he had no notice that the Johnson house incident was involved in the hearing and was taken by surprise. The record does not disclose any motion for continuance or for time to prepare for defense on this phase of the case.

Defendant's sole objection to the Johnson house incident below was that defendant had been charged with a criminal offense growing out of the Johnson house incident, that trial was pending, and therefore that incident could not, as a matter of law, be the basis for putting into effect the suspended sentence. Defendant, in this connection, relies on *State v. Guffey,* 253 N.C. 43, 116 S.E. 2d 148.

In the *Guffey* case defendant pleaded guilty in Recorder's Court to the illegal possession of liquor for sale. A prison sentence was imposed, and was suspended for 2 years on condition the defendant (1) not have in her possession intoxicating liquor, and (2) not violate any laws of the State. Within the period of suspension defendant was tried and convicted of having in her possession liquor for the purpose of sale after the suspended sentence had been entered. "Based on the . . . conviction" the Recorder's Court activated the suspended sentence. Defendant appealed both the conviction and the activation of the suspended sentence. On appeal, the Superior Court found that defendant "did have in her possession liquor," and "entered an order affirming the order of the judge of the Recorder's Court." On appeal

from the conviction defendant was found guilty by a jury in Superior Court and appealed to the Supreme Court where the conviction was reversed. *State v. Guffey,* 252 N.C. 60, 112 S.E. 2d 734. Thereupon, the Superior Court struck from the record the orders activating the suspended sentence, and the State appealed. This Court, in the *Guffey* opinion, reviewed the general rules of law applicable to the activation of suspended sentences, and discussed the exception thereto, and a repetition of these principles here would serve no useful purpose. In applying the law to the facts there presented, it is stated: " . . . when the defendant appealed from the order entered in the Recorder's Court activating the suspended sentence and also appealed from the conviction in said court, which *conviction* was the sole basis for activating the suspended sentence, the hearing on the appeal from the order activating the suspended sentence should not have been heard until the defendant was tried on the criminal charge. . . . The facts in the present case are distinguishable from those in the case of *S. v. Greer,* 173 N.C. 759, 92 S.E. 147. In the *Greer* case, grounds for activating the suspended sentence in the municipal court of Winston were based on certain findings of fact and not on the conviction in that court. In the present case, while Judge Thompson . . . found certain facts, he *did not enter an independent judgment,* based thereon, activating the suspended sentence, but merely affirmed the order entered in Recorder's Court. . . . The order in the Recorder's Court was predicated on the fact that the defendant was convicted . . . ." (Emphasis added.)

In the *Guffey* case the activation of the suspended sentence was, in Recorder's Court, based solely upon the conviction of defendant. On appeal, the Superior Court, though it found facts, merely reaffirmed the activating order of the Recorder's Court. Thus the only basis for putting the suspended sentence into effect was the conviction. In the instant case, the court found facts in detail and in summary stated: "that the defendant had in his possession intoxicating beverages . . . in . . . the incident in which the defendant had three pints of whisky in his hand taking them to the refrigerator in the Johnson home." Based on this finding the Superior Court entered an independent order putting the suspended sentence into effect. The order is not in any way predicated upon a conviction. Indeed the defendant may well be guilty of violating the terms of the suspended sentence by having the possession of intoxicating beverages, and not be guilty of violating any criminal law of the State. The findings of fact and order of the court below are in accord with the general rules laid down by this Court, and in the findings and order we find no error. *State v. Pelley,* 221

N.C. 487, 20 S.E. 2d 850; *State v. Shepherd,* 187 N.C. 609, 122 S.E. 467; *State v. Greer,* 173 N.C. 759, 92 S.E. 147.

Either the findings of fact with respect to the car incident of 3 March 1961, or that of the Johnson house incident of 23 December 1960, is sufficient to support the activation of the suspended sentence.

The order of the Superior Court is

Affirmed.

R. C. BAKER, t/a BAKER OIL COMPANY v. MALAN CONSTRUCTION CORPORATION.

(Filed 20 September, 1961.)

1. Frauds, Statute of § 5—

Where diverse inferences may be drawn from the evidence as to whether the promise to answer for the debt of another was an original or a collateral promise, nonsuit on the defense of the statute is properly denied and the evidence must be submitted to the jury on appropriate issues.

2. Appeal and Error § 15—

Where a new trial is awarded on defendant's appeal, the Supreme Court will refrain from discussing the evidence.

3. Trial § 40—

The form and number of issues rest in the discretion of the trial court subject to the limitation that the issues submitted must arise upon the pleadings, afford the parties opportunity to present fairly any view of the case arising on the evidence, and that a verdict upon them must be such as to enable the court to render judgment.

4. Pleadings § 29—

An issue of fact arises when the answer controverts a material allegation of the complaint. G.S. 1-196, G.S. 1-197.

5. Jury § 5—

Unless a trial by jury is waived or a reference is ordered, issues of fact arising on the pleadings must be submitted to a jury. G.S. 1-172.

6. Trial § 40—

Where defendant denies that it had entered into the agreement alleged by plaintiff, the court must submit to the jury an issue upon this controverted issue of fact, and the submission of the single issue as to the amount, if any, defendant is indebted to plaintiff is insufficient.

7. Same—

Where a party tenders proper issues arising upon the pleadings and

excepts to the refusal of the court to submit such issues, such party cannot be held to have waived the right to object that the issue submitted was insufficient.

8. Appeal and Error § 35—

The rule that when the charge is not in the record it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts, presupposes a trial on proper issues and the failure of the court to submit proper issues cannot be cured by the charge.

APPEAL by defendant from *Parker, J.*, April Term, 1961, of PERQUIMANS.

Plaintiff's action is to recover from defendant $1,814.52 for merchandise delivered by plaintiff to L. W. Raynor and G. L. Tart, trading as Sampson Construction Company. Plaintiff's claim consists (1) of a balance of $1,749.77 for Sinclair products, gasoline, diesel fuel and motor oil, and (2) of a balance of $64.75 for truck tires and truck tubes.

Defendant, as general contractor, was obligated, *inter alia,* to construct certain roads in connection with the Naval Air Facility at Harvey's Point, Perquimans County, and to furnish all labor, equipment and materials to perform the work. Raynor and Tart, as subcontractors of defendant, were obligated to haul dirt in connection with the construction of said roads.

Plaintiff seeks to recover from defendant on a special contract allegedly entered into between plaintiff and defendant, through Fred W. Dyke, its Superintendent, prior to plaintiff's delivery of merchandise to Raynor and Tart. Plaintiff alleges defendant requested plaintiff to let Raynor and Tart have whatever supplies they needed for the performance of their work and agreed defendant "would pay for the same or would see that the plaintiff was paid therefor"; and that the merchandise was delivered by plaintiff to Raynor and Tart in reliance upon defendant's said promise and agreement.

Answering, defendant denied it had entered into the alleged agreement with reference to merchandise delivered by plaintiff to Raynor and Tart. If such agreement was made, so defendant alleged, it was an oral agreement to pay the debt of another person; and defendant pleaded G.S. 22-1, the Statute of Frauds, in bar of plaintiff's right to recover.

The only evidence was that offered by plaintiff. At the conclusion thereof, defendant moved for judgment of nonsuit and excepted to the court's denial of its said motion.

Thereupon, defendant tendered the following issues: "1. Did an agent of defendant enter into an agreement with plaintiff that the de-

fendant would pay for supplies furnished Sampson Construction Company? ANSWER: ____ 2. If so, was the promise by defendant's agent an original or a collateral promise? ANSWER: ____ 3. What amount, if any, is defendant indebted to the plaintiff? ANSWER: _____"

The court refused to submit the first and second issues tendered by defendant. Defendant excepted.

The issue submitted, and the jury's answer thereto, are as follows: "1. In what amount, if any, is the defendant indebted to the plaintiff? ANSWER: $1814.52 + 6% interest from June 16, 1959, until paid in full."

The record contains this statement: "The Court then charged the jury in full on the issue submitted." However, the charge itself is not in the record.

The court entered judgment that plaintiff recover of defendant the sum of $1,814.52, plus interest and costs; and defendant excepted and appealed.

Walter H. Oakey and John H. Hall for plaintiff, appellee.
Jordan, Dawkins & Toms for defendant, appellant.

BOBBITT, J. The assignment of error directed to the denial of defendant's motion for judgment of nonsuit is overruled. While diverse inferences may be drawn therefrom, the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of the case to the jury on appropriate issues and under proper instructions. In this connection, see *Peele v. Powell*, 156 N.C. 553, 73 S.E. 234, s. c. on rehearing, 161 N.C. 50, 76 S.E. 698; *Whitehurst v. Padgett*, 157 N.C. 424, 73 S.E. 240; *Dozier v. Wood*, 208 N.C. 414, 181 S.E. 336; *Taylor v. Lee*, 187 N.C. 393, 121 S.E. 659; *Tarkington v. Criffield*, 188 N.C. 140, 124 S.E. 129; *Warren v. White*, 251 N.C. 729, 112 S.E. 2d 522, and cases cited therein; Annotation: 20 A.L.R. 2d 246 *et seq.*, particularly § 7, pp. 262-268.

Since a new trial is awarded, we refrain from discussing the evidence presently before us. *McGinnis v. Robinson*, 252 N.C. 574, 576, 114 S.E. 2d 365; *Tucker v. Moorefield*, 250 N.C. 340, 342, 108 S.E. 2d 637.

Defendant contends the court erred in refusing to submit the first and second issues tendered by it and in submitting the single issue, to wit, "In what amount, if any, is the defendant indebted to the plaintiff?"

"The form and number of the issues is left to the sound discretion of the judge, subject to the following restrictions: (1) That only issues of fact raised by the pleadings should be submitted. (2) That they be

such that a verdict upon them will enable the court to render a judgment. (3) That the parties shall have the opportunity to present any view of the law arising out the evidence. All the issues of fact raised by the pleadings, and only such issues, should be submitted; and whether there shall be one or more, and in what particular form, is left to the judge, provided the above conditions are met. It is error to submit the single issue, 'How much, if anything, is the plaintiff entitled to recover?' *if other issues are raised, since this leaves out the controverted facts upon which the right to recover is based.*" (Our italics) McIntosh, North Carolina Practice and Procedure, § 510; McIntosh, Second Edition (Wilson), § 1353.

An issue of fact arises when the answer controverts a material allegation of the complaint. G.S. 1-196; G.S. 1-197; *Braswell v. Johnston,* 108 N.C. 150, 12 S.E. 911; *Rubber Co. v. Distributors,* 253 N.C. 459, 466, 117 S.E. 2d 479, and cases cited. "An issue of fact must be tried by a jury, unless a trial by a jury is waived or a reference ordered." G.S. 1-172; *Wells v. Clayton,* 236 N.C. 102, 105, 72 S.E. 2d 16, and cases cited.

"It is well settled that the statutes (The Code, secs. 395, 401) are mandatory in the requirement that an issue or issues of fact raised by the pleadings shall be submitted to the jury. *Rudasill v. Falls,* 92 N.C. 222. But section 400 in express terms distinguishes issues of fact from mere inquiries of damages by providing that 'Every *issue of fact joined in the pleadings* and *inquiry of damages* required to be tried,' etc., 'shall be tried at the next term,' etc." *Denmark v. R. R.,* 107 N.C. 185, 12 S.E. 54; *Bowen v. Whitaker,* 92 N.C. 367; *Braswell v. Johnston, supra; Tucker v. Satterthwaite,* 120 N.C. 118, 27 S.E. 45; *Falkner v. Pilcher,* 137 N.C. 449, 49 S.E. 945; *Holler v. Tel. Co.,* 149 N.C. 336, 63 S.E. 92; *Griffin v. Insurance Co.,* 225 N.C. 684, 686, 36 S.E. 2d 225; *Turnage v. McLawhon,* 232 N.C. 515, 61 S.E. 2d 336. (Note: Sections 395 and 400 of The Code are now codified as G.S. 1-200 and G.S. 1-173, respectively.)

In *Bowen, Merrimon, J.* (later *C.J.*), discusses the purpose for which Section 395 of The Code, now G.S. 1-200, was enacted. No distinct issues were submitted. The verdict was "that the jury find all issues in favor of the plaintiff, and assess his damages at $250." It was held this general finding did not comply with the mandatory requirements of Section 395 of The Code and a new trial was awarded.

In *Denmark,* the plaintiff's action was to recover damages for personal injuries allegedly caused by defendant's negligence in the operation of its engine. The defendant tendered issues of negligence, contributory negligence and damages. The trial judge, declining to submit the issues so tendered by the defendant, submitted instead a single

issue, to wit, "What damages, if any, is the plaintiff entitled to recover?" The defendant excepted. The jury answered: "$5,000." A new trial was awarded on account of the court's failure to submit the main issue raised by the pleadings, to wit, whether the plaintiff's injuries were caused by the negligence of the defendant. This Court, in opinion by *Avery, J.*, said: "The question of *quantum* of damages is an incidental one, the right to have them assessed at all depending upon the preliminary decision of *the real issues of fact raised by the pleadings.*" (Our italics)

In *Braswell,* the main issue raised by the pleadings was whether the contract sued on was an entire contract. The defendant tendered issues with reference thereto. Instead, the court submitted only the single issue, "How much, if any, is the plaintiff entitled to recover?" A new trial was awarded for failure to submit *an issue determinative of the plaintiff's right to recover.* This Court, in opinion by *Avery, J.*, said: "The judge who tries the case may, in his discretion, confine the inquiry to one or more of the issues raised by the pleadings, provided that he does not thereby deprive a party of the opportunity to present the law arising out of some view of the testimony to the jury *through the median of an issue submitted,* and provided a judgment can be predicated upon the finding — though in the exercise of this power by the judge, it should be borne in mind that The Code system contemplates *distinct findings upon material issues* and these should be submitted where it can be done without repetition or confusion." (Our italics) In this connection, see Emery v. R. R., 102 N.C. 209, 9 S.E. 139, and *McAdoo v. Railroad,* 105 N.C. 140, 11 S.E. 316.

In *Shoe Co. v. Hughes,* 122 N.C. 296, 29 S.E. 339, material issues of fact determinative of plaintiff's right to recover were raised by the pleadings. Over defendant's objection, the single issue, "Is the defendant indebted to the plaintiff, and, if so, in what amount?" was submitted. A new trial was awarded on the ground this issue did not properly present the contentions of the parties. This Court, in opinion by *Furches, J.* (later *C.J.*), said: ". . . the trial judge should keep it in mind that the very object of submitting *written issues* to the jury is that they should find the *facts* and then the Court would apply the law. It was found by experience that the old mode of submitting but one issue to the jury, where there were several *issues* of fact raised by the pleadings, was not satisfactory. The old mode of *one issue,* which means to find for the plaintiff or for the defendant, gave rise in many cases to what were called vicious verdicts. If it could be so, the jury ought to find the *issues* submitted to them without knowing whether their findings were for the plaintiff or the defendant."

In *Hatcher v. Dabbs,* 133 N.C. 239, 45 S.E. 562, plaintiff's action

was to recover the reasonable value of services rendered by him to defendant's intestate. Plaintiff alleged he had entered into a special contract with defendant's intestate under which, in consideration of plaintiff's services, defendant's intestate promised to devise and bequeath to plaintiff his entire estate but that defendant's intestate failed to do so. Defendant denied his intestate entered into the alleged agreement with plaintiff. The court, over defendant's objection, submitted one issue, "What damages, if any, is the plaintiff entitled to recover of the defendant?" This Court, in opinion by *Walker, J.*, said: "The issue was not a proper one to be submitted to the jury *by itself.* It did not present to the jury for their consideration all the matters in controversy between the parties, and was therefore insufficient as the basis of a verdict and judgment." Again: "The provision in our present system of procedure for submitting issues was adopted for the purpose of enabling the jury to find the material facts with as little consideration as possible of principles of law, sometimes difficult for them to understand and apply, and so that the court, upon the facts thus found, may with greater ease and accuracy declare the law and thus determine the legal rights of the parties. (Citation) This result cannot be obtained in this case under the issue submitted to the jury. There is no separation of the facts from the law, but the jury are required to consider and decide both the facts and the law, under instructions from the court, it is true, but, nevertheless, in direct contravention of the very spirit and purpose of The Code and the rule of this Court." Again: "The submission of issues is not a mere matter within the discretion of the court, but it is now a mandatory requirement of the law, and a failure to observe this requirement will entitle the party *who has not in some way lost the right* to have the error of the court corrected." (Our italics)

In *Busbee v. Land Co.*, 151 N.C. 513, 66 S.E. 577, the single issue, "What damages, if any, are the plaintiffs entitled to recover?" was submitted. A new trial was awarded. This Court, in opinion by *Walker, J.*, said: "The issue as to the damages is not material if the decision of the jury upon the issues constituting the plaintiff's cause of action are found against him." In this opinion, *Walker, J.*, repeats verbatim what he had previously stated in the second excerpt (quoted above) from his opinion in the *Hatcher* case.

"If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later." McIntosh, *opus* cited, § 510. If defendant had not tendered issues or otherwise objected to trial on the issue submitted, it could not do so on this appeal. *Tarkington v. Criffield, supra,* and *Noland Co., Inc. v. Jones,* 211 N.C. 462, 190 S.E. 720. In each of these

cases, the defendant pleaded G.S. 22-1; and in each, presumably by consent, only a general issue as to what amount, if any, defendant owed plaintiff, was submitted. Examination of the record and brief in each of these cases discloses no assignment of error or argument addressed to the insufficiency of the issue. This Court, in *per curiam* opinions, did not discuss the sufficiency of the issue.

In *Burton v. Mfg. Co.*, 132 N.C. 17, 43 S.E. 480, and in *Nance v. Telegraph Co.*, 177 N.C. 313, 98 S.E. 838, only a general issue as to what amount, if any, defendant owed plaintiff, was submitted. In each case, defendant denied the special contract alleged by plaintiff but did not tender issues or object to the issue submitted.

In *Burton*, this Court, in opinion by *Connor, J.*, said: "The general issue should not be submitted." Again: "There is no exception to the issue as submitted, and we cannot interfere."

In *Nance*, this Court, in opinion by *Walker, J.*, said: "We will not close without adverting to the form of the issue, which we do not approve. There should have been an issue as to whether there had been a breach of the contract, the defendant having denied that there had been one. The second issue, then, should have been in the form of the one submitted, or substantially so. But there was no objection to the form of the issue, and we merely refer to it, because such an issue has been condemned by this Court. (Citations) If the breach had been admitted, then, of course, the issue submitted would be the proper one."

Here, plaintiff's action is based upon an alleged special contract. The main issue raised by the pleadings, determinative of plaintiff's right to recover, was whether defendant had entered into the agreement alleged by plaintiff. Defendant tendered two issues relating to the alleged agreement. True, the court was not required to submit these particular issues. *Clark v. Guano Co.*, 144 N.C. 64, 71, 56 S.E. 858; *Potato Co. v. Jeanette*, 174 N.C. 236, 240, 93 S.E. 795. It was for the court, in its discretion, to determine whether one or more issues should be submitted relative to the alleged agreement and the particular form of the issue(s) so submitted. See *Warren v. White, supra*, p. 735. But defendant, having tendered pertinent issues in apt time, was entitled to have submitted some factual issue(s) which, in terms, presented to the jury for determination whether defendant had entered into the agreement alleged by plaintiff. Where, as here, the answer raises an issue of fact which, if answered adversely to plaintiff, defeats entirely the plaintiff's alleged cause of action, the defendant is entitled, as a matter of legal right, to have an issue or issues submitted with reference thereto separate and distinct from the issue as to the amount, if any, plaintiff is entitled to recover.

Plaintiff cites *McNeeley v. Shoe Co.*, 170 N.C. 278, 87 S.E. 64, where the trial judge submitted and the jury answered this single issue: "Did the defendant, at the time it received the check or shoes, or both, have reasonable cause to believe that it was intended thereby to give a preference? Answer: As to the $100 cash payment, No. As to the $582, Yes." It was admitted the $100.00 was paid to defendant and that the shoes, valued at $582.00, were turned over to defendant, within four months prior to the bankruptcy adjudication. Thus, the amounts were not in dispute; and the issue submitted was determinative of the plaintiff's right to recover. Moreover, the defendant tendered no issue. This Court, in opinion by *Brown, J.*, said: "The court having submitted the issue and the defendant having failed to except to same, then he consents to the issue submitted, and cannot, after the case is disposed of, be heard to complain that other issues were not submitted."

Plaintiff calls our attention to the well-settled rule that, where the charge of the trial judge is not included in the record on appeal, it is presumed that the jury was instructed correctly on every principle of law applicable to the facts. Plaintiff cites *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E. 2d 104, where issues of negligence, contributory negligence, agency and damages were submitted, and *White v. Lacey*, 245 N.C. 364, 96 S.E. 2d 1, where issues of negligence, contributory negligence and damages were submitted. Suffice to say, the rule presupposes a trial on proper issues. If, and we so hold, defendant was entitled, as a matter of legal right, to have submitted an issue or issues relating to whether defendant entered into the alleged contract with plaintiff, the error in failing to submit such issue(s) could not be cured by the charge.

For failure to submit separately an issue or issues directed to whether defendant entered into the contract alleged by plaintiff, defendant is entitled to a new trial. It is so ordered.

New trial.

LEMUEL ASHE, EMPLOYEE v. JACK BARNES, EMPLOYER.

(Filed 20 September, 1961.)

1. **Master and Servant § 46— Procurement of accident policies on employees does not exempt employer from liability under Compensation Act.**

The fact that an employer who fails to purchase compensation insurance procures and pays the premiums on accident policies taken out on each of his employees does not exempt the employer from liability under the provisions of the Compensation Act, nor does the fact that an injured employee accepts the benefits under the accident policy amount to an election to exempt himself from the provisions of the Act or estop him from claiming compensation under the Act, there being nothing in the record to show that the employee knew, prior to time of his injury, that the employer was not carrying Workmen's Compensation insurance as required by law, or that either the employer or employee had exempted himself from the provisions of the Act in the manner required by G.S. 97-4. G.S. 97-93.

2. **Master and Servant § 67—**

Disability benefits and hospital and medical payments received by the employee under an accident policy procured by the employer and upon which the employer alone paid the premiums, may not be deducted by the employer from the award of compensation to the employee for injuries causing the disability, even though the liability of the employer under the Act was not protected by compensation insurance. G.S. 97-6, G.S. 97-42.

APPEAL by defendant from *Bone, J.*, February Term 1961 of WASHINGTON.

This is a proceeding to recover for injuries sustained in an accident, pursuant to the provisions of our Workmen's Compensation Act.

Defendant Jack Barnes was engaged in the business of cutting trees for pulp wood. He had in his employ seven men, among whom was plaintiff Lemuel Ashe. The employer, before engaging in said business, did not give the formal notice required to exempt himself from the provisions of our Workmen's Compensation Act, as required by the Act. However, before entering upon the work, he took out a policy of insurance upon each man in his employ in the Nationwide Mutual Insurance Company (hereinafter referred to as Nationwide). The respective policies provided for certain stated benefits, including the payment of $100.00 per month for a period not exceeding sixty months for total disability due to accident. Plaintiff has been receiving $100.00 per month from Nationwide since his accident. Defendant paid the premium for the aforesaid policy and no part thereof was charged to or paid by the plaintiff.

The above insurance policy also provided for the payment of certain stated hospital and surgical benefits, and further provided that the hospital and surgical provisions of the policy do not cover loss "for which benefits are payable under any Workmen's Compensation, Occupational Disease, Employer's Liability or similar law of any State or Federal Insurance."

It appears from the record that hospital benefits in the sum of $1,640.00 have been paid by Nationwide based on statements that there was no workmen's compensation coverage.

At the hearing before the hearing commissioner the parties stipulated:

"1. The parties were subject to and bound by the provisions of the Workmen's Compensation Act at the time of the injury by accident * * *.

"2. The employer-employee relationship existed between plaintiff and defendant at such time.

"3. On 15 September 1959 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant."

The hearing commissioner found as a fact that the plaintiff's injury by accident occurred when he was struck by a log while working for the defendant. The evidence further tended to show that the plaintiff at the time of the hearing had 75 per cent permanent partial disability of both legs, which condition had not reached maximum improvement. Plaintiff's average weekly wage while working for the defendant was found to be $25.55. It was found as a fact that the defendant had not insured his liability under the Workmen's Compensation Act at the time of the injury by accident giving rise to the present action. However, the defendant was insured by workmen's compensation insurance at the time of the hearing. Hence, no penalty is imposed pursuant to G.S. 97-94.

The hearing commissioner held that the policy taken out by the defendant on the plaintiff in Nationwide does not meet the requirements of our Workmen's Compensation Act and is not workmen's compensation insurance; that such policy appears to be in the nature of a "fringe benefit," such as life insurance, on and off the job sickness or accident insurance, annual leave, et cetera, which many employers furnish their employees as part of the terms of employment; that our Compensation Act does not authorize the substitution of such insurance for workmen's compensation insurance, nor does the law authorize the employer to be given credit for monies paid pursuant to the provisions of such a policy; that G.S. 97-42 applies only to payments made by the employer.

The hearing commissioner concluded as a matter of law that the

defendant is not allowed to take credit for monies paid for or on behalf of plaintiff by Nationwide pursuant to the terms of its policy.

Plaintiff was awarded compensation at the rate of $15.33 per week for temporary total disability commencing 15 September 1959, such compensation to continue until plaintiff reaches maximum improvement, or to the end of the healing period, or until he has a change of condition. Defendant was likewise directed to pay all medical expenses incurred as a result of plaintiff's injury, when such bills have been submitted to and approved by the Industrial Commission.

The defendant appealed to the full Commission, filing exceptions to the refusal of the hearing commissioner to find as a fact that when the defendant took out the accident policy with Nationwide it was the intention of the parties that such policy was to provide for all injuries sustained by plaintiff during his employment, and by his acceptance of the benefits provided in such policy he elected not to be bound by the provisions of the Workmen's Compensation Act and is estopped from claiming any benefits thereunder.

The full Commission overruled these exceptions and affirmed the findings of fact and conclusions of law of the hearing commissioner and the award entered by him.

The defendant excepted to the ruling of the Commission and appealed to the Superior Court on the same grounds. The Superior Court overruled the exceptions and affirmed the award of the Industrial Commission.

The defendant appeals, assigning error.

Bailey & Bailey for plaintiff appellee.
W. L. Whitley for defendant appellant.

DENNY, J. The appellant poses these questions: (1) When the employee, Ashe, elected to accept the insurance policy provided for him by his employer, Barnes, did he not elect thereby to exempt himself from the provisions of our Workmen's Compensation Act? (2) When the employee, Ashe, accepted benefits under the Nationwide policy and which he continues to do, did he not thereby estop himself from claiming under the provisions of our Workmen's Compensation Act? In our opinion, both of these questions must be answered in the negative.

It appears from the evidence offered by the employer before the hearing commissioner that the agent of Nationwide who wrote the policy on plaintiff Ashe informed defendant Barnes that the policy was not workmen's compensation insurance, and also that he knew at

the time he wrote the Nationwide policy that Barnes was not carrying workmen's compensation insurance on his employees.

"In general, doctrines of waiver and estoppel do not apply in workmen's compensation cases and they may not be invoked to defeat rights granted, or to avoid burdens imposed, thereunder." 100 C.J.S. Workmen's Compensation, section 389, page 155; *Sackolwitz v. Charles Hamburg & Co.*, 295 N.Y. 264, 67 N.E. 2d 152; *Matter of Braiter v. Addi Co.*, 282 N.Y. 326, 26 N.E. 2d 277; *Micieli v. Erie R. Co.*, 131 *N.J.L.* 427, 37 A. 2d 123.

There is nothing in the record on this appeal to indicate that employee Ashe knew prior to or at the time of his injury, that his employer was not carrying workmen's compensation insurance as required by law, or that his employer had procured the accident policy from Nationwide on his life.

G.S. 97-3 provides: "From and after July 1, 1929, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided."

It is not contended that either employer Barnes or employee Ashe exempted himself from the Workmen's Compensation Act in the manner required in G.S. 97-4. Moreover, it is provided in G.S. 97-93, in pertinent part, as follows: "Every employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his liability thereunder * * * or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided in this article * * *." The appellant did not comply with the provisions of the foregoing statute in either respect.

In view of our conclusion with respect to the questions posed by the appellant, is the employer entitled to have the sums paid by Nationwide to his employee credited on payments required under the award of the Industrial Commission? Our Workmen's Compensation Act allows a deduction from the amount to be paid as compensation for payments made by the employer to the injured employee before an award is made by the Industrial Commission. The pertinent statute, G.S. 97-42, reads as follows: "Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation. Pro-

vided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment."

We have not found a case where this Court has construed the above statute with reference to the question involved, and there is very little authority to be found in other jurisdictions.

In *Butler v. Lee,* 97 Ga. App. 184, 102 S.E. 2d 498, the Court said: "There is no provision of law under which payments to an employee under a company-owned health and accident insurance policy, whether for the payment of medical bills or otherwise, may be deducted from payments required under the Workmen's Compensation Act. The hearing director did not err in failing to deduct from the amount of an award made to an employee sums received by such employee under a policy of accident insurance maintained by the employer."

In the case of *Alabam Freight Lines v. Chateau,* 57 Ariz. 378, 114 P. 2d 233, the employer took out an accident insurance policy on his employees, on which he paid all the premiums. Chateau, an Alabam employee, suffered an injury on the job, for which his employer paid his medical and hospital bills, and in addition turned over to him $409.00 received as proceeds from the accident insurance policy. Subsequently, the Industrial Commission awarded Chateau the sum of $307.00 as compensation for lost time, and ordered his employer to pay for reasonable medical and hospital treatment. The Industrial Commission further ordered that any payment of compensation or medical benefits theretofore made by the employer be credited against the award and were deductible therefrom. The employer sought to enjoin the collection of the award on the ground that it had already been paid, in that Chateau had received an amount in excess of the award from the accident insurance policy. The Court held that the proceeds from the accident insurance policy should not be credited against the award in favor of the employee as compensation for his lost time, even though the employer paid all of the premiums for the insurance. The Court further said: "There is no connection, as a matter of law, between the amount which he was entitled to under the accident insurance policy and the amount which was due him as an award under the workmen's compensation law. By the terms of that award, (the employer) was required to pay a fixed sum for compensation, and also the necessary medical expenses. It was also provided that any sums which had been paid previously on either the compensation or the medical expenses might be deducted from the award. All of the medical expenses having been paid by (the employer) under its contract with (the employee), the latter had no further claim under the award against (the employer) for medical expenses. But he did have

a right to recover from (the employer) the award of compensation, for the amount paid him under his accident policy was not, and could not be, a payment on the award. The one rested upon the workmen's compensation law and the other upon a contract between (the employer) and the insurance company for the benefit of (the employee)." This case was cited with approval and followed in *Whipple v. Industrial Commission,* 59 Ariz. 1, 121 P. 2d 876.

There is nothing in our Workmen's Compensation Act that prohibits an employer from making special provisions for an injured employee beyond those benefits which the employee is entitled to receive under the provisions of our Workmen's Compensation Act.

It is well known that many employers of labor who carry Workmen's compensation insurance on their employees, or who are self-insurers, provide pension funds and other benefits for their employees, *Grady v. Appalachian Electric Power Co.,* 126 W.Va. 546, 29 S.E. 2d 878, but there is no provision in our law which authorizes an employer subject to our Workmen's Compensation Act to substitute an accident policy in lieu of compensation and other benefits required by our Workmen's Compensation Act. G.S. 97-6.

The judgment of the court below is

Affirmed.

FLORENCE H. WILLIAMS v. ALICE H. WILLIAMS.

(Filed 20 September, 1961.)

1. Courts § 18; Veterans—

Where a person claiming the proceeds of a policy of war risk insurance does not appeal from the adverse ruling of the Board of Veterans' Appeals, the failure to pursue the exclusive procedure provided in 38 U.S.C.A., § 784 precludes the matter, and such ruling is not open to challenge in a State court.

2. Same; Husband and Wife § 11—

The provision of a separation agreement that the husband should keep in force his policies of life insurance issued by the Federal Government in which his wife was named beneficiary, and should not change the beneficiary, does not entitle the wife to impress a trust on the proceeds of the policies in the hands of the second wife when the husband, subsequent to his divorce from his first wife and marriage to the second, changes the beneficiary in the policies to his second wife in accordance with the Federal regulations, 38 USCA., § 3101(a).

APPEAL by plaintiff from *Parker, J.*, June Term 1961 of PASQUOTANK.

The plaintiff and Alford J. Williams, now deceased, were married in 1926 and lived together as man and wife until near the end of 1939. On or about 20 November 1940 the plaintiff and the said Alford J. Williams entered into a separation agreement and property settlement in the State of New York. Among other things, the agreement provided that Alford J. Williams would maintain and keep in force certain policies of insurance on his life, in each of which policies the plaintiff was designated the beneficiary. It was further agreed by Alford J. Williams that he would not change the beneficiary in any of said policies during the life of the plaintiff, Florence H. Williams. The policies were delivered to the plaintiff as provided in the separation agreement. Among the policies so delivered was one in the sum of $5,000 (20 payment life) and one for $5,000 (30 payment life), both issued by the Government of the United States.

Subsequent to entering into the aforementioned separation agreement, the plaintiff and Alford J. Williams were divorced. Thereafter, on 13 May 1942, the said Alford J. Williams married the defendant, Alice H. Williams. Alford J. Williams died on 15 June 1958, leaving surviving his second wife, the defendant herein.

On 10 June 1958 the said Alford J. Williams changed the beneficiary in the two policies issued by the Government of the United States on his life from Florence H. Williams, the plaintiff herein, to Alice H. Williams, the defendant herein.

Following the death of Williams, both plaintiff and defendant filed claims for the proceeds of the two policies described herein with the Veterans' Administration. The Veterans' Administration denied the plaintiff's right to receive the proceeds of the policies and approved the claim of the defendant. The plaintiff appealed to the Board of Veterans' Appeals, which Board likewise denied the plaintiff's claim and approved the defendant's claim. The plaintiff did not pursue her statutory remedy to institute suit pursuant to the provisions of 38 U.S.C.A., section 784. Therefore, the Veterans' Administration duly awarded the proceeds of the two policies of insurance to the defendant as the proper beneficiary named in said policies.

The plaintiff instituted this action to recover from the defendant the sum of $10,000, being the amount of the proceeds of the two policies described herein.

The court below heard this matter upon an agreed statement of facts and stipulations entered into by the parties, including certain exhibits. The court concluded (1) that the plaintiff cannot recover for that, under the applicable Federal statutes and decisions, her sole remedy was and is that set out in 38 U.S.C.A., section 784; and that

the proceeds of a policy or policies of United States Government life insurance are payable to the last validly designated beneficiary, who, in this action, is the defendant; that there cannot be an irrevocable beneficiary; that the separation agreement between the plaintiff and the said Alford J. Williams cannot and does not control the disposition of the proceeds of the said two policies of insurance; (2) that if this action be treated as one in which the plaintiff is suing under a quasi-contract of money had and received or upon the basis of unjust enrichment, plaintiff cannot recover for that a prerequisite to recovery in such a situation is that the money or funds, the subject matter of the action, belong to the plaintiff, and this the plaintiff has failed to show; (3) that if this action be treated as one seeking to impose a constructive trust upon the proceeds of the said two policies of insurance, the plaintiff cannot recover for that the law applicable to ordinary insurance under such claim is not applicable to the proceeds of the type of Government life insurance policies involved in this case; and (4) that in no view of the cause of action set out in the complaint, considered upon the agreed statement of facts, including the exhibits, is the plaintiff entitled to prevail herein.

Judgment was entered accordingly. The plaintiff appeals, assigning error.

McMullan, Aydlett & White; Frank B. Aycock, Jr. for plaintiff appellant.

John H. Hall, W. W. Cohoon for defendant appellee.

DENNY, J. It is provided in 38 U.S.C.A., section 749, as follows: "Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of a United States Government life insurance policy without the consent of such beneficiary or beneficiaries."

In light of the provisions of the foregoing statute, the appellant concedes that since she did not pursue the exclusive procedure provided in 38 U.S.C.A., section 784, she has no claim against the Government of the United States, or any agency thereof, as a result of the adverse ruling of the Veterans' Administration and its Board of Veteran's Appeals awarding the proceeds of the two policies of insurance to the defendant as the proper beneficiary named in such policies. Moreover, such ruling is not open to challenge in a State court. *In re Greiner's Estate,* 195 Wisc. 332, 218 N.W. 437; *United States ex rel Norris v. Forbes, Director,* 278 F. 331.

In the absence of an appeal in pursuing one's claim to proceeds of insurance policies issued by the Government of the United States,

serviced by the Veterans' Administration, the decisions of the administrator of such administration are final and conclusive and "no other official or any court of the United States shall have power or jurisdiction to review any such decision." 38 U.S.C.A., sections 211 and 785.

Consequently, the plaintiff in this action seeks to impress a trust on the proceeds of these insurance policies in her favor. She contends that the defendant's right to retain the proceeds from said insurance policies must be determined in light of the terms of the separation agreement and property settlement entered into between the plaintiff and her former husband.

The appellant further contends there is no distinction between the status of the proceeds of United States savings bonds in the hands of the owner or beneficiary therein and the proceeds of Government life insurance policies in the hands of the beneficiary named in such policies. We do not concur in this view.

While Government savings bonds, Series E, are not assignable and the Code of Federal Regulations provides that "if either co-owner dies without having presented and surrendered the bond for payment * * *, the surviving co-owner will be recognized as the sole and absolute owner of the bond, and payment will be made only to him," *Tanner v. Ervin,* 250 N.C. 602, 109 S.E. 2d 460, the weight of authority is to the effect that when the proceeds from such bonds are paid to the owner, such proceeds may be impressed with a trust growing out of a *bona fide* agreement whereby the holder of such bonds has surrendered his or her interest in the bonds to the co-owner for a valuable consideration. *Tanner v. Ervin, supra; In re Hendricksen's Estate,* 156 Neb. 463, 56 N.W. 2d 711, *certiorari* denied, 346 U.S. 854, 98 L. Ed. 368; *Tharp v. Besozzi, Ind. App.,* 144 N.E. 2d 430; *Chase v. Leiter,* Cal. App., 215 P. 2d 756; *Roman v. Smith,* 228 Ark. 833, 314 S.W. 2d 225.

Furthermore, the Government of the United States has not by congressional legislation or otherwise, sought to exempt the proceeds from Government savings bonds in the hands of the owner or beneficiary thereof, from attachment, levy, or seizure under any legal or equitable process after receipt by the owner or beneficiary. The proceeds of a Government life insurance policy have been so exempted by congressional action, 38 U.S.C.A., section 3101, which in pertinent part reads as follows: "(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable * * * and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or

seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

In the case of *Eldin v. United States,* 157 F. Supp. 34, the plaintiff, Caroline S. Eldin, was married to one Zaky Eldin, and the other plaintiffs, Patricia Eldin and Karen Eldin, were children born of the marriage. Zaky Eldin served in the military forces of the United States and there had been issued to him a National Service Life Insurance policy. Caroline S. Eldin was designated as beneficiary and this policy was in full force and effect at the time of the insured's death on 28 February 1954. On 4 January 1946 Caroline and the decedent separated and on 17 January 1946 a separation agreement was entered into. They were later divorced. The divorce decree entered in the State of Illinois ratified and confirmed the separation agreement. In the separation agreement the decedent agreed to name his wife Caroline his irrevocable primary beneficiary in the insurance policy involved and to name their two children as his irrevocable secondary beneficiaries. On 27 August 1946 the decedent married Eleanor A. Eldin and named her as the beneficiary under his policy. Upon the death of the insured, the plaintiff and the second wife filed claims for the proceeds of the policy. The Court said: "Upon maturity the proceeds of a National Service Life Insurance policy are payable to the designated beneficiary. There is no dispute that at the maturity date of the policy the defendant was and still is within the class of permitted beneficiary * * *. At one time plaintiff was the designated beneficiary in the policy but plaintiff was not the designated beneficiary at the time the policy matured. It is the opinion of the Court that plaintiff lost all rights under the applicable Act and regulations when the veteran exercised his right in his lifetime in proper form and in accordance with law to change his beneficiary to the defendant. It is the opinion of the Court that the separation agreement between the veteran and his first wife in which he agreed to irrevocably name his first wife and their children as beneficiaries of the policy and also the divorce decree granted to the first wife approving the terms of the separation agreement, had no force and effect so far as the proceeds of the policy are concerned."

In *Kauffman v. Kauffman,* Cal. App., 210 P. 2d 29, Gertrude A. Kauffman and her husband, Barton H. Kauffman, entered into a separation agreement and property settlement on 27 August 1941. It was agreed between the parties that the wife should remain the beneficiary in the husband's War Risk Insurance policy, but if they should be divorced it was agreed that their two children should be named beneficiaries. Gertrude A. Kauffman secured a final divorce decree from Barton H. Kauffman on 20 October 1942. The children were

named beneficiaries in the insurance policy as provided in the separation agreement. However, on 20 November 1942, Barton H. Kauffman married Angie F. Kauffman and on 20 October 1947 the insured changed the beneficiary in his policy to his second wife. The insured died on 28 February 1948. An action was instituted to impress a trust upon the proceeds of the policy. The Court held: "We conclude that the property settlement agreement was an assignment of the proceeds of the policy in question, *Chilwell v. Chilwell,* 40 Cal. App. 2d 550, 553, 105 P. 2d 122; that such an assignment is prohibited by the terms of the Federal Statute, § 454a, *supra* (now 38 U.S.C.A., section 3101), and is therefore not enforceable against the defendant beneficiary. *Lewis v. United States,* 3 Cir., 56 F. 2d 563; *Von Der Lippi-Lipski v. United States,* 55 App. D.C. 202, 4 F. 2d 168; *Bradley v. United States,* 10 Cir., 143 F. 2d 573; *Tompkins v. Tompkins,* 132 N.J.L. 217, 38 A. 2d 890; *Yake v. Yake,* 170 Md. 75, 183 A. 555; *Robertson v. McSpadden, D. C.*,46 F. 2d 702; *United States v. Williams,* 302 U.S. 46, 50, 58 S.Ct. 81, 82 L.Ed. 39."

In *Wissner v. Wissner,* 338 U.S. 655, 94 L.Ed. 424, after the death of an Army officer, the proceeds of his National Service Life Insurance policy were paid by the Veterans' Administration to his mother, whom he had named as principal beneficiary. His widow, claiming to be entitled, under state community property law, to one-half of these proceeds, obtained a judgment in her favor for that amount in the state courts of California. On appeal to the Supreme Court of the United States, the Court in reversing the lower court, said: "It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand."

Counsel for the respective parties have filed excellent and exhaustive briefs. However, no case has been cited by the appellant and we have found none, in which the facts are similar to those in the instant case where the judgment has been upheld if contrary to the judgment entered below.

The judgment of the court below is

Affirmed.

WILLIAM B. THOMPSON v. ALD, NEW YORK, INC.

(Filed 20 September, 1961.)

1. Contracts § 12—

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

2. Master and Servant § 10—

Where an employee without prior notice to the employer decides to go into business for himself, ceases to engage in the activities of the employment and engages in activities relating solely to his personal business venture, the acts of the employee constitute an abandonment of his employment contract, and the employer, upon being advised of the facts, is entitled to treat the contract of employment as having been terminated by the employee.

3. Master and Servant § 9—

Where a sales agent, employed on salary and commissions to sell equipment for a particular business, decides to go into the business himself, ceases his activities pursuant to the employment and engages solely in activities to set up his personal business, and thereafter purchases the equipment for the business from the employer, the employee is not entitled to commission on the equipment sold to himslf, since commissions on such sale is not contemplated in the contract of employment and the employee had terminated and abandoned the employment prior to the purchase of the equipment.

4. Principal and Agent § 4—

A statement of an agent constituting an admission against the interest of the principal is not competent against the principal until the authority of the agent to bind the principal in regard to the matter is shown.

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

APPEAL by plaintiff from *Bone, J.*, February, 1961, Term, of BEAUFORT.

Plaintiff alleges that, as salesman for defendant, he sold *to himself* at the price of $18,716.85 certain automatic Laundromat equipment; that he is entitled to a commission of 5% on said sale price, *alleged to be* $925.93; and that he is entitled to recover from defendant the sum of $773.61, to wit, $925.93 less $152.32 theretofore paid by defendant to plaintiff as salary.

The only evidence was that offered by plaintiff. It tends to establish the facts narrated below.

Prior to Monday, October 5, 1959, plaintiff was engaged in business in Washington, N. C., as an insurance agent. On that date, in accordance with the terms of a written contract, plaintiff was employed

by defendant to sell Westinghouse automatic Laundromat equipment. He was *to be assigned* a territory in eastern North Carolina.

The employment contract, in the form of a letter from defendant's Chicago office, was executed in behalf of defendant by A. A. McCarley, "Vice President of Sales." It was signed by plaintiff on October 5, 1959. After signing the contract, plaintiff, on October 5th, went to Raleigh, N. C., and reported to Mr. Gerald DeBoer, defendant's North Carolina Sales Manager. Plaintiff spent that week in Raleigh, working out of the Raleigh office with DeBoer and another salesman, "just learning the general conditions of the business, did not make any sales, did not try to, just picked up ideas." He went to his home in Washington on Saturday, October 10th. On Sunday, October 11th, he went back to Raleigh and there "caught a plane to New York, reported to a training school at Jamaica, New York and studied at the training school for five days." The school was conducted by defendant. Mr. Dan Fitzgerald, defendant's Eastern Division Training Manager, was the instructor. Plaintiff finished his training course and returned to his home in Washington on Saturday, October 17th.

Plaintiff's expenses while attending defendant's training school, including transportation, were paid by defendant.

Plaintiff testified: "In the course of my instruction at my employer's training school I gave thought to the possible purchase of a Laundromat and different equipment." Again: "When I got home after attending the school I was completely sold on this type of business and wanted to get into it."

On Sunday, October 18th, plaintiff and his wife rode to Williamston, N. C., some twenty miles from Washington, "looking around for empty buildings." On Monday, October 19th, at Williamston, plaintiff located an "ideal building, located in a good spot, had parking space." He contacted the owner. On Tuesday, October 20th, plaintiff got "a five-year lease and a five-year option to renew the lease on that building."

After obtaining the lease, plaintiff telephoned DeBoer. Plaintiff testified: "I told him (DeBoer) I had found a location, had signed a lease and was ready to sell myself a store or the equipment to go in a Laundromat store." As a result of that conversation, DeBoer met plaintiff in Williamston on Thursday, October 22nd, at 11:00 p.m. Plaintiff testified: "He and I went over the details of the equipment I would need or wanted to buy." Again: "It was about 11:30 at night, the 22nd of October, when I finally agreed on what I wanted and signed the sales agreement covering it."

The sales agreement lists defendant as Seller, plaintiff as Buyer, and P. McElheney as Salesman. McElheney was with DeBoer and

plaintiff when the sales agreement was signed. Plaintiff testified: "I talked to him (McElheney) several hours before Mr. DeBoer arrived."

When the sales agreement was written, plaintiff stated it was his opinion he had made the sale and was entitled to the commission.

Plaintiff testified: "I recall asking Mr. DeBoer why Mr. McElheney's name appears on the sales agreement rather than mine. He told me I was not entitled to the commission on the sale, that Mr. McElheney was, that is why he put his name on the sales agreement." Again: "He (DeBoer) said no I was not entitled to the commission. I did not let that hold up making the purchase. I wanted to go into the business. I signed the agreement."

When the sales agreement was signed, plaintiff handed DeBoer a check payable to defendant for $1,000.00 as a deposit. On the 23rd and 24th of October, plaintiff made arrangement with his bank in Washington and mailed to ALD, Baltimore, a letter guaranteeing payment on sight draft in the amount of $17,716.85. Plaintiff testified: "I paid ALD, Inc. in full for the equipment. I did not deduct any commission when I made the payment."

The first piece of equipment, a small item, was delivered to plaintiff on or about November 5th. The rest of it was delivered on or before December 24th.

The employment contract provided for the payment of a base salary and expenses. If earned commission (5%) in any month exceeded plaintiff's base salary, defendant was to pay plaintiff the amount of such excess.

Two checks, representing salary less deductions for social security and withholding, were issued by defendant to plaintiff and cashed by plaintiff, one for $69.24 and the other for $83.08. The second check was written October 19th and mailed to plaintiff from New York. Plaintiff did not recall whether he received it before or after he signed (October 22nd) the sales agreement. As indicated above, plaintiff proposes to credit the amount of these checks ($152.32) against the commission of $925.93 he alleges defendant owes him.

At the conclusion of plaintiff's evidence, the court, on defendant's motion, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Rodman & Rodman for plaintiff, appellant.
Bryan Grimes for defendant, appellee.

BOBBITT, J. Plaintiff signed the sales agreement, designating plaintiff as Buyer and P. McElheney as Salesman, after he had been advised positively by DeBoer that he (plaintiff) was not entitled to the com-

mission. Thereafter, plaintiff received the equipment and paid the full purchase price therefor. Whether these facts, if they had been properly pleaded, would be sufficient to estop plaintiff from asserting a claim for commission, need not be decided or discussed.

The basic question is whether, independent of estoppel, plaintiff was entitled to a commission on the sale price of the equipment he purchased from defendant.

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Stacy, C.J.*, in *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295; *DeBruhl v. Highway Commission*, 245 N.C. 139, 145, 95 S.E. 2d 553, and cases cited. The sufficiency of plaintiff's evidence is to be tested in the light of this well-settled legal principle.

Clearly, when they entered into the contract of October 5th, both plaintiff and defendant contemplated and intended that plaintiff was employed, as a salesman, to sell equipment to third parties. It was not contemplated or intended that plaintiff would go into the automatic Laundromat business and purchase equipment from defendant incident to the establishment thereof. Indeed, the contract of October 5th provides: "For so long as his employment may continue, no sales representative or person in the employ of ALD, Inc., or ALD New York, Inc. may own or have any interest in an automatic laundry store nor may he own nor have any interest in any laundry equipmet, coin metered or otherwise, which may be made available for use of customers in private or public housing of whatever type."

Plaintiff did not make or attempt to make a sale of automatic Laundromat equipment to any third party during the two weeks he acted under defendant's instructions. The training he received at defendant's expense during this period was to prepare him to do so. But, when he returned from New York on Saturday, October 17th, plaintiff was "completely sold" on the automatic Laundromat business and "wanted to get into it." Having made this decision, plaintiff acted promptly. By Tuesday, October 20th, he had leased the building in Williamston. Thereupon, he notified DeBoer of his decision to go into the automatic Laundromat business and that he had obtained the lease. On Thursday, October 22nd, in Williamston, plaintiff purchased the equipment from defendant in accordance with the sales agreement.

Plaintiff testified he received no notice from defendant with reference to the termination of his contract. But plaintiff, without prior notice to defendant, made his decision to enter the automatic Laundromat business; and from Sunday, October 18th, plaintiff was engaged in

activities relating solely to his personal business venture. In our view, plaintiff's said decision and activities were wholly inconsistent with the purpose for which he was employed and constituted an abandonment by him of his employment contract; and, when advised of plaintiff's said decision and activities, defendant was fully justified in treating the contract as having been terminated by plaintiff. "An employee who refuses to serve or voluntary abandons his employer's service, terminates the employment, or, at least, the employer is authorized to rescind the contract and refuse longer to be bound by it." 56 C.J.S., Master and Servant § 40.

Having so terminated his contract of employment, plaintiff had no right to commission on account of any sale thereafter made; and on October 22nd, when the sales agreement was executed, plaintiff's true status was that of purchaser from defendant rather than salesman for defendant.

Plaintiff offered a letter dated October 29, 1959, from plaintiff to Mr. Dan Fitzgerald, containing, *inter alia*, this statement: "About the fourth day of this school, I asked you if I sold myself a store would I get the commission on the sale. Your exact reply was, 'Yes Sir, you sure do.' " The evidence fails to show any authority on the part of Fitzgerald, defendant's Eastern Division Training Manager, to enter into any agreement on behalf of defendant in relation to plaintiff's contract of employment. If the remark attributed to Fitzgerald is considered an expression of a legal opinion, such opinion is not in accord with the views of this Court.

Being of opinion (1) that the contract did not contemplate the payment of a commission by defendant to plaintiff on a purchase of equipment by plaintiff from defendant incident to plaintiff's withdrawal from defendant's employment and his establishment of an automatic Laundromat business, and (2) that the decision and activities of plaintiff constituted an abandonment and termination by plaintiff of his employment contract prior to his negotiations with DeBoer and his purchase of equipment from defendant, the judgment of involuntary nonsuit is affirmed.

Affirmed.

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

HALL *v.* CARROLL AND MOORE *v.* CARROLL.

MATTIE ESTELLE HALL, ADMINISTRATRIX OF THE ESTATE OF LILLIE MAE HALL, PLAINTIFF

v.

HARRY CARROLL, DEFENDANT AND JOHN H. SINGLETON AND ULYSSES MOORE, ADDITIONAL DEFENDANTS

AND

ROBERTA McMILLIAN MOORE, ADMINISTRATRIX OF THE ESTATE OF JAMES ARTHUR McMILLIAN, PLAINTIFF

v.

HARRY CARROLL, DEFENDANT AND JOHN H. SINGLETON AND ULYSSES MOORE, ADDITIONAL DEFENDANTS.

(Filed 20 September, 1961.)

1. Trial § 18—

Upon motion to nonsuit, the function of the court is to determine only whether the facts and circumstances in evidence, considered in the light most favorable to the plaintiff, tend to make out and sustain the cause of action alleged in the complaint.

2. Trial § 22—

Contradictions in the testimony go to its weight, which is for the jury, and therefore do not justify nonsuit.

3. Automobiles § 48—

If the negligence of the driver of one car is a proximate cause of a collision between two other vehicles, a passenger in one of the colliding vehicles may hold such driver liable even though negligence on the part of either or both of the drivers of the colliding vehicles join and concur in producing the injury.

4. Negligence § 7—

There may be more than one proximate cause of an accident and injury.

5. Automobiles § 9—

The stopping of an automobile upon the highway without giving any signal either by hand or by device approved by the Department of Motor Vehicles, when the operation of any other vehicle may be affected by such movement, is negligence. G.S. 20-154.

6. Same—

Where the evidence discloses that a vehicle stopped on a highway some distance before reaching an intersection at which a blinker light was maintained, it is for the jury to say whether the blinker light was close enough to relieve the driver of the car of the duty to give proper signal of his intention to stop on the highway.

7. Automobiles §§ 41a, 43— Whether stopping without signal was proximate cause of collision between two other vehicles held for jury.

The evidence disclosed that the car in which plaintiffs' intestate was

a passenger followed the car operated by the appealing defendant for a distance of some two miles upon a wet and slippery highway, that the appealing defendant suddenly stopped his car without giving any signal of his intention to do so, that the driver of the car in which intestate was riding applied his brakes, skidded to the left across the other lane of the highway, and crashed head-on into a vehicle which approached from the opposite direction. *Held:* The evidence is sufficient to be submitted to the jury on the question of the appealing defendant's negligence as a proximate cause of the injury notwithstanding that his car did not come in contact with either of the colliding vehicles and notwithstanding any negligence on the part of the drivers of the colliding vehicles.

APPEAL by plaintiffs from *Campbell, J.*, February, 1961, Civil Term, BUNCOMBE Superior Court.

These civil actions, each for wrongful death, grew out of an automobile accident which occurred near the town of Fletcher in Henderson County about 7:00 a.m. on November 17, 1956. The cases were consolidated and tried together. At the close of the plaintiff's evidence the court granted Harry Carroll's motions for involuntary nonsuit. From the judgments dismissing the actions as to him, the plaintiffs appealed.

S. Thomas Walton, for plaintiffs, appellants.

Van Winkle, Walton, Buck and Wall, By Herbert L. Hyde, for defendant, appellee.

HIGGINS, J. These cases have been considered on previous appeals. They are reported in 249 N.C. 287, 106 S.E. 2d 214, and 253 N.C. 220, 116 S.E. 2d 459. The plaintiffs now seek to have the Court reverse the judgments of involuntary nonsuit entered in the superior court at the close of the plaintiffs' evidence. The present appeals pose these questions of law: (1) Did the trial court have before it any substantial evidence of facts and circumstances from which, viewed in the light most favorable to the plaintiffs, negligence on the part of Harry Carroll may reasonably be inferred? (2) If so, was such negligence the proximate cause, or one of the proximate causes of the fatal accident? *Peeden v. Tait*, 254 N.C. 489, 119 S.E. 2d 450; *Price v. Gray*, 246 N.C. 162, 97 S.E. 2d 844.

The court determines whether the facts and circumstances in evidence have probative value on the material issues involved; that is, when taken in the light most favorable to the plaintiff do they tend to make out and sustain the cause of action alleged in the complaint? An affirmative answer by the court to this preliminary question sends the case to the jury. *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330. The

jury weighs the evidence. Consequently, contradictions in the testimony involve weight and do not justify nonsuit. *Maddox v. Brown,* 232 N.C. 244, 59 S.E. 2d 791.

Roberta McMillian Moore testified as a witness for the plaintiffs. Here, summarized in part and quoted in part, is her testimony: The witness and her husband, James Moore, were riding in the back seat of an Oldsmobile owned and driven by Ulysses Moore. Riding with Moore in the front seat were James Arthur McMillian and Lillie Mae Hall. They left Asheville about 7:00 a.m. on November 17, 1956, on Highway 25, intending to go to Greenville, South Carolina. Light rain was falling. The surface of the road was wet and slippery. For a distance of about two miles immediately prior to the accident the Moore Oldsmobile followed a Ford driven by the defendant Harry Carroll. The distance between the vehicles — three or four car lengths — and the speed — 35 to 40 miles per hour — remained constant. "As we approached the point of collision I observed the Harry Carroll car traveling in front . . . He stopped suddenly in front of Ulysses Moore's car without giving any signal at all. When I say he gave no signal at all, I was looking at the Harry Carroll car. . . . In reference to any hand signal, I did not observe any, no hand signal. I could see the light fixtures on his car clearly. No, not any tail lights came on . . . When he stopped suddenly in front, . . . Ulysses Moore applied his brakes, his car began to skid to the left over across into the other lane . . . When that occurred, that is when they all crashed. When the crash came the Harry Carroll car was in the west lane right side of Ulysses Moore's car . . . As Harry Carroll approached the driveway that is shown on the chart, he suddenly stopped . . . No, sir, he was not giving any mechanical signal of his intention, none whatever. I did not see Mr. Carroll give a hand signal. I say that when Harry Carroll came to a sudden stop Ulysses Moore applied his brakes."

The Oldsmobile driven by Moore skidded into the left lane and crashed head-on into the Singleton truck. Lillie Mae Hall was killed instantly. James Arthur McMillian died the day following the accident. Neither Moore's Oldsmobile nor Singleton's truck came in actual contact with Carroll's Ford. If Carroll was negligent in failing to give Moore a proper signal of his intention to stop on the highway, and that negligent failure was the proximate cause, or one of the proximate causes of the accident and the injury, in that event Carroll would be liable to guest passengers in Moore's Oldsmobile even though negligence on the part either of Moore or of Singleton, or of both, joined and concurred with his negligence in producing the injury. There may be more than one proximate cause of accident and injury. *Lamm v. Gardner,* 250 N.C. 540, 108 S.E. 2d 875; *Price v. Gray, supra; Bullard*

v. Ross, 205 N.C. 495, 171 S.E. 789. The weather — rain — and the condition of the highway — wet and slippery — would tend to increase the vigilance required of each driver in the use of the highway. "Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. *Leary v. Bus Corp.,* 220 N. C. 745, 18 S.E. 2d 426. It is stopping without giving a signal by hand and arm 'or any approved mechanical or electrical signaling device' approved by the Department of Motor Vehicles *whenever the operation of any other vehicle may be affected by such movement.* G.S. 20-154 (sec. 116, ch. 407, Public Laws 1937)." *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

There was evidence in the record the accident occurred (1) at the entrance to a driveway into a private dwelling, (2) at or near the entrance to a road to the airport, and (3) at some undisclosed distance north of a blinker light at an intersection. It was for the jury to say whether the blinker light was close enough to relieve Carroll of the duty to give the signal of his intention to stop in the road.

The evidence in the light most favorable to the plaintiff, disregarding the inconsistencies and conflicts, presents issues of fact for jury determination. We have examined the cases cited by appellee in support of his argument that nonsuit was required. They present factual situations which are readily distinguishable from the instant cases. The defendant, of course, will have opportunity at the trial to establish any proper further defenses set up in answers.

The judgments of nonsuit are

Reversed.

EDWARD WILSON, SR. v. TOM BRIGHT AND WIFE, BERTIE H. BRIGHT
AND
ED WILSON, JR., BY HIS NEXT FRIEND, A. D. WARD v. TOM BRIGHT AND WIFE, BERTIE H. BRIGHT.

(Filed 20 September, 1961.)

1. Trial § 26—

The allegations were to the effect that infant-plaintiff was riding his bicycle on his right side of the road and the evidence was to the effect that the child was astride his bicycle reaching to pick up his shoe, and the evidence was confused as to whether the child was on the right or the extreme right of the road or whether he was near the center. *Held:* The variance relates to mere detail and is insufficient to warrant nonsuit. G.S. 1-168.

2. Automobiles § 42m; Negligence §§ 11, 26—

A nine year old boy is rebuttably presumed incapable of contributory negligence, and therefore nonsuit may not be entered on the ground of his contributory negligence.

3. Trial § 21—

Evidence of defendant in conflict with that of plaintiff may not be considered on the question of nonsuit.

4. Automobiles §§ 13, 41j—

Evidence tending to show that defendant's car skidded for some 30 feet in a straight line on a dirt road and then skidded sidewise some 15 steps is sufficient to permit an inference of negligence in operating the vehicle in such manner as to cause the sidewise skid.

5. Automobiles § 41m—

Evidence that the driver of the car travelling along a dirt road some 18 feet wide, skidded in a straight line some 30 feet and then sidewise some 15 steps, hitting a child on his bicycle just after the child had entered the road from an intersecting 10-foot lane, with physical facts permitting the inference that the car struck the boy in its skid sidewise, *is held* sufficient to take the case to the jury on the issue of the driver's negligence.

APPEAL by defendants from *Cowper, J.*, February, 1961, Civil Term, CRAVEN Superior Court.

These civil actions were consolidated and tried together. They involve the personal injury to Ed Wilson, Jr., as the result of a collision between his bicycle and the Plymouth automobile owned by defendant Tom Bright and driven by his wife, the defendant Bertie H. Bright. Ed Wilson, Sr., instituted the first action to recover the medical and hospital expenses incurred in the treatment of his minor son's injuries. Ed Wilson, Jr., by his Next Friend, instituted the second action to recover damages for his personal injuries.

The pleadings raise issues of negligence, contributory negligence, and damages. After hearing the evidence offered by both parties, the jury found all issues in favor of the plaintiffs and awarded Ed Wilson, Sr., $2,082.36 and Ed Wilson, Jr., $2,000. The defendants made timely motions for judgments of involuntary nonsuit and excepted to the court's refusal to allow them. From judgments on the verdicts, the defendants appealed.

Kennedy W. Ward, for plaintiffs, appellees.

Whitehurst & Henderson, By R. E. Whitehurst, for defendants, appellants.

HIGGINS, J. This appeal presents identical questions in each case:

(1) Is there a fatal variance between the allegations and the proof? (2) Was the evidence sufficient to survive the motions for nonsuit?

The complaints allege that Mrs. Bright operated the Plymouth over a dirt road carelessly and negligently at an excessive rate of speed and in such manner as to endanger the plaintiff; that she failed to keep the vehicle under proper control and failed to keep a proper lookout when she knew, or should have known, that children were accustomed to play on the road. The defendants contend the evidence fails to support the allegations of the complaint in that, "the infant-plaintiff claims to have been on his right side of the road riding a bicycle headed east, when the plaintiff's own evidence showed the plaintiff to have been standing on his extreme right-hand side of the road looking for a shoe and not observing traffic when he was injured. Additional evidence of the plaintiff . . . shows the infant plaintiff to have been on or near the center of the road at the time of the impact."

The evidence of the parties fixes the scene of the accident near the point where a path or lane ten feet wide made a T-intersection into a rural dirt road 18 feet wide. Ed Wilson, Jr., on his bicycle, entered the dirt road from the lane at this T-intersection. Whether at the time of impact he was pedaling his bicycle, had stopped it to pick up his shoe, was on the right, or on the extreme right of the road, or whether he was at or near the center, are matters of mere detail insufficient to constitute a fatal variance. G.S. 1-168; *Litaker v. Bost*, 247 N.C. 298, 101 S.E. 2d 31; *Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561; *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844.

In passing on the sufficiency of the evidence to go to the jury, we need not consider contributory negligence. At the time of the accident the infant plaintiff was nine years of age. Consequently, whether he was capable of contributory negligence presented a jury question with the rebuttable presumption that he was incapable. Nonsuit on the ground of contributory negligence was not permissible. *Adams v. Board of Education*, 248 N.C. 506, 103 S.E. 2d 854; *Walston v. Greene*, 247 N.C. 693, 102 S.E. 2d 124.

The minor plaintiff testified he rode his bicycle from his aunt's home down the road, then over the path or lane to the church and back to the dirt road. "I had just entered and started to turn around when my shoe came off. I was on the right-hand side of the road. The last thing I remember was reaching for my shoe."

W. D. Parrish, Highway Patrolman, testified: "I found a 1955 Plymouth which had been heading west, sitting with the front end in the ditch heading south, on the left side of the road. . . . I found a bicycle lying on the right side of the car torn up. . . . I found skid

marks for approximately . . . 30 feet; they were going in a straight line, then into a side skid . . . it looked as if about the time she got into the complete side skid, she hit the bike; after that the car went for 15 more steps into a side skid. . . . I would say the car was skidding down in the center of the road, and the bike was struck on the right front of the car. . . . The point of impact was just slightly east or north directly in front of the path; was more to the car's left side . . . either near the center or maybe some . . . to the left of it . . . left of the center of the road."

Mrs. Bright testified: "Just before I got to the path, I would say half a car's length — I saw the little boy ride out in front of the car. . . . He won't at any particular place I mean on the road . . . he was just riding, pedalling his bike . . . there was no other traffic that day."

There were other circumstances detailed in the evidence more or less bearing on the accident. Evidence favorable to the defendant was for jury consideration. We are not permitted to consider it on the question of nonsuit. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

The evidence in its entirety paints a somewhat confused picture. Mrs. Bright's testimony as to the point of impact and the distance she traveled after she saw the boy "pedalling his bike," (half a car's length) is at variance with the physical facts as testified to by the patrolman. The evidence permits the inference that the Plymouth in its skid sidewise struck the boy. It seems obvious that a Plymouth automobile in a sidewise skid on a road 18 feet wide left very little room by which a boy on a bicycle might escape. Operating the vehicle in such manner as to cause the sidewise skid permits an inference of driver negligence. The evidence and the permissible inferences from it are sufficient to take the case to the jury and to support the verdicts. *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205; *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560; *Austin v. Austin,* 252 N.C. 283, 113 S.E. 2d 553.

After hearing the evidence and the court's charge, to which there was no objection, the jury resolved the controversy in favor of the plaintiffs. In the trial we find

No error.

RAY J. BRIDGES, BY HIS NEXT FRIEND MARY ELLEN BRIDGES, v. ALBERT T. JACKSON.

(Filed 20 September, 1961.)

1. Trial § 20—

By introducing evidence the defendant waives his motion for judgment as of nonsuit at the close of plaintiff's evidence. G.S. 1-183.

2. Trial § 57; Appeal and Error § 51—

Where, in a trial by the court under agreement of the parties, appellant has no exception to the admission or rejection of evidence or to the findings of fact, his motion for nonsuit at the close of all of the evidence does not present for review the sufficiency of the evidence to warrant recovery.

3. Appeal and Error § 21—

A sole exception to the signing of the judgment presents only whether the facts found support the judgment and whether error of law appears on the face of the record.

4. Trial § 57—

In a trial by the court under agreement of the parties the court is required to find only the ultimate facts and not the evidentiary or subsidiary facts.

5. Automobiles § 6—

Findings to the effect that defendant was operating his automobile at a speed greater than was reasonable and prudent under the circumstances and that he approached a sharp curve with which he was unfamiliar at a speed of from 45 to 50 miles per hour, are sufficient predicate for the conclusion of negligence, since such findings amount to findings of violations of G.S. 20-141(a) and G.S. 20-141(c), and the violation of a safety statute is negligence *per se*, unless otherwise provided in the statute.

6. Automobiles § 41a—

Findings to the effect that defendant violated certain safety statutes and failed to keep a proper lookout in the direction of travel, and also failed to keep his vehicle under proper control, with further findings to the effect that plaintiff-passenger's injuries, received when the vehicle ran off the road, were proximately caused by such negligence, are sufficient to support judgment in plaintiff's favor.

APPEAL by defendant from *Clarkson, J.*, January 1961 Term of RUTHERFORD.

Civil action to recover damages for personal injuries received while riding as a passenger in an automobile owned and driven by defendant.

Pursuant to the provisions of G.S. 1-184 the parties waived a jury trial, and the trial judge, pursuant to the provisions of G.S. 1-185, rendered a written decision containing a statement of the facts found and conclusions of law separately, and awarding plaintiff damages in

the amount of $2,054.66 together with the costs. The judgment further provided that from the recovery the clerk of the superior court should pay specified hospital and medical bills for plaintiff totalling $514.66.

From the judgment defendant appeals.

C. O. Ridings and Jack M. Freeman By: C. O. Ridings for plaintiff, appellee.

Hamrick & Hamrick for defendant, appellant.

PARKER, J. When the defendant introduced evidence, he waived his motion for judgment as of nonsuit made at the close of plaintiff's evidence. G.S. 1-183. Defendant's exception to the denial of his motion for judgment as of involuntary nonsuit made at the close of all the evidence presents no question for review with respect to the findings of fact or the conclusions of law, for the simple reason that he has no exception to the admission or rejection of evidence and to the judge's findings of fact and conclusions of law, and, therefore, the findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759; *Beaver v. Paint Co.*, 240 N.C. 328, 82 S.E. 2d 113.

However, defendant's exception to the signing of the judgment presents these questions for decision: One, do the facts found by the trial judge support the judgment, and two, does any error of law appear upon the face of the record? *Goldsboro v. R. R., supra; Bailey v. Bailey*, 243 N.C. 412, 90 S.E. 2d 696; *Bond v. Bond*, 235 N.C. 754, 71 S.E. 2d 53.

G.S. 1-185 "requires the trial judge to find and state the ultimate facts only," and not the evidentiary or subsidiary facts required to prove the ultimate facts. *Woodard v. Mordecai*, 234 N.C. 463, 67 S.E. 2d 639.

The trial judge, after hearing the evidence, found as facts from the evidence and by its greater weight, that the plaintiff was injured by the negligence of the defendant, in that the defendant was operating his automobile "at a speed that was greater than reasonable under the circumstances, he being on Old #221 approaching a sharp curve which he was unfamiliar with and driving at a speed of from 45 miles per hour to 50 miles per hour, and that he failed to keep a proper lookout, failed to keep his car under proper control, and failed to drive at a speed that was reasonable and proper under the circumstances," and that such negligence of the defendant was the proximate cause of plaintiff's injuries. The trial judge further found as facts that by reason of defendant's actionable negligence plaintiff received a fractured skull

and other injuries, incurred medical and hospital expenses in the amount of $554.66, and lost eleven weeks from work for which he was being paid $40.00 a week. (The trial judge in his judgment directed the clerk to pay from the recovery specified medical and hospital bills in the amount of $514.66.) The trial judge concluded as a matter of law that plaintiff's injuries were caused by defendant's actionable negligence. Whereupon, the trial judge entered judgment that plaintiff recover from defendant for his injuries received the sum of $2,054.66 together with the costs.

It is alleged in the complaint and admitted in the answer that plaintiff was riding as a passenger in an automobile owned and driven by the defendant, and that about 2:00 o'clock a.m. defendant's automobile ran off the road and struck "the bank."

The findings of fact are to the effect that defendant was driving his automobile in violation of G.S. 20-141(a) and of G.S. 20-141(c), and this constitutes negligence on his part, because "according to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se*," unless otherwise provided in the statute. *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740; *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331. The findings of fact are also to the effect that the defendant failed to perform his positive duty to keep a proper lookout in the direction of travel, *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330, and to keep his automobile under such proper control as would enable him to keep it on the road. *Lane v. Dorney*, 252 N.C. 90, 113 S.E. 2d 33.

The findings of fact are that there was a causal connection between the injuries received by plaintiff and the defendant's negligence in the operation of his automobile, or in other words that plaintiff's injuries were proximately caused by defendant's negligence in the operation of his automobile.

The findings of fact of the trial judge are very meager, but after careful consideration we conclude they suffice to show that plaintiff's injuries were proximately caused by the defendant's negligence, and, therefore, the facts found support the judgment. *Boyd v. Harper*, 250 N.C. 334, 108 S.E. 2d 598; *Conley v. Pearce-Young-Angel Co., supra.*

No error of law appears upon the face of the record.

The judgment below is

Affirmed.

ROBERT MOORE, IRENE MOORE, MARTHA MANN, WILLIAM MANN, ALICE McNAIR, ARTHUR McNAIR, WILLIAM MOORE, BESSIE MOORE, HATTIE GEE, ALEXANDER GEE v. EDWARD L. OWENS, TRUSTEE, AND A. LLOYD OWENS.

(Filed 20 September, 1961.)

1. Appeal and Error § 24—

An assignment of error to peremptory instructions given by the court in favor of defendant and an assignment of error to the refusal of the court to give peremptory instructions in favor of plaintiff will not be considered when there is no exception supporting the assignments of error and no prayer for special instructions.

2. Appeal and Error § 19—

An assignment of error not supported by an exception is ineffectual.

3. 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, and this includes whether the judgment is regular in form and supported by the verdict.

4. Same—

Where the verdict is certain and imports a definite meaning free from ambiguity and is sufficient in form and substance to support the judgment, which is definite in terms and regular in form, a sole exception to the signing of the judgment cannot be sustained.

APPEAL by plaintiffs from *Bone, J.*, April 1961 Civil Term of WASHINGTON.

Civil action to restrain the sale by the trustee of land under a deed of trust on the alleged ground that such a sale under the deed of trust is barred by G.S. 45-21.12(a).

The jury found by its verdict that foreclosure under the power of sale contained in the deed of trust from Stewart Moore, Jr., to Edward L. Owens, Trustee, was not unlawful and forbidden by G.S. 45-21.12, that the deed of trust from Stewart Moore, Jr., to Edward L. Owens, Trustee, is conclusively presumed to have been complied with or the debt secured thereby paid as against the plaintiffs Robert Moore and Irene Moore, as to a part of the land conveyed to them by Stewart Moore, Jr., and that the said deed of trust is not conclusively presumed to have been complied with or the debt thereby secured paid as to the lands described in the complaint other than the lands conveyed by Stewart Moore, Jr., to Robert Moore and wife, Irene Moore.

The court entered judgment upon the verdict that the deed of trust from Stewart Moore, Jr., to Edward L. Owens, Trustee, dated 27 April 1927, registered in the register of deeds' office of Washington County in Book 74, page 430, is still valid and subsisting, and is a lien according to its terms upon the land therein described and conveyed,

save and except the portion thereof conveyed by Stewart Moore, Jr., to Robert Moore and Irene Moore by deed dated 10 June 1957, and registered in the register of deeds' office of Washington County in Book 181, page 475, from which portion of land the lien of the deed of trust was discharged by presumption arising under the provisions of G.S. 45-37, subsection 5, and that the defendants Edward L. Owens, Trustee, and A. Lloyd Owens, owner of the debt secured by the deed of trust, have a right to foreclose the deed of trust and exercise the power of sale therein according to its terms, except as to the part of the land which was conveyed by deed from Stewart Moore, Jr., to Robert Moore and Irene Moore. The judgment further provided that the order before entered restraining the exercise of the power of sale is vacated, except as to the part of the land conveyed by deed from Stewart Moore, Jr., to Robert Moore and Irene Moore, and as to such part of the land, the order before entered is made permanent. The judgment ordered the defendants to pay the costs.

From the signing of the judgment plaintiffs, other than Robert Moore and Irene Moore, appeal.

Charles V. Bell and Peter H. Bell for plaintiffs, appellants.
Bailey & Bailey and W. M. Darden for defendants, appellees.

PARKER, J. Appellants have two assignments of error: One, the court committed error in refusing to charge the jury as a matter of law, to answer all the issues in favor of plaintiffs and against defendants, Two, the court committed error in charging the jury peremptorily to answer the first and third issues No. These two assignments of error are not supported by any exception anywhere in the record, not even under the assignments of error. Plaintiffs tendered to the court no prayer for instructions.

This Court has universally held that an assignment of error not supported by an exception is ineffectual. Exceptions which appear nowhere in the record except under the assignments of error are worthless and will not be considered on appeal. *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223, and cases there cited; *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E. 2d 926; *Tynes v. Davis*, 244 N.C. 528, 94 S.E. 2d 496; *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118; *In re McWhirter*, 248 N.C. 324, 103 S.E. 2d 293; *S. v. Corl*, 250 N.C. 262, 108 S.E. 2d 613; *Tanner v. Ervin*, 250 N.C. 602, 109 S.E. 2d 460; *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1.

This Court said in *Rigsbee v. Perkins, supra:* "And the rule is that only an exception previously noted in the case on appeal will serve to

present a question of law for this Court to decide." Further discussion is unnecessary.

An exception to a judgment raises the question whether any error of law appears on the face of the record. This includes the question whether the facts found and admitted are sufficient to support the judgment, or whether the judgment is regular in form and supported by the verdict. *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; Strong's N. C. Index, Vol. I, Appeal and Error, Section 21, page 91 *et seq.,* where numerous cases are cited.

This Court said in *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422: "Plaintiff's exceptions and assignments of error only suffice to challenge the correctness of the judgment. . . . If the answers to the issues, when correctly interpreted, are sufficient in law to support the judgment, plaintiff must fail in his appeal; but if, when so interpreted, they fail to support the judgment, it must be vacated in order that the rights of the parties may be adjusted in accordance with law."

The issues submitted to the jury arise upon the pleadings and the evidence. The verdict here is certain, imports a definite meaning free from ambiguity, and is sufficient in form and substance to support the judgment entered, which is definite in terms, capable of execution, and regular in form. No error of law appears on the face of the judgment. The sole exception in the record is to the signing of the judgment.

The judgment below is

Affirmed.

IN RE ALBEMARLE DRAINAGE DISTRICT, BEAUFORT COUNTY NO. 5.

(Filed 20 September, 1961.)

1. Drainage § 3—

Drainage districts are quasi-municipal corporations, and the boundaries of a district can be altered only as permitted by statute.

2. Same—

Under G.S. 156-62(4) and G.S. 156-65 all lands which may be benefited must be included within the boundaries of the drainage district, and therefore lands lying outside of the boundaries may not be assessed with any portion of the cost of repairing and maintaining improvements originally authorized, G.S. 156-118 *et seq.,* notwithstanding that the board of viewers had recommended that the boundaries of the district be enlarged so as to include the lands in question, there being no statutory authority for enlarging the boundaries of the district prior to the effective date of Ch. 614, Session Laws 1961.

IN RE DRAINAGE DISTRICT.

APPEAL by Albemarle Drainage District, Beaufort County No. 5, from *Bone, J.*, February 1961 Term of BEAUFORT.

John A. Wilkinson for petitioner appellant.
Rodman & Rodman for respondents Taylor.

RODMAN, J. This is an adversary proceeding between Albemarle Drainage District, Beaufort County, No. 5, hereafter called petitioner, and J. T. Taylor, Jr. and wife, Dora Taylor, hereafter called respondents. Ignoring the requirments of our rules Nos. 19 and 20, the parties have omitted from the record the pleadings filed by petitioner stating the facts on which the court was expected to act and the relief sought. Instead they stipulated: "The Albemarle Drainage District, Beaufort County No. 5, was duly and validly organized on the 22nd day of June, 1917, and the same functioned for a number of years. That thereafter, by Petition and Order, the said District was reactivated on the 25th day of October, 1958. That proceedings were duly and properly commenced for the levying of assessments to pay for a proposed sale of bonds . . ."

From the stipulations it appears that petitioner came into being in 1917 pursuant to the provisions of subchapter 3 of c. 156 of the General Statutes entitled "Drainage Districts." These statutory provisions permit a majority of the resident landowners or the owners of three-fifths of all the land within a drainage basin to file a petition with the Superior Court for the establishment of a drainage district authorized to construct canals and drains and to levy assessments for the benefits accruing. G.S. 156-56. Upon the filing of such petition the court is required to appoint disinterested viewers and an engineer to investigate and report upon the practicability of the proposed improvement. They are specifically required to report "whether or not all lands that are benefited are included in the proposed drainage district." G.S. 156-62(4). Upon the filing of the report, notice is given to interested parties and a hearing is held. G.S. 156-64. The court has no authority to decree the establishment of a drainage district which does not include within its boundaries all lands benefited by the work to be done. It must enlarge the boundaries to include all such land. G.S. 156-65.

Lands within the boundaries of a district are classified according to benefits to be received and assessed their proportionate part of the cost of the work to be done. G.S. 156-71. After the district has been created, its affairs are managed by a board of commissioners appointed by the court or elected by the property owners. G.S. 156-81. It is the duty of the commissioners to keep the drains and works of the district

in good repair. For this purpose they are authorized to levy assessments on the properties within the district benefited by the repairs. G.S. 156-92. If the cost of repairs and improvements exceeds an annual levy of $1 per acre, the drainage commissioners, upon application to the court, may obtain authority to issue bonds to pay for the cost of the improvements and repairs. G.S. 156-118, 119.

The stipulation that the district was "reactivated" in 1958 and proceedings were had for the levying of assessments to pay for the sale of a proposed bond issue necessarily implies that the bonds were to be issued to pay the cost of (a) the original construction, G.S. 156-97, or (b) for the repairs and maintenance of the improvements originally authorized, G.S. 156-118 *et seq.* Additional stipulations with respect to work to be done make it clear that the bonds proposed to be issued and the assessments to be made for payment thereof were sought pursuant to the provisions of G.S. 156-118.

The board of viewers appointed as directed by G.S. 156-119 recommended to the court that the boundaries of petitioner be enlarged so as to include the lands of respondents and that the same be assessed with a portion of the cost of repairing and maintaining Intercepting Canal, one of the canals of petitioner.

Respondents' land was a part of a large area owned by John L. Roper Lumber Company, one of the petitioners, in 1917, seeking the creation of the district. A part of its lands was included within the boundaries of petitioner, but the part now owned by respondents was excluded.

The viewers appointed on the petition to repair, acting upon the mistaken assumption that respondents desired to have their lands included within the boundaries of the district because of the benefits which would accrue to them, so recommended, fixing the amount which the lands of respondents should be assessed for the repairs. Respondents, being informed of the proposed assessment of their lands, excepted to the report of the board of viewers, insisting that no benefits would accrue to them, that they did not wish to become a party to the proceeding, and the court was without authority to levy an assessment against their lands for the improvement or maintenance of the drains of petitioner. The clerk confirmed the report. Respondents appealed to Judge Bone, who sustained respondents' exceptions.

Drainage districts created pursuant to the provisions of sub-chapter 3 of our drainage law are quasi-municipal corporations. *Newby v. Drainage District,* 163 N.C. 24, 79 S.E. 266; *Davenport v. Drainage District,* 220 N.C. 237, 17 S.E. 2d 1; *Nesbit v. Kafer,* 222 N.C. 48, 21 S.E. 2d 903. Municipal or quasi-municipal corporations created and having their boundaries fixed by statutory formula can alter their

boundaries only as permitted by statute. *In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795; *Lutterloh v. Fayetteville,* 149 N.C. 65; *Pittsburg C., C. & St. L. Ry. Co. v. City of Anderson,* 95 N.E. 363; *City of New York v. Village of Lawrence,* 165 N.E. 836; *City of Tucson v. Garrett,* 267 P. 2d 717; 37 Am. Jur. 640; McQuillen, Municipal Corporations, 3rd ed., vol. 2, p. 288.

The Legislature, when it enacted the statute authorizing the establishment of drainage districts, made no provision for an alteration and enlargment of boundaries subsequent to the date of creation for the simple reason that the boundaries as finally determined had to include all lands benefited by the improvement, and the lands so benefited were required to be assessed for the benefits accruing. Hence no assessment could be levied either for original construction or for cost of maintenance on lands beyond the boundaries.

The right to levy such an assessment on lands excluded from the district was squarely presented and decided adversely to the contention of appellant more than thirty years ago. *Drainage District v. Cahoon,* 193 N.C. 326, 137 S.E. 185. The correctness of that decision has not heretofore been challenged. The conclusion reached in the *Cahoon* case accords with decisions of other courts in cases involving the annexation of territory. *Westerhold v. Hale,* 75 N.E. 2d 27; *In re Jefferson County Farm Drainage,* 59 N.W. 2d 655; *Glenn v. Marshall County,* 206 N.W. 802.

The 1961 Legislature, recognizing that lands not originally expected to receive benefit from works to be performed by a drainage district might, by changing conditions and the modification or enlargement and maintenance of the drains, receive benefits from work subsequently proposed to be done, made provision for the enlargement of boundaries of drainage districts. C. 614, S.L. 1961. That statute, however, was not enacted until 2 June 1961 and has no application to this litigation. In fact it repealed the very statutes under which petitioner sought authority from the court to enlarge and maintain and repair its canals. Petitioner makes no contention that its petition conforms to the requirements of that Act.

The judgment of Judge Bone dismissing the proceeding as to respondents Taylor is

Affirmed.

EDWIN G. MOORE, II, AND WIFE MARIBELLE R. MOORE v. ELIZABETH Q. PARKERSON AND MARTIN KELLOGG, JR., TRUSTEE.

(Filed 20 September, 1961.)

1. Mortgages and Deeds of Trust § 19—

Where the contract for sale of property provides that the seller should aid the purchasers in the operation of the properties, the purchasers are entitled to have monies collected by the seller as agent of the purchasers in operating the property applied to the interest due upon the note secured by deed of trust on the property, and when there is evidence that the amount thus claimed to be due by the purchasers is more than sufficient to pay all interest and principal due on the note, order continuing the temporary order restraining foreclosure is properly entered.

2. Same—

The fact that the mortgagee is solvent does not affect the mortgagor's right to have sums due by the mortgagee under contract applied to the mortgage debt so as to prevent default and preclude the operation of the acceleration clause.

3. Payment § 3—

The right of the debtor to direct the items of the indebtedness to which his payment should be credited cannot preclude the right of the creditor to apply the payment as an offset to a separate debt owed by the creditor to the debtor.

APPEAL by defendants from *Parker, J.*, January 1961 Term of DARE.

LeRoy, Goodwin & Wells for plaintiff appellees.
Forrest V. Dunstan and John H. Hall for defendant appellants.

RODMAN, J. This appeal presents for determination the validity of an order enjoining foreclosure of plaintiffs' equity of redemption in real and personal property described in a deed of trust from plaintiffs to defendant Kellogg securing payment of the balance of the purchase price owing defendant Parkerson pending ascertainment of the amount, if any, due when the property was advertised for sale.

Plaintiffs allege these facts as the basis for injunctive relief:

Plaintiffs, in May 1960, purchased from Parkerson three lots at Nags Head Shores, Dare County, on which was situated a building and cottages known as Hotel Parkerson. The sale also included linens and other personal properties used in connection with the operation of the hotel. The purchase price was $60,000; $18,000 was paid in cash, the remaining $42,000 was evidenced by note payable in ten annual installments of $4,200, the first installment being payable 6 September 1961. Interest on the debt was payable annually. The first installment of interest amounting to $665 was due 6 September 1960. Payment

of the note was secured by deed of trust to Kellogg. The deed of trust contained a provision for accelerating the time for payment upon default in payment of any portion of the interest or principal when due. As part of the transaction by which Parkerson sold and plaintiffs acquired the hotel properties, they entered into a contract by which Parkerson agreed to assist plaintiffs in the operation of the hotel. She was to devote her entire time to the performance of her duties. She was to receive a salary of $100 per week. The hotel is operated as a summer resort. When the sale was made, the hotel had already opened; Parkerson had incurred expenses in connection with the opening, and had received money from guests at the hotel. Plaintiffs agreed to reimburse Parkerson for monies expended by her in the opening of the hotel for the 1960 season, and Parkerson agreed to turn over to plaintiffs "all monies and income that she has received in connection with the operation of the hotel for the current season."

Plaintiffs allege breach of this contract by Parkerson in several particulars. Specifically they allege she was indebted to them in the sum of $926.53 collected prior to the time plaintiffs commenced operation of the hotel; she failed to account to plaintiffs for monies collected subsequent to the time plaintiffs took over the operation, and was indebted to them for the monies so collected in the sum of $989.12; Parkerson accepted guests in her private apartments across the street from the hotel, boarded them at the hotel, and failed to account for the meals furnished her guests in a sum in excess of $2,000. They allege other breaches of the contract. The aggregate of plaintiffs' claim is $9,020.54.

On 6 September, the date when the first installment of interest was payable, plaintiffs filed with Parkerson an itemized statement of their claim and demanded that she apply $665 of the amount collected for them in payment of the interest due on that date. Parkerson refused to credit the note with the amount or any part of the amounts which she collected for plaintiffs and required the trustee to advertise the property for sale.

Plaintiffs notified defendants that they would apply to Judge Morris for a restraining order. Judge Morris issued an order enjoining the sale until a hearing could be had at the regular January 1961 Term of Dare.

Defendants answered, admitting the contract and advertisement under power because of the asserted failure of plaintiffs to pay the interest on 6 September 1960, and because of such failure, the maturity of the entire debt under the acceleration provision of the deed of trust. Parkerson denied she owed plaintiffs any sum; on the contrary she asserted a counterclaim against plaintiffs for $5,236.84 for unpaid

salary and advances made by her for the benefit of plaintiffs. She alleged she was solvent and able to respond in damages for any amount that she might be found to be owing to plaintiffs.

At the hearing before Judge Parker, plaintiffs, maintaining their right to require Parkerson to apply the monies owing them on the interest which accrued on 6 September 1960, nevertheless offered to pay said interest in cash together with the cost of advertising the property for sale provided such payment should be without prejudice to their right to claim and litigate the amount alleged to be owing to them by defendant Parkerson. She refused this offer.

Plaintiffs had a right to require Parkerson to apply the monies she collected as plaintiffs' agent or otherwise owing plaintiffs by virtue of the contract between plaintiffs and Parkerson to the payment of interest accrued to 6 September 1960. *Dameron v. Carpenter,* 190 N.C. 595, 130 S.E. 328; *Salinger v. Lincoln Nat. L. Ins. Co.,* 52 F. 2d 1080, 80 A.L.R. 242; *Doyle v. Di Medio,* 132 A 854; *Fegers v. Pompano Farms,* 139 So. 201. If so applied, nothing was due and no right of acceleration existed. Had Parkerson brought suit to foreclose because of the asserted default, plaintiffs could have pleaded as a set off the sums owing them arising out of Parkerson's breach of contract. G.S. 1-137. The contractual method of barring plaintiffs' equity of redemption did not diminish their right to an accounting nor permit their rights to be defeated when in fact no default existed.

The mere fact that defendants are solvent is not sufficient to deprive a court of equity of its jurisdiction to prevent oppression and injustice by foreclosure when a mortgagee owes his mortgagor a sum in excess of the amount currently due. *Johnson v. Jones,* 186 N.C. 235, 119 S.E. 231; *Jones v. Buxton,* 121 N.C. 285; *Harvey v. Knitting Co.,* 197 N.C. 177, 148 S.E. 45; *Harrison v. Bray,* 92 N.C. 488; *Gooch v. Vaughn,* 92 N.C. 610; *Bridgers v. Morris,* 90 N.C. 32.

There is no merit in the contention that Parkerson had a right to apply the monies which she collected as agent for plaintiffs to a debt not due for ten years. A debtor who uses his money to pay may direct how the creditor shall apply it, but he has no right to supervise the manner in which the creditor uses his monies.

The court required plaintiffs to give bond to indemnify defendants. It is not suggested the bond is not adequate.

Affirmed.

WILLIAM C. FREEL AND WIFE, NELL T. FREEL v. CENTER, INC., HENRY B. FOY, AND TAI Y. LEE, PARTNERS, DOING BUSINESS AS FOY AND LEE ASSOCIATES, AND AS INDIVIDUALS, AND PAUL L. BRYSON.

(Filed 20 September, 1961)

1. Pleadings § 19—

A demurrer to the crosscomplaint of one defendant against another must be sustained if the crosscomplaint fails to allege each material fact necessary to constitute a cause of action in favor of the first defendant against the second.

2. Same—

In determining the sufficiency of a pleading upon demurrer, the facts alleged and not the conclusions of the pleader are determinative.

3. Negligence § 35; Torts § 4— Allegations held insufficient to state cross action against grading contractor for failure to provide lateral support.

The owner of one lot sued the owner of an adjacent lot for damages for failure of the defendant-owner to provide lateral support incident to excavation. Defendant-owner had his grading contractor joined as a defendant upon assertions of primary and secondary liability and the right to contribution. The cross action alleged that the contract required the contractor to use reasonable care in the protection of adjacent property, but alleged no facts in respect to the violation of, or deviation from, the plans and specifications or from the terms of the grading contract. *Held:* The demurrer of the grading contractor was properly sustained, the allegations of primary and secondary liability and the right to contribution being merely conclusions not supported by allegations of fact.

APPEAL by original defendant from *Froneberger, J.*, regular May, 1961, Civil Term, HAYWOOD Superior Court.

This civil action was instituted by the plaintiffs who allege they are owners of a specifically described lot in the town of Canton upon which their dwelling house is located. The original defendant owns the adjoining lot upon which it undertook to erect a large building to be used as a super market. In excavating for the foundation the defendant removed the dirt to a depth of 35 to 40 feet along the line separating the two lots and thereby removed all lateral support from plaintiffs' property; "that immediately after the excavation . . . the soil and earth began to crack, subside and slide away . . . and has continued intermittently without restraint," as a result of which the plaintiffs have been damaged in the sum of $10,000.00. The plaintiffs alleged other damages, the allegations with respect to which were stricken by consent.

The defendant, Center, Inc., by answer, admitted the ownership of a lot adjoining the plaintiffs upon which it did grading and erected a building. Other allegations were denied. By way of cross action the

original defendant alleged it employed and relied upon the firm of Foy and Lee Associates, licensed architects, to prepare plans and specifications for the grading of the lot and providing for adequate lateral support. ". . . and while this answering defendant still alleges and asserts that proper and adequate lateral support was provided, yet if it should be found that this defendant is liable in any respect whatsoever . . . Foy and Lee Associates are primarily responsible therefor and this defendant is only secondarily liable . . . and such primary liability . . . is hereby pleaded against said partners." Also, "if this defendant be adjudged liable, (which liability is denied) then and in that event there is liability also of the above-mentioned partners," whose acts and conduct joined and concurred as a proximate cause of any liability.

The original defendant, upon motion, had Foy and Lee Associates made additional parties defendant for the purposes (1) of having them adjudged primarily liable, or (2) of having them held jointly liable for purposes of contribution. Foy and Lee Associates filed answer.

The original defendant, by way of further cross action against Paul Bryson, alleged that he and the original defendant entered into a contract by which Bryson was to do certain grading work on the lot owned by the answering defendant, "and that thereafter the said Paul Bryson did all of the grading and excavating work." The contract provided: "Contractor shall use reasonable care in the protection of adjacent and abutting property." . . . "That while this answering defendant again alleges and asserts that the said grading done by the said Paul Bryson did in fact leave proper and adequate lateral support to adjoining property and there is no liability . . . yet if there should be found any liability . . . the said Paul Bryson is primarily liable . . . and this answering defendant is only secondarily liable," or the liability is joint and the original defendant is entitled to contribution from Bryson.

Bryson was brought in as an additional party defendant and filed a demurrer to the cross action upon the ground it failed to allege facts sufficient to state a cause of action against him. The court entered judgment sustaining the demurrer, from which the original defendant appealed.

Williams, Williams & Morris, By: J. N. Golding, for Center, Inc., defendant, appellant.

Uzzell & DuMont, By: Harry DuMont, for Paul L. Bryson, defendant, appellee.

HIGGINS, J. This appeal presents for review the order sustaining Bryson's demurrer. A demurrer must be sustained if the challenged pleading (complaint or crosscomplaint) fails to allege each material fact necessary to constitute a cause of action. *Ledwell v. Proctor,* 221 N.C. 161, 19 S.E. 2d 234. Facts and not conclusions must be alleged. *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441.

The original defendant alleged it had a contract with Bryson to do the excavation and grading out of which this controversy arose. The agreement provided the "contractor shall use reasonable care in the protection of adjacent and abutting property." " . . . that while this answering defendant again alleges that the said grading done by the said Paul Bryson did in fact provide and leave proper and adequate lateral support" . . . but if it should be found otherwise, Bryson is primarily liable or at least jointly liable. The allegations as to Bryson's liability are conclusions not supported by allegations of fact. Violation of, or deviation from, the plans and specifications or from the terms of the grading contract are not alleged. Bryson's demurrer to the cross action was properly sustained.

Affirmed.

STATE v. ROLAND E. BEAM.

(Filed 20 September, 1961.)

1. Rape § 6; Assault and Battery § 7—

An indictment charging assault with intent to commit rape includes the lesser offense of assault on a female, and it is not required that the indictment allege that defendant, at the time of the assault, was over the age of 18 years, there being a presumption that a male person charged with an assault with intent to commit rape is over 18 years of age.

2. Assault and Battery § 7—

That defendant is over 18 years of age does not create a separate and distinct offense in a prosecution of such defendant for assualt upon a female, but the age of defendant relates only to the punishment, and the burden is upon defendant to prove that he is under 18 years of age if such is the fact.

3. Same—

In a prosecution for assualt to commit rape a verdict of "guilty of simple assault on a female" will support sentence for an assault on a female by a man or boy over 18 years of age when defendant's own evidence discloses that he was over 18 years of age at the time he committed

the assault and no question of defendant's age was raised during the trial, it further appearing that the word "simple" was used in the verdict in response to the charge of the court in distinguishing the assault from an assault with intent to commit rape.

APPEAL by defendant from *Cowper, J.*, April Term 1961 of CRAVEN.

This is a criminal prosecution upon an indictment charging the defendant with an assault on one Gertrude Fenner, a female, with intent to commit rape. The defendant entered a plea of not guilty.

The evidence tends to show that on the evening of 22 December 1960 the prosecutrix, at the instance of the defendant, went to the defendant's Oyster Bar near Cherry Point, North Carolina to work for him. According to the testimony of the prosecutrix, after she had been there for sometime, and while there were no customers in the bar, the defendant locked the door to the bar, made improper advances to her, threw her on the floor and had sexual intercourse with her, forcibly and against her will.

The defendant admitted the act of intercourse but testified it was voluntary on the part of the prosecutrix and that she cooperated fully in the act. Defendant further testified on direct examination by his own counsel: "My name is Sgt. Roland E. Beam; I am married; have been a member of the Marine Corps for 12 years and have an adopted son who is 14 years old."

The jury returned a verdict of guilty of simple assault on a female.

The court imposed a sentence of two years.

The defendant appeals, assigning error.

Attorney General Bruton for the State.
Charles L. Abernethy, Jr. for appellant.

DENNY, J. We have carefully examined the defendant's exceptions and assignments of error and in our opinion no prejudicial error was committed in the trial below that would justify a new trial.

It will be noted, however, that the jury did not make a specific finding that the defendant was a male person over eighteen years of age. Even so, the defendant does not claim to have been under eighteen years of age on 22 December 1960, nor did he except to and assign as error the failure of the jury to make a specific finding with respect to his age. However, in a criminal action, an appeal itself is an exception to the judgment and presents the question whether or not the verdict is sufficient to support the judgment. *S. v. Barham,* 251 N.C. 207, 110 S.E. 2d 894; *S. v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738.

This Court has repeatedly held that in a bill of indictment charging an assault with intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and it is not necessary for the indictment to allege that the defendant, at the time he committed the assault, was over the age of eighteen years. *S. v. Smith*, 157 N.C. 578, 72 S.E. 853; *S. v. Jones*, 181 N.C. 546, 106 S.E. 817.

Walker, J., in speaking for the Court in *S. v. Smith, supra*, said: "Discarding all superfluities and rejecting nice distinctions and subtle refinements, and stripping these statutes to the bone, even to the marrow, the real intention of the Legislature is laid perfectly bare and its meaning becomes apparent. It all, therefore, results in this, that a man who is indicted for an assault with intent to ravish, and is convicted of a *simple assault and battery upon a woman*, without the alleged intent, he being over the age of eighteen years, can be punished at the discretion of the court, without any allegation in the bill as to his age, and cannot shield himself behind the statute conferring jurisdiction on a magistrate of simple assault, nor limit the punishment, under the first proviso of Revisal, sec. 3620 (now G.S. 14-33), to a fine of $50 or imprisonment for thirty days, upon conviction in the Superior Court, where, by the statute, it has acquired jurisdiction. * * * The third proviso (with respect to an assault on a female by a man over eighteen years of age) was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over eighteen years old, upon a woman, but it merely excepted that case from the operation of the first proviso, by which the punishment for a *simple assault was limited to a fine of $50 or imprisonment for thirty days*. It related solely to the degree of punishment for an assault committed upon a woman by a man, or by a boy over eighteen years of age. (Emphasis added) * * *.

"It must be observed that the language of the statute is that if the indictment is for rape, or any felony whatsoever, 'and the crime charged shall include an assault against the person,' the jury 'may find a verdict against the defendant for assault.' It does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. If the assault is of that kind which, if committed with intent to ravish or to commit any other felony, would subject him to punishment for the offense so charged, if convicted of the same, then, subject to the rule already stated, he can be punished at the discretion of the court, if convicted of the assault only."

In the case of *S. v. Jones, supra*, the decision of the Court is succinctly stated in the second headnote as follows: "It is not necessary

for the defendant's age to be stated in the bill of indictment to convict him for an assault on a female, etc., when the proof clearly showed that he was over eighteen at the time of the alleged assault, and on the trial no question was made as to that fact."

The reason the jury returned a verdict of guilty of simple assault on a female in this case, instead of "guilty of an assault on a female," is clearly apparent when the verdict is considered in light of the court's charge. The court in substance charged the jury that if the State had satisfied it beyond a reasonable doubt that the defendant committed an assault on Gertrude Fenner, a female, without intent to commit rape, "it would be your duty to return a verdict of guilty of simple assault on a female." The court was simply emphasizing the difference between an assault on a female with intent to commit rape, and an assault on a female without such intent.

It appears from the evidence in the record on this appeal that no effort was made by the court, the prosecuting attorney or counsel for the defendant in the trial below, to establish the age of the defendant. But, it clearly appears from the defendant's own evidence in the trial, that he was over eighteen years of age at the time he committed the alleged assault, unless we take the untenable position that the defendant may have joined the Marine Corps when he was less than six years of age. He testified at the trial in April 1961 that he was married, and had been a member of the Marine Corps for twelve years, and had an adopted son who is fourteen years of age.

There is a presumption that a male person charged with an assault with intent to commit rape, is over eighteen years of age. If the defendant so charged is under eighteen years of age, such fact is relevant only on the question of punishment and is a matter of defense. *S. v. Lewis*, 224 N.C. 774, 32 S.E. 2d 334, and the burden of establishing this defense is on the defendant. *S. v. Morgan*, 225 N.C. 549, 35 S.E. 2d 621; *S. v. Herring*, 226 N.C. 213, 37 S.E. 2d 319.

On the authorities cited herein and the case of *S. v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861, in which *Justice Bobbitt* assembled and discussed the authorities bearing on this question, we hold that in the trial below there is

No error.

STATE OF NORTH CAROLINA v. ELWOOD FRANKLIN BALL.

(Filed 20 September, 1961.)

Automobiles § 3— Suspension of driver's license is effective from date of order and not date of receipt of notice of conviction warranting revocation.

The provision of a statute that the Department of Motor Vehicles shall "forthwith" revoke a driver's license upon receiving record of the licensee's conviction of violating G.S. 20-138, means that the Department shall do so with reasonable dispatch, and when within five days from the receipt of such notice the Department orders the revocation of the license for one year from the date of the order, G.S. 20-19(f), the revocation is in effect until the same date of the subsequent year, and defendant's contention that his operation of an automobile more than one year from the date of conviction or the date of receipt of notice by the Department, but within a year of the order of revocation, will not support a conviction of driving without a license, is untenable.

APPEAL by defendant from *Cowper, J.*, May-June 1961 Criminal Term of CRAVEN.

Defendant was convicted of operating a motor vehicle on a public highway after his license was revoked and while said revocation was in effect, in violation of G.S. 20-28. A fine of $200, as provided by that statute, was imposed.

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

Charles L. Abernethy, Jr. for defendant appellant.

RODMAN, J. Defendant admitted he was operating a motor vehicle on a public highway on the night of 21 January 1961. He admitted his license to operate had been revoked, but asserted the revocation could not lawfully extend beyond 20 January 1961.

He preserves and presents this defense by an exception to the court's charge that operation of a motor vehicle on a highway subsequent to 23 January 1960 and prior to 23 January 1961 would be a violation of the Department's revocation of his license to drive and hence criminal.

To support the charge of criminal conduct, the State put in evidence a certified copy of the Department's "OFFICIAL RECORD OF CONVICTIONS FOR VIOLATIONS OF MOTOR VEHICLE LAWS AND DEPARTMENTAL ACTION." This record discloses that defendant was convicted on 11 January 1960 in the recorder's court at Kinston of the offense of "Driving Drunk," and "Department Action: Revoked Jan. 23, 1960 to January 23, 1961 — Notice mailed

to address as shown by the records of the Dept. January 20, 1960 — Duplicate Renewal License on file in Dept. January 28, 1960."

Defendant's motion that he be allowed to insert as a part of the record the official report made by the recorder's court has been allowed. This record shows the date of the alleged offense of "Driving Drunk" as 11-14-59, date of conviction, 1-11-60, plea of guilty, and fine of $100 and costs. The report from the recorder's court dated 15 January 1960 was received by the Department on 18 January 1960. Defendant concedes that his plea of guilty in the recorder's court was an admission of a violation of G.S. 20-138, and the judgment there rendered conforms to the provisions of G.S. 20-179.

The Department of Motor Vehicles is required to "forthwith revoke the license" of any operator upon receiving a record of such operator's conviction of operating a motor vehicle while under the influence of intoxicating liquor. G.S. 20-17. The period of revocation is one year by the express language of G.S. 20-19(f). When does the period of revocation begin? Defendant contends revocation should have started 11 January 1960, the date of his conviction, not because the court had a right to revoke his license, but because the statute, G.S. 20-24, makes it the duty of the court, upon conviction, to secure the defendant's license and transmit the same to the Department of Motor Vehicles. This contention ignores the express language of G.S. 20-17, which forms the basis on which the Department is authorized to act. The statute expressly declares the Department shall act "upon receiving a record of such operator's or chauffeur's conviction . . ." In no event was the Department authorized to revoke defendant's license prior to 18 January 1960, the date on which it received notice of his conviction.

Since the notice of conviction was received by the Department on 18 January 1960, defendant maintains the revocation should start on that date and could not extend beyond 18 January 1961; but the statute does not require the commissioner to act instantaneously. The language is that he shall act "forthwith". "Forthwith" is defined by Webster as "Immediately; without delay, hence, within a reasonable time; promptly and with reasonable dispatch." Webster's New Int. Dic., 2d ed. *Brown, J.*, in interpreting the meaning of the words "immediately" and "forthwith," said in *Claus v. Lee*, 140 N.C. 552: "Such terms never mean the absolute exclusion of any interval of time, but mean only that no unreasonable length of time shall intervene before performance."

If defendant deemed 23 January 1960 an improper date for revocation to become effective, he should have applied to the Department to correct its records by inserting the correct date. He could not, when on trial for the criminal offense of driving while his license was

revoked, collaterally attack the record of revocation which did not on its face disclose invalidity. *Beaver v. Scheidt,* 251 N.C. 671, 111 S.E. 2d 881.

If the period of revocation is to begin on the date of conviction, the Legislature may so provide by amending the present statutes. We have no authority to write such an amendment into the law.

Affirmed.

STATE v. WALLACE E. FOSTER.

(Filed 20 September, 1961.)

Criminal Law §§ 121, 173—

Where it appears on appeal from judgment in a post conviction hearing that the indictment was fatally defective as to one of the offenses of which defendant was convicted, but that the petition under the Post Conviction Hearing Act was filed more than five years after the conviction, the Supreme Court may arrest the judgment on the defective count *ex mero motu,* the defendant and the State being before the Court.

On *Certiorari* to review an order of *Huskins, J.,* entered in the above-entitled action in the Superior Court of MECKLENBURG County on June 13, 1961.

Upon petition of Wallace E. Foster, counsel was appointed for him and a post conviction hearing was held to review his trial and sentences imposed by the Superior Court of Mecklenburg County on September 1, 1953. In case No. 19869 the defendant was convicted on a bill of indictment containing two counts: (1) Breaking and entering for the purpose of committing a felony; and (2) the larceny of office supplies, money and other personal property of the value of more than $100.00, the property of Sterchi Bros. Furniture Store. The trial court entered judgment on the first count "that the defendant be confined in the State Prison at hard labor for not less than Eight (8) nor more than Ten (10) years. On the count charging Larceny of goods of the value of more than $100.00 from Sterchi Bros. Furniture Store the judgment of the Court is that the defendant be confined in the State Prison at hard labor for not less than Seven (7) nor more than Nine (9) years. This prison sentence to begin at the expiration of the prison sentence pronounced in the breaking and entering count and it is to be served in addition thereto."

The defendant's petition for the Post Conviction Hearing was served

on the Solicitor for the State who filed a motion to dismiss on the ground the petition was filed more than five years after the conviction. Judge Huskins made detailed findings of fact and concluded: "2. It is the conclusion of this Court that the bill of indictment does not sufficiently charge the crime of larceny for that it does not adequately describe property allegedly stolen by the defendant." (Citing *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *State v. Scott,* 237 N.C. 432, 75 S.E. 2d 154) "In the foregoing respects, and to the extent indicated, the court is of the opinion that there was a substantial deprivation of defendant's constitutional rights in the original proceedings which resulted in his conviction on the larceny count for which he received a sentence of not less than seven (7) nor more than nine (9) years to commence at the expiration of the sentence pronounced on the breaking and entering count. . . . That more than five years have elapsed after rendition of final judgment on September 1, 1953. . . . IT IS THEREUPON CONSIDERED, ORDERED AND ADJUDGED That defendant's petition be dismissed. . . ."

The prisoner filed petition for *certiorari* which this Court allowed. The Attorney General filed an answer thereto, reciting the prisoner's three convictions for escape while serving the sentence on the house breaking count. If the larceny count here being reviewed is vacated, the prisoner's sentences will not expire until December 1, 1961. The answer of the Attorney General States: "Procedurally, the petitioner probably would be entitled to release on *Habeas Corpus* if and when the Prison Department should attempt to keep the petitioner in confinement pursuant to the sentence herein contested. If the Court so chooses, perhaps it could arrest judgment as to this contested sentence *ex mero motu.*"

T. W. Bruton, Attorney General, Harry W. McGalliard, Asst. Attorney General, for the State.

John H. Hasty, for petitioner.

PER CURIAM. Presented here for review is the order dismissing the proceeding upon the ground the petition for review was filed more than five years after conviction. Nevertheless the Court, at the hearing, made extensive findings and concluded that the sentence on the larceny count was unlawful in that the count failed to charge a criminal offense. The Attorney General, with his usual frankness, concedes the sentence on the larceny count cannot be sustained if raised by *Habeas Corpus.* The prisoner, by his petition, and the State, by the Attorney General's answer, are now before us. In this state of the record we may treat the judgment on the larceny count as challenged because it

is not grounded upon a valid indictment. The challenge must be sustained. For that reason, the judgment is arrested. The result of this decision is to strike the seven (7) to nine (9) years' sentence, leaving the sentences for escape to begin at the end of the sentence of eight (8) to ten (10) years on the breaking and entering count.

Judgment Arrested.

CITY OF NEW BERN, A NORTH CAROLINA MUNICIPAL CORPORATION, v. ERSLE M. WALKER AND WIFE, RUBY EPTING WALKER.

(Filed 20 September, 1961.)

1. Injunctions §§ 4, 13; Municipal Corporations § 34—

Where a temporary order restraining defendant from violating a zoning ordinance has been properly continued to the hearing on the merits, defendant is not entitled to stay the restraining order until the hearing on the merits even though he files bond.

2. Appeal and Error § 13—

A supersedeas is a writ issuing solely from an appellate court to preserve the *status quo* pending the exercise of the appellate court's jurisdiction, and upon certification of opinion of the Supreme Court affirming the judgment of the lower court, the effect of the writ terminates.

APPEAL by defendants from *Cowper, J.*, at Chambers 27 June 1961 in CRAVEN.

Plaintiff seeks to permanently enjoin defendants in the alleged violation of a zoning ordinance of the City of New Bern. Plaintiff asserts that the feme defendant has a life estate in certain lots zoned as residential property, and that she and her husband are using the property as a commercial garage for the storage and repair of heavy equipment, particularly tractors and trailers.

The court issued a temporary injunction on 31 May 1961. Defendants thereafter filed motion and petition that the court "maintain the *status quo* and permit the giving of a supersedeas bond" pending the final hearing on the merits. The motion was heard 27 June 1961, and the court entered an order denying defendants' motion and continuing the temporary injunction until the final determination of the action.

Defendants appealed.

A. D. Ward for plaintiff.

Charles L. Abernethy, Jr., for defendants.

PER CURIAM. In effect, defendants contend that they are entitled, as a matter of right, to continue and maintain their commercial garage business *in statu quo* pending the determination of the validity of the zoning ordinance, upon making bond in an amount to be fixed by the Superior Court.

". . . G.S. 160-179 expressly authorizes the use of the injunctive power of the court to enjoin violations of zoning ordinances." *Raleigh v. Morand,* 247 N.C. 363, 366, 100 S.E. 2d 870. "There can be no doubt that this statute authorizes the present proceeding; and it may be found to enlarge the scope of the ordinary equity jurisdiction, or to provide a statutory injunction to be applied to acts and conditions ordinarily considered as being beyond equity interference." *Fayetteville v. Distributing Co.,* 216 N.C. 596, 602, 5 S.E. 2d 838. Appellants cite no authority for the proposition that a temporary injunction may not issue to restrain a violation of a zoning ordinance pending a final adjudication upon the merits, or that the alleged violators are entitled to maintain the *status quo,* as a matter of right, until the action is terminated.

The verified pleadings and affidavits are sufficient to substantiate the court's findings of fact, and the findings of fact support the order continuing the temporary injunction.

Defendants' motion was for a "supersedeas bond." Supersedeas was not available in the trial court. "Supersedeas" is a writ issuing from an *appellate court* to preserve the *status quo* pending the exercise of the appellate court's jurisdiction, is issued only to hold the matter in abeyance pending review, and may be issued only by the court in which an appeal is pending. *Seaboard Air Line R. Co. v. Horton,* 176 N.C. 115, 96 S.E. 954. The trial court was without authority to issue writ of supersedeas. The purport of defendants' motion was for the dismissal or modification of the temporary injunction. G.S. 1-498. In the denial of the motion we find no error.

The Supreme Court issued a writ of supersedeas in this case, effective pending review. Upon the certification of this opinion to the Superior Court of Craven County the effect of this writ terminates.

The order appealed from is

Affirmed.

PEARL PATE NANTZ v. IVEY LEE NANTZ, RAY STYLES AND VICK STYLES.

(Filed 20 September, 1961.)

Automobiles § 41i—

Evidence that the driver of the car in which plaintiff was riding as a passenger was traveling at a speed within the statutory maximum and struck a car entering the highway from a filling station, that he applied brakes 65 to 70 feet prior to the collision, without evidence that the car had entered the highway prior to the time the brakes were applied or that a prudent driver should have anticipated that it would be driven into the highway in violation of G.S. 20-156, is insufficient to be submitted to the jury.

APPEAL by plaintiff from *Craven, S.J.*, Special May 1961 Term of McDOWELL.

Plaintiff, wife of defendant Nantz, seeks damages for personal injuries sustained in a collision between her automobile, operated by her husband, and an automobile owned by Ray Styles, operated by defendant Vick Styles. Plaintiff alleges the collision was caused by the joint and concurrent negligence of the respective drivers. The negligence alleged against defendant Nantz is (1) speed in excess of what was reasonable and prudent under existing conditions, (2) failure to keep the motor vehicle under control and reduce speed, and (3) failure to keep a proper lookout. Defendant Nantz denied plaintiff's allegations of negligence as to him. He pleaded the negligence of Styles as the sole proximate cause of the collision.

The record contains no answer or other pleading by defendants Styles. It does not definitely appear that they have been served.

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

Thomas E. White for plaintiff appellant.
W. Harold Mitchell for defendant Ivey Lee Nantz.

PER CURIAM. Plaintiff's automobile was traveling northwardly on a paved highway at a speed of 50 m.p.h. in a 55-mile speed zone. The road was straight. The weather was dry and clear. The collision occurred shortly after 8:00 a.m. The Styles car came from a filling station on the east side of the highway. Plaintiff saw the Styles car start to move. "It was moving out towards the road very, very slowly." She advised her husband to blow the horn. He did so.

There was a bag of candy on the seat between plaintiff and her husband. He and she were eating from the bag when she observed

the Styles car. Her husband continued to eat therefrom. Skid marks showed defendant Nantz applied his brakes 65 to 70 feet prior to the collision. There was no evidence to show the Styles car had entered the highway prior to that time nor was there evidence to show that a prudent driver should have anticipated that Styles would enter the highway in violation of G.S. 20-156(a).

Plaintiff's evidence fails to establish her allegations of negligence. *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111.

Affirmed.

STATE v. DELMUS WARD LEGGETT.

(Filed 20 September, 1961.)

1. Criminal Law § 168—

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal.

2. Seduction § 3—

Testimony of prosecutrix as to each essential element of the crime of seduction with independent supporting evidence as to each essential element is held sufficient to be submitted to the jury.

3. Criminal Law § 161—

An assignment of error to the charge will not be sustained in the absence of prejudicial error.

APPEAL by defendant from *Bone, J.,* June 26, 1961, Term of BEAUFORT.

Defendant was indicted under G.S. 14-180 for the seduction under promise of marriage of Marjorie Smith. After trial and conviction, judgment imposing a prison sentence was pronounced. Defendant appealed, assigning as error (1) the denial of his motions for judgment as in case of nonsuit, and (2) designated portions of the court's instructions to the jury.

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

Edgar J. Gurganus for defendant, appellant.

PER CURIAM. Defendant offered evidence. Hence, as to defendant's motion for judgment as in case of nonsuit, the only question is whether

the court erred in the denial of the motion made by defendant at the close of all the evidence. G.S. 15-173.

The elements of the crime defined in G.S. 14-180 and the evidence required to support a conviction therefor are fully stated in *S. v. Smith,* 223 N.C. 199, 25 S.E. 2d 619, and cases cited. Here, the prosecutrix testified as to each essential element; and, as to each essential element, there was independent supporting evidence. Hence, defendant's said motion was properly denied.

As to defendant's assignments of error directed to the court's instructions, consideration thereof does not disclose error of such prejudicial nature as to justify a new trial.

We deem it unnecessary and inappropriate to set forth the evidence. Suffice to say, while defendant's testimony, in material respects, was in conflict with that offered by the State, the factual issues were properly submitted to the jury and were resolved by the jury adversely to defendant.

No error.

D. H. BOWEN v. ANCHOR ENTERPRISES, INC.

(Filed 20 September, 1961.)

Negligence § 37f—

Evidence that defendant-proprietor mopped the floor of its restaurant with a damp mop, the moisture from which dried within three or four minutes, that plaintiff knew the mopping operation was going on, and that he fell when his crutch slipped on a damp spot on the floor, *is held* insufficient to warrant recovery.

APPEAL by plaintiff from *Clarkson, J.,* April-May Term, 1961, RUTHERFORD Superior Court.

The plaintiff instituted this civil action to recover damages for personal injury he sustained as a result of a fall while he was a customer in the Howard Johnson Restaurant operated by the defendant.

At the close of all the evidence the court entered judgment of nonsuit, from which the plaintiff appealed.

Hamrick & Hamrick, By: J. Nat Hamrick, for plaintiff, appellant.

Jones & Jones, By: Robert A. Jones, Hamrick & Jones, for defendant, appellee.

PER CURIAM. The evidence disclosed that the plaintiff, using crutches because of a recent leg amputation, slipped on the floor of defendant's restaurant. In the fall he sustained injury. It was defendant's custom to mop the floor three times daily, using a mop pulled through a pressure wringer. Any moisture left by the mop dries within three or four minutes. After the mop goes through the wringer, "It was not a wet mop, it is a damp mop, it does not leave residuary water on the floor." Plaintiff knew the mopping operation was going on. He testified: "I saw the place on the floor where the crutch slipped, it was spotted damp and showed the skid marks of the crutch."

In the light of applicable law in this State, evidence of actionable negligence is lacking. *Harris v. Montgomery Ward & Co.*, 230 N.C. 485, 53 S.E. 2d 536.

The judgment of nonsuit is

Affirmed.

ODELL L. MORTON v. BLUE RIDGE INSURANCE COMPANY

(Filed 27 September, 1961.)

1. Pleadings § 31—

A motion to require plaintiff to make the allegations of the complaint more definite and certain may not be made after judgment by default and inquiry.

2. Judgments § 15—

A judgment by default and inquiry establishes the right of action pleaded in the complaint, but the nature and extent of the default judgment is limited to the cause of action properly pleaded, and the default judgment does not preclude defendant from showing that the averments of the complaint are insufficient to warrant any recovery.

3. Same; Judgments § 21—

Upon motion to vacate a default judgment upon the ground that the complaint fails to allege facts sufficient to constitute a cause of action, the test of the sufficiency of the complaint is the same as upon a demurrer, and the motion is properly denied if the facts alleged in the complaint are sufficient to make out a cause of action and support the judgment.

4. Insurance § 48b—

A collision clause in an automobile insurance policy generally will be held to cover collision of the vehicle with any physical object, moving or stationary, in the absence of limitation in the policy contract.

5. Same

Where a car is backed down a launching ramp to launch a boat from a trailer attached to the rear of the automobile, and while the drivers and others were in the rear to lower the boat into the water, the automobile rolls backward into the water and into a canal, there is a collision of the car with the water in the canal and with the bottom of the canal within the meaning of a policy insuring against damages to the car resulting from a collision of the automobile with another object.

6. Same—

Allegations to the effect that after an automobile had been backed down a launching ramp, and while the car was stationary and unattended, the car suddenly started rolling backwards and rolled into the water and into a canal, clearly implies that the event was neither intended nor foreseen and therefore was an "accident" within the meaning of a clause insuring against damage from an accidental collision.

APPEAL by defendant from *Cowper, J.,* May Term, 1961, of CARTERET.

Plaintiff instituted this action to recover on insurance policy issued to him by defendant covering plaintiff's 1952 Buick Special. He alleged his said automobile was damaged May 17, 1958, in the amount of $1,150.00; and that he is entitled to recover from defendant the amount of his said loss.

Plaintiff alleged the policy issued by defendant "insured plaintiff against loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile"; that he gave defendant due notice of the accident giving rise to plaintiff's loss; that defendant denied liability for such loss; and that plaintiff, prior to the institution of this action, had complied fully with all obligations required of him by the terms of the policy.

Plaintiff alleged his loss and damage occurred under these circumstances: ". . . the plaintiff backed his automobile down a launching ramp at Sonny's Yacht Basin at Atlantic Beach; that at the time a trailer and a boat were attached to the rear of the automobile; that he backed the automobile down where the wheels of the trailer were in the water; that he stopped the car and got out and began to uncrank the boat to lower it into the water and that just as the boat got about halfway in the water, all of a sudden the plaintiff's automobile started rolling down towards the water and rolled into a canal approximately 14 feet deep, colliding with the water and the canal bottom and being upset, as a result of which plaintiff's automobile was ruined, damaged and became a total loss."

Defendant failed to answer, demur or otherwise plead within the statutory time; and the clerk, on April 27, 1959, based on plaintiff's verified complaint, entered judgment by default and inquiry against defendant.

On May 12, 1959, defendant filed three separate motions; (1) a motion in arrest of judgment, (2) a motion to vacate judgment for excusable neglect, and (3) a motion to vacate judgment on the ground the summons served on defendant was void. The said motions were addressed to said judgment by default and inquiry.

At a hearing on June 8, 1959, judgment was entered dismissing plaintiff's action on the ground the summons served on defendant was void. On plaintiff's appeal therefrom the said judgment entered June 8, 1959, was reversed. *Morton v. Insurance Co.*, 250 N.C. 722, 110 S.E. 2d 330. The opinion of *Moore, J.*, states: "The record discloses that other motions are pending in this cause. These apparently have not been heard below. They are not before us."

Subsequent to the entry of said judgment of June 8, 1959, and pending a determination of plaintiff's appeal therefrom, to wit, on June 20, 1960, defendant filed a motion to make the complaint more definite and certain. This motion did not appear in the record on former appeal.

The judgment of Judge Cowper entered May 12, 1961, from which defendant appeals, provides:

> "In this cause, coming on to be heard . . . upon the motion of the defendant to Vacate the Judgment for Excusable Neglect. the defendant having in open court abandoned the motion, and having shown no excusable neglect, the said motion is denied;
>
> "AND FURTHER, upon the motion of the defendant to require the plaintiff to make the allegations of the complaint more definite and certain, it appearing that said motion was made after the time for pleading in the cause had expired, the same is hereby disallowed;
>
> "AND FURTHER, the defendant having filed a Motion in Arrest of Judgment, upon a consideration of the same the said motion is denied.
>
> "AND FURTHER, the defendant having demurred *ore tenus;* the Court having reviewed the pleadings and the record and briefs filed in the Supreme Court in the case of *MORTON v. INSURANCE COMPANY*, 250 N.C. 722, and it appearing that the defendant had demurred *ore tenus* in the Supreme Court and extensively argued the same in its brief and that the Supreme Court did not consider the demurrer *ore tenus;* and the Court being of the opinion that the complaint states a good cause of action. the demurrer *ore tenus* is overruled."

Defendant's appeal is predicated upon this exception: ". . . the signing of the Judgment of his Honor, Albert W. Cowper, denying defendant's motion to make the complaint more definite and certain,

and denying the motion in arrest of judgment." Upon this exception, defendant assigns as error "the denying of the Motion in Arrest of Judgment and the Motion to make the Complaint more Definite and Certain."

Harvey Hamilton, Jr., and George W. Ball for plaintiff, appellee.
C. R. Wheatly, Jr., and Thomas S. Bennett for defendant, appellant.

BOBBITT, J. Defendant's assignment of error, directed to the court's denial of his motion for an order requiring the plaintiff to make the allegations of his complaint more definite and certain, is without merit. Such an order, under G.S. 1-153, is to enable the movant to prepare his defense. Such a motion may not be made *after judgment.*

Defendant's motion captioned, "MOTION IN ARREST OF JUDGMENT," is in fact a motion to vacate the judgment by default and inquiry on the ground the complaint fails to allege facts sufficient to constitute a cause of action and therefore will not support such judgment.

In *Presnell v. Beshears,* 227 N.C. 279, 41 S.E. 2d 835, in passing upon a like motion, this Court, in opinion by *Devin, J.* (later *C.J.*), said: "The effect of the failure of the defendants to appear in response to the summons and complaint personally served upon them was to establish *pro confesso* in the plaintiff a right of action of the kind properly pleaded in the complaint and thereupon the plaintiff became entitled as a matter of law to recover on the cause of action set out in his complaint. G.S. 1-212; *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67. Defendants' failure to answer, however, admitted only the averments in the complaint and did not preclude them from showing, if they could, on this motion, that such averments were insufficient to warrant recovery. *Beard v. Sovereign Lodge,* 184 N.C. 154, 113 S.E. 661; *Strickland v. Shearon,* 193 N.C. 599 (604), 137 S.E. 803. Hence they were entitled to have the judgment vacated if the facts set out in the complaint should be determined to be insufficient to constitute a cause of action, as there would then be no basis upon which the default judgment could be predicated."

As stated in Judge Cowper's judgment, this Court, on former appeal, did not consider a demurrer *ore tenus* to the complaint. Indeed, nothing in our records indicates defendant (then appellee) filed such demurrer in this Court although its brief contained references to such demurrer and arguments and citations in support thereof. Be that as it may, the complaint is now challenged on the ground it does not allege facts sufficient to state a cause of action; and the rules for testing its suf-

ficiency are the same whether this challenge be by demurrer, *Howze v. McCall,* 249 N.C. 250, 106 S.E. 2d 236, or by motion to set aside the judgment by default and inquiry, *Presnell v. Beshears, supra.*

"Unless there are special limitations in a policy insuring against loss of, or damage to, an automobile caused by accidental collision, the coverage extends to all losses caused by accidental collision however occasioned, and such a policy does not usually exclude damage caused by negligence." 45 C.J.S., Insurance § 798a.

"A collision clause is strongly construed against the insurer upon the basis that, if it desired to insert exceptions precluding liability under the circumstances presented, it should have done so by inserting such exceptions as would limit the effect of the general terms employed." Appleman, Insurance Law and Practice, § 7465.

The foregoing general statements are quoted, in whole or in part, by *Denny, J.,* in *Suttles v. Insurance Co.,* 238 N.C. 539, 78 S.E. 2d 246.

In *Hallock v. Casualty Co.,* 207 N.C. 195, 176 S.E. 241, the policy provided for the payment of loss "if caused solely by Accidental collision with another object either moving or stationary." A chauffeur, operating plaintiff's automobile, ran off the road and down a bank into bottom land, where the automobile turned over on its side. Judgment for the plaintiff was affirmed by this Court.

In *Hallock,* defendant contends, the plaintiff's pleading and evidence revealed that the automobile collided "with an object." Defendant refers to *the bank* as *the object* with which the automobile collided. (Consideration of the evidence in *Hallock* indicates the collision causing the damage occurred when the automobile struck the bottom land and turned over.) Be that as it may, defendant is correct in its contention that the question, whether water is "an object" within the meaning of the collision clause, was not presented or discussed in *Hallock.* This question is one of first impression in this jurisdiction.

In 45 C.J.S., Insurance § 797b(1), it is stated: "There cannot be a collision within the coverage of a policy insuring an automobile against loss or damage from collision without the presence of an object with which to collide. Where the risk designated in such a policy is collision with an object, in general the word 'object' is used in its ordinary and usually accepted sense as meaning anything tangible or visible. Since the phrase 'being in collision with an object,' as commonly used in such policies, is of so general an import, any effort to classify the objects with which a car may collide is futile, and it has been laid down broadly that, in the absence of a restriction as to the kind of object, a collision may occur with any object."

In Sunderlin on Automobile Insurance, § 711, the author states:

"Water and land are objects—physical objects. They are not abstract or imaginary, but tangible, visible, concrete, and real, and may be perceived and apprehended by the mind. The understanding has knowledge of them. An insured automobile which runs into either water or land collides with an 'object.'" The clear weight of authority supports this oft-quoted statement. *Harris v. American Casualty Co.* (N.J.), 85 A. 194; *Gans v. Columbia Ins. Co.* (N.J.), 123 A. 240; *Columbia Ins. Co. v. Chatterjee* (Okla.), 219 P. 102; *Tinker v. Boston Ins. Co.* (Okla.), 233 P. 1058; *Ringo v. Automobile Ins. Co.* (Ore.), 22 P. 2d 887; *Long v. Royal Ins. Co.* (Wash.), 40 P. 2d 132, 105 A.L.R. 1423; *Providence Washington Ins. Co. v. Proffitt* (Texas), 239 S.W. 2d 379; *Washington Fire & Marine Ins. Company v. Ryburn* (Ark.), 311 S.W. 2d 302; Appleton, op. cit., § 3205; 45 C.J.S., Insurance § 797b(2).

In *Ringo v. Automobile Ins. Co., supra,* the policy provided coverage against "(d)irect loss or damage to the automobile described caused solely by accidental collision with another object or by upset." Plaintiff, while driving his automobile along the highway struck "something," which caused his car to skid and strike a bank and go over the bank into a river. The defendant contended the damage to the insured automobile caused by being plunged into the river did not come within the coverage of the policy. The opinion of *Justice Bailey,* after reviewing prior decisions, concludes: "There was, within the meaning of the policy, a direct loss or damage to plaintiff's automobile caused solely by accidental collision with another object. Plaintiff testified positively that the car, while being driven along the highway, struck some object other than the roadbed. Even disregarding this evidence, the proof is that the car plunged into the waters of Yamhill river and sank to the bottom of that stream. The incident of coming into contact with the water and the bed of the stream constituted a collision with another object."

In *Washington Fire & Marine Ins. Company v. Ryburn, supra,* the policy provided coverage against "(d)irect and accidental loss of or damage to the automobile caused by collision of the automobile with another object or by upset of the automobile." Plaintiff's employee, while driving the insured truck along the highway, "encountered a slick place in the roadway, lost control of the truck, careened off the highway, hit a knoll causing the truck to bounce, went down an embankment and plunged into a ditch filled with water." Water damage to the motor constituted the major element of damages. It was held "that the damages to the truck here were caused by a collision of the truck 'with another object'—here, the water in the ditch." The opinion of *Judge Holt* states: "Had the appellant intended to limit the extent

of its above coverage when a collision occurred 'with another object' it could easily have done so in unmistakable language."

In *Harris v. American Casualty Co., supra,* the policy provided coverage against loss "resulting solely from collision with any moving or stationary object; (excluding however) . . . (c) damage resulting from collision due wholly or in part to upsets." Plaintiff's automobile was being driven by his chauffeur over a highway bridge. It crashed through a guard rail and was precipitated into the stream below. Collision with the guard rail caused only nominal damages. Water damage constituted a major element of damages. It was held that plaintiff's damages were caused by collision, not by upset; and that the automobile collided with a moving object, namely, the water of the stream, and with a stationary object, namely, the bed of the stream under the water.

We have examined carefully each of the cases cited by defendant, to wit, *Liverpool & London & Globe Ins. Co. v. Jones* (Ark.), 180 S.W. 2d 519; *Snare & Triest Co. v. Fireman's Fund Ins. Co.* (C.C.A., Second), 261 F. 777; *Aetna Casualty & Surety Co. v. Cartmel* (Fla.), 100 So. 802; *City Coal & Suppy Co. v. American Automobile Ins. Co.* (Court of Common Pleas of Ohio, Mahoning County), 128 N.E. 2d 264; *Albritton v. Firemen's Fund Ins. Co.* (La.), 61 So. 2d 615; *Unkelsbee v. Homestead Fire Ins. Co.* (Municipal Court of Appeals for the District of Columbia), 41 A. 2d 168. An analysis of the factual situation and questions presented in each of these cases is deemed unnecessary. Suffice to say, each involves a factual situation different from that here considered and none is regarded as authority for decision on this appeal.

When plaintiff's automobile rolled into and struck the water of the canal and the bottom of the canal as alleged by plaintiff, in our opinion, and we so decide, this constituted a collision of the automobile with another object within the meaning of the alleged provision of the policy. Since this entitled plaintiff to recover for loss by collision with another object, we need not consider whether plaintiff's allegations are sufficient to support recovery on the ground of "upset."

We have not overlooked defendant's contention that the facts pleaded by plaintiff do not show an *accidental* collision. In this connection, it is first noted that the word "accidental" is not used in plaintiff's allegations relating to coverage. True, plaintiff did not allege *what* caused his automobile to roll into the canal. But, when construed in the light most favorable to plaintiff, the allegations clearly imply that this event was neither intended nor foreseen, and that what defendant refers to as "an unexplained occurrence" was an accident within the

meaning of that term as defined by this Court in *Kirkley v. Insurance Co.*, 232 N.C. 292, 59 S.E. 2d 629.

In *St. Paul F. & M. Ins. Co. v. American Compounding Co.* (Ala.), 100 So. 904, 35 A.L.R. 1018, it was held, on rehearing, as stated in the first A.L.R. headnote: "The striking of the ground at the bottom of the declivity by an automobile falling over a precipice at the side of the road after it has started by the force of gravity when left standing on an inclined roadway is a collision within the meaning of a policy insuring against damage by accidental collision with any other automobile, vehicle or object." The following excerpt from the opinion of *Bouldin, J.*, is pertinent:

> "A collision implies an impact, the sudden contact of a moving body with an obstruction in its line of motion. Both bodies may be in motion, or one in motion and the other stationary. Clearly it matters not whether the car or the other object is in motion. The clause here involved covers all accidental collisions, save those arising from certain extrahazardous uses. In the nature of things no effort is made to enumerate the accidental collisions covered thereby. No particular kind of accident is in the contemplation of the parties. The peril insured against is the unforeseen accident; otherwise, there is no accident in the true sense. Neither is there any limitation as to cause of the accidental collision. The force leading thereto may be applied by human agency, or it may be a natural force, to which all our actions and dealings are related. A car, standing on a grade, is usually held in place by the friction of the wheels on the ground. This friction is maintained by brakes. If the brake does not hold, the car starts and proceeds down grade with accelerated velocity until arrested by collision or otherwise. The sole force in operation is the force of gravity, an ever-present agency, and a continuing peril to a car.
>
> "An automobile started by an external force, or by force of gravity on failure of the brakes to hold, and running uncontrolled against any object in its path, is in collision with such object."

The conclusion reached is that the facts stated in the complaint are sufficient to constitute a cause of action and therefore sufficient to support the judgment by default and inquiry. Hence, the judgment of Judge Cowper, denying defendant's motion to vacate the judgment by default and inquiry, is affirmed.

Affirmed.

JANICE RUTH MANNING v. CLARENCE EARL HART.

(Filed 27 September, 1961.)

1. Torts § 4— In absence of claim of joint-tort feasorship or liability under respondeat superior, driver sued by passenger may not file cross action against other driver.

A passenger in one car sued the owner of the other car involved in the collision. Defendant alleged contributory negligence on the part of the plaintiff and on the part of the driver of the car in which plaintiff was riding, that the owner of that car was liable for the driver's negligence under the family car doctrine, and that plaintiff was a niece of the owner, but did not allege that plaintiff was a member of the owner's household or was under her control in any respect. *Held:* The allegations are insufficient to invoke the family car doctrine as between plaintiff-passenger and the owner so as to entitle defendant to file a cross action against the owner and driver of the car in which plaintiff was riding, there being no allegations of concurrent negligence on the part of the drivers of the vehicles.

2. Automobiles §§ 48, 55½: Parties § 1: Pleadings § 8—

The passenger in one car sued the driver of the other car involved in the collision. Defendant filed a cross action against the driver and against the owner of the car in which plaintiff was riding, alleging negligence on the part of the driver and liability of the owner for the driver's negligence under the family car doctrine. *Held:* The driver and the owner of the car in which plaintiff was riding are not necessary parties to plaintiff's action against defendant, and defendant is not entitled to file the cross action notwithstanding that it arose out of the same collision constituting the basis of plaintiff's action.

APPEAL by defendant from *Cowper, J.*, January Civil Term 1961 of PITT.

Civil action to recover compensation for personal injuries resulting from a collision between the automobile in which the plaintiff was riding as a guest passenger and a pickup truck owned and operated by the defendant.

On 1 February 1959 the plaintiff, according to the allegations in the complaint, was riding as a guest passenger in a 1958 two-door Chevrolet automobile, operated by Linda Gaskins Jackson in an easterly direction on North Carolina Highway No. 118 in Pitt County in the vicinity of Curt Witherington's store; and the defendant was driving his 1959 Ford pickup truck in a westerly direction on said highway. The collision occurred between the hours of noon and 1:00 p.m. on said date.

Plaintiff alleges that at the time of the collision the defendant was operating his truck while under the influence of some intoxicating beverage, and suddenly and without warning drove his truck into

(his) left-hand lane of the highway directly into the path of the automobile in which plaintiff was riding as a guest passenger, causing a head-on collision between said motor vehicles, seriously and permanently injuring plaintiff.

The defendant filed answer denying the material allegations of the complaint and alleging that the automible being operated by Linda Gaskins Jackson at the time of the collision was owned by Ruby Manning Jackson; that Linda Gaskins Jackson was on 1 February 1959 a minor and was the daughter-in-law of Ruby Manning Jackson and lived in her home as a member of her family; that the husband of Linda Gaskins Jackson was away from home most of the time by reason of his employment, and that Linda Gaskins Jackson was a member of the household of Ruby Manning Jackson; that she was dependent upon the supervision and control of her mother-in-law; that the Chevrolet automobile owned by Ruby Manning Jackson was furnished by her for the use and convenience of the members of her household, specifically including her daughter-in-law, Linda Gaskins Jackson; and that it was being operated on 1 February 1959 with the express and implied consent and acquiescence of said owner; that Ruby Manning Jackson provided the said automobile for the use of her niece, Janice Ruth Manning, and said automobile was being operated on said date with the knowledge, consent and acquiescence of the said owner and under the family purpose doctrine in effect in the State of North Carolina, and was entrusted to the said Janice Ruth Manning under said doctrine; and that the plaintiff and Ruby Manning Jackson knew that Linda Gaskins Jackson was incompetent to operate the automobile and was reckless and careless in the operation of the same; and that their acts and conduct in permitting her to operate said automobile resulted in actionable negligence, rendering each of them (the plaintiff and the owner) jointly and severally liable for such injuries and damage as resulted from the operation of said automobile by Linda Gaskins Jackson.

The defendant further alleged that the plaintiff and Linda Gaskins Jackson were at the time of the accident engaged in a joint enterprise and that the negligence of the driver of the automobile was imputed to the plaintiff; that the trip was for a common purpose. The defendant pleaded contributory negligence and undertook to set up a cross action against the plaintiff and against Linda Gaskins Jackson and Ruby Manning Jackson as additional defendants. The original defendant thereupon obtained an *ex parte* order making Linda Gaskins Jackson and Ruby Manning Jackson additional parties defendant.

The plaintiff demurred to the new matter contained in the answer of the defendant, set out in his further answer, defense and for af-

firmative relief. The court below sustained the demurrer and on motion of plaintiff reversed the order making Linda Gaskins Jackson and Ruby Manning Jackson additional parties defendant and struck out the further answer, defense and for affirmative relief.

Defendant Hart appeals, assigning error.

White & Aycock for plaintiff appellee.
Jones, Reed & Griffin for defendant appellant.

DENNY, J. The appellant poses these questions: (1) Did the court below err in reversing the order of the Clerk of the Superior Court, making Ruby Manning Jackson and Linda Gaskins Jackson parties defendant? (2) Did the court below err in sustaining the demurrer of plaintiff to the further answer of the defendant for affirmative relief, and in striking from the pleadings the further answer and defense of defendant Hart for affirmative relief?

In our opinion, these questions must be answered in the negative.

The appellant cites and relies upon *Bullard v. Oil Co.*, 254 N.C. 756, 119 S.E. 2d 910, as authority for his contention that he should be allowed to prosecute his cross action against plaintiff and Ruby Manning Jackson, the owner of the car in which plaintiff was riding, and Linda Gaskins Jackson, the driver of the car at the time of the collision.

In the *Bullard* case, there was a collision between a car owned and operated by plaintiff and a truck owned by defendant and operated by its agent in the furtherance of its business. Defendant in answering plaintiff's complaint: (1) denied negligence on the part of its driver; (2) pleaded contributory negligence of the plaintiff; and (3) alleged a counterclaim or cross action against plaintiff and his employer, Franklin Life Insurance Company, and further alleged that plaintiff's negligence was the sole cause of the collision and that he was acting within the scope of his employment at the time. The court refused to make Franklin a party and dismissed the counterclaim or cross action against it. On appeal we reversed. *Bobbitt, J.*, speaking for the Court, said: "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. * * *

"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 to the cause of action it asserts against plaintiff is by way of counterclaim in plaintiff's 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.* * * *"

If, in the instant case, Ruby Manning Jackson, owner of the car involved, were liable for the alleged negligence of the plaintiff under the family purpose doctrine, *Bullard v. Oil Co., supra,* would be authority for allowing the defendant to make Ruby Manning Jackson a party defendant in order that the original defendant might hold her liable under the doctrine of *respondeat superior* for any verdict he might obtain against the plaintiff by way of counterclaim or cross action.

In our opinion, the allegations of defendant in his further answer, defense and for affirmative relief, with respect to the relationship of the plaintiff and the owner of the car, which was being operated by Linda Gaskins Jackson at the time of plaintiff's injury, are insufficient to establish that the plaintiff was the agent of the owner under the family purpose doctrine or otherwise. There is no allegation that the plaintiff was a member of the household of Ruby Manning Jackson or that she lived with her or was under her control in any respect.

In *Lynn v. Clark,* 252 N.C. 289, 113 S.E. 2d 427, it is said: "In our opinion, the mere allegation that a car owned by a defendant is a family purpose car is an insufficient allegation upon which to recover under the family purpose doctrine.

"Ordinarily, a cause of action based solely on the family purpose doctrine is stated by allegations to the effect that at the time of the accident the operator was a member of his family or household and was living at home with the defendant; that the automobile involved in the accident was a family car and was owned, provided, and maintained for the general use, pleasure, and convenience of the family, and was being so used by a member of the family at the time of the accident with the consent, knowledge, and approval of the owner of the car. 5A Am. Jur., Automobiles and Highway Traffic, section 893, at page 797."

In the case of *McGee v. Crawford,* 205 N.C. 318, 171 S.E. 326, this Court defined the term "family" with respect to the family pur-

pose doctrine as "(1) those who live in the same household, subject to the general management and control of the head thereof; (2) dependence of the members upon such supervising, controlling and managing head; (3) mutual gratuitous services with no intention on one hand of paying for such services, and no expectation on the other of receiving reward or compensation."

In the instant case, the plaintiff alleges in her complaint that she was a guest passenger in the automobile which Linda Gaskins Jackson was driving at the time of the collision, and defendant Hart also alleged in his further answer that Linda Gaskins Jackson was driving said automobile at the time of the collision.

Since we have reached the conclusion that the answer of defendant, designated as a further answer, defense and for affirmative relief, does not contain sufficient allegations upon which the relationship of *respondeat superior* may be established between plaintiff and the owner of the car in which plaintiff was riding at the time of the collision, the ruling of the court below must be upheld.

In our opinion, the facts in this case fall within and are governed by our decisions in *Montgomery v. Blades*, 217 N.C. 654, 9 S.E. 2d 397; *Horton v. Perry*, 229 N.C. 319, 49 S.E. 2d 734; *Wrenn v. Graham*, 236 N.C. 719, 74 S.E. 2d 232; *Kimsey v. Reaves*, 242 N.C. 721, 89 S.E. 2d 386; *Hannah v. House*, 247 N.C. 573, 101 S.E. 2d 357; *Bell v. Lacey*, 248 N.C. 703, 104 S.E. 2d 833, and similar cases.

We have repeatedly held that when a complete determination of a controversy cannot be made without the presence of other parties, the court must cause them to be brought in. G.S. 1-73. "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Colbert v. Collins*, 227 N.C. 395, 42 S.E. 2d 349; *Jones v. Griggs*, 219 N.C. 700, 14 S.E. 2d 836; 39 Am. Jur., Parties, section 5; 67 C.J.S., Parties, section 1." *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843.

Certainly no additional parties are necessary for a complete adjudication and determination of the plaintiff's cause of action alleged against the defendant Hart.

Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action.

Barnhill, J., later *C.J.*, in *Wrenn v. Graham, supra*, said: "While his (plaintiff's) cause of action, as alleged by him, arose out of the collision of the two automobiles, and proof in respect thereto is es-

sential, the collision is not the subject of plaintiff's action. The personal injuries and property damage suffered by him as a result thereof is the subject of his action and his right to compensation therefor is the claim he asserts."

In *Kimsey v. Reaves, supra,* the plaintiff was a passenger in an automobile owned by T. T. Johnston, Sr., which was being operated in a northerly direction on U. S. Highway No. 29 by his son. An automobile owned by Carl E. Reaves was being operated in the same direction by his wife, defendant Bertie G. Reaves. Mrs. Reaves undertook to pass the Johnston car, and the two vehicles collided. The plaintiff Kimsey was injured. He instituted an action against the defendants Reaves only. The defendants Reaves denied any negligence and plead that (1) the negligence of the Johnston boy was the sole proximate cause of the collision, and (2) then plead a cross action against Johnston, the owner of the car in which the plaintiff was riding. Thereupon, defendants Reaves moved the court to make Johnston a party defendant to the end that they might recover of Johnston any amount the plaintiff might recover of them. The motion was allowed and summons was issued and served on Johnston. Thereafter, defendant Johnston moved to strike his name from the pleadings and to strike the action attempted to be alleged against him by Reaves. He also moved to strike the motion made by Reaves to have him made a party defendant. The motions were allowed and the defendants Reaves excepted and appealed. We affirmed.

Likewise, in the case of *Hannah v. House, supra,* in a similar factual situation, we approved and followed the *Kimsey* case.

In the foregoing cases, the party or parties moving to make additional parties defendant, carefully avoided alleging concurrent negligence, as did defendant Hart in the instant case, thereby refraining from invoking the provisions of G.S. 1-240 for contribution.

The judgment of the court below is

Affirmed.

HAWKINS L. CHISHOLM, WAITES C. CHISHOLM, WALLACE P. CHISHOLM, EUGENE S. CHISHOLM, JOHN V. EDWARDS, RUDOLPH EDWARDS, ALMOND EDWARDS, HELENE M. CABRAL AND MADELINE K. CUNNINGHAM v. ANN HALL AND KATHERINE HALL.

(Filed 27 September, 1961.)

1. Trial § 31—

A directed verdict may not be given in favor of the party upon whom rests the burden of proof, or in favor of either party when the evidence in regard to the material facts is conflicting.

2. Same—

Where a material fact alleged in the complaint is denied in the answer, the pleadings raise an issue of fact for the determination of a jury, Constitution of North Carolina, Art. IV, sec. 1, and the court may not properly give a directed verdict on the issue in favor of plaintiffs even though defendants introduce no evidence, since, even so, the credibility of the evidence remains in the province of the jury.

3. Same—

When all of the evidence offered upon an issue suffices, if true, to establish the controverted fact, the court may charge the jury to answer the issue accordingly if they find the facts to be as all of the evidence tends to show, since such peremptory instruction does not deprive the jury of the right to reject the evidence because of lack of faith in its credibility.

4. Same; Appeal and Error §§ 1, 42—

When the first issue, upon which plaintiffs have the burden of proof, is merely formal and the rights of the parties, under the stipulations and admissions, depend solely upon the answers to the second and third issues relating to affirmative defenses, and there is insufficient evidence to be submitted to the jury upon the defenses, a directed verdict in favor of plaintiffs on all three issues cannot be prejudicial, since upon the theory of trial plaintiffs are entitled to recover as a matter of law.

5. Trial § 6—

Stipulations duly made during the course of the trial constitute judicial admissions, binding on the parties and dispensing with the necessity of proof.

6. Ejectment § 10; Quieting Title § 2— Upon theory of trial, defendents admitted plaintiffs' record title and relied solely upon affirmative defenses.

In this action to remove cloud from title, plaintiffs claimed as heirs at law of their ancestor, and the parties stipulated that plaintiffs and defendants claim under a common source of title and defendants admitted the death of the common source, and relied solely upon adverse possession for 20 years and for 7 years under color of title. *Held:* The admissions raise a presumption that the common source of title died intestate and the rights of the parties depend, under the theory of trial, solely upon the issues relating to the affirmative defenses, upon which defendants

have the burden of proof, and upon the failure of defendants to offer evidence sufficient to be submitted to the jury upon the affirmative defenses, a directed verdict in favor of plaintiffs upon the issue of whether plaintiffs were the owners and entitled to possession of the lands in controversy is not prejudicial.

7. Same—

Where, in an action to quiet title, defendants rely upon a tax foreclosure deed but fail to put in evidence any judgment or record showing sale of the property for non-payment of taxes, there is a hiatus in the chain of title, and such evidence is insufficient to establish record title in defendants.

8. Adverse Possession § 23—

Where defendants' evidence upon their claim of title by adverse possession is limited to evidence that their predecessors in title had planted grass seed on the land during one year and had planted and harvested oats in another year, and had listed and paid taxes on the lands for over 20 years, the evidence is insufficient to be submitted to the jury upon the question of adverse possession for 20 years or for 7 years under color, since while the payment of taxes is evidence of the character of their claim, it is not evidence of actual possession, and the evidence of the other two incidents is insufficient, as a matter of law, to show continuous possession by defendants for the statutory periods. G.S. 1-38.

9. Trial § 18—

It is the function of the court to declare the law and where, under the admissions of the parties, the evidence is insufficient as a matter of law to raise an issue of fact, it is the duty of the jury to return a verdict in accordance with the court's declaration of the law.

10. Trial § 45—

When the jury renders a verdict upon disputed issues of fact the court may not reject the verdict because it is contrary to the evidence, its power being solely to set aside the verdict to prevent an unjust result, but when the court properly directs a verdict upon the issues and the jury returns a verdict inconsistent with the charge and contrary to law, the court may refuse to accept the verdict and direct the jury to return a verdict which conforms to the law as declared by the court.

APPEAL by defendants from *Campbell, J.*, April 1961 Civil Term of BUNCOMBE.

This is an action to remove cloud from title. Plaintiffs alleged they are the descendants and heirs at law of John Chisholm and, as such, the owners of a parcel of land conveyed to him in 1875. Defendants denied plaintiffs owned the land in controversy. They sought affirmative relief based on their allegations that they had acquired title to the property in controversy by virtue of their possession within known and visible boundaries for the statutory period and by possession under color of title for the statutory period.

During the trial the parties stipulated that the deeds offered in evidence described and included the land in controversy. They further stipulated: ". . . the plaintiffs and the defendants have a common source of title and it will not be necessary to go further back than the papers introduced as we proceed with the trial."

The court submitted three issues to the jury: (1) Were the plaintiffs the owners and entitled to possession of the land in controversy? (2) Had defendants been in possession for seven years under color? (3) Had defendants been in possession for twenty years? The court directed the jury to answer the first issue yes and the last two issues no.

The jury, contrary to the instruction, answered the first issue no and the last two issues yes. The court declined to accept this verdict. The jury was directed to return to its room and answer the issues as originally instructed. It did so. Judgment reciting the verdict as last returned was entered declaring plaintiffs the owners of the land in controversy. Defendants excepted and appealed.

Richard B. Ford and Loren D. Packer for plaintiff appellees.
Guy Weaver for defendant appellants.

RODMAN, J. Defendants' assignments of error present these questions for decision: (1) Did the court err in directing the jury to answer the first issue in the affirmative? (2) Could the court refuse to accept a verdict which was contrary to the court's instruction and require the jury to answer the issue in accord with its direction?

It is true, as contended by defendants, that a denial of plaintiffs' claim of ownership, thereby raising an issue of fact, places the burden of proof on plaintiffs to establish their allegation by evidence which a jury is entitled to weigh. Facts at issue are "tried by order of court before a jury." N. C. Const. Art. IV, sec. 1.

When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. *In re Will of Harrington,* 252 N.C. 105, 113 S.E. 2d 21; *Roach v. Ins. Co.,* 248 N.C. 699, 104 S.E. 2d 823; *Hincher v. Hospital Care Ass'n.,* 248 N.C. 397, 103 S.E. 2d 457; *Peek v. Trust Co.,* 242 N.C. 1, 86 S.E. 2d 745; *Morris v. Tate,* 230 N.C. 29, 51 S.E. 2d 892; *Commercial Solvents v. Johnson,*

235 N.C. 237, 69 S.E. 2d 716; *In re Will of Evans,* 223 N.C. 206, 25 S.E. 2d 556. Such an instruction differs from a directed verdict as that term is used by us. A verdict may never be directed when the facts are in dispute. The judge may direct a verdict only when the issue submitted presents a question of law based on admitted facts. *Cauley v. Dunn,* 167 N.C. 32, 83 S.E. 16; *Everett v. Williams,* 152 N.C. 117, 67 S.E. 265; *Russell v. R.R.,* 118 N.C. 1098; McIntosh, N.C.P.&P., 2d ed., sec. 1516.

To determine if there was error in directing a verdict in plaintiffs' favor we must look to the issues and interpret them in the light of the pleadings and the stipulations made during the trial. *Rowland v. Rowland,* 253 N.C. 328, 116 S.E. 2d 795; *Hill v. Casualty Co.,* 252 N.C. 649, 114 S.E. 2d 648; *Lyda v. Marion,* 239 N.C. 265, 79 S.E. 2d 726.

Manifestly the parties understood that all three issues could not be answered in the affirmative. Plaintiffs could not be the owners and entitled to possession if either the second or third issue relating to defendants' adverse possession was answered in the affirmative. Such a finding on either issue would vest title in defendants. *Martin v. Bundy,* 212 N.C. 437, 193 S.E. 831; *Morse v. Freeman,* 157 N.C. 385, 72 S.E. 1056; *Mobley v. Griffin,* 104 N.C. 112. Title so acquired would defeat plaintiffs' right to possession and title acquired from their ancestors, their only asserted source of title.

The case on appeal, prepared by appellants, states plaintiffs, to support their claim of ownership, offered in evidence a deed dated in 1875 to John Chisholm covering the land in dispute. His death was admitted in the pleadings. The case on appeal further states: "The defendants claimed title under a deed from H. B. Higgins and wife dated August 25, 1951. Higgins having acquired title through several conveyances resulting from a tax foreclosure for non-payment of taxes from 1929 to 1933, inclusive, and alleged adverse possession of the property through their deed and predecessors in title for twenty years and pleaded the twenty-year statute of limitations, and the seven-year statute of Limitations."

The foregoing statement, when read in the light of the stipulation entered at the trial that the parties claimed under a common source and "it will not be necessary to go further back than the papers introduced as we proceed with the trial," necessarily implies and is a judicial admission of these facts: (1) John Chisholm acquired good title to the land in controversy by the deed to him dated in 1875. (2) John Chisholm was dead. (3) Plaintiffs were his descendants and heirs at law.

When facts are judicially admitted, they are no longer the subject of inquiry. As said by *Walker, J.,* in *Lumber Co. v. Lumber Co.,* 137

N.C. 431: "Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings, especially when they are solemnly made and entered into and are committed to writing, and when, too, they bear directly on the matters involved in the suit. Such agreements and admissions are a frequent occurrence and are of great value, *as they dispense with proof* and save time in the trial of causes. The courts recognize and enforce *them as substitutes for legal proof,* and there is no good reason why they should not." (Emphasis supplied.)

Upon the facts admitted the law raised a presumption that John Chisholm died intestate. *Skipper v. Yow,* 249 N.C. 49, 105 S.E. 2d 205; *Barham v. Holland,* 178 N.C. 104, 100 S.E. 186; *Cox v. Lumber Co.,* 124 N.C. 78. By statute when one dies intestate, title to his real estate is transmitted to his heirs. c. 29 of the General Statutes.

Under the stipulation the submission of the first issue to the jury was a mere matter of form. Plaintiffs were, as between plaintiffs and defendants, as a matter of law, the owners unless defendants had acquired title by possession as alleged. They carried the burden of establishing facts to show that they had acquired title as they alleged. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16.

Notwithstanding the statement in the case on appeal that defendants asserted title by virtue of a tax foreclosure proceeding and conveyances to them from the purchaser at such proceeding, they did not put in evidence any judgment or record showing a sale of the property for nonpayment of taxes. They did offer in evidence a deed dated 15 November 1937 to one Cashius Holloway reciting that the property conveyed was "the same property listed for County taxes in the name of Lucy Chisholm for the years 1929, 1930, 1931, 1932 and 1933, and being her interest in the John Chisholm old tract." They offered in evidence a deed from the widow of Cashius Holloway to H. B. Higgins dated 30 August 1951 and other conveyances sufficient to vest title in them to such properties as H. B. Higgins owned.

Manifestly the record title so offered is insufficient to establish defendants' ownership. In addition to the record evidence, they offered evidence to show that they had for many years paid taxes on the land. On one occasion one of their ancestors in title had purchased grass seed to sow on the land, and on another occasion had sown oats on the land, which he had harvested. The evidence with respect to actual occupancy was limited to the planting of the grass seed on one occasion and the planting and harvesting of the oats in another year. The evidence offered by defendants was insufficient to establish their assertion of adverse possession for the statutory period unless

the payment of taxes for such period constituted such continuous adverse possession as would vest title in them. The fact that defendants listed and paid the taxes is evidence of the character of their claim. *Faulcon v. Johnston,* 102 N.C. 264, but it is no evidence of actual possession. Such listing and payment would not suffice to support an action in ejectment or trespass. That is the test of possession referred to in G.S. 1-38 and 40. *Justice v. Mitchell,* 238 N.C. 364, 78 S.E. 2d 122.

Defendants had the burden of establishing their affirmative defense, *i.e.*, their allegation of ownership. *Wells v. Clayton, supra.* Accepting as true all the evidence offered by them, it was insufficient to meet the burden imposed by law since it failed to show continuous possession for the statutory period. Hence the court correctly directed the jury to answer the second and third issues in the negative. Here, as with respect to the first issue, the answer did not depend upon the determination of a factual controversy. The answer was the answer of the law, accepting as true all of the evidence offered by defendants.

Since there was no issue of fact, there was nothing for the jury to determine. The function of the jury is to ascertain the facts. They have no duty when the facts are admitted. It is the function and duty of the court to declare the law. It is the duty of the jury to follow the court's declaration of law. *Brown v. Vestal,* 231 N.C. 56, 55 S.E. 2d 797; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Bundy v. Sutton,* 207 N.C. 422, 177 S.E. 420; *Sears, Roebuck v. Banking Co.,* 191 N.C. 500, 132 S.E. 468.

When a jury returns a verdict inconsistent with the charge and contrary to law, making it manifest the jury has misunderstood the law as declared by the court, it may refuse to accept the verdict and direct the jury to return a verdict which conforms to the law as declared by the court. *Oates v. Herrin,* 197 N.C. 171, 148 S.E. 30; *Willoughby v. Threadgill,* 72 N.C. 438; *Cahill v. Chicago, M. & St. P. Ry. Co.,* 74 F. 285; *Cherniak v. Prudential Ins. Co. of America,* 14 A. 2d 334; *S. v. McElhinney,* 100 S.W. 2d 36.

The Court of Appeals of Missouri, in the *McElhinney* case, on facts substantially identical with the facts of this case, said: "But while the judge acts within his accepted province in directing a verdict, the jury in such an instance departs from its usual function, since in returning a verdict in response to such a direction the jury does not exercise any measure of discretion, but acts only formally, perfunctorily, and ministerially as the instrument by which the court prepares the orderly record which will support the only judgment that can lawfully be rendered in the case. Under such circumstances, though

the act of returning a directed verdict purports to be that of the jury, it is in legal effect the act of the court itself, and the function of the jury in returning a directed verdict is as much ministerial as is the act of the clerk of the court in subsequently entering up the judgment based thereon.

"It must follow, therefore, that with the judge passing upon a question of law in directing a verdict, and with the jury bound to follow the law as declared to them by the judge, a refractory jury, refusing to obey the judge's directions, is not to be permitted to defeat the exercise by the judge of a power and function which he and he alone possesses by assuming and arrogating to itself the power which it does not and could not possess of reviewing and overruling the decision of the judge on the law of the case. To so permit would be to invest the jury with an authority and function which is solely innate and inherent in the judge, and to make the jury and not the law supreme."

Of course the court may not, when the jury is performing its duty of applying the law to disputed facts and the answers given are based on the jury's determination of the facts, refuse to accept the verdict and require it to render another verdict. The court may, in that situation, set aside the verdict because contrary to the weight of the evidence and for that reason would produce an unjust result, but it cannot refuse to receive the verdict and require a verdict contrary to the jury's findings.

No error.

GRINERS' & SHAW, INC. v. CONTINENTAL CASUALTY COMPANY, SOUTHERN CONTRACTORS, INC., AND ATLANTIC CONTRACTORS, INC.

(Filed 27 September, 1961.)

1. Appeal and Error § 21—

An appeal from an order for the examination of the adverse party presents for review the legal sufficiency of the application for examination.

2. Appeal and Error § 33—

The application for examination of the adverse party is a necessary part of the record proper on an appeal from an order allowing the application.

3. Bill of Discovery § 2—

G.S. 1-568.1 *et seq.*, repealing the former statutes relating to discovery and enacting new provisions in regard thereto, requires that plaintiff's

application for an examination of the adverse party to obtain evidence necessary to draw the complaint must contain factual averments disclosing that an action had been commenced, and that the information sought, designated with reasonable particularity, was not otherwise available to plaintiff and was necessary to enable plaintiff to draw the complaint.

4. Same—

An application for the examination of the adverse party to obtain information necessary to enable plaintiff to draw the complaint will lie solely in respect to those matters which relate to the action instituted by plaintiff.

5. Same— Application held insufficient to support order for examination of adverse party.

Where it appears from an application for examination of the adverse party to obtain information necessary to draw the complaint that plaintiff's claim is for labor and material furnished in a construction project, that plaintiff has sufficient information to draw a complaint against the contractor and the surety on the contractor's bond, but seeks to discover other contractual agreements and bonds made by the surety with any other defendants whereby the plaintiff would be able to allege a cause of action against the surety other than upon the surety bond, *held* the application is insufficient to support an order for the examination of the surety, since the relief sought is not for the purpose of enabling plaintiff to draw the complaint in respect to the cause of action instituted, but is for authority for a "fishing expedition" to discover grounds for an action other than the one instituted.

APPEAL by defendant Continental Casualty Company from an order of *Morris, J.*, entered at 27 March 1961 Regular Civil Term of ONSLOW.

Action by plaintiff "to collect money due the plaintiff in the sum of $5,090.05 for labor and materials, plus interest."

On 27 February 1961 plaintiff filed with the clerk of the superior court of Onslow County an application for an extension of time to file a complaint. On 2 March 1961 the clerk entered an order allowing the application.

On 2 March 1961 counsel for plaintiff, under the provisions of G.S. 1-568.10, applied to the clerk for an order for the examination of Edwin H. Forkel, president, Boyn N. Everett, vice-president and treasurer, Willard N. Boyden, vice-president and secretary, J. E. Postula, W. C. Crow and James G. Roberts, all officers or employees of the defendant Continental Casualty Company, who work in the company's home or principal office at 301 South Michigan Avenue, Chicago, Illinois. The application shows: One. This action was commenced on 2 March 1961 "for the purpose of collecting money due the plaintiff in the sum of $5,090.05 for labor and materials, plus interest." Two. In order for plaintiff to prepare its complaint it is necessary for it to

secure information from the officers and employees of Continental Casualty Company above named as to the following:

"(a) Corporate internal organization of the defendant, Continental Casualty Company, and the authority given by its stockholders, Board of Directors and officers to persons and corporations acting for and in its behalf;

"(b) Contracts, agreements and bonds made by or between Continental Casualty Company and any other defendant herein;

"(c) Employees and agents of Continental Casualty Company and their duties and responsibilities as to claims, demands and obligations of Continental Casualty Company arising, connected with, or growing out of, in any way, the construction of housing for First Camp Lejeune Quarters, Inc., Second Camp Lejeune Quarters, Inc., Third Camp Lejeune Quarters, Inc., Fourth Camp Lejeune Quarters, Inc., and Fifth Camp Lejeune Quarters, Inc., and Sixth Camp Lejeune Quarters, Inc., at Camp Lejeune, North Carolina;

"(d) Arrangements, contracts and bonds between Continental Casualty Company and Atlantic Contractors, Inc., notices received by Continental Casualty Company as to claims presented to it by virtue of nonpayment of sums due under any bond or bonds executed by Continental Casualty Company dated on or about March 30, 1959 wherein Atlantic Contractors, Inc., is principal and First Camp Lejeune Quarters, Inc., Second Camp Lejeune Quarters, Inc., Third Camp Lejeune Quarters, Inc., Fourth Camp Lejeune Quarters, Inc., Fifth Camp Lejeune Quarters, Inc., and Sixth Camp Lejeune Quarters, Inc., are referred to as 'Mortgagor-Builder' and the National Commercial Bank and Trust Company of Albany is referred to as 'Lender'; and,

"(e) As to the knowledge of Continental Casualty Company as to the corporate relationship of Atlantic Contractors, Inc., and Southern Contractors, Inc., as well as any contract, agreement or bond between Continental Casualty Company and Southern Contractors, Inc., or any other person, firm, corporation or association concerning said Camp Lejeune, North Carolina, construction."

Three. The information sought is not available to plaintiff, but is within the knowledge and control of the officers and employees of Continental Casualty Company named in the application and of the company. Four. The application is made in good faith.

On 2 March 1961 the clerk entered an order granting the application in full, and ordering a copy of the order to be served upon the Continental Casualty Company, and its officers and employees named in the application.

Counsel stipulated that summons was duly issued on 2 March 1961,

and the summons, a copy of the application and order for extension of time to file complaint, and a copy of the order of examination were served on Continental Casualty Company and its officers and employees above named on 6 March 1961.

On 14 March 1961 Continental Casualty Company made a motion before the clerk to vacate the order of examination. On 16 March 1961 the clerk denied the motion to vacate the order of examination, and approved such order in all particulars. Continental Casualty Company excepted and appealed to the judge.

Judge Morris heard the appeal, and entered an order finding that subsections (c) and (d) of the order for examination are too broad and should be stricken, and that subsections (a), (b) and (e) are not too broad and should not be stricken. Whereupon, he ordered that subsections (c) and (d) of the order of examination should be stricken, and, except as so modified, the order of examination is affirmed in all respects.

Defendant Continental Casualty Company excepted to the judge's findings and to the order and appeals.

Ellis, Godwin & Hooper By: Glenn L. Hooper, Jr., for plaintiff, appellee.

E. K. Powe and W. Travis Porter for Continental Casualty Company, defendant, appellant.

PARKER, J. Defendant Continental Casualty Company assigns as errors Judge Morris' findings, or more properly conclusions, even though his striking out subsections (c) and (d) of the order for examination was in its favor, and his order. Both assignments of error are supported by exceptions.

Defendant's exception to Judge Morris' order raises the question whether any error of law appears on the face of the record. This includes the legal sufficiency of the application for examination to support the order of examination, *Webb v. Gaskins, ante,* 281, ... S.E. 2d ....., where many authorities are cited, because the application for examination is a necessary part of the record proper. *Thrush v. Thrush,* 245 N.C. 63, 94 S.E. 2d 897; Strong's N. C. Index, Vol. I, Appeal and Error, § 33, where many cases are cited.

G.S. 1-568.3 provides: "An examination may be had before trial pursuant to the provisions of this article — (1) For the purpose of obtaining information necessary to prepare a pleading. . . . ."

G.S. 1-568.9(a) reads: "Before the examining party has filed his complaint, petition or answer, he may procure an examination pursuant to this article only upon showing by affidavit, as provided by G.S.

1-568.10, that the examination is necessary to enable him properly to prepare his complaint, petition or answer."

G.S. 1-568.10(b) provides: "The application must be in the form of, or supported by, an affidavit, showing: (1) That the action has been commenced and the purpose thereof; (2) That, in order to prepare his complaint, petition or answer, it is necessary for the applicant to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity; (3) That the information sought is not otherwise available to the applicant, together with a statement of the reasons therefor."

The Act 1951 Session Laws of North Carolina, Chapter 760, relating to the examination of parties and certain other persons before trial, now codified as G.S. 1-568.1 through 1-568.27, repealed the former statutes (G.S. 1-568 through 1-576) concerning the examination of parties before trial. *Tillis v. Cotton Mills,* 238 N.C. 124, 76 S.E. 2d 376.

The application for an order of examination states that plaintiff's action is "for the purpose of collecting money due the plaintiff in the sum of $5,090.05 for labor and materials, plus interest." Certainly, plaintiff knows to whom it furnished labor and materials, and who is indebted to it for them. The application and record proper furnish no definite answer as to whom plaintiff furnished labor and materials, though it seems from the application and record proper that plaintiff furnished labor and materials in the sum of $5,090.05 to either Southern Contractors, Inc., or Atlantic Contractors, Inc., both defendants, and that Atlantic Contractors, Inc., constructed certain housing at Camp Lejeune, and Continental Casualty Company executed a bond or bonds on or about 30 March 1959 wherein Atlantic Contractors, Inc., is principal. There is nothing in the application or record proper to show that Continental Casualty Company executed any bond with Southern Contractors, Inc., as principal.

Plaintiff states in its brief: "The plaintiff certainly admits that it is in a position to file a complaint against the appellant, Continental Casualty Company, upon the basis of a certain payment bond and this was admitted to the trial court. However, this does not preclude the existence of other 'contracts, agreements and bonds made by and between Continental Casualty Company and any other defendant herein,' whereby the plaintiff would be able to allege a cause of action other than upon the above referred to bond."

It seems apparent that plaintiff has available to it sufficient essential and material facts to draft its complaint for money due for labor and material furnished in the sum of $5,090.05 against the corporation to whom it furnished it, and whom it surely knows, and for a cause

of action on the bond or bonds dated on or about 30 March 1959 executed by Continental Casualty Company, wherein Atlantic Contractors, Inc., is principal, and we are fortified in our opinion by the statement in plaintiff's brief quoted above. It also seems apparent from the application that plaintiff has not designated with reasonable particularity any matters about which it seeks to examine Continental Casualty Company and its designated officers and employees, which are material and necessary to draft its complaint in the instant action "for the purpose of collecting money due the plaintiff in the sum of $5,090.05 for labor and material," and on the bond or bonds of Continental Casualty Company, and plaintiff admits this in its brief. To paraphrase language used in *Cates v. Finance Co.*, 244 N.C. 277, 93 S.E. 2d 145, plaintiff's application for examination is a fishing expedition, and it seeks judicial license to cast its line into the records and business of the Continental Casualty Company, and thereby to land some other cause of action than the action it has instituted. Such a ransacking expedition seeking a new cause of action is not within the intent and purpose of the 1951 Act permitting an examination before trial for the purpose of obtaining information necessary to prepare a complaint in the action instituted. Plaintiff is entitled to an order of examination only in respect to those matters which relate to the action it has instituted. *Cates v. Finance Co., supra.*

The factual averments in plaintiff's application for an order of examination are fatally insufficient to support Judge Morris' order.

The factual averments in the application for examination of defendant to obtain information to file a complaint in *Jones v. Fowler*, 242 N.C. 162, 87 S.E. 2d 1, the record of which is on file in the office of the clerk of this Court, were decided by this Court to be sufficient. This was an action by a tenant against a landlord for an accounting for the year 1954. The application states in substance that an examination of defendant is necessary for plaintiff properly to prepare his complaint, because defendant has all the records in respect to their farming operations during 1954, such as advancements made to plaintiff, insurance issued on the crops, amount of insurance collected, and the amount for which the 1954 crops sold. The *Jones* case is easily distinguishable from the instant case.

The order of Judge Morris below for an examination is

Reversed.

WILLIAM V. JOHNSON v. SOUTHERN RAILWAY COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 September, 1961.)

1. Railroads § 3—

Where one railroad company is permitted to run its train over the tracks of another, both may be held liable for negligent injury to a motorist in a crossing accident, notwithstanding that only one of them is guilty of negligence causing the accident.

2. Railroads § 5—

A railroad company and a motorist are under mutual and reciprocal duty of exercising due care to avoid a crossing accident; the engineer of the train is under duty to give the customary warning of the train's approach to the crossing and to exercise reasonable vigilance, the motorist is under duty to look and listen in both directions for an approaching train if not prevented from doing so by the fault of the railroad company, and to do so at a point where lookout will be effective.

3. Same—

The failure of warning signals of the approach of a train to a railroad crossing does not justify a motorist in driving blindly onto the track in reliance on the absence of signals, but a motorist remains under duty to look and listen in both directions for an approaching train.

4. Same—

Momentary failure of an automatic crossing signal is not evidence of any negligence of the railroad company, *res ipsa loquitur* having no application, but such failure may be properly considered in measuring the care exercised by the motorist, since a motorist has a right to place some reliance upon the signal, even though he may not rely blindly thereon, and therefore the absence of such signal is relevant on the question of contributory negligence.

5. Same—Evidence held not to show contributory negligence as a matter of law on part of motorist injured in crossing accident.

Evidence tending to show that the crossing in question was obstructed by a box car standing some 50 feet from the crossing on a spur track and another box car standing some 250 feet therefrom, that plaintiff stopped his vehicle some 30 feet before reaching the crossing, from which point plaintiff could see about 75 feet northward along the track to the south end of the nearest box car and some 300 feet northwardly between the box cars, that plaintiff then moved slowly forward, continuing a lookout by glancing along the track, the view between the box cars lessening as he approached the track, that the automatic signal device at the crossing was not working, and that the train, approaching from the north, gave no warning by bell or whistle, does not disclose contributory negligence as a matter of law on the part of the motorist notwithstanding his testimony that he did not see or hear the train until it struck his vehicle.

APPEAL by plaintiff from *Parker, J.*, March 1961 Term of GATES.

This action was instituted 1 December 1959 to recover for personal injuries and property damage suffered by plaintiff when a pickup truck driven by him was struck by a freight train at a railroad crossing in Roduco, N. C., on 24 January 1959.

At the close of plaintiff's evidence the court allowed the motions of defendants for nonsuit and entered judgment dismissing the action.

Plaintiff appealed and assigned errors.

Phil P. Godwin, Thos. L. Woodard and John H. Hall for plaintiff, appellant.

Joyner, Howison & Mitchell for defendant Southern Railway Company, appellee.

Godwin & Godwin and Rodman & Rodman for defendant Atlantic Coast Line Railroad Company, appellee.

MOORE, J. It is admitted in the pleadings that the railroad is owned by the Atlantic Coast Line Railroad Company (hereinafter referred to as A.C.L.), that the Southern Railway Company (hereinafter called "Southern") by agreement with A.C.L. operates freight trains on and over this railroad, and that the freight train involved in the alleged collision was owned and operated by Southern.

"It is a well-established principle of law that a railroad company which admits another railroad company to the joint common use of its tracks is liable for the negligent acts of such company in the enjoyment of such use, although it was guilty of no negligence or breach of duty on its own part, and such liability is not affected by the fact that the company using the tracks is also liable. . . ." 74 C.J.S., Railroads, s. 364a, p. 895.

Appellant alleged and offered proof of negligence on the part of defendants in the following respects: (1) Southern's train which struck plaintiff's vehicle at the crossing did not give warning of its approach either by ringing bell, sounding gong, or blowing whistle; (2) the automatic signal light maintained by A.C.L. at the crossing failed to work and give warning of an approaching train; and (3) the train approached from the north, and in that direction the view was obstructed. Defendants alleged that plaintiff was contributorily negligent in that he failed to keep a proper lookout and drove upon the crossing without taking reasonable precautions to discover the peril and avoid collision.

"When approaching a public crossing the employees in charge of a train and a traveler upon the highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury. . . ." *Moore v. R. R.*, 201 N.C. 26, 29, 158 S.E. 556.

The train has the right of way, but the law imposes upon the engineer the duty to give the usual and customary warning of the train's approach and to exercise vigilance in approaching crossings in order to avoid injury. A traveler on the highway has the right to expect timely warning. But the failure to give such warning does not justify the traveler in relying upon such failure or in assuming that no train is approaching. Before attempting to go upon or cross the track, a traveler must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company; and this should be done before he has taken a position exposing him to peril, and at a point where lookout will be effective. *Parker v. R. R.*, 232 N.C. 472, 61 S.E. 2d 370; *Godwin v. R.R.*, 220 N.C. 281, 17 S.E. 2d 137; *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598; *Johnson v. R.R.*, 163 N.C. 431, 79 S.E. 690; *Coleman v. Railroad Company*, 153 N.C. 322, 69 S.E. 251; *Cooper v. Railroad*, 140 N.C. 209, 52 S.E. 932; *Norton v. R. R.*, 122 N.C. 910, 29 S.E. 886.

"While it should not be understood that the failure of a signaling device maintained at a crossing to work at any particular time necessarily constitutes negligence on the railroad's part under all circumstances, . . . such a failure has been very generally held or regarded to be a breach of duty toward a person relying upon such signal, and consequently at least evidence of negligence, which may be taken into consideration along with other alleged acts of negligence, particularly where the device has been out of repair for a considerable period of time and the railroad has had notice of its defective condition." Anno: 99 A.L.R., Railroad Crossing — Signal Device, s. II, pp. 729, 730.

The mere momentary failure of an automatic signaling device to operate upon the occasion of an accident is not evidence of negligence on the part of the railroad company. *Res ipsa loquitur* has no application in such circumstances. *Vaca v. Southern Pac. Co.*, 267 P. 346 (Cal. 1928). But it is proper to consider such failure in measuring the care exercised by the traveler in negotiating the crossing, and it is therefore relevant on the question of contributory negligence. *Southern Pac. Co. v. Kauffman*, 50 F. 2d 159 (9th C. 1931). A traveler on a highway has the right to place some reliance upon an automatic crossing signal, especially if his view is obstructed. *Southern Ry. Co. v. Whetzel*, 167 S.E. 427 (Va. 1933). But the fact that an automatic warning signal is not working does not relieve the traveler of the duty to look and listen for approaching trains when from a safe position such looking and listening will suffice to warn him of danger. *Price v. Chicago & E. I. Ry. Co.*, 270 Ill. App. 111 (1933); *Calloway v. Pennsylvania R. Co.*, 62 F. 2d 27 (4th C. 1932); *Kindig v. Atchison, T. & S. F. Ry. Co.*, 1 P. 2d 75 (Kan. 1931). Where there are obstructions to

the view and the traveler is exposed to sudden peril, without fault on his part, and must make a quick decision, contributory negligence is for the jury. *Southern Ry. Co. v. Davis*, 147 S.E. 228 (Va. 1929).

In the instant case the evidence, when taken in the light most favorable to plaintiff, is sufficient *prima facie* to establish that defendants were negligent and that such negligence was a proximate cause of the collision. Decision turns upon the question as to whether or not plaintiff was contributorily negligent as a matter of law.

The railroad runs north and south. U. S. Highway 158 runs east and west and crosses the railroad at grade. 158 is a two-lane highway. Plaintiff was headed west. He stopped the pick-up about 30 feet before reaching the railroad track and in his proper lane of travel. He looked in both directions and listened. The railroad station is about 300 feet north of the crossing and about 12 feet east of the main track. To the north of the station is a pile of sawdust or chips. A spur track runs between the station and the main track, parallels the latter, and ends near the highway but does not cross it. The main and spur tracks are about 6 feet apart. There was a housed box car, about 40 feet long, standing on the spur track about 50 feet north of the highway. There was another box car on the spur track alongside the station. The railroad is straight and level for two miles north of the crossing. At the crossing A.C.L. had installed automatic signal lights about 10 feet from and on both sides of the track, and when in operation the lights blink alternately and give off a bright red light. These signal devices bear the legend: "Stop on red signal." Above the lights are cross-arm signs marked "Railroad Crossing." Plaintiff did not see or hear a train. The weather was clear and the sun shining. It was about 10:20 A.M. Plaintiff could see about 75 feet northwardly along the track to the south end of the nearer box car. Plaintiff moved forward in low gear. He did not see or hear the train until it struck his vehicle. He heard no whistle, bell or gong. The automatic signal light was not blinking.

Plaintiff makes the following explanations: "There was nothing on the spur track between the two box cars. . . . My view to the north did increase some. I continued to look as I came up here." As I "went up to the railroad track, during that 30 feet, . . . I glanced, you know how would turn your head and glance, but I was mainly looking at the road then. When I pulled off I looked again to be sure and then I centered my attention primarily on the highway. . . . I did not rely on the lights alone, I listened and looked. During the last thirty feet when I was approaching the crossing I did not assume that there was no train merely from the fact I did not see any light blinking. I looked carefully in both directions and listened carefully."

It does not suffice to say that the traveler on the highway stopped, looked and listened; the looking and listening must be timely, so that the precaution may be effective. It is his duty to look attentively up and down the track in time to save himself, if the opportunity to do so is available, but he is not required to leave his vehicle and go upon the track on foot to make his observations. Yet, it is his duty to take such precautions as an ordinarily prudent man would take under the same or similar circumstances. *Parker v. R. R., supra; McCrimmon v. Powell,* 221 N.C. 216, 19 S.E. 2d 880; *Miller v. R. R.,* 220 N.C. 562, 18 S.E. 2d 232; *Godwin v. R. R., supra.* Even so, a traveler on a highway has the right to place some reliance upon an automatic crossing signal if his view is obstructed. *Southern Ry. Co. v. Whetzel, supra.* See also: *Oldham v. R. R.,* 210 N.C. 642, 188 S.E. 106; *Keller v. R. R.,* 205 N.C. 269, 171 S.E. 73; *Barber v. R. R.,* 193 N.C. 691, 138 S.E. 17; *Shepard v. R. R.,* 166 N.C. 539, 82 S.E. 872.

While plaintiff in the instant case was stopped, 30 feet from the crossing, he could see at least 300 feet northwardly along the track. The only obstruction within 300 feet was the box car near the end of the spur line. There was a substantial opening between the two box cars. Plaintiff then had a view of the track between the first box car and the crossing of about 75 feet. As he moved forward the view between the box cars decreased and at length disappeared altogether, and the view south of the first box car increased some. Had plaintiff stopped just before entering the crossing, it does not appear how far he could have seen along the track. The box car was wider than the track, and the main and spur tracks were only about 6 feet apart.

Should plaintiff, in the exercise of due care, have stopped again just before entering the crossing, and, if so, how far could he have seen along the track? Would an ordinarily prudent man have relaxed his vigilance somewhat, under the circumstances, because of the failure of the automatic signal lights to work? If plaintiff had focused his attention along the track to the north as he neared the crossing, could he have seen the approaching train in time to stop before going upon the track? These and other pertinent questions must be answered by the jury. Opposing inferences are permissible from the evidence. *Harris v. Davis,* 244 N.C. 579, 581, 94 S.E. 2d 649. Therefore, it cannot be said that plaintiff was contributorily negligent as a matter of law.

In *Boyd v. R. R.,* 232 N.C. 171, 59 S.E. 2d 785, the circumstances were very similar to those in the case at bar. There an opposite result was reached. The distinguishing feature is that in the *Boyd* case plaintiff stopped and looked at a point 20 feet from the track where

her view was almost entirely obstructed and then went blindly forward. Plaintiff said: "We did not look but one time. . . . I just don't know why I didn't look the second time."

The judgment below is

Reversed.

FRANK LEE ISRAEL v. MAXINE FAYE ISRAEL.

(Filed 27 September, 1961.)

Divorce and Alimony § 1: Domicile § 1: Army and Navy—

Evidence tending to show that plaintiff in a divorce action was born and raised in a municipality of this State and lived here until inducted into the army, that he continued to regard this State as his domicile while stationed in many states and in a foreign country under military orders, that while on leave he made his "headquarters" at his mother's home in this State, *is held* to support an instruction that plaintiff's home remained in this State unless he had intended to make some other state his home permanently or for an indefinite period, and supports the jurisdiction of the court over the action, notwithstanding the marriage was contracted in another state.

APPEAL by defendant from *Campbell, J.*, at May 1961 Civil Term of BUNCOMBE.

Civil action for divorce on the grounds of two years separation.

Plaintiff, in his complaint, filed on 9 July 1960, alleges among other things: (1) That he is and has been for more than six months next preceding the commencement of this action, a citizen and resident of Buncombe County, North Carolina; (2) that plaintiff and defendant were lawfully married 26 October 1952; (3) that plaintiff and defendant separated without any fault on his part, on 23 December 1956, and have continuously lived separate and apart since then; and (4) that one child was born of the marriage, which child has been and shall continue to be supported by plaintiff.

Wherefore, plaintiff prays for an absolute divorce.

Defendant, answering, admits the existence of the marriage and the birth of one child, and denies the other material allegations of the complaint including plaintiff's allegation of residence in North Carolina for six months next preceding the commencement of the action.

As a further answer and defense, defendant alleges that plaintiff wrongfully and unlawfully abandoned her and their minor child without provocation and without securing to them adequate support.

Wherefore defendant prays that the divorce be denied and that plaintiff be ordered to pay adequate support for herself and their minor child.

At the trial plaintiff offered evidence tending to show, among other things, that he was born and raised at Candler in Buncombe County, North Carolina; that he went to grammar school and high school there, and graduated from Candler High School in 1941; that he has been in the Army 19 years, and has had no other home except Buncombe County; that he married the defendant in October, 1952, in Arkansas and has been in the Army since then; that he was stationed in Colorado at the time of the marriage, then in Oklahoma, and then in Kentucky, and that his wife would not join him at these places; that plaintiff was transferred to Germany in May, 1956, and took with him the defendant and her minor daughter; that the family lived together there in a three-bedroom apartment which was provided by the Army, and which had a modern kitchen and all the utilities, "very, very nice"; that he helped in the home and provided a maid for a short time; that he provided his wife with an automobile which was at her disposal "24 hours a day"; that defendant remained in Germany about seven months and returned to the United States on 23 December 1956; that plaintiff didn't know "under what circumstances my wife left at that time." In his language, "she just * * * she just wanted to come home. She didn't give me no excuse at all. I had at this time been providing support * * * I did not ask my wife to leave Germany * * * When I came home from the field she had called her folks in Oklahoma wanting to come home. At that time I had not done nothing, not used any physical force on my wife;" that plaintiff did not have enough money to send defendant home, but that her parents agreed to give her the money with plaintiff's approval; that he finally gave his approval; that from 23 December 1956, until the present, plaintiff has not resumed marital relations with defendant; that when they were married, plaintiff took out an allotment for defendant and her minor daughter of $157.00 per month, which was increased to $176.90 after their minor son was born; that the allotment has never been stopped and is still being received by defendant; that plaintiff was transferred in April, 1960, from Germany to Fort Ord, California, where he is presently stationed; that since April, 1960, plaintiff has had twenty days leave from the Army, which time he spent visiting his mother in North Carolina; that "I (plaintiff) made a decision regarding my future married life after my wife left me. When she left me in Germany, I told her I wouldn't live with her no more"; that in August, 1960, at Fort Ord in the presence of

the Army Chaplain, plaintiff again told defendant that he would not live with her any more; that plaintiff sent $600 to defendant after she left Germany and has continued to provide her with a Class Q allotment; that when and if plaintiff retires from the Army, he expects to come back to North Carolina to live. "It is my home; I was born and raised here. I don't have any other place to go besides my mother's home at Candler."

Plaintiff further offered as evidence the testimony of Mrs. Lillie Israel which tended to show, among other things, that she lives at Candler, Route #3, and is the mother of Sergeant Frank Israel; that when defendant returned from Germany in 1956 or 1957, she spent a week at the witness' house; that defendant told the witness that she was not going back, that she didn't like it and didn't want to live there; that defendant made no statement about not being supported by plaintiff; that defendant didn't speak well of plaintiff; that when plaintiff is on leave he makes his headquarters at the witness' house; that "he visits the family and goes from one place to the other, but usually headquarters is my home, his home"; that plaintiff has a room at the witness' house which is always ready for him.

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. The motion was denied and defendant excepts, and, thereupon, defendant introduced evidence tending to rebut plaintiff's evidence and tending to support her contentions.

At the close of all the evidence, the court submitted the case to the jury upon these issues, which were answered as shown:

> "1. Were the plaintiff and the defendant married as alleged in the complaint? Answer: Yes.
>
> "2. Was the plaintiff a resident of the State of North Carolina at the time of the institution of the action and had he been a resident of said State for more than six months prior to the commencement of the action? Answer: Yes.
>
> "3. Have the plaintiff and the defendant lived separate and apart continuously for more than two years next preceding the institution of this action, as alleged in the complaint, with the intention to cease cohabitation as man and wife? Answer: Yes.
>
> "4. If so, was the separation caused without fault of plaintiff? Answer: Yes (we do not think it was the plaintiff's fault).
>
> "5. Did the plaintiff wrongfully and unlawfully abandon the defendant and their minor child, without securing to them adequate support, as alleged in the defendant's answer? Answer: No."

To judgment in accordance therewith defendant excepts and appeals to Supreme Court, and assigns error.

James S. Howell for plaintiff appellee.
William J. Cocke for defendant appellant.

WINBORNE, C.J. The defendant makes numerous assignments of error. This is the pivotal one: Did the trial court err in instructing the jury as a matter of law that unless plaintiff did intentionally change his home and intend to make some other State his permanent home for an indefinite period of time or for a permanent length of time, that his residence would remain in North Carolina even though he may have been in Korea or various other localities? We think the answer is No.

In *Martin v. Martin,* 253 N.C. 704, 118 S.E. 2d 29, *Moore, J.,* speaking for the Court said, quoting in part as follows: "Jurisdiction in divorce actions is conferred by statute. The requirement that one of the parties to a divorce action shall have resided in the State for a specified period of time next preceding the commencement of the action is jurisdictional. If the element of residence is lacking the court has no jurisdiction to try the action or grant a divorce. *Henderson v. Henderson,* 232 N.C. 1, 9, 59 S.E. 2d 227; *Ellis v. Ellis,* 190 N.C. 418, 421, 130 S.E. 7. In an action for divorce 'The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint * * * .' G.S. 50-8.

"' * * * To establish a domicile there must be a residence, and the intention to make it a home or to live there permanently or indefinitely. *S. v. Williams,* 224 N.C. 183 (1944), 29 S.E. 2d 744.' *Bryant v. Bryant,* 228 N.C. 287, 289, 45 S.E. 2d 572 (1947).

" * * * In *Williams v. North Carolina,* 325 U.S. 226, 229 (1945), it is said: 'Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell v. Bell,* 181 U.S. 175; *Andrews v. Andrews,* 188 U.S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between persons and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted.'

" 'In a strict legal sense that place is properly the domicil of a person where he has his true permanent home and principal establishment, and to which he has, whenever he is absent, the intention of returning, and from which he has no present intention of moving.' 17A Am. Jr., Domicil, S. 2, pp. 194-5."

And in *Hart v. Coach Co.*, 241 N.C. 389, 85 S.E. 2d 319, *Higgins, J.*, quotes with approval from *Central Manufacturers Mut. Ins. Co. v. Friedman*, 209 S.W. 2d 102 (Ark.) as follows: "The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur." See also: 19 C.J. 418; 17A Am. Jur. Domicile, S. 40, p. 227; *Trigg v. Trigg*, 226 Mo. App. 284, 41 S.W. 2d 588; *Kennedy v. Kennedy*, 205 Ark. 650, 169 S.W. 2d 876.

Thus it appears that the charge was presented to the jury correctly and free of error.

Moreover, all assignments of error brought forth by defendant have been given consideration and fail to show cause for disturbing the decision reached in the court below.

In the judgment below there is

No error.

GARLAND T. HOLLAND v. TROY J. MALPASS.

(Filed 27 September, 1961.)

1. Negligence §§ 21, 242—

Negligence is not presumed from the mere fact of an accident, but if the evidence establishes actionable negligence as a more reasonable probability, the cause must be submitted to the jury in the absence of contributory negligence as a matter of law, even though the possibility of an accident may arise on the evidence.

2. Negligence § 26—

If plaintiff's evidence establishes contributory negligence so clearly that no other conclusion may be reasonably drawn therefrom, nonsuit is proper.

3. Negligence § 11—

Contributory negligence bars recovery if it contributes to the injury as a proximate cause or one of them.

4. Same—

A person *sui juris* is under duty to exercise ordinary care for his own safety, the degree of care being commensurate with the obvious danger.

5. Automobiles § 25—

Testimony that a vehicle was travelling at a speed of about 25 or 30

miles an hour may not be considered as tending to show a speed in excess of 25 miles an hour.

6. Automobiles § 33—

A pedestrian crossing a highway at a place other than a marked crosswalk is required to yield the right-of-way to vehicular traffic. G.S. 20-174a.

7. Automobiles §§ 41l, 42k— Nonsuit held proper in action by pedestrian to recover for injuries received when struck by motorist.

The evidence tended to show that defendant was driving on a motor scooter within a foot or so of his right edge of the highway so that automobile traffic would have room to pass, that the motor scooter was being driven at a reasonably prudent speed under the conditions then existing, that as defendant was passing a line of pedestrians waiting to cross, plaintiff, who had jumped across a mudhole at the edge of the road, fell with the lower part of his body on the highway some 25 feet in front of the scooter, and that defendant did not have time to stop or swerve before hitting plaintiff. The evidence further tended to show that as plaintiff was approaching the road, intending to cross, his view was obstructed by the line of pedestrians, that plaintiff elected to jump across the mudhole to the side of the road rather than walk around, and slipped and fell when he landed on the mud and gravel at the far side. *Held:* Nonsuit was properly entered for want of evidence of actionable negligence on the part of defendant or on the ground that plaintiff's evidence discloses contributory negligence as a matter of law, since plaintiff could have anticipated that the pedestrians were waiting for the passage of on-coming traffic and that in jumping across the mudhole he might fall partially on the road in front of closely approaching traffic.

APPEAL by plaintiff from *Fountain, S.J.*, January 1961 Special Civil Term of CARTERET.

Civil action to recover damages for personal injuries sustained by defendant when he was hit by a motor scooter operated by defendant.

Defendant denies negligence, and pleads as a defense that plaintiff's negligence was the sole proximate cause of his injuries, but that if he, the defendant, was negligent, then plaintiff contributed to his injuries by his own negligence.

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

C. R. Wheatly, Jr., and Thomas S. Bennett By Thomas S. Bennett for plaintiff, appellant.

Ward and Tucker for defendant, appellee.

PARKER, J. On 21 August 1957 plaintiff was employed at the Marine Air Corps Station, Cherry Point, North Carolina, in the Overhaul and

Repair Department. On this date about 4:15 o'clock p.m. he left his place of employment along with about 300 other employees there and behind about 100 other employees there who had left, and walked down a gravel area or street westerly to Curtis Road, a paved street 20 feet wide. His destination was a parking lot across Curtis Road where his automobile was parked. There is a marked pedestrian crossing across Curtis Road located north of the point where he was hit by a motor scooter. When he neared Curtis Road, he noticed a mudhole about three feet wide, which commenced at the eastern margin of Curtis Road and extended back about three feet. About 15 or 20 people on his left standing right on the edge of Curtis Road had his view blocked. There were about 10 or 12 people standing on his right. There were also two automobiles parked off Curtis Road on the shoulder. He stopped behind the mudhole and could not see the street. He is a short man, and the people standing to his left were taller than he is. He saw four or five people cross Curtis Road in front of him, and in order for him to see the street and see if the way was clear, he testified "he took a long step and a hop across the mudhole, landing on the edge of Curtis Road on his right foot." He landed on gravel which caused him to slip, and he fell with his body from his ribs down lying in Curtis Road and from his ribs up toward his head lying on the gravel in the mud at the edge of the street. While falling he saw a motor scooter approaching him from his left on Curtis Road about 25 feet from him, and travelling at a speed of about 25 or 30 miles an hour and within a foot or so of the eastern edge of the street. When the motor scooter was about five feet from him, he heard its brakes squealing. Defendant did not blow his horn at any time. He had insufficient time to crawl off Curtis Road before the motor scooter hit him. The front wheel of the motor scooter hit his body and knocked him over on his right side, and the back wheel hit him in the back and dragged him across the street about five feet, inflicting on him serious injuries. After hitting plaintiff the motor scooter went about 12 feet and turned over in the street throwing the defendant out in the center of the street. There were no signs regulating traffic on Curtis Road.

Plaintiff offered one eye witness, William Boyd. According to his testimony about 15 people were on either side of plaintiff, when the plaintiff jumped and fell. The people on plaintiff's left were standing close together waiting for an opportunity to cross the street, and the people to his right extended about 150 feet from plaintiff, and all were close to Curtis Road. In his opinion, the motor scooter was travelling at least 20 miles an hour. He testified, "I did not see the defendant swerve either to the left or to the right in an attempt to avoid the accident; in fact, I don't think he had much time for it. . . . Mr. Mal-

pass sitting on top of the motor scooter and riding it would have constituted a height of approximately 5 feet."

Proof of a collision between the motor scooter operated by the defendant and plaintiff lying partially on Curtis Road is not sufficient to warrant an inference that the collision and resulting injuries to plaintiff were proximately caused by the negligence of the defendant. *Whitson v. Frances*, 240 N.C. 733, 83 S.E. 2d 879.

However, if the facts shown by plaintiff's evidence establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence, unless plaintiff's evidence establishes contributory negligence on his part so clearly that no other conclusion may be reasonably drawn therefrom, for if such contributory negligence is so shown, then defendant is entitled to have his motion for judgment as of nonsuit sustained. *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477; *Whitson v. Frances, supra; Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

Plaintiff's negligence to bar recovery need not be the sole proximate cause of his injuries. It suffices, if it contributes to his injuries as a proximate cause, or one of them. *Sheldon v. Childers*, 240 N.C. 449, 82 S.E. 2d 396; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251.

The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788; 65 C.J.S., Negligence, § 116, p. 706.

Plaintiff testified that while falling he saw a motor scooter approaching him from his left on Curtis Road about 25 feet from him, and travelling at a speed of about 25 or 30 miles an hour and within a foot or so of the eastern edge of the street. The only other evidence of speed of the motor scooter is the testimony of William Boyd that in his opinion the motor scooter was travelling at least 20 miles an hour. The evidence may not be considered as tending to show a speed in excess of 25 miles an hour. *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585. The time was 4:15 o'clock p.m. There is a marked pedestrian crossing across Curtis Road located north of the point where plaintiff was hit by the scooter. The pedestrians standing at the eastern edge of Curtis Road on either side of plaintiff were not at a marked crosswalk. It would seem defendant for his own safety was travelling within a foot or so of the eastern edge of the street so automobile traffic would have room to pass him. The pedestrians standing at the edge of Curtis Road and preparing to cross it at a place not within a marked crosswalk, and also plaintiff at such a place, were required to yield de-

fendant the right of way. G.S. 20-174(a). We conclude that defendant was not driving his motor scooter at a speed in excess of what was reasonable and prudent under the conditions then existing, that he was not negligent in driving it within a foot or so of the eastern edge of the street at the time and under the existing circumstances, and that he was not negligent in failing to sound his horn under the existing circumstances. It appears that defendant was keeping a proper lookout in the direction of travel, because when plaintiff suddenly jumped and fell in the road about 25 feet in front of him, the brakes of the motor scooter were heard squealing about five feet before it collided with plaintiff; a mere fragment of time elapsed between the time plaintiff jumped and fell in the street and the time the brakes of the motor scooter squealed. In our opinion, the evidence before us would not justify a legitimate inference that if defendant had been travelling at a lower rate of speed, for instance 10 or 15 miles an hour, he could have avoided the collision in the exercise of ordinary care, because William Boyd testified on direct examination, "I did not see the defendant swerve either to the left or to the right in an attempt to avoid the accident; in fact, I don't think he had much time for it." In our opinion, and we so hold, the evidence before us shows no negligence of defendant.

But if we concede, which we do not, that the evidence made out a case of negligence against defendant, it is manifest from the evidence that plaintiff failed to exercise due care for his own safety, which was a proximate cause of his injuries, or in other words, plaintiff's evidence proves contributory negligence of plaintiff so clearly that no other conclusion can be reasonably drawn therefrom.

Plaintiff, a short man, approached Curtis Road to cross it where there was no marked crosswalk. He saw to his left and right pedestrians standing at the edge of the street waiting to cross. He could not see over their heads. Any reasonably prudent person should have known these pedestrians were waiting for closely approaching vehicular traffic to pass before entering on the road, even though he had seen four or five persons cross Curtis Road in front of him at a time not definitely fixed in the evidence. Plaintiff in order to see the street and to see if the way was clear "took a long step and a hop" across a mudhole about three feet wide, which commenced at the eastern margin of Curtis Road and extended back about three feet, and landed on the eastern edge of Curtis Road on gravel which caused him to slip and fall with part of his body on Curtis Road and part on the gravel in the mud at the edge of the street about 25 feet in front of the approaching motor scooter. Any ordinarily prudent person should have reasonably anticipated under the circumstances then and there

existing that in making such a jump to the edge of the street and landing on the mud and gravel he might fall partially on the road in front of closely approaching vehicular traffic with injurious consequences to himself, and this seems particularly true because pedestrians were standing on either side of him at the edge of the street evidently waiting for closely approaching vehicular traffic to pass before venturing to cross the street. Under these circumstances plaintiff could have easily and safely walked around the mudhole to the edge of the street, but he voluntarily chose the dangerous way of hopping across the mudhole to the edge of the street, and fell partially in the street about 25 feet in front of the motor scooter which hit him.

In the circumstances disclosed by the evidence, we are constrained to hold that the judgment of involuntary nonsuit should be sustained, if not upon the principal question of liability, then upon the ground of contributory negligence. *Cook v. Winston-Salem,* 241 N.C. 422, 85 S.E. 2d 696; *Houston v. Monroe,* 213 N.C. 788, 197 S.E. 571.

The cases relied upon by plaintiff are factually distinguishable.

The judgment of nonsuit below is

Affirmed.

ASHEVILLE ASSOCIATES, INC., A CORPORATION v. JOHN WILLIAM MILLER.

AND

ASHEVILLE ASSOCIATES, INC., A CORPORATION v. FRANK L. BERMAN.

(Filed 27 September, 1961.)

1. Contracts § 7—

Where a contract of employment with a partnership contains restrictions against the employee engaging in business in competition with the employer within a defined territory for one year after the termination of the employment, and thereafter the partners incorporate and the parties continue to operate according to the terms of the contract until new contracts, containing the same restrictions, are executed with the corporation, the restrictive covenants, having been entered into at the time of the execution of the original contract, are supported by the consideration of the mutual agreements of that contract.

2. Same—

A covenant in the contract of employment of an insurance agent that the agent would not engage in business in competition with the agency within the territory in which the agent had represented the agency for one year after the termination of the employment, is reasonable as to time and territory.

3. Same—

Covenant in a contract of employment of an insurance agent that the agent would not engage in business in competition with the employer within a limited territory for a reasonable time after termination of the employment does not tend to create a monopoly and is not contrary to the public interest.

4. Same—

Where an insurance agent, after having become acquainted with the employer's policyholders and the employer's method of doing business, resigns and organizes a competing business in the same territory, no equitable grounds exist which would warrant a court of equity in refusing to enforce the agreement of the parties that the agent should not engage in a competing business for a reasonable time within a reasonable territory.

APPEAL by defendants from *Campbell, J.,* March, 1961, Term, BUNCOMBE Superior Court.

These civil actions were instituted by the plaintiff for the purpose of restraining the defendants from selling health and accident insurance in 23 western North Carolina counties in violation of the restrictive covenants in the employment contracts under which they formerly worked for the plaintiff. The two cases were consolidated and tried together. The employment contracts, dated December 31, 1959, were in writing. Each contained the following:

> "(13) While the agent is acting for the agency, agent agrees that he will not directly or indirectly be connected with any other agency or health and accident or life insurance company. In the event of termination of this Agreement, agent agrees that for the period of one year from the date of such termination he will not, directly or indirectly, represent or be connected with any other agency or health and accident or life insurance company engaged in similar business to the business conducted by the agency or the companies in the territory where the agent has represented agency.
>
> "(14) Agent agrees that in the event of the termination of his association with the agency he will not, directly or indirectly, induce or attempt to induce any supervisors, agents, associates, managers, collectors, or employees of the agency, or companies to terminate their association with the agency, or companies nor will the agent induce or attempt to induce any policyholder of the companies to cancel, discontinue, or fail to renew his or her insurance with the companies."

The defendants admit the execution of the contracts. However,

they contend the restrictive covenants should not be upheld for these reasons: (1) They were not founded on valuable considerations; (2) they were not reasonably necessary to protect the legitimate interests of the plaintiff; (3) they impose unreasonable hardships on the defendants; (4) they are unduly prejudiced to the public interest.

After hearing, Judge Campbell found facts in part: (1) The defendant Berman was assigned to and wrote health and accident insurance for the plaintiff in ten specifically named counties near Asheville, North Carolina. (2) The defendant Miller was assigned to and wrote health and accident insurance in 14 specifically named counties in the same area. (3) Both Berman and Miller terminated their employment with the plaintiff by resignation effective February 1, 1961. (4) Berman, Miller, and their wives, as the only stockholders, immediately organized the "Income Replacement Associates, Inc.," for the purpose of selling health and accident insurance. Thereafter the corporation employed Allen Ballard Orr and George Olof Lundeen, plaintiff's former employees, to act as agents for the corporation and to sell insurance in the territory in and around Buncombe County. Income Replacement Associates, Inc., through its stockholders and agents began to sell health and accident insurance of the type formerly sold by them for the plaintiff.

After hearing, Judge Campbell ordered the temporary restraining order continued to the hearing or to February 1, 1962, (one year from date Miller and Berman left the plaintiff's employment) whichever is the earlier date. The defendants filed detailed exceptions to the findings of fact, conclusions of law, and appealed from the order continuing the injunction.

Ward & Bennett, for plaintiff, appellee.

Van Winkle, Walton, Buck & Wall, By: O. E. Starnes, Jr., Smith, Moore, Smith, Schell & Hunter, By: Bynum H. Hunter, for defendants, appellants.

HIGGINS, J. Courts generally refuse to enforce restrictive covenants in employment contracts unless they are (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy.

The contracts here involved are in writing. They were found to have been entered into as a part of the contracts of employment. The mutual agreements in these contracts were sufficient considerations to support the obligations undertaken. The time — one year, the territory — 14

counties in which Miller had previously worked and 10 counties in which Berman previously worked, are not unreasonable. *Welcome Wagon v. Pender,* 255 N.C. 244, 120 S.E. 2d 739, and the many authorities cited therein.

The defendants assert the restrictive covenants were not based on valuable considerations and were not a part of the contracts of employment with the corporation. However, each of the defendants signed an original contract with the partnership. It contained the restrictive covenants. The partners incorporated. The corporation succeeded to the partnership in the insurance field. For some time after incorporation the defendants operated according to the terms of their contracts with the partnership. However, new contracts between the corporation and the defendants were executed and these contracts likewise contained the restrictions. Judge Campbell held, and properly so, that the restrictive covenants in the contracts with the corporation were based on valuable consideration.

The time and the territory in which the covenants were to be enforced were reasonable. *Thompson v. Turner,* 245 N.C. 478, 96 S.E. 2d 263, 83 N.C.L.R. 396 (1960); *Delmar Studios v. Goldston,* 249 N.C. 117, 105 S.E. 2d 277; *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 42 S.E. 2d 352.

The defendants rely on the case of *Kadis v. Britt,* 224 N.C. 154, 29 S.E. 2d 543, 152 A.L.R. 405. In that case Britt was employed as a clothing salesman in a retail store in Goldsboro at $27.50 per week. The restrictive covenant covered any business that Kadis might be engaged in if and when Britt left his employment. The restriction applied not only to Britt, but to his wife and other members of his immediate family. After two years Kadis discharged Britt on the ground his services were no longer needed. Britt had a family to support. After his discharge he accepted employment as a salesman in another clothing store in Goldsboro. The trial court refused to continue the injunction against Britt and this Court affirmed by reason of the plaintiff's failure to show an equitable right to enforce the restriction.

In the case before us the defendants, during the employment became acquainted with plaintiff's policyholders and its method of doing business. They resigned, entered into a competing business in the same territory and two other of plaintiff's employees became associated with them in this competing business.

The general rule with respect to enforceable restrictions is stated in 9 A.L.R. 1468: "It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and re-

quirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." *Welcome Wagon v. Pender, supra.*

In this case the trial court found that health and accident insurance is a highly competitive business in the territory embraced in the defendants' covenants. The public will not be prejudiced by enforcing the covenants in these cases. Insurance agents are licensed. The form of insurance policies and the premiums charged are closely policed under the State insurance laws. The danger of monopoly by limiting competition in employment contracts, therefore, is not and cannot be a problem involving the public interest. After all, by enforcing the restrictions the court is only requiring the defendants to do what they agreed to do. Equitable excuse for failure to observe the restrictions is absent here.

The order of Campbell, J., is supported by his findings, which in turn are supported by the evidence.

Affirmed.

SAMUEL J. TRIPP v. PHILLIP KEAIS.

(Filed 27 September, 1961.)

1. Trespass To Try Title § 2—

In an action in trespass to try title, plaintiff ordinarily has the burden of proving both title in himself and the trespass of defendant.

2. Same—

In an action in trespass to try title plaintiff must rely on the strength of his own title and prove his title by some method recognized by law.

3. Same—

While title is conclusively presumed to be out of the State in an action involving title to real property when the State is not a party, G.S. 1-36, there is no presumption of title in favor of either party.

4. Trespass to Try Title § 5: Appeal and Error § 45—

Where plaintiff in an action in trespass to try title seeks to prove title

by showing he had been in adverse possession of the *locus in quo* for more than 20 years and in possession under color of title for 7 years, G.S. 1-38, and the jury, under proper instruction from the court, answers the issue of plaintiff's title in the negative, the verdict is conclusive of plaintiff's rights, and instructions relative to defendant's evidence of title cannot be prejudicial.

APPEAL by plaintiff from *Bone, J.*, at February 1961 Civil Term of BEAUFORT.

Civil action to recover land and for damages for trespass thereon.

Plaintiff, Samuel J. Tripp, alleges in his complaint, among other things (1) that he "is now and has been for sometime past the owner of and in possession of a certain tract or parcel of land" in Beaufort County, North Carolina, specifically described, containing 97 acres, being well known as the J. C. Warren Heirs Tract, and excepting "from the above described lands so much thereof as plaintiff hereinafter admits has been held adversely by the defendant as is set out * * * below"; (2) that defendant "has adversely held a portion of the above described tract of land under deed dated November 23, 1934, and recorded in Book 302, page 214, Beaufort County Registry"; (3) "that neither said deed nor the possession of defendant, or anyone under him has extended south of Pine Branch or Poplar Branch as shown on map prepared by H. L. Rayburn, Registered Surveyor, on June 23, 1954, and recorded in Map Book 10, page 15"; (4) that "the defendant without the consent of the plaintiff during the months of March and June 1958, went upon certain land of the plaintiff and cut and removed some half dozen or more trees and has repeatedly asserted and does now assert that he owns said lands; that the portion of land so trespassed upon by defendant and to which, as plaintiff is informed and believes, defendant wrongfully asserts claim of title lies to the west of Poplar Branch, to the south of and fork of Poplar Branch and to the east of the call, 'North 61 deg. 45' west 8.25 chains' referred to in the description of plaintiff's land set out in paragraph 2 above"; and (5) that during October or November 1958 defendant went upon the same lands and again cut and removed trees therefrom.

Defendant, answering, denies in the main the allegations of the complaint, admitting however that he is owner in fee of a certain tract of land conveyed to him on 23 November 1934, by deed recorded in Book 302, page 214, Beaufort County Registry. Defendant further asserts title in himself by adverse possession to the lands on both sides of Poplar Branch or Pine Branch, "and particularly extending on the south side of said Branch."

Upon the trial in Superior Court plaintiff offered in evidence these exhibits: (1) A deed from William H. Warren and ten others to Sam-

uel Tripp, dated 26 February 1957, and registered 11 March 1957, in Book 473, at page 24 of the Registry of Beaufort County, purporting to convey an undivided six-sevenths interest in a tract of land of the same description as that set forth in the complaint herein.

(2) A deed from Romanus Kraus and Lucretia Kraus to Joseph C. Warren, dated 12 October 1899, and registered in Book 104, at page 526 of Registry of Beaufort County, purporting to convey a tract of land described as "adjoining the lands of Jesse Warren and others, it being all the interest of Lucretia S. Kraus in the land in Chocowinity Township inherited by her from her father, the late William H. Warren, and purchased by him from his brothers and sisters, containing one hundred acres, more or less."

And (3) a deed from Oakley O. Warren and wife to Samuel J. Tripp, dated 1 June 1957, and registered in Book 467, at page 18 of Registry of Beaufort County purporting to convey an undivided one-seventh interest in a tract of land of the same description as that set forth in the complaint herein.

Plaintiff further offered evidence in substance tending to show that on 26 February 1957, W. H. Warren and the other six heirs of Joseph C. Warren executed and delivered to him a deed for certain lands described therein; that a map was made by a surveyor named Rayburn in 1954; that the calls in plaintiff's deed from Warren heirs correspond to the calls shown on that map; that they all can be identified and that they are known and visible bounds; that the boundaries in his deed from Warren heirs and the boundaries on the plat or the lines on the plat include lands which plaintiff admits belong to defendant although said lands are included within the boundaries of plaintiff's deed; that the land was formerly owned by J. C. Warren; that a deed was made to J. C. Warren by Romanus Kraus and Lucretia Kraus in 1899; that Joseph C. Warren during his lifetime was in possession of the land and grew crops on that which was tillable and also had hog pens and pounds or pastures thereon; that he cut wood and timber on any portion of the land which he desired, including the portion claimed by defendant, being south of Poplar Branch and west of the prong or fork of Poplar Branch; that after the death of Joseph C. Warren, his heirs had possession of the land in question and exercised ownership over it, cultivating that which was tillable and cutting wood on the other parts, making such uses of it as it was adapted to; and that since plaintiff got his deed from the heirs of Joseph C. Warren he has exercised acts of ownership and possession over it continuously.

The defendant offered evidence in support of his contentions and claims.

The case was submitted to the jury upon these issues:

"1. Is the plaintiff the owner of the lands as alleged by plaintiff in his complaint? Answer: No.

"2. Is the defendant the owner of the lands as alleged by defendant in defendant's answer? Answer: Yes.

"3. In what amount, if any, is the plaintiff entitled to recover of defendant for the wrongful cutting and removing of trees as alleged by plaintiff in plaintiff's complaint? Answer: _____."

In accordance therewith the court rendered judgment.

Plaintiff excepts thereto and appeals therefrom to Supreme Court, and assigns error.

John A. Wilkinson, Hallett S. Ward for plaintiff appellant.
LeRoy Scott, A. W. Bailey for defendant appellee.

WINBORNE, C.J. It is well settled in North Carolina that where in an action for the recovery of land and for trespass thereon defendant denies plaintiff's title and defendant's trespass, nothing else appearing, issues of fact arise both as to title of plaintiff and as to trespass of defendant, the burden as to each being on plaintiff. *Mortgage Corp. v. Barco*, 218 N.C. 154, 10 S.E. 2d 642; *Smith v. Benson*, 227 N.C. 56, 40 S.E. 2d 451; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E. 2d 673; *Scott v. Lewis*, 246 N.C. 298, 98 S.E. 2d 294.

In such action plaintiff must rely on the strength of his own title. This requirement may be met by various methods which are specifically set forth in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142. See also *Prevatt v. Harrelson*, 132 N.C. 250, 43 S.E. 800; *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627; *Smith v. Benson, supra; Locklear v. Oxendine, supra,* and many others.

Moreover, in all actions involving title to real property, title is conclusively presumed to be out of the State unless it be a party to the action, G.S. 1-36, but "there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself." *Moore v. Miller, supra; Smith v. Benson, supra; Locklear v. Oxendine, supra; Scott v. Lewis, supra.*

In the light of that presumption, plaintiff in the present action, while introducing three deeds into evidence, did not attempt to show a record chain of title, but assuming the burden of proof, elected to show title in himself by adverse possession, under known and visible lines and boundaries without color of title for twenty years, and with color of title for seven years, which are methods by which title may be shown.

G.S. 1-38; *Locklear v. Oxendine, supra; Williams v. Robertson,* 235 N. C. 478, 70 S.E. 2d 692.

In brief filed here on this appeal, plaintiff states that "While the court adequately defined the meaning of adverse possession, as such, it failed to point out to the jury the necessity of defendant's describing or identifying the land claimed by him to have been held adversely." But this argument will not avail plaintiff, because, as stated above, the plaintiff in such a case must rely on the strength of his own title and not on the weakness of defendant's.

All assignments of error which appellant brings forward pertain to the court's charge to the jury relative to the contentions of defendant. However, since the jury found, under proper instructions, that plaintiff is not the owner of the land in question, it is unneccessary to discuss these assignments of error.

Hence, in the judgment there is

No error.

JUANELL PETIT PICKELSIMER, BY AND THROUGH HER NEXT FRIEND, ROBERT T. GASH, v. CHARLES W. PICKELSIMER, JR., AND JOSEPH PICKELSIMER, EXECUTORS OF THE ESTATE OF C. W. PICKELSIMER, SR., DECEASED.

(Filed 27 September, 1961.)

1. Contracts §§ 14, 24—

Where two persons enter into a contract for the benefit of a third party, such third party beneficiary may maintain an action for breach of the agreement.

2. Wills § 2—

Where a person agrees to live with and look after another and his household in consideration of the promise of such other to devise and bequeath a designated portion of his estate to the child of the promisee, the child, as a third party beneficiary, may maintain an action against the personal representatives of testator to recover for testator's breach of the agreement without the joinder of the child's mother, and the child's mother is not a necessary party to such action.

3. Parties § 1—

A necessary party is one whose rights must of necessity be affected by a judgment in the cause, and therefore one who must be brought in before the court can proceed to final judgment; a proper party is one having an interest in the subject matter of the action but whose rights need not necessarily be determined in adjudicating the rights of necessary parties to the action.

PICKELSIMER *v.* PICKELSIMER.

APPEAL by defendant from *Campbell, J.*, at July Term, 1961 of TRANSYLVANIA.

Civil action on behalf of minor plaintiff to recover damages against the estate of C. W. Pickelsimer, Sr., deceased, for breach of an oral contract, or for the value of the services rendered by minor plaintiff's mother, Blanche Petit (Goosen), to the said decedent for and on behalf of minor plaintiff.

Robert T. Gash, next friend of the minor plaintiff, Juanell Petit Pickelsimer, alleges in his amended complaint substantially the following: (1) That the defendants, Charles W. Pickelsimer, Jr., and Joseph Pickelsimer are the duly qualified and acting executors of the estate of C. W. Pickelsimer, deceased; that C. W. Pickelsimer died leaving a last will and testament, which said last will and testament is duly recorded; (2) that for several years prior to April 1, 1945, the minor plaintiff's mother, Blanche Petit, now Blanche Petit Goosen, was employed by the defendants' testator, as a housekeeper; (3) that while the minor plaintiff's mother was in the employ of defendants' testator, he seduced the minor plaintiff's mother upon the promise of marriage, and continued to promise to marry her for some time thereafter; (4) that the minor plaintiff, Juanell Petit Pickelsimer, was born on 1 April 1945, her father being defendants' testator, and her mother being Blanche Petit, now Blanche Petit Goosen; (5) that on 1 April 1945, defendants' testator was the father of four other children, three of whom were minors on that date; (6) that after the birth of the minor plaintiff, defendants' testator failed to keep his promises to marry Blanche Petit, that the said Blanche Petit and the minor plaintiff, who was in the care, custody and control of her mother, moved from Brevard, North Carolina to Cashiers, North Carolina, where Blanche Petit opened and operated a beauty parlor; (7) that while so engaged in the operation of said beauty parlor, defendants' testator contracted and agreed with Blanche Petit that if she would not bring suit against him, or have any suit brought against him, and if she would return to his home in Brevard, North Carolina, and bring with her their minor child, Juanell Petit Pickelsimer, and care for himself, the said minor child, and his three minor children until said children were old enough to care for themselves, that he would marry her, recognize Juanell Petit Pickelsimer as his child and provide care and support and maintenance for said minor child, and at his death would will, devise and bequeath to Juanell Petit Pickelsimer a one-fifth part of his estate; (8) that in reliance upon the said promises of defendants' testator, the said Blanche Petit fully performed all of the terms of her agreement, more particularly that she did not institute or cause to have instituted any legal action against defendants' testator; that

she gave up her home and beauty parlor operations in Cashiers, North Carolina, and returned to the home of defendants' testator and cared for his children until the three minor children, other than the minor plaintiff, had left home fully capable of caring for themselves and further continued to take care of defendants' testator, up to a time shortly before his death; (9) that repeatedly after the said Blanche Petit returned to the home of defendants' testator, he reaffirmed his contract and agreement with the said Blanche Petit and continued to accept the considerations for the aforesaid contract from the said Blanche Petit, which considerations were rendered in full by the said Blanche Petit; (10) that under the terms of the will, recorded in Book of Wills 6 at page 107, in the office of the Clerk of the Superior Court of Transylvania County, defendants' testator bequeathed to Juanell Petit Pickelsimer the sum of $1,000.00, plus the additional sum of $75.00 per month until she attain the age of eighteen years: (11) that despite the full performance by Blanche Petit of her agreement with the defendants' testator, he failed to comply with the terms of his contract with her in that he failed to marry her, failed to fully provide care, support and maintenance for the minor plaintiff, and failed to devise and bequeath to the minor plaintiff a one-fifth part of his estate, and that the minor plaintiff has therein and thereby been damaged in a sum in excess of $250,000.00.

Wherefore, plaintiff prays that she recover damages in the sum of $250,000.00, "the same representing a sum equal to approximately one-fifth of the estate of C. W. Pickelsimer, Sr., or the value of the services rendered by the said Blanche Petit to the said C. W. Pickelsimer, Sr., for and on behalf of the minor plaintiff"; that the defendants, as Executors of the estate of the deceased, be required to make a full accounting of the assets of the estate; that defendants be enjoined from distributing any of the assets of the estate other than preferred claims, pending the trial of this case; costs; and any other just and proper relief.

Whereupon the defendants filed a motion that Blanche Petit Goosen be made a party to this action.

Upon consideration of this motion, the court being of the opinion that Blanche Petit Goosen is not a necessary party to this action, ordered that the motion be denied.

Defendants appeal therefrom to Supreme Court and assign error.

Uzzell & DuMont, Hamlin, Potts, Ramsey & Hudson for plaintiff appellee.

Redden, Redden & Redden, J. Bruce Morton for defendants appellants.

WINBORNE, C.J. The question presented on this appeal is: Did the court below err in denying defendants' motion to make Blanche Petit Goosen a party to this action? The answer is No.

While the minor plaintiff is not a party to the alleged contract between her mother and the defendants' testator, she is a beneficiary under it to the extent that the promises contained therein relate to her. And if the defendants' testator breached the contract, plaintiff would have a cause of action against him for recovery of damages. *Redmon v. Roberts,* 198 N.C. 161, 150 S.E. 881.

In this respect, in *Brown v. Construction Co.,* 236 N.C. 462, 73 S.E. 2d 147, this Court said: "It is a well settled principle of law in this State that where a contract between two parties is made for the benefit of a third person, or party, the latter is entitled to maintain an action for its breach." *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720; *Parlier v. Miller,* 186 N.C. 501, 119 S.E. 898; *Thayer v. Thayer,* 189 N.C. 502, 127 S.E. 553; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383, *Chipley v. Morrell,* 228 N.C. 240, 45 S.E. 2d 129; *Coleman v. Mercer,* 229 N.C. 245, 49 S.E. 2d 405; *Canestrino v. Powell,* 231 N.C. 190, 56 S.E. 2d 566; and cases there cited.

However, the defendants contend that minor plaintiff's mother, Blanche Petit Goosen, as a party to the contract, is a necessary party to this action.

In *Gaither Corp. v. Skinner,* 238 N.C. 254, 77 S.E. 2d 659, *Devin, C.J.,* speaking for the Court said: "Necessary or indispensible parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the Court cannot proceed until they are brought in. Proper parties are those whose interest might be affected by a decree, but the Court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the Court." McIntosh, Prac. & Proc., Sec. 209, p. 184; *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

Thus it appears that Blanche Petit Goosen is not a necessary party to the action. Further, if it should appear that she is a proper party, the court's refusal to make her a party to the action would be within its discretion and therefore not reviewable.

Affirmed.

STATE v. SAMUEL HARGETT.

(Filed 27 September, 1961.)

1. Indictment and Warrant § 1—

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State, and a person arrested without warrant and charged with murder by indictment returned by the grand jury at a term of court during the same month of the arrest may not attack the validity of the trial on the ground that no warrant was issued and no preliminary hearing held. G.S. 15-45, G.S. 15-47, G.S. 15-85, and G.S. 15-87 do not prescribe mandatory procedures affecting the validity of the trial.

2. Homicide § 20—

Evidence for the State raising the permissible inference that defendant intentionally shoved deceased face down into the water in a ditch while the deceased was so drunk that he was helpless, and left the deceased there, with expert testimony that deceased died as a result of drowning and not as a result of alcoholism, is sufficient to be submitted to the jury in a prosecution for murder.

3. Criminal Law § 9—

An aider is a person who, being present at the time and place, does some act to render aid to the actual perpetrator without taking an actual share in the commission of the offense, and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit the offense.

4. Same—

Mere presence alone and failure to do anything to prevent the actual perpetrator from committing a felony cannot constitute a bystander an aider or abettor, even though he has the uncommunicated intention of assisting the perpetrator, unless he is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection.

5. Same: Homicide §§ 2, 20— Evidence of defendant's guilt as aider or abettor held insufficient to be submitted to jury.

Evidence that defendant was requested by the actual perpetrator to strike deceased, and refused, and protested against the assault made by the actual perpetrator, and stood by while the actual perpetrator intentionally pushed deceased face down into water in a ditch while deceased was so drunk as to be helpless, and that defendant did nothing to prevent the perpetration of the murder, *is held* insufficient to be submitted to the jury on the question of defendant's guilt as an aider or abettor, even though in other aspects the State's evidence is sufficient to be submitted to the jury on the questiton of defendant's guilt as the actual perpetrator of the offense, and notwithstanding evidence of defendan's guilt as an accessory after the fact in later making false statements as to the whereabouts of the deceased, and a charge of the court submitting to the jury the question of defendant's guilt, not only as a

pepetrator, but also as an aider and abettor, must be held for error upon defendant's appeal from a conviction, since the verdict may be grounded on the theory that defendant was guilty as an aider and abettor.

APPEAL by defendant from *Hooks, S.J.*, March 1961 Term of CRAVEN.

This is a criminal action.

Indictment: Murder. Plea: Not guilty. Verdict: Guilty of manslaughter.

Judgment: Confinement in State Prison for a period of not less than 17 nor more than 20 years.

Defendant appealed.

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

Kennedy W. Ward for defendant.

MOORE, J. Before pleading to the bill of indictment, defendant filed a motion alleging that he was arrested and placed in jail on 3 January 1961, no warrant was ever issued, no preliminary hearing was held, and he was thereby denied due process of law. He requested that all proceedings be stayed and abated until a preliminary hearing or coroner's inquest was had. The motion was overruled.

The bill of indictment was returned by the grand jury at the January term, 1961. Counsel was appointed for defendant 8 February 1961. When a person is arrested without a warrant, the arresting officer shall inform such person of the charge against him, and shall immediately, or "as soon as may be," take him before a magistrate and, on proper proof, a warrant shall be issued; an officer failing to comply with these requirements is subject to penalties. G.S. 15-45 and G.S. 15-47. A preliminary hearing may be held unless waived by defendant. G.S. 15-85 and G.S. 15-87. But none of these statutes prescribes mandatory procedures affecting the validity of a trial. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. "We have no statute requring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing." *State v. Hackney*, 240 N.C. 230, 237, 81 S.E. 2d 778. See also *State v. Doughtie*, 238 N.C. 228, 232, 77 S.E. 2d 642; *State v. Cale*, 150 N.C. 805, 808, 63 S.E. 958. If defendant was at a disadvantage in preparing for trial through ignorance of the nature of the evidence against him, ample remedies were available to him. He might have obtained a hearing at any time by petition for *habeas corpus*. In fact, he requested and obtained a bill of particulars. The ruling on the motion was proper.

Defendant assigns as error the denial of his motion for nonsuit.

The State's evidence, in summary, is as follows: The deceased, Sgt. Paul Weingardner, and Billy Parrish, together with two other soldiers, left Fort Bragg on 1 January 1961 in Weingardner's automobile and went to New Bern and to the home of one McDaniel. Weingardner remained there while the others took the car and visited several places including Holland's Drive-In. Defendant had joined them on their rounds. While they were at Holland's, Weingardner rode up in a taxi and accused Parrish of stealing his car. Abusive language passed between Parrish and Weingardner. Weingardner took his car keys and tried to drive but was too drunk. Parrish drove the car. There were five persons in the car including Weingardner and defendant. They visited another place, obtained liquor, and returned to Holland's. Later Parrish and defendant left in the car to take Weingardner to the bus station to put him on a bus for Fort Bragg. About 20 minutes later Parrish and defendant returned, stating they had put Weingardner on a bus. Later in the evening defendant said that Weingardner was in his (defendant's) car. On 4 January 1961 the body of Weingardner was found in a creek or canal at the City dump. A pathologist performed an autopsy, and testified: "The cause of death was drowning. . . . There was no evidence of trauma on the body. . . . the ethal alcohol content of the blood was 4.0 milligrams per milliliter. . . . A person with this much alcohol content could have been unconscious or could have been in what might be called a helpless condition. . . . death has been reported due to acute alcoholism in a number of cases; . . . the range of alcoholic content in the blood in these cases usually is somewhere from 5.5 to anywhere to 7.5. . . . I found water and fluid in the trachea and lungs. . . . When a person drowns, he does get water in his lungs. . . . The level of the alcohol found in the blood is not enough to kill this man." Parrish testified at the trial: Defendant drove the car from Holland's and he (Parrish) was lying in the back seat. When the car stopped he saw defendant and Weingardner in front of the car. Defendant had Weingardner "by the chest, by the clothes," and shoved him in the ditch. Parrish looked in the ditch and saw Weingardner lying face down in the water. Defendant called and Parrish got in the car and they drove off.

This evidence is sufficient to take the case to the jury. The inference is permissible that defendant intentionally shoved Weingardner face down into the water while he was in a drunken and helpless condition, and left him there, and as a result he drowned.

In the charge the court instructed the jury that the State contended the defendant was guilty by reason of aiding and abetting even if he should be found not guilty as principal in the first degree. The

court then gave full and correct instructions as to the law relating to aiding and abetting in the commission of crime. And finally, the court charged: ". . . if you find from all the evidence and beyond a reasonable doubt that the defendant unlawfully committed an intentional assault and battery upon Sgt. Weingardner . . . or if you find beyond a reasonable doubt that the defendant was present and aided and abetted another person who committed an assault and battery upon Sgt. Weingardner . . . and if you further find that such assault and battery was the proximate and efficient cause of the drowning and death of Sgt. Weingardner, you would return a verdict of guilty of manslaughter." This instruction is tantamount to a declaration by the court that the evidence is sufficient as a matter of law to support a verdict of guilty on the ground that defendant aided and abetted another.

Officer Laughinghouse testified that defendant made the following statement when interrogated by him: They went to the City dump. Parrish asked defendant to hit Weingardner. Defendant refused. Parrish opened the door and pulled Weingardner out of the car. Defendant told Parrish, "Man, you shouldn't hit him, lay him over on the side of the grass." He told Parrish not to hit Weingardner. But Parrish threw deceased in the ditch. Defendant did nothing to stop Parrish, looked at deceased lying in the ditch but did not attempt to pull him out.

The evidence does not warrant a verdict of guilty on the ground of aiding and abetting. "A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime." *State v. Holland,* 234 N.C. 354, 358, 67 S.E. 2d 272; *State v. Johnson,* 220 N.C. 773, 776, 18 S.E. 2d 358. ". . . Mere presence, even with the intention of assisting in the commission of a crime cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to him (the perpetrator). . . ." *State v. Hoffman,* 199 N.C. 328, 333, 154 S.E. 314. However, there is an exception. ". . . when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting." *State v. Holland, supra.*

Applying the foregoing rules to the evidence, we find no basis for conviction of defendant as an aider and abettor. He was either guilty as the perpetrator or not guilty at all. He was present, it is true. It

may be that he was a friend of Parrish. But he refused to strike deceased when requested by Parrish and protested against the assault made by Parrish. He made his feelings and intentions clear to the perpetrator. It is true that he did not physically intervene and did not pull deceased from the water. ". . . one who is present and sees that a felony is about to be committed, though he may do nothing to prevent it, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor." *State v. Hart,* 186 N.C. 582, 585, 120 S.E. 345; *State v. Hildreth,* 31 N.C. 440, 444. He had had no difficulty with deceased. The fact that he later, at another place, made false statements as to the whereabouts of deceased is not alone sufficient to make him an aider and abettor. If Parrish was the perpetrator, such statements might be evidence of defendant's guilt as an accessory after the fact.

Under the challenged instruction, it is possible that the jury's verdict was grounded upon the theory that defendant was guilty as aider and abettor.

Other matters assigned as error may not recur when the case is tried again.

New trial.

JOHN HARDY ROBBINS v. JOSEPH WHEELER HARRINGTON, JR.

(Filed 27 September, 1961.)

1. Automobiles § 41l—

Evidence to the effect that defendant-motorist was blinded by the lights of on-coming cars and drove off the highway on his right side, hitting plaintiff-pedestrian who was walking some two feet off the hard surface on his left side of the highway, *is held* sufficient to be submitted to the jury on the issue of actionable negligence, since the evidence permits the legitimate inference that defendant was driving his automobile without due caution and circumspection and in a manner so as to endanger or be likely to endanger another, and did not keep his vehicle under proper control on the hard surface of the highway in violation of G.S. 20-140(b).

2. Automobiles § 6—

A violation of G.S. 20-140(b) is negligence *per se.*

3. Negligence § 24c—

Negligence may be proved by circumstantial evidence, and when the facts and circumstances directly proven establish actionable negligence as a more reasonable probability, such evidence is properly submitted to the jury on the issue, notwithstanding the possibility of accident may also arise therefrom.

APPEAL by plaintiff from *Bundy, J.*, February 1961 Term of BERTIE.

Civil action to recover damages for personal injuries.

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

Jones, Jones and Jones By Carter W. Jones and Pritchett & Cooke By J. A. Pritchett for plaintiff, appellant.

V. D. Strickland for defendant, appellee.

PARKER, J. Plaintiff's evidence tends to show the following facts:

About 8:00 o'clock p.m. on 5 July 1959 plaintiff, a man 68 years old, was walking in a westerly direction on the dirt shoulder two feet off the hard surfaced Highway 308, running between the towns of Roxobel and Rich Square. He was walking on the left shoulder of the highway in the direction he was walking, was within the corporate limits of the town of Roxobel, and was going home. Defendant was driving his automobile in an easterly direction on the highway on his right side of the highway, and was meeting two automobiles. The highway at this point was straight for about a mile. The weather was fair and the shoulder of the highway was dry. Plaintiff testified: "The motorist that hit me was coming from Rich Square going toward Roxobel; that man is Mr. Harrington, the defendant. At the time I was struck by the motor vehicle Mr. Harringon was driving, I was on the shoulder of the road two feet off from the hard surfaced road." He testified on cross-examination, "I tell the court and jury that Mr. Harrington lost control of his car, ran off the shoulder and ran into me at that point."

Floyd Ruffin testified as to a conversation he had with the defendant, as follows: "I asked him how did he hit him. He said he had met two cars and they blinded him so that he did not see Robbins. He said it was not plaintiff Robbins' fault that he hit him."

The collision resulted in serious injuries to plaintiff.

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." A violation of this

statute is negligence *per se. Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115.

Plaintiff's complaint liberally construed with a view to substantial justice between the parties, G.S. 1-151, alleges a violation of G.S. 20-140(b).

Plaintiff's evidence does not show the speed of defendant's automobile, but it permits the legitimate inference that defendant was driving his automobile on the highway without due caution and circumspection and in a manner so as to endanger or be likely to endanger a person, in that he did not keep it under proper control on the hard surfaced highway, but permitted it to run off the hard surfaced highway two feet on the dirt shoulder and to collide with plaintiff, proximately causing serious injuries to plaintiff.

This Court said in *Whitson v. Frances,* 240 N.C. 733, 83 S.E. 2d 879: "Direct evidence of negligence is not required. It may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence."

The evidence here shows far more than the mere proof of a collision between a motor vehicle and a pedestrian, resulting in injury to the pedestrian.

The judgment of involuntary nonsuit was improvidently entered, and is

Reversed.

ALICE HENKLE RHYNE v. C. DALE CLARK, CHARLES C. CLEGG, LEO FULLER, FRANK L. RANKIN, J. B. THOMPSON, V. A. HOWARD, TRUSTEES OF CHURCH PROPERTY OF THE FIRST METHODIST CHURCH OF MOUNT HOLLY, NORTH CAROLINA.

(Filed 27 September, 1961.)

1. Pleadings §§ 15, 18—

A demurrer will lie only for defect apparent on the face of the complaint, without consideration of facts alleged in the answer, and when it is not apparent on the face of the complaint that there is a defect of parties plaintiff or defendant, or that a necessary party has not been joined, it is error for the court to sustain defendants' demurrer on the ground that a necessary party had not been joined.

APPEAL by plaintiff from *Walker, Special Judge,* August 7, 1961, Term of GASTON.

Plaintiff's action is for injunctive relief and damages.

Plaintiff, in brief summary, alleges: She owns a tract of land in Mount Holly, North Carolina, and an easement or right-of-way over defendants' adjoining tract for use as a driveway. This driveway has been established and in use by plaintiff and her predecessors in title for more than forty-five years. The driveway was paved and was visible and apparent when defendants acquired title to their property. Defendants, by means of a bulldozer, have "graded away" plaintiff's said driveway, destroying it to such extent an automobile cannot be driven thereon between the street and plaintiff's yard and garage.

Defendants answered. They denied the essential allegations of the complaint and alleged four further defenses. In their third further defense, they alleged the plaintiff had conveyed "all her right, title, and interest in the property now owned by the defendants to Henry Henkle Rhyne."

When the case was called for trial, defendants "demurred ore tenus to the plaintiff's complaint on the ground that a necessary party had not been joined as plaintiff or defendant." After hearing, the court "ORDERED, ADJUDGED AND DECREED that the demurrer be and it is sustained and that this action be dismissed." Plaintiff appealed.

McDougle, Ervin, Horack & Snepp for plaintiff, appellant.
Childers & Fowler and Ernest R. Warren for defendants, appellees.

PER CURIAM. "A demurrer lies only when the defect asserted as the ground of demurrer is apparent upon the face of the pleading attacked." *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 488, 98 S.E. 2d 852; G.S. 1-127; G.S. 1-133. Facts alleged in defendants' answer may not be considered in passing on the legal sufficiency of the complaint.

Here, the allegations of the complaint do not disclose "a defect of parties plaintiff or defendant." G.S. 1-127(4). Nor do they disclose "that a necessary party ha(s) not been joined as plaintiff or defendant." Hence, the judgment sustaining defendants' demurrer *ore tenus* and dismissing the action was erroneously entered and is reversed.

Reversed.

STATE v. JOHNNY PAYTON.

(Filed 27 September, 1961.)

Constitutional Law § 31—

In this prosecution of defendant for rape of an eight-year old child, the court had the reporter take the examination of the child in the absence of the jury because of the difficulty in getting the child to answer questions and to talk loud enough for the jury to hear and comprehend her story, and then had the reporter read to the jury the examination which had been conducted in its absence. *Held:* The defendant is entitled to have the jury hear the testimony from the witness herself and to observe her demeanor at the time she testified, and a new trial must be awarded.

APPEAL by defendant from *Morris, J.*, at the March, 1961 Term, JONES Superior Court.

Criminal prosecution upon an indictment charging the defendant Johnny Payton with the crime of rape. The alleged victim, Margie Henderson, age eight, is the daughter of the defendant's wife. At the time of the trial she was nine years of age. During her direct examination by the solicitor she cried frequently, did not answer questions readily, and at times did not answer at all. After many attempts by the solicitor and the presiding judge to reassure the witness and have her talk loud enough for the jurors to hear and to comprehend her story, the judge finally excused the jury and conducted the further examination in the jury's absence. The court reporter took the examination in shorthand. This examination brought out evidence tending to establish all essential elements of the crime charged.

After the examination the court recalled the jury and, over defendant's objection, had the reporter read to the jury the examination which had been conducted in its absence. The defendant duly excepted. (Exceptions Nos. 10 and 15, Assignment of Error No. 7)

The jury returned a verdict of guilty of rape and recommended the punishment be imprisonment for life. From the judgment accordingly, the defendant appealed.

T. W. Bruton, Attorney General, H. Horton Rountree, Asst. Attorney General, for the State.

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

PER CURIAM. Evidence vital to the State's case against the defendant was elicited from the State's witness in the absence of the jury. The court reporter relayed this evidence to the jury by reading her notes. Thus the story of the witness went to the jury as hearsay. The

defendant was entitled to have the jury hear the story from the witness herself and to observe her demeanor at the time she told it. This was a fundamental right.

A review of the record fully discloses the difficult problem confronting the court by reason of the tender age of the witness and the excitement incident to her role in the court proceedings. Nevertheless, guilt must be established by evidence offered in accordance with the rules. For the error committed, the defendant is awarded a

New trial.

THE ATLANTA STOVE WORKS, INC. v. R. V. KEEL AND WIFE, BERTHA C. KEEL, AND ROBERT ELKS AND WIFE, JESSIE B. ELKS, FORMERLY DOING BUSINESS AS FRIENDLY FURNITURE COMPANY.

(Filed 27 September, 1961.)

Partnership § 4—

Where a person denies liability on a partnership debt on the ground that he was a limited partner, but offers no evidence that he signed and swore to the certificate required by G.S. 59-2, or that the requisite certificate was filed for record in the office of the clerk of Superior Court, the court properly gives peremptory instructions on the issue of a general partnership, there being no evidence of an actual or substantial compliance with the statute.

APPEAL by defendants from *Cowper, J.,* at February-March 1961 Term of PITT.

Civil action to recover the unpaid balance of a partnership debt.

In January, 1949, the defendants attempted to form a limited partnership to conduct a retail furniture business under the name of Friendly Furniture Company. Defendants did not sign and swear to a certificate stating the name of the partnership, character of the business, etc., nor was such certificate filed for record in the office of the Clerk of the Superior Court. In January, 1959, defendants attempted to extend the partnership for an additional ten years, which extension agreement was neither sworn to nor recorded. The name of defendant R. V. Keel, with his knowledge, appeared on various advertising media of the partnership and was used in connection with various business transactions of the partnership. A receiver was appointed for Friendly Furniture Company on 23 February, 1960, at which time said company was indebted to plaintiff in the sum of $567.62. The receiver paid the sum of $194.67 on said indebtedness,

leaving an unpaid balance of $372.95, for which this action was instituted against the named defendants as co-partners.

Judgment by default was taken against defendants Elks and wife. Defendants Keel and wife filed answer in which each denied being a general partner in the business and denied any liability to plaintiff.

Upon conclusion of all the evidence, the court gave peremptory instructions in favor of plaintiff on the issues as to whether or not defendants Keel and wife were general partners in Friendly Furniture Company. The jury found defendants indebted to plaintiff in the sum of $372.95, and from judgment on the verdict defendants Keel and wife appeal to Supreme Court, and assign error.

Lewis G. Cooper for plaintiff appellee.

L. W. Gaylord, Jr., M. E. Cavendish for defendants appellants.

PER CURIAM. The evidence fails to show either actual or substantial compliance by defendants with the provisions of G.S. 59-2 pertaining to formation of a limited partnership which would relieve them of liability as general partners in the partnership in question. Thus the trial court was correct in giving the jury peremptory instructions on the issues of general partnership. Furthermore, all of defendants' contentions have been given consideration, and no error is made to appear.

No error.

McKINLEY MEARS v. JASON F. CRIBB.

(Filed 27 September, 1961.)

APPEAL by defendant from *Paul, J.*, April Civil Term 1961 of NEW HANOVER.

Civil action to recover for personal injuries sustained by plaintiff, a pedestrian, while crossing Dawson Street at the intersection of said street and Seventh Street, in the city of Wilmington, North Carolina, about 6:00 p.m. on 24 January 1958. Plaintiff was struck by an automobile operated by defendant in a westerly direction on Dawson Street, and was seriously injured.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning error.

Addison Hewlett, Jr., and Solomon B. Sternberger for plaintiff appellee.

R. S. McClelland, L. Bradford Tillery, W. Alllen Cobb for defendant appellant.

PER CURIAM. A careful consideration of defendant's exceptive assignments of error, leads us to the conclusion that they are without sufficient merit to disturb the verdict below.

In the trial below, we find

No error.

HELEN ELIZABETH PULLEY v. CHARLIE HERBERT PULLEY.

(Filed 11 October, 1961.)

1. Courts § 2—

Jurisdiction may not be conferred upon a court by waiver or consent of the parties, but where the court has jurisdiction of the subject of the action and the parties are before the court, objections as to the manner in which the court obtained jurisdiction of the person or to mere informalities in the procedure or judgment may be waived, and a party may be estopped to attack the judgment on such grounds by failure to object in apt time and by acquiescence in the judgment after rendition.

2. Divorce and Alimony § 16—

The Superior Court of the county in which the parties reside has jurisdiction to order the payment of alimony by the husband to the wife. G.S. 50-1.

3. Divorce and Alimony § 21; Judgments § 11— Husband may not attack decree of alimony by confession for want of verification or informalities.

The Clerk of the Superior Court has authority to enter a judgment by confession directing a husband to pay alimony to his wife, G.S. 1-247, and where the husband appears before the court and confesses judgment for the payment of alimony in a stipulated amount on specified dates of each month and states that the confession is for an obligation for maintenance and support justly due by him to the wife pursuant to a deed of separation, and pays alimony in accordance with the judgment for a number of years, the husband is thereafter estopped from attacking the validity of the judgment by confession for want of verification or for irregularity of the judgment in adjudicating that the wife recover of the husband the sum stipulated rather than decreeing that the husband should pay to the wife the sum stipulated, there being no challenge of the judgment by the husband for fraud, mistake, or oppression, and

such judgment will support proceedings in contempt for willful failure of the husband to make payment of alimony as therein provided. The distinction is pointed out between an attack of the judgment by the husband who himself had confessed it, and an attack of the judgment by creditors of the husband.

APPEAL by plaintiff from *Morris, J.*, March 1961 Civil Term of ONSLOW.

Motion by plaintiff, dated 6 January 1961, praying the court to order the defendant to appear before it, and show cause, if any he can, why he should not be subject to contempt in wilfully failing to make payments of alimony to plaintiff, as required by a confession of judgment by defendant for such payments entered in the superior court of Onslow County on 11 July 1958. Service of notice of such motion was made on defendant on 6 January 1961 by the sheriff of Onslow County.

On 11 July 1958 plaintiff and defendant, who were then husband and wife, entered into a deed of separation, which states both parties were of Onslow County. The parts of which relevant to this appeal are either summarized or quoted verbatim, as follows:

PRELIMINARY PREMISES. On 21 March 1933 the parties were lawfully married, and thereafter lived together as man and wife. Many differences, irreconcilable controversies and incompatibilities have arisen and existed for an appreciable length of time, and do continue to exist between them, causing them to be very unhappy, by reason of which they have come to the conclusion that they can never live together happily and peacefully as man and wife. Therefore, believing that it is necessary to the health and happiness of both that they should separate and live apart, both parties agree that from this date they will live separate and apart from each other. "AND WHEREAS, the said husband has agreed to make provision for the support and maintenance of the said wife and to that end has this date confessed judgment before the clerk of the superior court of Onslow County, North Carolina, wherein he acknowledges an obligation to support the said wife and has consented that a judgment be entered against him that he pay to the said wife the sum of Sixty-two Dollars and Fifty Cents ($62.50) on the 3rd and 18th days of each and every succeeding month hereafter."

Therefore, in consideration of the premises and other valuable considerations the parties "mutually, solemnly and voluntarily" entered into the following agreements: They will henceforth live separate and apart. "SECOND: That with the exception of the provisions for her support and care set out in the premises hereto, the said wife hereby releases the said husband from all obligations to her for past, present and future support." They quitclaimed and released all rights each

had, or might have, in the property of the other. Defendant conveys to plaintiff all household furnishings and fixtures. Both parties signed the deed of separation. Both parties appeared before the clerk of the superior court of Onslow County on 11 July 1958, and acknowledged the due execution of the deed of separation, and the wife being by him privately examined separate and apart from her husband, touching her voluntary execution of it, stated she signed the same freely and voluntarily without fear or compulsion of her husband or any other person, and that she still voluntarily asserts thereto. The clerk certified that after an examination into the transactions therein set forth and agreed, and all matters pertaining thereto, it has been made to appear to his satisfaction, and he found as a fact that the deed of separation is not unreasonable or injurious to the wife, and signed it.

The confession of judgment is, as follows:

"I, Charlie Herbert Pulley, of Onslow County, North Carolina, the defendant in the above entitled action, do hereby confess judgment and authorize entry thereof, subject to further order of court as in such cases by law made and provided, in favor of Helen Elizabeth Pulley of Onslow County, North Carolina, the plaintiff herein, in the form of alimony in the sum of sixty-two dollars and fifty cents ($62.50) on the 3rd and 18th of each and every month hereafter from the 3rd day of July, 1958, for her maintenance and support.

"This confession is for an obligation for maintenance and support justly due by the defendant to the plaintiff and which obligation arose in the following manner, to wit:

"The plaintiff and the defendant were lawfully married each to the other in Clinton, Sampson County, North Carolina, on the 21st day of March, 1933, and thereafter lived together as husband and wife until the date hereof when as a result of many differences, irreconcilable controversies and incompatibilities which have arisen and have existed for an appreciable length of time and do continue to exist between the said parties hereto, causing them to be very unhappy by reason of which they have come to the conclusion and find as a fact that they can not ever live together happily and peaceably as man and wife and believing that it is necessary to the health and happiness of both of the said parties that they should separate and live apart from each other, both of the parties hereto have agreed that from the date hereof they will live separate and apart from each other forever hereafter as if they had never been married, and whereas, the said defendant herein fully realized his moral and legal obligation to provide adequate maintenance and support for the plaintiff herein and is desirous of fulfilling the said obligation and of giving evidence

of his good faith sufficient to satisfy the said plaintiff, the defendant herein has chosen this means of so doing.

/s/ Charley Herbert Pulley

Subscribed and sworn to
before me, this the 11th day
of July, 1958.

/s/ W. F. Justice

Signature of Officer

C. S. C.

Title of Officer

M. D. 16 Page 534."

The clerk's judgment reads:

"It appearing to the court from the confession of the defendant entered of record in this cause that the plaintiff and defendant were lawfully married each to the other in Clinton, Sampson County, North Carolina, on the 21st day of March 1933; that the plaintiff and defendant have on this date entered into a separation agreement whereby they have agreed with each other that they will live separate and apart from each other forever hereafter as if they had never been married; that the defendant is desirous of making provision of the support and maintenance of the plaintiff and to that end has authorized the entry of judgment that the defendant pay to the plaintiff the sum of Sixty-two Dollars and Fifty Cents on the 3rd and 18th days of each and every month from the 3rd day of July, 1958, as an obligation justly due by the defendant to the plaintiff for her support and maintenance;

"NOW, THEREFORE, upon the confession of the defendant entered of record in this cause and under the authority of and according to the terms of Section 1-247, Article 24, Chapter 1, of the General Statutes of North Carolina, it is ordered, adjudged and decreed that Helen Elizabeth Pulley, the plaintiff herein, have and recover of Charlie Herbert Pulley, the defendant herein, the sum of Sixty-two Dollars and Fifty Cents ($62.50) on the 3rd and 18th of each and every month from the 3rd of July, 1958, for her maintenance and support, together with the costs of this action.

"Given under my hand and official seal, this the 11th day of July, 1958.

/s/ W. F. Justice

Clerk of the Superior Court of
Onslow County, North Carolina.

M. D. 16 Page 534."

Plaintiff's motion states: Defendant has made all payments required by the judgment of confession up to and including the payment due on 3 December 1960, but since that date he has wilfully refused to make any payment, and payments required by his confession of judgment are now in arrears in the amount of $125.00. Defendant is amply able from his current income to make such payments.

It appears from the record that on 30 November 1960 in a county court in Johnston County defendant procured an absolute divorce from plaintiff on the ground of two years separation, G.S. 50-6.

Defendant filed an answer to the motion denying all its allegations, except such as conform to the record, and as a further answer and defense and for affirmative relief alleges:

The confession of judgment is void for: (a) It is not verified as required by G.S. 1-248; (b) It does not state facts sufficient to create an obligation to pay alimony as required by G.S. 1-248(2); (c) It is void for indefiniteness; (d) It does not come within the purview of orders and decrees which may be enforced by contempt proceedings. Wherefore, defendant prays that plaintiff's motion be denied, and that defendant's confession of judgment and the clerk's judgment be declared void and cancelled of record.

Plaintiff filed a lengthy reply to defendant's answer, and, *inter alia,* alleged that defendant made all the payments of alimony as required by his confession of judgment until a few days after he acquired from her an absolute divorce, and that now under all the circumstances he should be estopped to deny the validity of his judgment of confession, if it should be held improper, because to grant defendant the relief he requests in his answer would be to permit him to perpetuate a gross fraud upon her.

Judge Morris after an examination of the pleadings and after hearing oral argument states in his order he was of opinion that defendant's confession of judgment does not conform to the requirements for a confession of judgment, but that it is a mere contract between the parties sanctioned by the court, constituting a consent judgment unenforceable by contempt. Wherefore, he ordered and adjudged that plaintiff's motion that defendant be held for contempt be, and it hereby is, dismissed.

Plaintiff excepted to his order, and from the order entered appealed.

A Turner Shaw, Jr., and Ellis, Godwin & Hooper By: Glenn L. Hooper, Jr., for plaintiff, appellant.

Jones, Reed & Griffin for defendant, appellee.

PARKER, J. Plaintiff assigns as errors Judge Morris' conclusions and order.

G.S. 1-247 authorizes the entry of a judgment by confession for alimony, and provides that a wilful failure of the defendant to make payments of alimony, as required by such judgment, shall subject him, upon proper cause shown to the court, to such penalties as may be adjudged by the court as in any other case of contempt of its orders.

G.S. 1-248 provides: "A statement in writing must be made, signed, and verified by the defendant, to the following effect: 1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor. 2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show the sum confessed is justly due, or to become due."

Defendant challenges the validity of his own judgment by confession for the payment of alimony on the grounds set forth above in the statement of facts.

Defendant relies upon *Gibbs v. Weston & Co.*, 221 N.C. 7, 18 S.E. 2d 698, where it is said in reference to a judgment by confession: "The verified statement is jurisdictional, both as to its filing and as to its contents. Citing authority. Since the proceeding is in derogation of common right, the statute authorizing this form of judgment must be strictly construed." In that opinion the Court further said, which is not quoted in defendant's brief: "The failure to comply with the mandatory terms of the statute and especially the want of rendition of judgment upon the statement and affidavit of the defendant is not a mere irregularity, but constitutes a fatal defect, rendering the proceeding of no effect *as against creditors* whose judgments were subsequently docketed." Emphasis ours.

Defendant also relies on *Smith v. Smith*, 117 N.C. 348, 23 S.E. 270, which was a proceeding by an administrator of the confessing debtor, representing creditors, to set aside a judgment confessed, because the confession does not state sufficiently the consideration of the note and that it was justly due. The Court after setting forth that the statutory requirement is that the confessed judgment must show the consideration, and the amount confessed is justly due and after stating that this is to prevent fraud in such cases, says, "If the statutory requirements are not complied with the judgment is irregular and void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings."

These two cases, and others relied on by defendant, where the challenges are made by creditors, are not controlling in the instant case, because, *inter alia*, the challenge to the validity of the confessed judgment here comes not from or in behalf of creditors of the confessing debtor, but from the defendant himself.

This Court said in *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673: " . . . It is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel." Citing many authorities.

This Court said in *Jones v. Brinson,* 238 N.C. 506, 78 S.E. 2d 334: "While it is true that no consent can give a court jurisdiction of the subject matter of an action which the court does not possess without such consent, it is equally true that a court may obtain jurisdiction over the person of a party litigant by his consent. This for the reason that it is a mere personal privilege of a defendant to require that he be served with process in a legal manner, and since it is a personal privilege — even though of a constitutional nature — he may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process." Citing authorities. See *Waters v. McBee,* 244 N.C. 540, 94 S.E. 2d 640.

21 C.J.S., Courts, § 108, says: "Jurisdiction of the subject matter cannot be conferred upon a court by, or be based on, the estoppel of a party to deny that it exists. As to other objections to jurisdiction, there may be an estoppel, as in the case of objections to the manner in which, or the steps by which, the court obtained jurisdiction, or to the venue."

19 Am. Jur., Estoppel, § 77, says: "One who invokes or voluntarily submits to the exercise by a court of its jurisdiction upon a matter of which it has power to take cognizance is estopped from subsequently objecting thereto."

An absolute want of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment. However, "An objection to jurisdiction based on any ground other than lack of jurisdiction of the subject matter, such as lack of jurisdiction of the person or irregularity in the method by which jurisdiction of the particular case was obtained, is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time, or within the time prescribed by statute." 21 C.J.S., Courts, § 110.

In *Martin v. Briscoe,* 143 N.C. 353, 55 S.E. 782, there was a motion upon affidavit and notice to revive a dormant judgment, which defendant had confessed in favor of plaintiff. The verification was: "Sworn to and subscribed before me, this 14 November 1896. T. C. Smith, C.S.C." Confessing defendant contended that this verification was not sufficient to authorize the entry of judgment by confession, and that such judgment was void for want of jurisdiction. Upon hearing the cause

the clerk of the superior court held the judgment invalid and refused to revive it. On appeal to the judge this was reversed, and the defendant appealed. We affirmed the judge. In its opinion the Court with one Justice concurring in the result, and two dissenting, said: "We would not be understood as passing upon the question of the validity of such judgment confessed if it were attacked by a creditor, or even if the defendant had assailed it on the ground of fraud or imposition or denied the debt. We place this decision upon the ground of estoppel — the original affidavit by defendant that the debt was due the plaintiff, his acquiescence in the judgment for six years, his failure in this proceeding to deny the plaintiffs' allegation (made under oath) that the debt is still due, the absence of any averment by defendant of fraud, mistake or imposition, and the fact that if the judgment should be now held invalid, at defendant's instance, for informality, after having been entered at defendant's request, he would be protected by the statute of limitation."

In *Johnson v. Alvis,* 159 Va. 229, 165 S.E. 489, the Court said: "A defendant confessing judgment is estopped, in the absence of fraud, to question its validity on account of irregularities to which he did not object, or to dispute any facts set forth in the confession, and if, after the entry of the judgment, he ratifies or accepts it, or acquiesces in it, he is estopped to deny the authority on which it was confessed or otherwise to impeach its validity." To the same effect see *Sheldon v. Stryker,* 34 Barb. 116, 122; *Mullin v. Bellis,* 90 N.Y.S. 2d 27; *Yonkers Factors, Inc. v. Pugach,* 214 N.Y.S. 2d 820; *Risman v Krupar,* 45 Ohio App. 29, 186 N.E. 830; 49 C.J.S., Judgments, § 172.

In *Mullin v. Bellis, supra,* the defendant made a motion to set aside a judgment entered upon his confession of judgment, and one of his grounds for vacatur was the confession of judgment was signed but not verified, Civil Practice Act, § 541. Cahill-Parsons, N. Y. Civil Practice, contains The New York Civil Practice Act, § 541, which reads in part: "The statement must be verified by the oath of the defendant to the effect that the matters of fact therein set forth are true." The Court said: "In any event, a defendant cannot impeach a judgment which is based upon his signed statement even though it be unverified or unacknowledged." See *Los Angeles Adjustment Bureau, Inc. v. Noonan,* 5 West's Cal. Rptr. 445, (1960), which quotes from the *Mullin* case what we have quoted.

The deed of separation states both parties were of Onslow County. Therefore, the superior court of Onslow County had jurisdiction over the subject matter of the proceeding here, the payment of alimony. G.S. 50-1.

Defendant's confession of judgment is for the payment of specified

alimony, which is authorized by G.S. 1-247, it states he fully realizes his moral and legal obligation to provide adequate support for plaintiff, and that he confesses judgment therefor, stating it "is for an obligation for maintenance and support justly due by" him to her, and authorizes the entry of judgment by the court therefor. He invoked the exercise by the superior court of Onslow County of its undoubted jurisdiction upon a subject matter of which it had power to take cognizance. He made the payments of alimony required by his confessed judgment, and the entry of judgment therefor, from 18 July 1958 through 3 December 1960. On 30 November 1960 he obtained an absolute divorce from plaintiff. If this confessed judgment for alimony, and the entry of judgment therefor, should now be held invalid, at his instance, it would prevent, as he states in his brief, the enforcement by contempt of the payment of alimony to plaintiff by him, which defendant states in his confessed judgment is an obligation justly due by him to her. *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. Perhaps, a paraphrase of the aria Captain Macheath sings in Gay's "The Beggar's Opera," XIII, air XXXV, truly expresses defendant's feelings and desires, how happy could I be with my second wife, could I rid myself of the support of my first wife. The sums of alimony to be paid, as stated in the confessed judgment are definite — payments during her life, provided defendant survives her. Defendant makes no suggestion that there was any fraud, mistake or oppression.

The entry of judgment for the payment of alimony by the court, based on defendant's confessed judgment therefor, states plaintiff shall have and recover of defendant the specified payments of alimony, instead of ordering defendant to pay these amounts. This is an infelicitous choice of words and an irregularity, because the court's judgment before this states the defendant has confessed judgment for alimony, and "to that end has authorized the entry of judgment that the defendant pay to the plaintiff" the specified alimony, "an obligation for maintenance and support justly due by the defendant to the plaintiff for her support," and because further this language appears in the deed of separation: "AND WHEREAS, the said husband has agreed to make provision for the support and maintenance of the said wife and to that end has this date confessed judgment before the clerk of the superior court of Onslow County, North Carolina, wherein he acknowledges an obligation to support the said wife and has consented that a judgment be entered against him that he pay to the said wife the sum of Sixty-two Dollars and Fifty Cents ($62.50) on the 3rd and 18th days of each and every succeeding month hereafter."

It is to be understood that we are not passing upon the question of the

validity of the confessed judgment, and the entry of judgment thereon, if they were assailed by a creditor, or challenged by defendant on the ground of fraud, mistake, or oppression. We place our decision squarely upon the ground that defendant, under all the facts here, is estopped to question the validity of his own confessed judgment for alimony, and of the entry of judgment therefor by the superior court of Onslow County as authorized by him, and to question that the entry of judgment by the court on the confessed judgment is a court order to pay alimony.

The court below erred in not holding that defendant is estopped to question the validity of his own confessed judgment for alimony, and of the entry of judgment therefor by the court, and to question that the judgment entered by the court on his confessed judgment is an order of court for defendant to pay alimony, and in concluding that they are a mere contract between plaintiff and defendant constituting consent judgments unenforceable by contempt proceedings, and in ordering plaintiff's motion to show cause dismissed. The lower court will issue a show cause order as prayed in plaintiff's motion, and then have a hearing on such order according to law.

The order below is

Reversed.

STATE v. THEODORE BOYKIN.

(Filed 11 October, 1961.)

1. Criminal Law § 122—

The trial court has the discretionary power to withdraw a juror and order a mistrial when necessary to attain the ends of justice, but in a capital case the court is required to find the facts fully and place them in the record so that the court's action may be reviewed.

2. Same; Criminal Law § 26—

In this prosecution for capital offenses, the trial court ordered a mistrial in the exercise of its discretion as necessary to attain the ends of justice upon findings set out in the record that the judge has suffered an attack of angina pectoris and that in view of the judge's physical condition and the orders of his attending physician the judge could not return to the courtroom to resume trial. *Held:* The court had the discretionary power to order the mistrial and such order will not support a plea of former jeopardy upon the trial of the defendant at a subsequent term resided over by another judge.

3. Criminal Law § 71—

Where the evidence before the court upon the *voir dire* is not in the record it will be presumed that there was evidence sufficient to sustain the court's finding that the confession of the defendant was voluntary, and evidence elicited by counsel for defendant upon cross-examination that the interrogation of defendant took place in the sheriff's office in the presence of uniformed and armed officers is insufficient to impeach the voluntariness of the confession.

4. Homicide § 14; Rape § 4—

In this prosecution for murder and rape, the fact that the solicitor's order for a post-mortem examination of the victim, introduced in evidence, contained the statement that in the opinion of the solicitor "foul play" had been committed in connection with the death, *is held* not prejudicial, the order having been entered solely to ascertain the exact cause of the death of the victim, and there being plenary evidence complementing, supplementing and corroborating defendant's confession that he attacked the victim with a poker, raped, and then shot her.

APPEAL by defendant from *Fountain, S.J.*, June, 1961, Special Term, DUPLIN Superior Court.

Criminal prosecution upon a two-count bill of indictment charging rape and murder. After the appointment of counsel and the formal arraignment and plea, the chronology of the court proceedings is set out in the following orders:

"PLEA AND ARRAIGNMENT — IN THE SUPERIOR COURT, APRIL, 1961 CRIMINAL TERM

"The defendant is produced before the court and duly arraigned as provided by law and pleads not guilty.

"At the April, 1961, Criminal Term the following named Jurors were chosen, sworn and empanelled to try this cause: Mac D. Hunter, Edward P. Johnson, Leslie Norris, Amos Lanier, Odel Lee Brock, John Nick Kalmer, Gerald Harper, George Brown, Russell Gray, Harvey Myers, Gurney M. Harper, James Handley Atkinson. One alternate juror, Roscoe Whitman, was selected."

About five o'clock on the afternoon of April 5, the presiding judge suffered a heart attack and immediately was sent to the hospital. The next morning he entered the following:

"ORDER TO JURY

"Gentlemen of the jury, I regret this imposition upon you due to circumstances over which I have no control, I feel that I should not require you to be held together pending the resumption of the trial of this very important case both to the State and to the defendant. For that reason, by and with the consent of the solici-

tor and private prosecution and the attorneys for the defendant, I am hereby permitting you to return to your several homes. My physician will not permit me to resume the trial of this case prior to Monday, April 10.

"I shall expect each of you to return to the Courthouse on that day at 10:00 A.M. In the meantime I admonish you that you will not permit anyone to discuss this matter in your presence; that you will not discuss it with anyone, not even a member of your family except perhaps to answer that the trial has not been finished. That you will come to no conclusion about the matter and that in so far as it is humanly possible for you so to do you will keep your minds open. I also admonish you not to read the newspapers as to any article concerning this case, and that you will not listen to any commentator either on radio or television regarding the case now being tried.

"The Sheriff will open court this A.M. and will recess until 9:30 A.M. tomorrow at which time the court will be reconvened and recessed until 10:00 A.M. on Monday, April 10, at which time I hope to be able to meet you and will conclude the trial of this matter.

"This the 6th day of April, 1961

/s/ Chester R. Morris, Judge Presiding.

"The foregoing statement is ordered to be read to the jury by the Clerk of Superior Court and the same to be recorded in the minutes of the court.

"This the 6th day of April, 1961,

/s/ Chester R. Morris,
Judge Presiding."

"O R D E R

"This cause coming on to be heard the above designated term of court for the trial of criminal cases before the undersigned Judge assigned to and presiding over the Courts of the Fourth Judicial District;

"The Court in this cause does find the following facts that heretofore the defendant, Theodore Boykin, was charged with capital crimes of rape and murder, and that prior to his arraignment upon said capital charges Honorable Henry L. Stevens, Jr., by virtue of the authority contained in Chapter 112 Public Laws of 1949 did by Order duly appoint Rivers D. Johnson, Jr., and J. T. Gresham, Jr., Attorneys at Law and members of the Bar, residents in Duplin County and the Fourth Judicial District, to represent said defendant;

"That thereafter at the January Term, 1961, of Duplin County Superior Court, the defendant was indicted upon the following bill of indictment:

"STATE OF NORTH CAROLINA
DUPLIN COUNTY
SUPERIOR COURT
JANUARY TERM, A.D. 1961

"FIRST COUNT:

"The jurors for the State upon their oath present, that Theodore Boykin, late of the County Duplin, on the 24th day of December, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and the County aforesaid, did, unlawfully, wilfully and feloniously ravish and carnally know Mrs. Lena T. Barnes, a female, by force and against her will and against the peace and dignity of the State.

"SECOND COUNT:

"The jurors for the State upon their oath do further present that Theodore Boykin, late of the County of Duplin, on the 24th day of December, 1960, with force and arms, at and in the County aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder Mrs. Lena T. Barnes, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/s/ WALTER T. BRITT, Solicitor.

"Which indictment fully appears in the minutes of the Office of the Clerk of Superior Court for said Term;

"That thereafter and on the 3rd day of April, 1961, the defendant was duly arraigned in Open Court upon the capital felony of said Bill of Indictment, at which time he entered a plea of 'Not Guilty,' and placed himself upon God and his Country;

"That the regular venire was examined and exhausted without having completed the Jury, and the undersigned deeming it necessary did order the Jury boxes of Duplin County be brought into open Court, and that the scrolls bearing the names of One Hundred (100) jurors be drawn from Box No. 1 and placed into Box No. 2;

"That from said special venire the order for which duly appears in the Minutes of Superior Court of Duplin County, a jury was selected at the end of the Session, Tuesday, April 4, 1961, which jury consisted of twelve jurors, who were first impaneled and a thirteenth juror who was subsequently impaneled with the original twelve;

"That an Officer was appointed to take charge of said jury, and the jury was properly instructed and was taken by said Officer to Stone Manor Motel in Wallace, North Carolina;

"That the trial was resumed on Wednesday, April 5, 1961, and proceeded until 5:00 P.M., the State at which time had not finished its evidence; that immediately upon the adjournment of the Court that undersigned was stricken with an attack of angina pectoris; that a physician was summoned to-wit, Dr. J. W. Straughan, who admitted the undersigned to Duplin General Hospital in Kenansville, and about 300 yards from the Courthouse where the undersigned has been a patient since admission, and that upon X-ray and electrocardiogram examination, it has been determined that the undersigned can not return to the Court room;

"That the undersigned has caused Court to be convened each day and recessed until the following day by the High Sheriff of Duplin County;

"That the Court has in its discretion permitted the Jury to go to their respective homes, but has not discharged them; the separation of said Jurors having been by and with the consent of the Solicitor for the State and by the private prosecution, and by and with the consent of the defendant;

"That in view of the physical condition of the presiding Judge and the orders of his attending physician, the undersigned Judge can not return to the Courtroom to resume this trial, and in the sound discretion of the Court, the Court finding it necessary to attain the ends of justice, does hereby order a juror withdrawn to-wit, Edward P. Johnson, and a mistrial ordered, and the jury discharged and the case is hereby continued for the term;

"To the foregoing Order counsel for the defendant do hereby consent as does the defendant in his own person evidenced by his own mark.

"This 8th day of April, 1961,

/s/ Chester R. Morris,
Judge Presiding.

"WE CONSENT:

/s/ Water T. Britt, Solicitor

/s/ H. E. Phillips, Attorney for the Private Prosecution

/s/ Rivers D. Johnson, Jr.
/s/ J. T. Gresham, Jr. } Attorneys for Defendant

/s/ Theodore (X — his mark) Boykin, Defendant

WITNESS: /s/ R. D. Johnson, Jr."

"ORDER

"When the case was called for trial by the solicitor, the defendant before pleading to the indictment entered an oral plea of former jeopardy based on the defendant's assertion and the stipulation of the State that the defendant was not personally present on April 8, 1961, when an order of mistrial was entered by The Honorable Chester Morris, Judge Presiding; and further rests his plea of former jeopardy upon his contention that the order of mistrial is in itself inadequate and insufficient; and upon the further statement by counsel that Judge Morris was permitted to go to Elizabeth City on the 8th day of April, 1961; and upon the stipulations as set out in the hearing of this plea and upon the record of the case and the evidence offered;

"The court finds as a fact that the defendant was on trial at the April 1961 term of this court upon an indictment charging him with the capital crime of rape and murder in the first degree; that during the progress of the trial the presiding judge was stricken with a serious heart condition which consisted of a clot in his coronary artery and he was immediately hospitalized and was advised by his physician, Dr. J. W. Straughan, at the Duplin General Hospital that he could not return to court and could not proceed further with the trial of the case and that if he attempted to do so it would very likely be fatal to the presiding judge.

"From the testimony of the attending physician the Court finds as a fact that the judge then presiding became and is totally and permanently disabled by reason of the clot in his coronary artery, and that on the 8th of April, 1961, he was permitted by his physician to go to a hospital in Elizabeth City near his home by ambulance.

"The Court further finds it as a fact that Judge Morris, while in the hospital in Kenansville, on the 8th day of April, 1961, signed the order which is set out in the record of this case in which he declared a mistrial; that the sole cause of the order of mistrial was the physical condition of Judge Morris as before set out; that the defendant's counsel, with the solicitor in the presence of Judge Morris in the Duplin General Hospital on April 8, 1961, stated that they did not wish the defendant to be brought to the hospital and into the Judge's hospital room to be present while the order of mistrial was dictated or signed by the Judge. At the time the Order of Mistrial was signed by Judge Morris it had been consented to by the defendant in his own proper person and also by each of the attorneys for the defendant as shown and indicated by their signatures which appear on the same page of the Order as the signature of the Judge Presiding.

"Upon the foregoing findings of fact the Court concludes that the plea of former jeopardy is not well taken for that the presiding judge could not, because of his physical condition, then or thereafter, proceed with the trial of the case; and further, that the defendant and his counsel consented to the Order of Mistrial which was entered by the presiding judge on April 8, 1961.

"IT IS NOW THEREFORE ORDERED AND ADJUDGED that the plea of former jeopardy be and the same is hereby overruled and denied.

"This the 5th day of June, 1961. /s/ George M. Fountain, Judge Presiding.

"To the foregoing Order the defendant objects and excepts. /s/ George M. Fountain, Judge."

The State's evidence introduced at the trial tended to show the following: For six years prior to December 24, 1960, Mrs. Lena T. Barnes lived alone in a rural section of Duplin County. The defendant Theodore Boykin had worked on the Barnes' farm. He had not worked, however, during 1960. About 11:30 or 12:00 o'clock on December 24, 1960, the defendant left the automobile of John Moore at a point about one-half mile from Mrs. Barnes' home, stating he intended to visit a friend nearby.

The officers went to the home of Mrs. Barnes about 9:40 on the night of December 24, 1960. They found the doors locked, a slit in the screen, and a broken window to the bathroom. They also found blood in the hall, in the bedroom, in the kitchen, and in the bathroom. They found the dead body of Mrs. Barnes partially concealed under the stairway in the basement. The body was nude from the waist down. The medical expert who examined the body found two skull fractures at the back of the head, a broken nose, multiple contusions on the hands, arms and face. There were two entrance bullet wounds in the chest, one exit wound in the back. Under the skin in the back the physician removed a bullet. A spent bullet was found on the floor near the body. Examination of the vagina disclosed the presence of male sperm. The officers found a metal poker in the living room; also a blue Ivy-league cap in the bathroom.

Mary Elizabeth Kenan testified in substance: She lived about 12 miles from the home of Mrs. Barnes. The prisoner came to her home about 4:30 on the afternoon of December 24, 1960. He had a brown paper bag in which were a red sweater, a green sweater, nylon panties and a box of candy. He requested the witness and her daughter to wrap these article as gifts, stating he would go to town and would be back to pick them up. He returned about 7:30, stated, "I have some

more presents for you." He gave her a billfold with the name "Mrs. Lena T. Barnes" on it. He gave Sara a comb and brush set, and a wrist watch to Lilly Mae Peterson. He had a pistol which he asked Mary Elizabeth Kenan to keep for him overnight. He left about 1:30 but returned next morning about 10:30 o'clock, when she gave him the pistol. It contained three live cartridges. She saw the defendant again that day, December 25, about noon. He was in the custody of the officers.

At the time of the arrest near Rose Hill, the defendant was riding with Henry Wiggins in the latter's automobile. After the arrest Henry Wiggins found a pistol "under the dashboard to my car. It was not my pistol. . . . I never saw that pistol before." The witness delivered it to Sheriff Dempsey.

Mrs. Faircloth identified the pistol and the watches as the property of her sister, Mrs. Barnes. Mr. Brady, local manager of the Electric Membership Corporation, identified the billfold as a gift from the corporation to Mrs. Barnes at their Christmas party the week preceding Christmas. Mary Elizabeth Kenan and Sara Freeman identified the green sweater, the red sweater, the box of candy, and the wrist watch as the articles the defendant gave as presents on Christmas Eve. The other watch was in the defendant's pocket at the time of his arrest.

John Boyd, the ballistics expert of the State Bureau of Investigation, testified he made laboratory tests of the two bullets and the revolver which had been offered in evidence and in his opinion the bullets had been fired from the revolver.

The State offered the following testimony of Hoyle T. Hartley:

"Mr. Hartley testified that he introduced himself to the defendant, showed him his credentials and told him he was a Special Agent for the S. B. I., and told Theodore Boykin that he did not have to tell anything, but that anything he would say could be used against him in court. Also told him they wished to question him concerning the rape and murder of Mrs. Lena T. Barnes, that no threats or promises of reward or hope of reward was made to him. That Theodore told them that sometime during the afternoon of December 24, 1960, he went to Mrs. Lena T. Barnes' home, that he entered by the back yard, came up onto the back porch, punched a hole in the bathroom screen, opened the screen with a pocket knife, broke out the window, unlocked the bathroom window, raised it and entered. That he stated he closed the window, locked it and pulled the shade down. That Theodore further stated that he was there approximately thirty minutes when he heard Mrs. Barnes drive into the carport. That he went into the room where the heater was located, got a long object from beside the

heater and stood near the kitchen door. That Mrs. Barnes entered the kitchen door with a package in her hand, that he struck her one or two times with the object, that she fell backwards and grasped for the kitchen bar then fell backward onto the floor. That Theodore stated he did not remember anything else until in the room where the heater was located he remembered he had Mrs. Barnes on the floor and that he raped her there, in that room. That he stated he then picked her up in his arms and carried her down into the basement, laid her on the basement floor near the stairs. He then started back up the steps and after he had gotten to the first landing in the steps he turned around and took the .32 caliber pistol, which he had in his pocket, and shot Mrs. Barnes. That he stated he then went upstairs and onto the back porch and got some mops there and attempted to mop up the blood on the kitchen floor. That he then went into the room where the heater was located, got the wrist watch from the dresser, went to her bedroom and got another watch, a box of candy, billfold, sweaters, lady's pants. That he then left the house by the back door and later that night went to the home of Mary Kenan. That Sara Freeman and Lilly Mae Peterson were there and he gave out the things he got from Mrs. Barnes' home to them. He stated that on the 25th he gave the .32 caliber pistol to Mr. Richard Wiggins who lives in Wallace near the power plant, also a colored person. That the defendant said be gave the billfold and red sweater to Mary Kenan."

On April 25, the Solicitor ordered the Coroner of Duplin County to exhume the body of Mrs. Barnes and conduct a post-mortem examination. The order, together with the objection and the court's ruling thereon, are here quoted in full:

"NORTH CAROLINA
DUPLIN COUNTY
IN THE MATTER OF THE DEATH
OF MRS. LENA T. BARNES ORDER

"TO: Mr. Hector McNeill, Coroner of Duplin County:

"It appearing to the undersigned that Mrs. Lena T. Barnes died in Duplin County, North Carolina, on December 24, 1960, and the undersigned being of the opinion that foul play was committed in connection with the death of the said Mrs. Lena T. Barnes and that it is necessary that her body be exhumed for the purpose of determining the cause of her death;

"Therefore, you are hereby ordered and directed to exhume the body of Mrs. Lena T. Barnes and to direct a post-mortem examination by one or more physicians in order to determine the exact cause of the death of the said Mrs. Lena T. Barnes.

"This the 25th day of April, 1961. Walter T. Britt, Solicitor for the Sixth Solicitorial District of North Carolina.

"Defendant objected to the words 'FOUL PLAY'."

Objection was overruled.

"JUDGE TO THE JURY: Gentlemen of the jury, the document Mr. Britt just read is admitted only as it may show authority for having the body of Mrs. Barnes exhumed. The statement of the possibility of foul play appearing in the instrument does not constitute any evidence against the defendant, or any evidence that there was foul play and you will not consider that portion of that document for any purpose whatever. Completely disregard that. The only purpose of the document itself being offered is to show that the solicitor of the district authorized and directed that the body be exhumed. Consider it for that purpose and no other."

Dr. Hawes, who conducted the post-mortem, testified that in his opinion the death of Mrs. Barnes was caused by the chest injuries, one of which pierced the heart.

The court overruled the defendant's motion to nonsuit, after which the defendant rested without offering evidence. The jury returned these verdicts: (1) Guilty of rape without recommendation of life imprisonment. (2) As to the second count, guilty of murder in the first degree without recommendation of life imprisonment.

From a separate judgment of death in each case, the defendant appealed.

T. W. Bruton, Attorney General, Harry W. McGalliard, Asst. Attorney General, for the State.

R. D. Johnson, Jr., J. T. Gresham, Jr., for defendant, appellant.

HIGGINS, J. The defendant seeks a new trial on each count in the indictment upon the ground the court committed error by (1) overruling his plea of former jeopardy, (2) admitting in evidence the defendant's confession, (3) permitting the State to introduce the order for the post-mortem examination.

The power of the presiding judge to order a mistrial in a criminal case after the jury has been impaneled, and before verdict, has been the subject of review by this Court beginning with *State v. Garrigues,* 2 N.C. 241. The many subsequent decisions dealing with the court's power to discharge a jury and order a new trial have been cited and analyzed by *Parker, J.,* in *State v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355; by *Bobbitt, J.,* in *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243;

by *Stacy, C.J.*, in *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; and in *State v. Beal,* 199 N.C. 278, 154 S.E. 604. "It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused."

In the light of our decisions, the defendant's objection to the order of mistrial in this case and his plea of former jeopardy based thereon cannot be sustained. Both he and his counsel of record consented to the order and signed it. However, in view of the condition of the judge's health, the order would have been valid even if the defendant and his counsel had objected. It goes without saying that a superior court trial cannot go on without a presiding judge. In this instance, before the State had completed its evidence, Judge Morris suffered a heart attack, a doctor was called immediately, and the Judge was removed from the courthouse to the hospital about 300 yards away. Immediately, he ordered the court recessed from day to day, hoping to recover sufficiently to continue the trial. However, on the third day after his admission, Judge Morris, from his hospital bed, made findings and ordered a mistrial heretofore quoted in full.

The findings of fact while terse and succinct, are amply sufficient to show necessity for the mistrial. This is so even under the rigid requirements in the early days of this State's judicial history and without the prisoner's consent. In *State v. Ephraim,* 19 N.C. 162; *In the Matter of Spier,* 12 N.C. 491, the rule is stated: " . . . that the jury cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from some matter occurring during the trial, which was beyond human foresight and control; and generally speaking, such necessity must be set forth in the record."

The rule has been subsequently relaxed: "It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge; but in capital cases he is required to find the facts fully and place them upon the record so that upon a plea of former jeopardy as in this case, the action of the court may be reviewed." *State v. Beal, supra.* The plea of former jeopardy was properly overruled.

By his second assignment of error the defendant challenges the admission of his confession. The record recites: "After hearing evidence in the absence of the jury, Judge Fountain overruled the objection, holding that whatever the prisoner said was voluntary." The record does not disclose what evidence the judge heard in the absence of the jury. It is presumed, therefore, the evidence was sufficient to sustain the finding.

After Mr. Hartley testified, the defendant moved to strike his testimony. The testimony is quoted in the factual statement. The court refused to allow the motion, whereupon the defendant, by cross-examination, sought to show additional facts relating to the confession. The cross-examination disclosed that the interrogation of the defendant took place in the sheriff's private office in the presence of five officers, three of whom were in uniform and were armed. "The prisoner observed he could not write." Nothing else was offered to impeach the confession. The evidence relating thereto was properly admitted as voluntary. *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

Finally, counsel for the defendant assign as error the admission of the solicitor's order to the coroner to exhume the body of Mrs. Barnes. The objection was made upon the ground the order contained the words "foul play." The purpose of the order was to obtain, by the post-mortem examination, evidence as to the cause of death. Based on the post-mortem examination, Dr. Hawes testified that in his opinion death resulted from the chest wounds.

The State's evidence was full, complete, and convincing. The defendant knew that Mrs. Barnes lived alone. He had worked on her farm. He was seen half a mile away about noon on December 24. At 4:30 that same afternoon he was 12 miles away at the home of Mary Elizabeth Kenan. At the time he had a paper bag containing a red sweater, a green sweater, a pair of nylon panties and a box of candy. He went to town, or so stated, and returned about 7:30. He announced he had some more presents. He gave to those attending the Christmas party the sweaters, panties, candy, a wrist watch, and the billfold with the name Lena T. Barnes on it. He gave Mary Elizabeth Kenan the pistol to keep overnight for him. He returned next morning for the pistol. After his arrest it was discovered hidden in Henry Wiggins' automobile in which he had been riding. He had another watch in his pocket. The pistol, watches, and the billfold were identified as the property of Mrs. Barnes. The circumstances and the confession complemented, supplemented, and corroborated each other without any inconsistencies even as to minor details. The whole evidence pointed unerringly to the defendant's guilt.

The hearing in this case was well conducted both from the bench and from the trial tables. It has been well presented here. After examination of the record with that care which the gavity of the consequences requires, we find in the trial

No error.

M. T. LANE, BY NEXT FRIEND, MARY C. LANE, v. CREG J. LANE, E. J. LANE, J. WILLIE BOYCE, AND JESSE E. CHAPPELL.

(Filed 11 October, 1961.)

1. Adverse Possession § 15—

Where the description in a deed in proper form embraces not only the land owned by grantor but also a contiguous additional strip of land, such deed conveys the land owned by the grantor and constitutes color of title as to the strip of land embraced in the description but not owned by the grantor.

2. Adverse Possession § 4—

Where there is lappage in the descriptions in deeds to contiguous tracts of land and the grantee in the senior deed is not in actual possession of the lappage and the grantee in the junior deed is in actual possession thereof, such possession will ripen title in the grantee in the junior deed after seven years.

3. Boundaries § 7; Quieting Title § 2—

Ordinarily when each of the parties owning adjoining tracts of land admits the title of the other, only the location of the true dividing line is involved and the question of title is not presented, G.S. 38-1 *et seq.*, but when one of the parties claims title to the lappage by adverse possession and asserts his ownership of all or a part of the lappage by reason of such adverse possession, the proceeding is assimilated into an action to quiet title, and the issue of title raised by the pleadings should be determined by a jury. G.S. 1-399.

4. Same—

Where defendants deny that plaintiff is the owner of the land as described in the complaint, allege good record title in themselves to an adjoining tract and title to a twenty foot strip of land along the southern boundary of their tract by 20 years adverse possession and by 7 years adverse possession under color of title, the pleadings raise the question of defendants' title by adverse possession to the twenty foot strip, and the issue of their title to such strip must be determined by a jury notwithstanding defendants' admission that the southern boundary of their land is the northern boundary of plaintiff's land.

APPEAL by defendants Creg J. Lane and E. J. Lane from *Parker, J.*, January Term, 1961, of PERQUIMANS.

Plaintiff is now nineteen or twenty years of age. His mother, Mrs. Mary C. Lane, the widow of A. C. Lane, was appointed next friend and prosecutes this action in plaintiff's behalf.

A. C. Lane, plaintiff's stepfather, died, testate, in November, 1958. His will was probated November 6, 1958. The only portion thereof in the record is this dispositive provision: "I also give to M. T. Lane the 'Henry Copeland Pine Thicket' containing eighteen acres, and 8½ acres of the Thomas Lamb land." (Note: The "8½ acres of the

Thomas Lamb land" is not involved in this litigation.) Plaintiff testified the will "is dated 1946."

A. C. Lane and defendant E. J. Lane were brothers. Defendant Creg J. Lane is a son of E. J. Lane and nephew of the late A. C. Lane.

On May 30, 1960, under G.S. 38-1, plaintiff filed a petition with the clerk alleging in paragraph 1 his ownership of a tract of land in Belvidere Township, Perquimans County, particularly described and referred to as "containing 18 acres, more or less."

Plaintiff alleged further: His said tract adjoins the lands of Creg J. Lane, Jesse E. Chappell and Willie Boyce. Defendant Creg J. Lane disputes the correctness of the boundary lines of plaintiff "as set out in the deeds" referred to in the description set forth in paragraph 1 where his land and plaintiff's land adjoin. Defendants Chappell and Boyce, to the best of plaintiff's knowledge, do not question the correctness of plaintiff's boundary lines as set out in said deeds but are made parties so the judgment will establish all of plaintiff's boundary lines.

Defendant Creg J. Lane answered. It was stipulated that E. J. Lane voluntarily made himself a party defendant and adopted as his own the answer filed by Creg J. Lane. Hereafter, "defendants" refers to Creg J. Lane and E. J. Lane.

In answering paragraph 1 of the complaint, defendants admitted plaintiff owns a tract of land "adjoining the lands of Creg J. Lane, Jessie E. Chappell and Willie Boyce." They denied all other allegations of said paragraph and alleged: ". . . it is specifically denied that the plaintiff owns a tract of land having in its entirety the description as set out in said section."

Defendants, for further answer, alleged: Creg J. Lane, subject to the life estate of his father, E. J. Lane, "is the owner of that certain tract well known as the Thompson Boyce tract, which tract adjoins the plaintiff's lands on the North"; that the location of their southern boundary is a line beginning on the east side of the Sandy Ridge Road, approximately 514.8 feet north of the Martin White corner, and running south 59° east approximately 1374 feet to the lands of Jesse E. Chappell, shown on a map "prepared for the plaintiff by T. J. Jessup, Registered Surveyor, dated April 25, 1959, bearing the legend in part, 'A. C. Lane Estate, Henry Copeland Thicket Tract' "; and that they, and those under whom they claim, had been in the open, notorious and adverse possession of a strip or parcel of land, having a width of approximately 20 feet, lying immediately to the north of the northern boundary of the "Henry Copeland Thicket Tract" as shown on the Jessup map, for more than seven years under color of title and for more than twenty years without color of title.

It was stipulated "that the hearing before the clerk was waived,

and that the matter might be heard in the first instance before the court and a jury."

At trial in superior court, three issues were submitted and answered by the jury, to wit:

"1. What is the true dividing line between the lands of the petitioner, M. T. Lane, and the lands of the defendants, E. J. and C. J. Lane, as to petitioner's northern boundary? Answer: C-D

"2. What is the true dividing line between the lands of petitioner, M. T. Lane, and the lands of the defendants, E. J. Lane, C. J. Lane and Willie Boyce, as to petitioner's Southern boundary? Answer: A-B

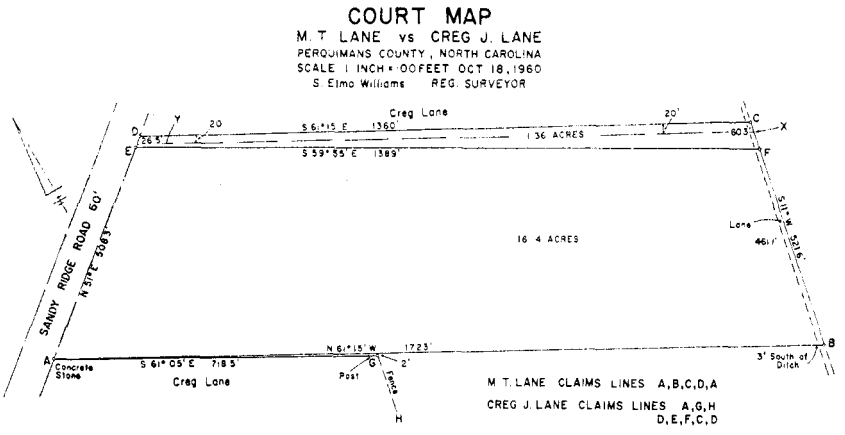
"3. What is the true dividing line between the lands of petitioner, M. T. Lane and the lands of the defendant, Jesse E. Chappell, as to petitioner's Eastern boundary? Answer: B-C"

Defendants tendered, for submission as the first and second issues, these additional issues: (1) "Was the 20-foot strip of land described in deed from Thompson Boyce to A. C. Lane, Book 20, page 101, included in the devise by A. C. Lane to M. T. Lane of the Henry Copeland Thicket?" (2) "Are the defendants, E. J. Lane and C. J. Lane, the owners of that certain tract or parcel of land, 20 feet in width, lying to the North of the Northern boundary of the parcel of land described in deed from Henry Copeland to A. C. Lane, Deed Book 17, page 354?" The court refused to submit these issues and defendants excepted.

The court adjudged the true dividing lines were the lines A to B, B to C, C to D, as shown on the court map; and it was ordered that these lines be marked, a map made and filed, etc. From this judgment, defendants appealed, assigning errors.

LeRoy, Goodwin & Wells for plaintiff, appellee.
John H. Hall for defendants Lane, appellants.

BOBBITT, J. The map, reproduced on the next page, was prepared by S. Elmo Williams, Court Surveyor.



The line, A to B, referred to in the second (submitted) issue, is not in controversy. As to the line, B to C, referred to in the third (submitted) issue, there is no controversy as between plaintiff and Jesse E. Chappell as to the portion thereof running from B to X. However, defendants contend the portion thereof from X to C is the dividing line between *their* land (the 20-foot strip) and the land of Jesse E. Chappell.

It is noted: The evidence discloses the point Y, shown on the court map, is on the east side of the Sandy Ridge Road, twenty feet south of D.

Originally, Henry Copeland owned a tract referred to as containing 17½ acres and Thompson Boyce owned a tract referred to as containing 5 acres. Thompson Boyce's southern boundary was Henry Copeland's northern boundary.

By deed dated February 3, 1928, filed for registration February 15, 1928, recorded in Book 17, page 354, Henry Copeland and wife conveyed his said tract to A. C. Lane. This tract, apart from a reduction in distances caused by the widening of Sandy Ridge Road, is the land embraced within the lines A to B to X to Y to A. The description in this deed refers to the Thompson Boyce line as the northern boundary of the tract therein conveyed.

By deed dated February 10, 1925, but acknowledged September 21, 1931, recorded in Book 20, page 101, Thompson Boyce conveyed to A. C. Lane a 20-foot strip. After the particular description, this 20-foot strip is referred to as "containing by estimation 1/2 acre to be the same more or less." This 20-foot strip is *a part* of the original Thompson Boyce tract. The southern line of the 20-foot strip is the northern line of the tract conveyed to A. C. Lane by Henry Copeland.

The 20-foot strip is the land embraced within the lines Y to X to C to D to Y.

The description in the petition is a composite of the descriptions in said two deeds to A. C. Lane.

Defendants offered in evidence a deed dated and filed September 23, 1938, recorded in Book 24, Page 108, by which Thompson Boyce, for a recited consideration of $300.00, purported to convey to E. J. Lane the entire original Thompson Boyce tract. Thereafter, E. J. Lane, reserving a life estate, purported to convey this tract to Creg J. Lane.

Each of the two deeds made by Thompson Boyce, the senior deed to A. C. Lane and the junior deed to E. J. Lane, describes and purports to convey the 20-foot strip. Clearly, the deed from Thompson Boyce to E. J. Lane did not vest in E. J. Lane title to the 20-foot strip. However, it purported to do so and, hence, constituted color of title to the 20-foot strip.

A deed which purports to convey a tract of land, sufficiently identified by the description set forth therein, but which fails to do so because of want of title in the grantor, constitutes color of title. *Carrow v. Davis*, 248 N.C. 740, 105 S.E. 2d 60; *Trust Co. v. Parker*, 235 N.C. 326, 69 S.E. 2d 841, and cases cited. The deed from Thompson Boyce to E. J. Lane conveyed a valid legal title to all land described therein except the 20-foot strip. As to the 20-foot strip, it constituted color of title. *Trust Co. v. Miller*, 243 N.C. 1, 6, 89 S.E. 2d 765.

Where, as here, there is a lappage, the pertinent rules for determining the relative rights of the parties are well established. The subject is fully discussed in *Currie v. Gilchrist*, 147 N.C. 648, 61 S.E. 581, where *Walker, J.*, after reviewing prior decisions, said: "We may therefore take it to be settled by this Court by a long and unvarying line of decisions that if the person who claims under the elder title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference, the title being out of the State." Also, see *Vance v. Guy*, 224 N.C. 607, 611, 31 S.E. 2d 766; *Berry v. Coppersmith*, 212 N.C. 50, 193 S.E. 3; *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E. 2d 101.

The evidence, considered in the light most favorable to defendants, tends to show they have had actual adverse possession (see *Berry v. Coppersmith, supra,* and cases cited therein) of the 20-foot strip for more than twenty years and that neither A. C. Lane nor plaintiff has had actual possession of any part thereof. It is noteworthy that defendants' evidence tends to show their adverse possession extended to a fence and ditch south of the line Y to X but north of the line E to F.

Where, in a special proceeding under G.S. 38-1 *et seq.*, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and, as a defense, pleads seven years' adverse possession under color of title under G.S. 1-38, or twenty years' adverse possession under G.S. 1-40, the proceeding is assimilated to an action to quiet title. In such case, as provided by G.S. 1-399, the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." See *Simmons v. Lee,* 230 N.C. 216, 222, 53 S.E. 2d 79, and cases cited.

In the trial below, the court held and instructed the jury, "that title is not involved because the answer of the defendant or respondents admits that the lands of the petitioner adjoin their land, particularly on the Northern boundary of petitioner's land . . ." Too, while instructions were given as to adverse possession, the court instructed the jury that the evidence of defendants as to their adverse possession was "to be received and considered by you not as establishing title to any of the disputed area, but only to assist you in arriving at the true dividing line between the parties." Defendants excepted to each of these instructions.

Ordinarily, in a special proceeding under G.S. 38-1 *et seq.*, where it is admitted that the lands of petitioner and respondent adjoin, the only question presented is the location of the true dividing line. It was so held in *Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501, cited by the court below as the basis for its ruling. But, for the reasons stated below, the factual situation here considered differs from that ordinarily involved in such cases.

The crucial question is whether the pleadings raised an issue as to plaintiff's alleged title to the 20-foot strip. The court below, by the instructions defendants assign as error, answered, "No." After careful consideration, we are of opinion, and so hold, that the court's ruling in this respect was erroneous.

Here, defendants do not contend the lines A to B to C to D to A were not located and shown on the court map in accordance with the calls in the two deeds to A. C. Lane. They admit their southern boundary is plaintiff's northern boundary. But this is so whether the true dividing line is the northern boundary of the 20-foot strip or the southern boundary thereof. Thus, the answer to the question, where is the true dividing line, a factual issue, depends upon the answer to the legal question, what is the true dividing line; and what is the true dividing line depends upon whether plaintiff or defendants own the 20-foot strip. Hence, the real controversy relates to the ownership of the 20-foot strip.

True, defendants contended, originally, the northern line of the

Henry Copeland tract and the southern line of the 20-foot strip was the line E to F, a line south of the line Y to X. There was evidence that this line was shown on the Jessup map as the northern line of the "Henry Copeland Thicket Tract." Defendants' original contention as to the location of the northern line of the Henry Copeland tract was based on the Jessup map. Plaintiff testified: "We had the Jessup survey map made . . . We did not agree to nothing that is on there." The Jessup map is not before us. Suffice to say, nothing appears to indicate plaintiff is bound thereby. E to F was not a marked line prior to the Jessup survey. The court surveyor testified that, according to the descriptions in the two deeds to A. C. Lane, the line shown on the map as Y to X is the northern line of the Henry Copeland tract and the southern line of the 20-foot strip. Defendants abandoned their original contention, thereafter contending the line Y to X, namely, the northern line of the Henry Copeland tract, was their southern boundary.

The significance of the allegations in the answer becomes clear in the light of the factual situation disclosed by the evidence. Defendants, in their answer, specifically denied that plaintiff owned "a tract of land having in its entirety the description" set out in paragraph 1 of the complaint. They alleged they owned the Thompson Boyce tract. They asserted their adverse possession of the 20-foot strip for more than twenty years. Considered in the light most favorable to them, we are of opinion, and so decide, that the gist of defendants' allegations was this: They admitted plaintiff's ownership of the tract conveyed to A. C. Lane by Henry Copeland. With this exception, they denied plaintiff's ownership of the land included in the description set forth in paragraph 1 of the complaint. They asserted title to the entire original Thompson Boyce tract, alleging title to the 20-foot strip, originally a part thereof, by adverse possession for more than twenty years. Hence, the answer of defendants is deemed sufficient to raise an issue as to the title to the disputed 20-foot strip. This being so, an issue as to the title to the 20-foot strip should have been submitted.

G.S. 8-39 provides: "In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass:

Provided, that such paper-writing is in all other respects sufficient to pass such title or interest."

In view of our conclusion that an issue of title as to the 20-foot strip is raised by the pleadings, it is incumbent upon plaintiff to establish that he acquired the title of A. C. Lane, if any, to the 20-foot strip, originally a part of the Thompson Boyce tract, under the devise to him by A. C. Lane of the "Henry Copeland Pine Thicket." The court below having ruled that no question of title was involved, there appeared to be no need for evidence tending to identify the "Henry Copeland Pine Thicket." Plaintiff is entitled to an opportunity to offer evidence as to the identity of the "Henry Copeland Pine Thicket" as of the time A. C. Lane executed his will. See *Trust Co. v. Wolfe,* 243 N.C. 469, 91 S.E. 2d 246, and cases cited.

The foregoing leads to these conclusions: (1) The judgment of the court below is vacated. (2) The answer to the second issue, establishing the location of plaintiff's southern boundary, and the answer to the third issue to the extent it establishes the true dividing line between plaintiff's land and the land of Jesse E. Chappell, stand; and these will be implemented when final judgment is entered. (3) The first issue, and the third issue to the extent it purports to establish X to C as the true dividing line between *plaintiff's* land and the land of Jesse E. Chappell, are set aside. A new trial, as between plaintiff and defendants Lane, for determination of title to the 20-foot strip, is awarded.

New trial.

MRS. VERA LOUISE LITTLE, WIDOW, AND NEXT FRIEND OF JUDITH ANN LITTLE, DAUGHTER OF ARTHUR HERMAN LITTLE, DECEASED, EMPLOYEE, v. POWER BRAKE COMPANY, INCORPORATED, EMPLOYER, AND UNITED STATES CASUALTY COMPANY.

(Filed 11 October, 1961.)

1. Evidence § 30—

In order for a declaration to be competent as a part of the *res gestae* it must be shown that the declaration was spontaneous, made contemporaneously with the transaction or so closely connected with it as to be a part thereof, and that it be relevant to the fact sought to be proved.

2. Same; Master and Servant § 53—

A statement by an employee some nine hours before departing upon the trip in question that the employee had to be going because he had to call on some customers in a specified town that day, is too far removed from

the transaction to be competent as a part of the *res gestae* to prove the purpose or destination of the trip.

3. Same—

A declaration by an employee that he was going to a particular town to attend to some business is not competent to prove than an accident occurring some four miles the other side of the town specified occurred on a trip made by the employee in the course of his employment, since the declaration does not disclose what business the employee intended to transact, and therefore was not relevant to the issue of whether the trip was on business for the employer, there being other evidence raising a surmise that the trip was made pursuant to personal business of the employee.

4. Same—

A declaration of the employee over long-distance telephone to his wife that the employee "was going to call on some more customers" is incompetent to prove that a trip started some half hour thereafter was made pursuant to the employment, since the statement was not so immediately connected with his actual departure as to preclude a change in the employee's purpose or design, and was not so connected with the transaction as to constitute a part of the *res gestae*, particularly in view of the fact that the fatal accident occurred outside of the employee's regular selling territory, at night outside his regular working hours.

5. Appeal and Error § 38—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by claimants from *Sharp, S.J.*, 23 January 1961 Special Term of MECKLENBURG.

A proceeding for workmen's compensation on account of the death by accident of Arthur Herman Little, an employee of Power Brake Company, Inc., for whom United States Casualty Company is the insurance carrier.

The parties stipulated the jurisdictional facts, and they were found as such by the hearing deputy commissioner.

This is a summary of other facts found by the hearing deputy commissioner: Arthur Herman Little was a salesman of Power Brake Company, selling and servicing truck parts and heavy machinery. His employer had six salesmen — three working out of the Charlotte office and three out of the Raleigh office. Arthur Herman Little's assigned territory was east of Charlotte to Laurinburg. Shelby Stephenson, a salesman from the Raleigh office, sold in the Lumberton-Whiteville-Fayetteville area, and he called on customers in this area every two or three weeks. On one occasion prior to July 1956 Arthur Herman Little called on two customers in Lumberton. On the morning of 8 January 1957 Arthur Herman Little left Charlotte driving a station

wagon owned by his employer, and in the course of his employment went to Laurinburg. He carried in the station wagon catalogues, samples, and other material he used in selling. In Laurinburg about 10:00 o'clock a.m. he called on a customer, H. F. Hoffman, and stayed with him about 45 minutes. At 5:15 o'clock p.m. he went to the Trade Winds Motel in Laurinburg, and registered as a guest. He then drove to Bill Adams' service station in Laurinburg and purchased gas for the station wagon. While there he talked with the attendant, Z. R. Jackson, about ten minutes. He then returned to the motel, and from there talked to his wife in Charlotte by telephone. After that he went to the motel's office, and there T. T. McNair, manager of the motel, pointed out to him on a North Carolina highway map a route from Laurinburg to Lumberton to Elizabethtown to White Lake to Burgaw, a distance of about 115 miles. Little's parents-in-law lived six miles north of Burgaw, and he and his wife had not seen or talked with them since two or three days before Christmas 1956. Little then went into the motel dining room, ate supper, came out, talked with McNair three or four minutes, and drove away from the motel in the station wagon at 7:30 p.m. o'clock.

The hearing deputy commissioner found as facts from a stipulation of the parties that Little was killed by accident about 8:25 p.m. o'clock on 8 January 1957 at or near the intersection of N. C. Highway 41 and a rural paved road, known as "Wiregrass Road" about four miles south of the city limits of Lumberton, when the station wagon he was driving east crossed the intersection and hit a tree. Based on such findings of fact the hearing deputy commissioner found Little's death by accident did not arise out of his employment, nor occur in the course of his employment.

The hearing deputy commissioner was of opinion there was not sufficient competent evidence to show where Little was going or for what purpose. The defendants apparently contended he was going to see his wife's parents near Burgaw, but in his opinion a finding to that effect would be based upon mere suspicion and conjecture. Claimants apparently contended he was going to make a business call, though it was at night, outside his regular working hours, and outside his regular selling territory, but in his opinion a finding to that effect would be based upon a mere suspicion and conjecture.

The hearing deputy commissioner concluded as a matter of law that the burden of proof was on claimants, and to make a valid claim they were required to show, (1) injury by accident, (2) suffered in the course of decedent's employment, and (3) arising out of his employment, and that they had failed to show the second and third requisites

for recovery, and therefore they are not entitled to an award of compensation. Whereupon, he denied claimants' claim.

Upon appeal by claimants to the Full Commission, the Full Commission overruled all claimants' assignments of error, held that the hearing deputy commissioner's findings of fact are supported by competent evidence, that his conclusions of law are without prejudicial error, and adopted as its own his findings of fact and conclusions of law, and affirmed his decision denying claimants' claim for compensation.

Upon appeal by claimants to the Superior Court Judge Sharp entered a judgment affirming the decision of the Full Commission, denying compensation to claimants.

From the judgment claimants appeal.

Carswell & Justice By: James F. Justice and B. Kermit Caldwell for plaintiffs, appellants.

Henry & Henry By: Everett L. Henry for defendants, appellees.

PARKER, J. Claimants assign as errors the exclusion by the court of the following statements made by the deceased employee, offered by them to show the purpose of his trip, and that he was engaged in work for his employer at the time of his death.

One. On the day of his death the deceased employee called on H. F. Hoffman, a customer, at Laurinburg about 10:00 o'clock a.m., and stayed about 45 minutes. As he prepared to leave he said, "I've got to be going along, I've got to be down at Whiteville to see a customer sometime today."

Two. About 7:00 o'clock p.m. on the day of his death the deceased employee bought some gas at Bill Adams' service station in Laurinburg. While there he told Z. R. Jackson, who worked there, the following: "He told me he was going to Lumberton and would see me when he came back through, wanted to know if I stayed open all night. He didn't specify no certain place he was going in Lumberton. Said he had a little business to attend to in Lumberton. All he said to me, he would be back and he would see me when he came back that night, wanted to know if I stayed open all night and I told him yes."

Three. As the deceased employee was leaving his home in Charlotte he told his wife he would call her from there, and he did. Around 7:00 p.m. o'clock the day of his death the deceased employee talked to his wife in Charlotte by telephone from the motel in Laurinburg, and told her: "He said that he was going to call on some more customers, so that he wouldn't have to spend another night. He had been down, hadn't been down there since before Christmas and he was behind and

he didn't want to stay over another night." She also testified: "My husband had been to Laurinburg before in his work for Power Brake Company and beyond Laurinburg as far as Whiteville and Lumberton," which was excluded.

The rule that statements made by a person since deceased, as to the purpose or destination of a trip or journey he is about to make, may be proved as part of the *res gestae* when connected with the act of departure, has been recognized and given effect in the admission of such testimony in a considerable number of cases, and the evidence has been excluded in a number of other cases because not part of the *res gestae*, though recognizing the rule. *Gassaway v. Gassaway & Owen, Inc.*, 220 N.C. 694, 18 S.E. 2d 120; Anno. 113 A.L.R. 268-310, an elaborate annotation where a very large number of cases are cited and analyzed; Anno. 163 A.L.R. 21-25; Jones on Evidence, 2nd Ed., Vol. III, § 1220. Other theories for the admission of such statements have been propounded, but the "theory of *res gestae* is by far the most popular theory of admission, though possibly not as well reasoned as the theory that the declarations are admissible as original evidence, as an exception to the hearsay rule." Anno. 113 A.L.R. 275. An extraordinary development in the literature of *res gestae* was Dean Wigmore's wholesale denunciation of the term itself. Evidence, 2nd Ed., § 1767. However, it is said in annotation 163 A.L.R. 20, "The bench and bar in general have not agreed with Dean Wigmore."

In *Gassaway v. Gassaway & Owen, Inc., supra*, a workmen's compensation case, claimants relied on statements made by deceased two days and one day prior to his departure for High Point to obtain a contract, to show that at the time of his death he was engaged in his work as an employee. The Court said: "These statements were not made at the time of and were not immediately connected with the actual departure. They were no part of the *res gestae*, and were inadmissible. (Citing authority). Nor were they admissible as dying declarations under C.S., 160. To be admissible as a part of the *res gestae* it must be made to appear that the statement was made at the time of the starting of the journey, as to the purpose or destination of the trip he is then about to make. It must be connected with the act of departure. Anno. 13 A.L.R., 273-275. (Sic. Should be 113 A.L.R.). When not so made they constitute no part of the *res gestae* and are inadmissible. Anno. 113 A.L.R., 281."

This Court said in *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757: "For a declaration to be competent as part of the *res gestae*, at least three qualifying conditions must concur: (a) The declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabri-

cation; 32 C.J.S., pp. 45, 46, *supra;* instinctive rather than narrative; *Queen v. Ins. Co.*, 177 N.C. 34, 97 S.E. 741; *Summerrow v. Baruch,* 128 N.C. 202, 38 S.E. 861; (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; *Queen v. Ins. Co., supra;* and (c) must have some relevancy to the fact sought to be proved. It must be remembered that to be admissible the declaration must be a *part* of the *res gestae* — not merely *amongst* the *res gestae* — that is, it must be so interwoven into the transaction that it may be vested with the significance of a fact — that is, one of the *'res gestae'* or 'things done.' They are called 'verbal facts' or 'verbal acts.' 20 Am. Jur., Evidence, sec. 664. If not of this character, its mere nearness to the transaction in point of time has no significance. No rule of universal application can be devised as to the time element; but the principle of relevancy to the fact sought to be proved by it admits of no relaxation. *Holmes v. Wharton,* 194 N.C. 470, 140 S.E. 93, 76 A.L.R., 1125 (Anno.)."

The deceased employee left the motel in Laurinburg on his fatal trip about 7:30 p.m. o'clock. His statement to H. F. Hoffman about 10:45 a.m. o'clock, "I've got to be going along, I've got to be down at Whiteville to see a customer sometime today," was not connected with his act of departure at 7:30 p.m. o'clock, constitutes no part of the *res gestae,* and was inadmissible.

The deceased employee after buying gas and talking with Z. R. Jackson at a service station went back to the motel, from there talked to his wife in Charlotte by telephone, went to the motel's office, and there T. T. McNair, manager of the motel, pointed out to him on a North Carolina highway map a route from Laurinburg to Lumberton, to Elizabethtown to White Lake to Burgaw, a distance of about 115 miles. His parents-in-law lived six miles north of Burgaw. He then ate supper in the motel dining room, and left on his fatal trip at 7:30 p.m. o'clock. In his statement to Jackson he said he was going to Lumberton and had a little business to attend to there, but he did not say it was his employer's business, or where he was going to in Lumberton. In our opinion, his statement to Jackson was not connected with his act of departure at 7:30 p.m. o'clock, and constitutes no part of the *res gestae,* and we are fortified in our opinion by the fact that he was killed by accident about four miles south of the city limits of Lumberton. In addition, claimants offered this evidence for the purpose of showing the purpose of his trip, and that he was engaged in work for his employer at the time of his death, but his statement to Jackson does not say what his business was in Lumberton, and has no relevancy to the fact sought to be proved. It was properly excluded.

We now come to his statement by telephone to his wife around 7:00

o'clock p.m., "that he was going to call on some more customers, so that he wouldn't have to spend another night, etc." He did not state who these customers were, or where they lived. After this conversation he went to the motel's office, and its manager pointed out to him on a North Carolina highway map a route from Laurinburg to Burgaw, near which place his parents-in-law lived. He then ate supper, and left. He was killed outside his regular selling territory by accident about an hour and a half later.

In *Prater v. Traders & General Ins. Co.*, (Tex. Civil App.), 83 S.W. 2d 1038, a case relied upon by claimants in their brief, appears this language: "It is sufficient if the declaration appears to have been made in a natural manner without circumstances of suspicion and purports to evidence the declarant's existing state of mind with reference to the purpose of the proposed journey and there be such proximity between the time of the making of the declaration and the incident involved in the suit as, under the circumstances, will furnish reasonable assurance that there has been no change of purposes or designs in the meantime." Citing authorities.

The facts found furnish no reasonable assurance that deceased employee had not changed his purpose or design to call on some more customers so he wouldn't have to spend another night, as he told his wife, before he left on his fatal trip after supper. Whether he did, or whether he did not, is left in the realm of conjecture and guesswork. In our opinion, and we so hold, under all the facts found, his statement to his wife was not immediately connected with his actual departure at 7:30 p.m. o'clock and not so interwoven into his departure that it is vested with the significance of a fact, so as to constitute a part of the *res gestae*, particularly as he was killed by accident outside his regular selling territory. It was properly excluded.

Claimants' other assignments of error brought forward and discussed in their brief have been carefully examined, and are overruled. The assignments of error not brought forward and discussed in their brief are deemed to be abandoned. Rules of Practice in the Supreme Court, 221 N.C. 544, 563, Rule 28.

The findings of fact are supported by sufficient competent evidence, and they in turn support the conclusions of law, and the judgment.

The following testimony by Mrs. Nan B. Simpkins, president and general manager of Power Brake Company, may cast some light upon this tragic accident: "On the following day I went with Mr. Barnette to Mrs. Little's home where I had a conversation with Mrs. Little. Mrs. Little felt awfully remorseful about Herman — Herman's death. And she hated she told Herman about her father being ill, that she felt like had she not have said that he wouldn't have tried to make

a trip. There was several people in the room including a doctor. Her father lived at Burgaw. She told me she had talked to Mr. Little, but did not say whether he made it or she made it, over the telephone." However, the widow, Mrs. Little, testified on cross-examination: "I saw Mrs. Simpkins the day following January 8th but made no statement to her that if I had not told my husband about my father, my husband would still be here . . . I do not recall having a conversation with Mrs. Simpkins in the presence of Mr. Barnette."

The judgment below is

Affirmed.

ALMA GRIMES LANIER, JEAN L. LAUMANN AND JAMES BRUCE LANIER v. DENE L. DAWES, CHARLES BURNICE LANIER, JR., WILLIAM LEE LANIER AND EVA FLY LANIER.

(Filed 11 October, 1961.)

1. Appeal and Error § 21—

An exception to the judgment presents for review whether error of law appears in the judgment or upon the face of the record.

2. Husband and Wife § 17—

Where husband and wife owning an estate for life by the entireties are divorced, their estate is converted into a tenancy in common for life, and not a joint estate for life, and the survivor does not take an estate for life in the entire tract but only an estate for life in an undivided one-half interest in the lands.

APPEAL by plaintiff from *Hall, J.*, at June Term, 1961, of EDGECOMBE.

Proceeding instituted under the North Carolina Declaratory Judgment Act, Chapter 1, Article 26, Section 1-253, *et seq.*, of the General Statutes.

The record shows: That the cause came on to be heard before the Honorable C. W. Hall, Judge Presiding, at the June Term, 1961, of the Superior Court of Edgecombe County upon pleadings filed herein under the said Act, and it was made to appear to the court, and the court finds as facts from the allegations and admissions in the pleadings, the following:

"1. By deed dated September 25, 1945, registered in Book 419, page 226, Edgecombe County Registry, C. B. Lanier and wife, Alma Grimes Lanier, conveyed to George M. Fountain, Trustee, the real estate described in the complaint (subject to certain charges in favor of Eva

Fly Lanier) upon the trust that said real estate should be immediately reconveyed by said Trustee as set out in the succeeding paragraph hereof;

"2. Pursuant to said trust, George M. Fountain, Trustee, executed a deed dated the same date, and registerd in Book 419, page 228, Edgecombe County Registry, 'to C. B. Lanier and his wife, Alma G. Lanier, for the term of their natural lives, and remainder to Anna Jean Lanier, Alma Dene Lanier, C. B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier, their heirs and assigns.'

"3. By judgment rendered April 20, 1955, in the Superior Court of Edgecombe County, C. B. Lanier was granted an absolute divorce from Alma G. Lanier, Judgment Docket 26, page 278.

"4. C. B. Lanier died January 22, 1960, leaving surviving his former wife, Alma Grimes Lanier, and five children, who are the remaindermen named in the aforesaid deed: Anna Jean Lanier (now Jean L. Laumann), Alma Dene Lanier (now Dene L. Dawes), C. B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier, all of whom are parties to this action.

"5. Peoples Bank and Trust Company, as Receiver heretofore appointed in this action, now holds the sum of Three Thousand Dollars ($3,000.00) realized as proceeds from a fire insurance policy resulting from destruction of the dwelling house on the aforesaid property on January 22, 1960.

"6. Alma Grimes Lanier was 48 years of age when this action was instituted.

"7. Peoples Bank and Trust Company, Receiver as aforesaid, holds the funds of $1,270.00 representing 1960 rents on the aforesaid real estate.

"8. All persons having an interest in this controversy are parties hereto and are properly before the court."

And the record also shows that from the foregoing facts, "the court is of the opinion that the deed from George M. Fountain, Trustee, created a life estate by the entireties in C. B. Lanier and wife, Alma G. Lanier, which life estate by the entireties was converted by the absolute divorce of said parties into a tenancy in common, C. B. Lanier then owning a life estate in a one-half undivided interest as tenant in common with his former wife, Alma G. Lanier, who owned a life estate in a one-half undivided interest; that upon the death of C. B. Lanier, his life estate in the one-half undivided interest terminated and the remaindermen thereby became vested of title in fee simple absolute in said one-half undivided interest and the interest of Alma G. Lanier (being a life estate in a one-half undivided interest) remained the same, all subject, however, to an annual charge of $140.07, payable

to Eva Fly Lanier on October 1st of each year as provided for by deed from J. B. Lanier and wife, Eva Fly Lanier, to C. B. Lanier, recorded in Book 395, page 414, Edgecombe Public Registry.

"The court is also of the opinion that the plaintiff Alma Grimes Lanier is entitled to a share in the aforesaid insurance funds computed as by statute provided on the basis of the cash value of her life estate in one-half of said insurance funds and that the rest of said funds belong to Jean L. Laumann, Dene L. Dawes, Charles B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier, in equal shares.

"The court is of the further opinion that the plaintiff Alma Grimes Lanier is entitled to one-half of the aforesaid rent proceeds as the owner of a life estate in a one-half undivided interest in the aforesaid real estate for the year 1960 during which said rent was earned, and that the remainder of said rent shall be divided in equal shares among Jean L. Laumann, Dene L. Dawes, Charles B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier.

"Now, therefore, it is Ordered, Adjudged and Decreed that the real estate which is the subject matter of this action is owned as follows: (a) The plaintiff Alma Grimes Lanier is seized of a life estate in one-half undivided interest in the aforesaid real estate; that Jean L. Laumann, Dene L. Dawes, Charles B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier are seized in fee simple of a one-half undivided interest in said real estate and of a vested remainder in fee simple subject to the life estate of Alma Grimes Lanier in the other one-half undivided interest, all subject, however, to an annual share of $140.07 payable on the first day of October of each year to Eva Fly Lanier for and during the term of her natural life as provided in that certain deed from J. H. Lanier and wife, Eva Fly Lanier, to C. B. Lanier, registered in Book 395, page 414 Edgecombe County Public Registry.

"(b) That the plaintiff Alma Grimes Lanier is entitled to a share in the aforesaid insurance funds computed as by statute provided on the basis of the cash value of her life estate at age 48 years in a one-half of said insurance funds and that the rest of said funds belong to Jean L. Laumann, Dene L. Dawes, Charles B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier, in equal shares; and

"(c) That the plaintiff, Alma Grimes Lanier, is entitled to one-half of the aforesaid rent proceeds as the owner of a life estate in a one-half undivided interest in the aforesaid real estate for the year 1960 during which said rent was earned; and that the remainder of said rent shall be divided in equal shares among Jean L. Laumann, Dene L. Dawes, Charles B. Lanier, Jr., William Lee Lanier, and James Bruce Lanier; and

"(d) That the costs of this action to be taxed by the Clerk shall be paid one-half by the plaintiffs and one-half by the defendants."

To the foregoing judgment the plaintiffs except and appeal to the Supreme Court. Notice of appeal given in open court. The case on appeal, by agreement of the parties, shall consist of the record proper.

Thorp, Spruill, Thorp, Trotter & Biggs for plaintiff appellants.
Fountain, Fountain, Bridgers & Horton for defendant appellees.

WINBORNE, C.J. The sole assignment of error appearing in the record is to the rendering of the judgment.

An exception to the judgment rendered raises the question as to whether error in law appears upon the face of the record. Indeed, the appeal to the Supreme Court is itself an exception to the judgment, or to any other matter of law appearing upon the face of the record. See *Lea v. Bridgeman*, 228 N.C. 565, 46 S.E. 2d 555; *Culbreth v. Britt*, 231 N.C. 76, 56 S.E. 2d 15, and cases cited; also *Gibson v. Ins. Co.*, 232 N.C. 712; 62 S.E. 2d 320; *Duke v. Campbell*, 233 N.C. 262, 63 S.E. 2d 555; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848; *S. v. Sloan*, 238 N.C. 672, 78 S.E. 2d 738; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *Cannon v. Wilmington*, 242 N.C. 711, 89 S.E. 2d 595; *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271.

Stated briefly, the appellants' contention is this: That the effect of an absolute divorce is to convert an entireties estate for life into a joint estate for life, so that upon the death of one life tenant, the surviving life tenant takes the whole life estate by survivorship as an incident of the estate. With this contention we cannot agree.

An exhaustive analysis of estates by the entirety is set forth by *Stacy, J.*, in *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566, from which we quote in pertinent part as follows: "When land is conveyed or devised to a husband and wife, as such, they take the estate so conveyed, or devised, as tenants by the entirety, and not as joint tenants or tenants in common. *Harrison v. Ray*, 108 N.C. 215. This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. The estate rests upon the doctrine of the unity of person, and, upon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virtue of the grant which vested the entire estate in each grantee. *Long v. Barnes*, 87 N.C. 329; *Bertles v. Nunan*, 92 N.Y. 152. * * * 15. A tenancy by the entirety may exist in lands whether the estate be in fee, for life, or for years, and whether the same be in possession, reversion, or remainder (30 C.J. 566); but in this jurisdiction it is held that there

can be no estate by the entirety in personal property, *Turlington v. Lucas,* 186 N.C. 283. * * * 9. An absolute divorce destroys the unity of husband and wife, and therefore converts an estate by the entirety into a tenancy in common. *McKinnon v. Caulk,* 167 N.C. 411." See also: *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530; 26 Am. Jur., Husband and Wife, Section 117.

The judgment of the court below is in accordance with these principles and is, therefore,

Affirmed.

FRED J. KNIGHT v. ASSOCIATED TRANSPORT, INC.

(Filed 11 October, 1961.)

1. Courts § 20—

In an action in the courts of this State on a transitory cause of action in tort arising in another state, the law of such other state controls the substantive rights, but matters of procedure, including rules of evidence and the sufficiency of the evidence to make out *prima facie* case, are governed by the laws of this State.

2. Automobiles § 54f—

Irrespective of statute, proof that a commercial vehicle involved in a collision bore the name or insignia of defendant makes out a *prima facie* case that at the time the vehicle was being operated by an agent of the owner with authority, consent, and knowledge of the owner, but such *prima facie* case does not amount to a presumption of agency, and an instruction submitting to the jury the presumptive rather than the *prima facie* rule is prejudicial. *Carter v. Motor Lines,* 227 N.C. 193, overruled to the extent of conflict.

APPEAL by defendant from *Phillips, J.,* May Civil Term 1961 of GASTON.

This is a civil action instituted on 4 November 1960 by plaintiff, an employee of Akers Motor Lines, Inc., to recover damages allegedly sustained on 19 May 1959 when a tractor-trailer unit of Akers Motor Lines, Inc., in which plaintiff was a passenger, was struck and sideswiped by a tractor-trailer unit owned by the defendant, Associated Transport, Inc., and which was being driven by one of its employees in the course of his employment.

The plaintiff's evidence tends to show that the collision took place in the State of Virginia, approximately two or three miles south of Clover, Virginia, on U. S. Highway No. 360, about 7:00 p.m. on the

above date. The plaintiff at the time of the collision was riding in the sleeping compartment of the Akers tractor-trailer.

The plaintiff's evidence further tends to show that the Akers tractor-trailer was being driven in a northerly direction on said highway and was entering a left curve when the defendant's tractor-trailer, which was being driven in a southerly direction, was driven across the white line which divided the two-lane highway. "He crossed the white line on the wrong side of the road. He got into the northbound lane * * * and just before he got to the Akers Motor Lines unit he gave his truck a cut to the right and as he did that it made the trailer swing around, and his trailer sideswiped the Akers tractor and trailer." The collision damaged the Akers equipment and injured the plaintiff. The driver of defendant's truck did not stop.

The plaintiff offered evidence to the effect that the tractor-trailer that sideswiped the Akers unit had the emblem or name of Associated Transport appearing on the front of the trailer, on its side, and on the door of the tractor.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. Motion denied. Defendant rested without offering any evidence.

The jury returned a verdict in favor of plaintiff. From the judgment entered on the verdict, the defendant appeals, assigning error.

Mullen, Holland & Cooke for plaintiff appellee.
Whitener & Mitchem for defendant appellant.

DENNY, J. The defendant excepted to and assigns as error the excerpt taken from the case of *Kavanaugh v. Wheeling*, 175 Va. 105, 7 S.E. 2d 125, and included in the charge of the court below as follows: "The court charges you that this is the law of the State of Virginia in regard to the ownership of an automobile insofar as this law fits any facts in this case.

"The Court says this: 'In Virginia, we have followed the rule adopted by the great weight of authority that in an action for injuries caused by the negligent operation of an automobile proof that the automobile was owned by the defendant establishes a *prima facie* case that the automobile was being operated by the defendant or someone for him, under circumstances making him liable therefor. However, this is merely an inference or presumption that may be rebutted with the burden of overcoming it resting upon the defendant.

" 'The presumption has been adopted by the courts as a reasonable rule because of the inconvenience, difficulty and, in a great many cases, the impossibility of otherwise proving by affirmative evidence that the

driver of the vehicle was acting under control and direction of the owner.'"

Unquestionably, the court below gave the plaintiff the full benefit of the presumptive rule in effect in this type of case in the State of Virginia.

In the case of *McCombs v. Trucking Co.*, 252 N.C. 699, 114 S.E. 2d 683, this Court, speaking through *Winborne, C.J.*, stated the correct rule in such cases as follows: "It being admitted that the collision involved in this action occurred in Virginia, 'the question of liability for negligence must be determined by the law of that State. The rule in such cases is that matters of substantive law are controlled by the law of the place — the *lex loci*, whereas matters of procedure are controlled by the law of the forum — the *lex fori*. Thus the methods by which the parties are required to prove their allegations, such as the rule of evidence, and the quantum of proofs necessary to make out a *prima facie* case are matters of procedure governed by the law of the place of trial * * * Therefore the question whether the evidence offered was sufficient to carry the case to the jury over defendants' motion for judgment as of nonsuit is to be determined under application of principles of law prevailing in this jurisdiction.' So wrote *Johnson, J.*, for the Court in *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558. See also *Harrison v. ACL R. Co.*, 168 N.C. 382, 84 S.E. 519; *Clodfelter v. Wells*, 212 N.C. 823, 195 S.E. 11."

Likewise, in the case of *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82, it is said: "In the trial of an action whatever relates merely to the remedy and constitutes a part of the procedure, is determined by the law of the forum; but whatever goes to the substance of the controversy and affects the rights of the parties is governed by the *lex loci.*" 11 Am. Jur., Conflict of Laws, section 203, page 521; 15 C.J.S., Conflict of Laws, section 22, page 948.

It is provided in G.S. 20-71.1 in pertinent part as follows: "(a) In all actions to recover damages for injury to person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be *prima facie* evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose. * * * *Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within one year after his cause of action shall have accrued.*" (Emphasis added.)

In view of the fact that this action was not instituted within one year of the date of the alleged injury, the plaintiff in the trial below

was not entitled to the benefit of the presumption created by the above statute. *Aiken v. Sanderford,* 236 N.C. 760, 73 S.E. 2d 911; *Floyd v. Dickey,* 245 N.C. 589, 96 S.E. 2d 731.

Therefore, a strict adherence to the rule laid down in *Carter v. Thurston Motor Lines,* 227 N.C. 193, 41 S.E. 2d 586, would support the defendant's position with respect to its motion for nonsuit. However, the limitation as to the time within which an action of this character must be instituted was repealed by Chapter 975 of the 1961 Session Laws of North Carolina on 17 June 1961, approximately twenty days after this action was tried below. Consequently, there can be no question any longer in this jurisdiction about the fact that proof of ownership of a motor vehicle involved in an accident or collision is *prima facie* evidence that such motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which the injury or cause of action arose.

Even so, the weight of authority in this country is to the effect that proof of ownership of a commercial motor vehicle involved in an accident or collision is *prima facie* evidence that such motor vehicle was being operated at the time by the owner's agent, with the knowledge and consent of the owner, and that such agent was operating the motor vehicle in behalf of the owner thereof, and this presumption is generally held to exist even though there is no statutory provision to that effect.

It is said in 9B Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), section 6056: "The general rule * * * supported by the great weight of authority is that the fact that the name of the defendant was painted or inscribed in some manner on the motor vehicle which inflicted the injury sued for raises a presumption, or is *prima facie* evidence, that the defendant owned such vehicle, and that the driver was using it in defendant's behalf.

"This presumption is rebuttable, and vanishes in the face of evidence establishing the contrary," citing numerous authorities from many jurisdictions.

In *Fullerton v. Motor Express,* 375 Pa. 173, 100 A 2d 73, the Court said: "The law is clear that an identifying sign on a vehicle declares its reputed ownership as much as a flag proclaims the nationality of the ship which flies it. If the ship is sailing under false colors it will have to answer for the deception. If a name on a vehicle mis-states ownership, opportunity is afforded the named person or firm to disprove the asserted proprietorship.

"In the case of *Sefton v. Valley Dairy Co.,* 345 Pa. 324, 326, 28 A 2d 313, 314, we said: 'It is well settled * * * that the presence of a defendant's name on a commercial vehicle raises a rebuttable presump-

tion that the vehicle is owned by defendant and that the driver of the vehicle is a servant of defendant acting within the scope of his employment * * *. This presumption is sufficient to take the case to the jury * * *.'

"The person who is struck down by a strange vehicle cannot automatically know the business of the owner of the vehicle; and, even with the most diligent inquiry, he may not be able to ascertain the nature of the mission to which the driver was committed at the time. Hence the imperative necessity of the presumption in a situation of this kind that the first person or firm to be called to answer for the mishap should be the person or firm whose name decorates the offending vehicle.

"Any business organization which permits a commercial conveyance to ply the public highways, prominently proclaiming its name, owes a duty to the public to stand by that voluntary self-advertising proclamation. That responsibility, of course, is not absolute. The named firm may introduce evidence to show that the identifying trappings were camouflage, or innocent coincidence, or that, although admitting ownership of the vehicle, the driver thereof ignored instructions and headed for Chicago instead of New York as directed. But such explanations are for the jury to evaluate and appraise in light of all the surrounding circumstances."

The case of *McDougall v. Glenn Cartage Co.*, 169 Ohio St. 522, 160 N.E. 2d 266, is strikingly similar to the case before this Court in almost every respect. The action was for personal injuries sustained when an approaching truck allegedly owned by the defendant sideswiped a truck driven by the plaintiff. The other vehicle continued on its way and vanished in the darkness. The collision occurred in New York and the action was brought in Ohio. The offending truck was identified as belonging to the defendant by a third truck driver, who observed the Glenn insignia and markings on the side of the door of the cab with ICC and PUCO permits and numbers. At the close of plaintiff's evidence, the trial court granted a directed verdict for the defendant, on authority of *Sobolovitz v. Lubric Oil Co.*, 107 Ohio St. 204, 140 N.E. 634, a case similar to *Carter v. Thurston Motor Lines, supra,* and entered judgment for the defendant. The Court of Appeals affirmed. On appeal to the Supreme Court of Ohio, the judgment was reversed.

The Ohio Court held: "Upon the evidence adduced, we believe that plaintiff made a *prima facie* case of liability against defendant, and that it is incumbent upon defendant to meet the case so made, if it can, by showing that the offending motor truck did not belong to it, or that, at the time of the collision, it was not being used in its business.

Surely information of that sort would be peculiarly within the defendant's possession. So far as it conflicts with this opinion, the case of *Sobolovitz v. Lubric Oil Co., supra,* is overruled."

In *Houston News Co. v. Shavers,* Tex. Civ. App., 64 S.W. 2d 384, the Court in considering the question now before us, said: "The presumption grows out of the fact that not infrequently the evidence necessary to establish the character of the mission in which the servant was engaged is exclusively within the possession of the defendant. The effect of the rule is to 'smoke out' the defendant and to compel him to disclose the true facts within his knowledge."

In *Bivins v. R.R.,* 247 N.C. 711, 102 S.E. 2d 128, the cause of action arose out of a spraying operation conducted from tank cars moved over defendant's railroad in McDowell County, to kill vegetation on its right of way. The plaintiff alleged the poisonous chemical was blown onto plaintiff's land and onto the plaintiff's vegetation and trees, to his great damage. The defendant contended that it was entitled to a nonsuit because there was no evidence showing that those who conducted the spraying operation were agents of the defendant railroad. This Court followed the decision of *Brooks v. Missouri Pac. Ry. Co.,* 98 Mo App. 166, 71 S.W. 1083, and quoted therefrom as follows: "It has never been held, to our knowledge, otherwise than that, if an engine and cars are being used on the road of a company, the presumption is that they are being controlled by such company. We believe it universally understood that a railroad company that is in control and operating a particular railroad is controlling and operating it to the exclusion of all other railroads or persons. * * * There was no pretense but what the defendant was in the exclusive possession of the railroad in question, and the presumption would necessarily follow that an engine and cars found passing over its tracks were under its operation and control."

Likewise, we have come to the conclusion that where common carriers of freight are operating tractor-trailer units, on public highways, and such equipment bears the insignia or name of such carrier, and the motor vehicle is involved in a collision or inflicts injury upon another, evidence that the name of the defendant was painted or inscribed on the motor vehicle which inflicted the injury constitutes *prima facie* evidence that the defendant whose name or identifying insignia appears thereon was the owner of such vehicle and that the driver thereof was operating it for and on behalf of the defendant.

This defendant admits, in its brief, that it has "upwards to two thousand" tractors and trailers in operation on the public highways, engaged in its transportation business.

In our opinion, the presumptive rule, which is generally recognized

throughout this country, is a just one, and well-nigh necessary if those who happen to be injured by the negligent operation of such equipment are to have the protection to which they are justly entitled.

Therefore, we hold that the evidence of the plaintiff in the trial below was sufficient to make out a *prima facie* case, and the defendant's motion for judgment as of nonsuit was properly overruled.

However, since the court below used the Virginia presumptive rule in charging the jury, and we are now adopting the *prima facie* rather than the presumptive rule, we think the defendant is entitled to a new trial, and it is so ordered.

Furthermore, insofar as it conflicts with this opinion, the case of *Carter v. Thurston Motor Lines, supra,* is overruled.

New Trial.

STATE v. GEORGE HAROLD OUTING, JR.

(Filed October 11, 1961.)

1. Criminal Law § 71—

Where the confession of the defendant is challenged on the ground that it was not voluntary, the question of its voluntariness is a preliminary question to be determined by the court from evidence heard in the absence of the jury.

2. Same—

Where, upon preliminary hearing, the court finds that defendant's confessions were voluntary, such finding is conclusive when supported by the evidence notwithstanding conflicts in the testimony of the officers and defendant.

3. Same—

The fact that the evidence on the *voir dire* discloses that after defendant had shown the officers where the murder weapon was hidden, an officer standing some distance from defendant, fired his pistol several times at used flashlight bulbs, does not preclude a finding that the confession of defendant, made the following day, was voluntary, notwithstanding the testimony of defendant that the officer shot toward him, the bullet striking a short distance from his feet.

APPEAL by defendant from *Patton, J.,* January 9, 1961, Regular Criminal Term (Schedule A) MECKLENBURG Superior Court.

Criminal prosecution upon a bill of indictment charging the murder of James T. Hamilton in the perpetration of a felony — robbery.

In summary, the State's evidence disclosed the following: James T. Hamilton was a taxi driver for Yellow Cab Company in the city of Charlotte. He was on duty the night of November 16, 1960. His last communication with the office was by two-way radio at about 12:50. Thereafter his cab failed to answer calls.

On the following morning his dead body was discovered under the wheel in his taxicab which was partially concealed in some bushes near the dead end of Celia Avenue in the outskirts of Charlotte. Hamilton's clothing and the front seat of the cab were bloody. Rosetta Street intersects Celia Avenue about 200 yards from the point where the cab was found. The defendant lived on Rosetta Street, in the second house from the intersection.

The coroner, a clinical pathologist, examined Hamilton's body at 12:00 noon on November 17. The examination revealed a cut on the right thumb and two stab wounds in the chest, one of which pierced the heart. Hamilton's leather belt was cut. The leather change purse which he customarily wore on his belt was missing.

About four o'clock on the afternoon of the 17th the city officers, acting on a tip, interviewed George Harold Outing. At this stage in the trial "the defendant duly objected to all extrajudicial statements made to the personnel in the police department which purported to be a confession, on the ground that it was obtained involuntarily, and by force under duress and coercion, and in violation of the provisions of the 14th Amendment to the Constitution of the United States." Whereupon Judge Patton excused the jury and in its absence proceeded to conduct an inquiry as to what statements the defendant made to the officers and under what circumstances they were made.

In substance, the officers testified they had information the defendant might know something that would aid "in breaking the case." They went to his home on the afternoon of November 17 (Thursday) and he seemed reluctant to talk in the presence of his wife who "wanted him to be quiet," so the officers asked him to come to police headquarters for an interview. One of the officers left his card with the defendant.

About nine o'clock that evening he reported to police headquarters for an interview with the officers. During the course of the interview he said he saw three boys at the corner of Celia Avenue and Rosetta Street as he came home from work about 1:30 a.m. He gave the name of one of the boys. He stated one of them had a long knife. The officers took him on a tour of the neighborhood, contacted the boy whom he had named, investigated the boy's alibi and released him. Outing then named others, including his uncle, whom he had seen in the vicinity on his

way home. At the end of the interview the officers permitted him to go home.

On the following day (Friday) after checking as many of those named by the defendant as could be found, and finding nothing connected them with the crime, the officers took the defendant in custody. He continued to name different people whom he had seen on his way home, claiming one of them had a long knife. On Friday night he was placed in jail. However, on Saturday the officers took the defendant to the vicinity of Celia Avenue and Rosetta Street. "He stated he would take us and show us where he had hidden the knife that was used in the killing . . . he lifted the manhole cover and pointed down and said, 'There's the knife.'" The officers removed a long French knife from the water in the manhole. Present at the time were Officers Homberg, Porter, and Fesperman. The latter had just joined them shortly before the discovery of the knife. Upon cross-examination, officers admitted that Fesperman fired his revolver twice at a flashlight bulb some 30 feet away; that he was not near the defendant at the time, and that he made no threats but stated that he wanted to test some old ammunition and fired only two shots. On Saturday night the defendant's wife came to the jail and at her request she and the defendant were permitted to confer in one of the private rooms on the second floor of the city jail. At this time the defendant jumped from the window and escaped.

After his re-arrest at the house of a relative in Charlotte on Sunday morning, he confessed, telling in substance the following story: He had been working as a dishwasher in a restaurant at the Dobbs House; that he left work about 11:30 p.m. on Wednesday, November 16. He picked up a long kitchen knife, concealed it in his coat, intending to use it in breaking open a vending machine. However, on his way home a Yellow Cab passed. He called to the driver, got in the back seat as a passenger and gave the driver an address, and when the driver got to the address and stopped, he reached over from behind, put the knife close to the taxi driver's face, and said, "I will take your money." Mr. Hamilton said, "Oh, no you won't," and grabbed the knife. They scuffled over the knife. "Mr. Hamilton was an older man and weaker, and he gave in first and he let his grip slip and the knife plunged into his chest." He stated he didn't know how many times he stabbed or struck or hit Mr. Hamilton; that to the best of his remembrance he said it was four or five times; that he drove the cab to where it was found, took the wallet, change purse and a billfold with some change which he got out of Mr. Hamilton's pocket. Thereafter he pushed Mr. Hamilton over under the wheel of the cab, left, took the money out of the purse, hid the knife in the manhole, and went home. That on Sun-

day night after the defendant's re-arrest that morning, his father came to the jail and the defendant said to his father, "I did it." The officers testified the admissions were made voluntarily, without any threats or show of violence or inducements whatever.

The defendant testified he had nothing to do with the death of Mr. Hamilton; that he did not tell the officers where the knife was. "If I made a confession it was not to my knowledge. I don't know if I made one because I was all upset . . . I was afraid the man was going to kill me so they say I made a confession. . . . After Mr. Fesperman shot and promised to kill me I would admit anything. He said, 'This is the same damn thing that will happen to you if you don't confess to this.' He shot several times about seven or eight inches from my feet. He was shooting at me . . . He pointed the gun at me and that time (Friday) I had not told anybody that I was implicated. It scared me because I never had been shot at before."

The defendant further testified that the officers roughed him up. His father testified that when he saw his son on Sunday his face was swollen. His wife testified to the same condition when she saw him on Saturday night.

On cross-examination, the defendant admitted he told his father in police headquarters, "I did it," but he did not mean to confess the killing of Mr. Hamilton.

The officers testified the defendant was never mistreated in any way and that they never observed any swelling on his face at any time. A newspaper reporter interviewed the defendant in jail. He did not observe any evidence of injury.

At the conclusion of the hearing in the absence of the jury, Judge Patton held the admissions to the officers and in the presence of the defendant's father were voluntarily made and permitted them to be detailed in the evidence as defendant's admissions, to which the defendant objected.

The State called as a witness Mr. Conrad Taylor who testified that in equipping his restaurant he bought two French-type knives for use in his kitchen. The defendant, employed as a dishwasher, had access to these knives. After November 16 or 17 one of the knives was missing. State's Exhibit No. 5 (the knife found in the manhole) is exactly the same style and the same shape.

The defendant testified that he didn't have anything to do with the killing of Mr. Hamilton.

The jury returned a verdict of guilty of murder in the first degree and at the same time and as a part of the verdict the jury recommended the defendant's punishment be imprisonment for life. To the verdict and judgment, the defendant excepted and appealed.

T. W. Bruton, Attorney General, H. Horton Rountree, Asst. Attorney General, for the State.

Charles V. Bell, for defendant, appellant.

HIGGINS, J. The defendant contends the court committed error by holding the defendant's confessions voluntary, and by admitting them in evidence. The law governing the admissibility of confessions has been the subject of frequent review by this Court. The leading authorities are collected in *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365, *Certiorari* denied 365 U.S. 855, 5 L. ed 2d 819. To the many cases there cited we may add *State v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121; *State v. Jones,* 203 N.C. 374, 166 S.E. 163; *State v. Livingston,* 202 N.C. 809, 164 S.E. 337, cited by the defendant.

When the State offers a confession in a criminal trial and the defendant objects on the ground it was not voluntary, the question thus raised is determined by the judge in a preliminary inquiry in the absence of the jury. *State v. Davis, supra.*

The trial judge hears the evidence, observes the demeanor of the witnesses and resolves the question. The appellate court must accept the decision if it is supported by competent evidence.

In the preliminary inquiry the testimony of the officers was unequivocal that the confessions were made voluntarily, without fear, threat, coercion, or inducement. On the contrary, the defendant said he was roughed up, intimidated by being shot at, and his life threatened. His only corroboration was the evidence of his father and his wife that his face was puffed up and the admission of the officers that Detective Fesperman fired two shots from his service revolver while the investigation was under way and the prisoner was in the field with the officers. The defendant testified that the officer shot at him and shot within a few inches of his feet. This the officers denied. Fesperman himself testified: "After the fingerprint man had taken all of the pictures and thrown the bulbs up there in the woods, and, if I am not mistaken, we were getting ready to leave, the cover was back on (manhole) and I had some old ammunition and said I am going to try it . . . I ain't never talked to Outing . . . I don't recall seeing Outing after that." Other officers corroborated Fesperman that he was some distance from Outing and that he shot in the woods at a flashlight bulb.

The shooting by Fesperman was in violation of police regulations. It was highly improper, and, at best, a thoughtless blunder. However, the firing of the shots occurred after the defendant had helped locate the knife, and as the officers were leaving the scene with the prisoner. The occurrence took place on Saturday. Neither at the time nor there-

after that day did the defendant make any admission. Fesperman did not participate in the investigation further. At the jail that night the defendant escaped. He was re-arrested next day and thereafter made the confession both to the officers and to his father. No doubt the officers confronted the defendant with the many inconsistencies and contradictions in his story and the suspicion attached to his claim to have seen so many different people near the scene — one with a long knife — at such an hour. When caught in a web of his own weaving he apparently thereafter confessed.

Judge Patton, with patience, care and discrimination, conducted the preliminary inquiry, saw and heard the witnesses, thereupon found the defendant's statements were voluntary. Substantial evidence supports the finding. It is binding on appeal. In this connection we quote from *Watts v. Indiana,* 338 U.S. 49: "In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication." In like manner this Court is bound by the determination made in the trial court, if supported by evidence. There the witnesses are heard and the facts are found. In the trial below, there is

No error.

STATE v. EDGAR WILLIS.

(Filed 11 October, 1961.)

1. Criminal Law § 3—

An attempt to do an act cannot be an offense unless the actual commission of the act would be an offense.

2. Common Law—

The common law of England is in force in this State to the extent it is not destructive of, repugnant to, or inconsistent with our form of government and to the extent it has not been abrogated or repealed by statute or has become obsolete. G.S. 4-1.

3. Suicide § 1—

The common law offense of suicide obtains in this State notwithstanding that the common law punishment for the offense is precluded by our constitution, Article XI, § 1, and therefore an attempt to commit suicide is an indictable misdemeanor in this State. G.S. 14-3.

4. Suicide § 2; Criminal Law § 5—

Insanity is a defense to a charge of attempted suicide as it is to any other crime, but the test of mental responsibility is the capacity to distinguish between right and wrong at the time and in respect to the matter under investigation.

APPEAL by the State of North Carolina from *Cowper, J.*, April 1961 Term of CARTERET.

This is a criminal action.

The bill of indictment charges that defendant on 13 February 1961 "unlawfully and feloniously did attempt to commit suicide by slashing and cutting his throat and by hanging himself by the neck from a barn rafter, which acts failed to cause death . . . "

Defendant moved to quash the bill on the ground that "it failed to state a crime." The court sustained the motion and quashed the indictment.

The State excepted and appealed.

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

C. R. Wheatly, Jr. and Thomas S. Bennett for defendant, appellee.

MOORE, J. Is an attempt to commit suicide a crime in North Carolina? This necessarily raises the further question: Is suicide a crime in this jurisdiction? "To constitute a criminal attempt, it is necessary that the act which is attempted be a crime." 1 Wharton's Criminal Law and Procedure (1957), s. 72, p. 155.

" 'It is manifest,' said the General Assembly of North Carolina in 1715, 'that the laws of England are the laws of this Government, so far as they are compatible with our way of living and trade.' " 17 N.C. Law Review, 205. At all times since 1715 the common law has, within certain limits, been recognized as the law of this jurisdiction. The General Assembly has declared that "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

G.S. 4-1. The term "common law" refers to the common law of England.

At common law suicide was a felony. Blackstone explains the matter thus:

"Felonious homicide is . . . the killing of a human creature, of any age or sex, without justification or excuse. . . . This may de done either by killing one's self, or another man.

". . . (T)he law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. . . . A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death . . . The party must be of years of discretion, and in his senses, else it is no crime.

"But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act." Chitty's Blackstone, 19th London Ed., Book IV, pp. 189, 190. See also: 10 Halsbury's Laws of England, 3d Ed., s. 1395, p. 727; *Hales v. Petit,* 1 Plowden 253, 75 Eng. Rep. 387 (1562); 1 East P. C. 219 (1803); 1 Hale P. C., c. XXXI, pp. 411-418; 3 Holdsworth's History of English Law, p. 315 (1923).

In 1824 by 4 Geo. IV, c. 52, s. 1, burial of suicides in the highway with stake driven through the body was forbidden in England, and it was provided that burial should be in churchyards or other usual burial places, but without religious ceremony and between 9:00 and 12:00 o'clock at night.

The matter of punishment seems to give the courts, in states where the common law is recognized, the greatest difficulty in deciding whether or not suicide is a crime. Nearly all agree that suicide is *malum in se.* In New York suicide was recognized as "a grave public wrong," but was not considered a crime. *Hundert v. Commercial Travelers' Mut. Acc. Ass'n of America,* 279 N.Y.S. 555 (1935). The Illinois court recognized that suicide was a felony at common law, but

stated that it "had never regarded the English laws as to suicide as applicable to the spirit of our (their) institutions." *Burnett v. State,* 68 N.E. 505, 510 (1903). In Alabama, Massachusetts, New Jersey and South Carolina it has been held that suicide is *malum in se* and a crime, though not punishable if self-murder is accomplished. *Southern Life & Health Ins. Co. v. Wynn,* 194 So. 421 (Ala. 1940); *Commonwealth v. Mink,* 123 Mass. 422 (1877); *State v. Carney,* 55 A. 44 (N.J. 1903); *State v. Levelle,* 13 S.E. 319 (S.C. 1891). Several states, including Iowa, Indiana and Texas, have no common law crimes. *State v. Campbell,* 251 N.W. 717, 92 A.L.R. 1176 (Iowa 1933); *Prudential Ins. Co. of America v. Rice,* 52 N.E. 2d 624 (Ind. 1944); *Grace v. State,* 69 S.W. 529 (Tex. 1902).

"By the English common law suicide was a felony. As, however, forfeitures are not allowed in the United States, and as the common-law punishment of forfeiture is the only punishment that would be available, the offense in the United States is not punishable; yet it may be said that generally in the states of the Union suicide is criminal and is recognized as such whenever the question has a bearing collaterally." 24 A & E Encyclopedia of Law, Suicide, s. II, pp. 490, 491.

Our Constitution and statutes have repealed and abrogated the common law as to suicide only as to punishment and possibly the quality of the offense. Suicide has perhaps been reduced to the grade of misdemeanor by reason of the following statutory provision: "A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison. Any other crime is a misdemeanor." G.S. 14-1. See also *Commonwealth v. Mink, supra.* Our Constitution forbids both ignominious burial and forfeiture of estates as punishment for crime. "The following punishment *only* may be known to the laws of this State, *viz:* death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State." (Emphasis added). N. C. Constitution, Art. XI, s. 1. Forfeiture, as punishment, has not had any force in this jurisdiction since 1778 when it was declared what part of the common law should be in force here. *White v. Fort,* 10 N.C. 251, 264.

So it must be conceded that suicide may not be punished in North Carolina. But in our opinion this fact does not change the criminal character of the act. The common law considered the offense to have been committed in the lifetime of the offender. It is explained thus: ". . . it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land,

and the husband drowns himself *(Hales v. Petit, supra);* the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death." (Parentheses added). Chitty's Blackstone, 19th London Ed., Book IV, p. 190. The New Jersey court explained the matter in this manner: "That the forfeiture of estates for crimes against the state was abolished by the first Constitution in 1776, and is still abolished, does not affect the criminal character of the offenses to which the non-forfeiture applies. Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted. If one kills another, and then kills himself, is he any less a murderer because he cannot be punished?" *State v. Carney, supra.* If a party, after committing a criminal offense and after being indicted therefor, dies before trial, the action abates, but this is not tantamount to acquittal.

For the reason that a suicide may not be punished, it is argued that this common law offense is now obsolete and serves no practical purpose for the protection of society. We do not agree. Since suicide is a crime, one who aids and abets another in, or is accessory before the fact to, self-murder is amenable to the law. *Commonwealth v. Bowen,* 13 Mass. 356 (1816). Likewise, where two agree to kill themselves together and the means employed takes effect upon one only. *McMahan v. State,* 53 So. 89 (Ala. 1910); *Turner v. State,* 108 S.W. 1139 (Tenn. 1908). Also, where one in attempting to commit suicide accidently kills another. *State v. Levelle, supra.* Such offenses, in the absence of statute to the contrary, would not be criminal offenses in a jurisdiction in which suicide is not a crime. *Grace v. State, supra.*

"An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or one which charges a completed offense. G.S. 15-170. . . ." *State v. Parker,* 224 N.C. 524, 525, 31 S.E. 2d 531; *State v. Batson,* 220 N.C. 411, 17 S.E. 2d 511.

At common law attempted suicide was a misdemeanor, punishable by fine and imprisonment. 10 Halsbury's Laws of England, 3d Ed., s. 1396, p. 728; 1 Brill: Cyclopedia Criminal Law, s. 149, p. 282; *Regina v. Doody,* 6 Cox C. C. 463 (1854); *Regina v. Burgess,* 9 Cox C. C. 247 (1862).

It is also asserted "that a person who commits suicide is abnormal mentally" and "fails to distinguish the fine points of what is right and what is wrong." It is often said that all persons who commit crime are

mentally abnormal. This line of argument is not new, it was in vogue 200 years ago. Blackstone discusses this point: ". . . this excuse ought not to be strained to that length to which our coroner's juries are apt to carry it, *viz.* that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos* as well as the self-murderer." Chitty's Blackstone, 19th London Ed., Book IV, p. 189.

An insane person is incapable of committing this or any other offense. The defense of insanity is available to all defendants in all criminal trials. "The test of mental responsibility is the capacity of defendant to distinguish between right and wrong at the time and in respect to the matter under investigation." 1 Strong's Index, Criminal Law, s. 5, p. 683, and cases there cited.

An attempt to commit suicide is an indictable misdemeanor in North Carolina. "All misdemeanors, where a specific punishment is not prescribed shall be punished as misdemeanors at common law," that is, by fine or imprisonment in the county jail, or both. G.S. 14-3; *State v. Powell,* 94 N.C. 920; *State v. McNeill,* 75 N.C. 15. This, of course, does not mean that the court may not place offenders on probation, or make use of other state facilities and services in proper cases.

The judgment of the court below, quashing the bill of indictment, is Reversed.

SUE LEE PARKS, BY HER NEXT FRIEND, ALVARO GARCIA v. JOHN WESLEY WASHINGTON AND MANGUM TRUCKING COMPANY, INC., A CORPORATION.

AND

WILLIAM J. FLOWE, BY HIS NEXT FRIEND, MRS. S. A. FLOWE v. JOHN WESLEY WASHINGTON AND MANGUM TRUCKING COMPANY, INC., A CORPORATION.

(Filed 11 October, 1961.)

1. Evidence § 15; Pleadings § 29— Whether evidence was prejudicial in affecting amount of recovery was determined by court on motion to set aside verdict.

Defendants admitted negligence but it was not clear whether such admission embraced also the element of proximate cause. *Held:* If the admission was not one of liability, evidence of defendant tort feasor's in-

toxication at the time of the injury was competent upon the issue of negligence, while if the admission was one of liability, such evidence was not necessary to prove the admitted facts, but, even so, the possibility that such evidence affected the jury's answer to the issue of damages is properly presented to the court by motion to set aside the verdict in the court's discretion, and where the court has refused such motion in the exercise of its sound discretion, the admission of the evidence will not be held prejudicial.

2. Appeal and Error § 40—

A new trial will not be awarded for mere technical error but only for error which is material and prejudicial so that, except for such error, a different result would likely have ensued.

3. Damages § 15—

Where the court gives correct instructions as to the measure of damages upon conflicting evidence as to whether plaintiff's injuries were serious and permanent or negligible and temporary, a new trial will not be awarded on exceptions to the charge, it being incumbent upon defendants, if they desired amplification, to have tendered proper request for special instructions.

APPEAL by defendants from *Sink, E.J.*, May Term 1961 of MECKLENBURG.

These actions were instituted 8 July 1959 to recover damages for personal injuries allegedly sustained in the collision of motor vehicles on 15 May 1959. As the basis for relief plaintiffs allege in substance: They were guests in an automobile owned and operated by one Killough; defendant Washington was the driver of a motor vehicle owned by and operated for defendant Mangum Trucking Company, Inc.; the collision occurred about 8:00 p.m. on U.S. Highway 74, which is intersected by Sharon Amity Road; traffic at the intersection is controlled by standard traffic lights; the vehicle in which plaintiffs were riding was traveling westwardly; as it approached the intersection their driver was confronted with the red light; the vehicle operated by Washington, likewise traveling westwardly, ran into the rear of the automobile occupied by plaintiffs, struck it so violently as to cause plaintiffs' vehicle to overturn, resulting in serious injuries to each of plaintiffs. Plaintiffs charge that the collision was caused by the negligent acts of Washington in that:

"(a) He failed to maintain and keep a proper lookout;

"(b) He failed to keep his vehicle under control;

"(c) He failed to avoid colliding with the vehicle in which the plaintiff was riding as a passenger;

"(d) He failed to observe the vehicle in which the plaintiff was riding as a passenger;

"(e) He failed to yield the right of way to the vehicle in which the plaintiff was riding as a passenger;

"(f) He failed to give warning of the approach of his vehicle;

"(g) He drove said truck at a high, excessive, and unlawful rate of speed and at a speed that was greater than was reasonable and prudent under the circumstances and conditions then and there existing, and failed to decrease his speed when approaching an intersection, in direct violation of the North Carolina General Statutes, Sec. 20-141;

"(h) He failed to pass the vehicle in which the plaintiff was a passenger at least two (2) feet to the left thereof, in direct violation of the North Carolina General Statutes;

"(i) He operated the said vehicle upon the highways of the State of North Carolina without an operator's and/or chauffeur's license from the State of North Carolina, in direct violation of the North Carolina General Statutes, Sec. 20-7;

"(j) He drove said vehicle while under the influence of intoxicating liquor, in direct violation of North Carolina General Statutes, Sec. 20-138;

"(k) And he otherwise operated his said vehicle in a manner which he knew or in the exercise of due care should have known would be likely to endanger the property and lives of persons lawfully using said streets, in direct violation of North Carolina General Statutes 20-140."

On motion of defendants allegations of negligence charged in subsections (i) and (k) were stricken. After these portions of the complaint were stricken defendants filed joint answers. They specifically denied the allegations of negligence. They admit that Washington was the operator of a motor vehicle belonging to defendant Mangum. They do not specifically deny that Washington was, at the time of the collision, operating the motor vehicle as agent for the owner. They allege facts with respect to the operation and aver that the question of whether Washington was or was not the agent of Mangum was a question of law. They deny the allegations with respect to the injuries.

The cases were, on motion of defendants and with the consent of plaintiffs, consolidated for trial. The cases were submitted to the jury on identical issues answered identically as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant John Wesley Washington as alleged in the complaint?

"ANSWER: Yes.

"2. Was the defendant John Wesley Washington acting as agent of the defendant Mangum Trucking Company, Inc., a corporation, as alleged in the complaint?

"ANSWER: Yes.

"3. What amount, if any, is the plaintiff entitled to recover?
"ANSWER: $5,000.00."
Judgments were entered on the verdicts and defendants appealed.

Bailey & Booe for plaintiff appellees.
Kennedy, Covington, Lobdell & Hickman for defendant appellants.

RODMAN, J. Defendants' assignments of error are directed to (a) the admission of asserted incompetent and prejudicial evidence, and (b) the asserted insufficiency of the charge directed to the issues of damages.

The asserted incompetent evidence was directed to plaintiffs' allegation that Washington operated his motor vehicle "while under the influence of intoxicating liquor, in direct violation of North Carolina General Statutes, Sec. 20-138." At the time of the collision both motor vehicles were traveling in the direction of Charlotte and away from Monroe. Plaintiffs were, without objection, permitted to testify to physical conditions at the scene of the collision, the speed of their vehicle, the fact that it was struck from the rear and with such force as to cause it to turn over four or five times. Highway Patrolman Thomas investigated the collision. He testified to physical conditions observed by him at the scene of the collision and to statements made by plaintiffs. He was asked if he talked with Washington at the scene of the collision. Defendants objected to statements emanating from Washington. The record does not show that any reason was given for the objection at that time. At their request the court excused the jury. It heard the testimony. The witness said that he did not have a conversation with Washington at the scene of the collision but did in Charlotte. Over defendants' objection the court admitted this evidence: "Q. All right, sir, Officer Thomas, would you state whether or not the defendant, John Wesley Washington, made any statement to you in regard to his condition at the time of his wreck?" "A. He stated to me just prior to the time he left Monroe he drank a pint of Whiskey." Over defendants' objection a police officer of Charlotte was asked to describe the condition of defendant Washington when seen in Charlotte shortly after the collision. Defense counsel said: "The defendant at this point would like to interpose an objection to any further testimony he might give would be irrelevant to the issues involved in view of the stipulation made at the beginning of the case." The objection was overruled and witness answered: "He was passed out drunk . . ."

The record discloses these seemingly contradictory positions taken by defendants during the trial: (1) Having specifically denied the acts of negligence detailed in the complaint, nevertheless: "On the

coming on of the trial of these causes, Mr. A. Myles Haynes, counsel for defendants, from the firm of Kennedy, Covington, Lobdell & Hickman, appeared for the defendants, and each of them, and admitted and stipulated in open court that the defendant Washington was negligent on the occasion with reference to which these actions pertain." It is to be noted that the stipulation does not particularlize the act of negligence alleged. More important, it does not specifically concede that Washington's negligence was the proximate cause of plaintiffs' injuries, although perhaps subject to that inference. (2) At the conclusion of plaintiffs' evidence and at the close of the evidence, defendants moved for judgment as of nonsuit. Why, if the admission was intended to admit liability for injuries negligently inflicted? *Clark v. Emerson,* 245 N.C. 387, 95 S.E. 2d 880.

(3) The record does not disclose who prepared or tendered the issues. No exception was taken by defendants, however, to the submission of the first issue. If the right to recover was at issue, plaintiffs were entitled to offer evidence to support their allegations, (4) The court charged the jury that the parties had stipulated that the jury might answer the first issue "yes" in each case. No exception was taken to this charge. (5) Notwithstanding the charge, when the verdict was returned "the defendants and each of them move to set it aside as being against the greater weight of the evidence, and for a new trial, motion overruled and the defendants except. The defendants then move to set the verdict aside as being excessive and for a new trial, motion overruled and defendants except." It may well be that the seemingly contradictory positions taken by defendants misled the court and the counsel for plaintiffs with respect to the extent of the admission and that the admission did not comprehend proximate cause so as to make the admitted negligence actionable.

But treating the stipulation as an admission of liability, as portions of the record indicate it should be treated, we must determine whether the evidence was improperly received and hence a new trial should be awarded.

Clearly the evidence was competent on the first issue. If that question was not before the jury and only the question of damages was to be determined, it would have been much better and much simpler to have limited the questions referred to the jury to that single question.

It is elementary that a party is not required to offer evidence to establish that which has been judicially admitted. *Chisholm v. Hall, ante,* 374; *S. v. Powell,* 254 N.C. 231, 118 S.E. 2d 617; *S. v. Martin,* 191 N.C. 401, 132 S.E. 14. But the mere fact that immaterial evidence is received is not of itself sufficient to warrant a new trial. As said by *Faircloth,*

C.J., in *Collins v. Collins*, 125 N.C. 98: "The admission of irrelevant testimony will not authorize a new trial unless it appears that the objecting party was prejudiced thereby." *Ray v. Membership Corp.*, 252 N.C. 380, 113 S.E. 2d 806; *Stathopoulos v. Shook*, 251 N.C. 33, 110 S.E. 2d 452; *In re Will of Crawford*, 246 N.C. 322, 98 S.E. 2d 29; *Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165; *S. v. Galloway*, 188 N.C. 416, 124 S.E. 745; *Deming v. Gainey*, 95 N.C. 528; *S. v. Manly*, 95 N.C. 661.

As said by *Johnson, J.*, in *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634: "Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on appellant to show this."

We are asked to hold as a matter of law that the evidence directed to the first issue in fact inflamed the jury and caused it to award more than fair compensation for the injuries sustained. What defendants now seek to accomplish could have been done by the trial judge as a matter of discretion, and should have been done if there was a miscarriage of justice. He was not limited to a mere question of legal right. He was expressly requested to exercise his discretion by setting aside the answers to the third issues because of the assertion that the amounts awarded were excessive. He refused to do so. His experience of more than thirty years on the bench eminently qualified him to evaluate the testimony. His service has demonstrated his learning and his desire to have litigation end in justice to all who appear before him.

Plaintiffs testified to painful injuries from which they continued to suffer until the day of the trial (a year after the collision) and from which the jury could infer the injuries were permanent. On the other hand, there was evidence from which the jury could find the injuries were negligible and in no way permanent.

What was fair compensation was, on all the evidence, a question of fact for the jury. We cannot, on this record, conclude as a matter of law that the jury, in disregard of its oath, failed to apply the rule for measuring damages as given by the court.

The rule by which damages are to be measured in cases of this character is stated in *Mintz v. R.R.*, 233 N.C. 607, 65 S.E. 2d 120. The charge conformed to the rule so stated. If defendants wished amplification of any phase, they should have given notice of their desire by proper requests.

No error.

J. T. TAYLOR, JR., AND HIS WIFE, DORA W. TAYLOR v. ELIJAH SCOTT, GEORGE SCOTT, JANIE BRYANT AND BARTHA SCOTT

AND

MERIWEATHER LEWIS v. ELIJAH SCOTT, GEORGE SCOTT, JANIE BRYANT AND BARTHA SCOTT.

(Filed 11 October, 1961.)

1. **Ejectment § 7—**

In an action to recover possession of land and damages for trespass thereon, defendants' denial of plaintiffs' title places the burden on plaintiffs of proving title in themselves.

2. **Ejectment § 10—**

Where plaintiffs claim record title from a common source, but the only evidence identifying the land claimed with the descriptions in their deeds is the testimony of a surveyor that the map prepared by him was based upon his assumption, without personal knowledge, that a certain branch referred to by witnesses by a particular name was in fact the same as a branch called by another name on his map, and that he disregarded the call in the deed designating the prong of the branch, *is held* insufficient to carry plaintiffs' burden of identifying the lands claimed, and nonsuit against them should have been entered.

3. **Same; Judgments § 33—**

In an action involving title to land, judgment of nonsuit for the insufficiency of plaintiffs' evidence identifying the land claimed with the descriptions in their deeds does not have the effect of adjudicating title in the defendants.

4. **Adverse Possession § 23—**

Evidence of a defendant in an action in ejectment that he had been in actual possession of a specific portion of the *locus in quo*, and had occupied and cultivated the tract under known and visible lines and boundaries in the character of sole owner, is sufficient to require the submission of the issue of his acquisition of title to such portion by adverse possession.

5. **Same: Adverse Possession § 7—**

Where parties claim the *locus in quo* as heirs of their ancestor, and introduced evidence of continuous possession by one or the other of them of the entire tract as tenants in common for more than 20 years, the evidence is sufficient to be submitted to the jury on their claim of title by adverse possession as against a stranger, since the possession of any one of them inures to the benefit of all, and it is not required that each cotenant be on the property during the entire time.

APPEALS by plaintiffs and defendants from *Cowper, J.*, May 1961 Term of CRAVEN.

In controversy between the parties is the ownership of an area of land containing approximately 400 acres. Plaintiffs Taylor assert title to a specifically described part constituting approximately the south-

ern half of the area, and trespass thereon by defendants. They seek an adjudication of their title and damages for the trespass.

Plaintiff Lewis alleges ownership of a specific area constituting the northern portion and trespass thereon. He likewise seeks an adjudication of his title and damages for the trespass.

Defendants denied plaintiffs were the owners of the land described in the complaints. For affirmative relief they allege that they, with one Majetta Scott, were the owners as joint tenants or tenants in common of the land in controversy except for seven specifically described parts. George Scott additionally alleged he was the owner in severalty of two of the seven areas excepted from the claim of joint ownership. Based upon the allegations of ownership as cotenants and in severalty, defendants prayed that their respective titles be declared.

The area in controversy is bounded on the north by a ditch and branch known as the Harmon Wilken Branch, on the east by the west and south prongs of Bachelor Creek, on the south by Thursday Hill Branch, and on the west by a public highway known as Dry Mourner Road from Tuscarora to Rhems.

A branch separates the land claimed by Lewis from the land claimed by Taylors.

The parties consented to a consolidation for trial because of identity of evidence and legal principles supporting their respective contentions.

At the conclusion of the evidence the court sustained defendants' motions to nonsuit plaintiffs. Plaintiffs' motions to nonsuit defendants were likewise allowed. Plaintiffs and defendants excepted and appealed.

Bernard B. Hollowell and R. E. Whitehurst for plaintiffs.

Barden, Stith & McCotter, L. T. Grantham, and Lee & Hancock for defendants.

RODMAN, J. The appeals present for determination the correctness of the rulings allowing the several motions to nonsuit.

When a party's claim of title is denied, he has the burden of proof. *Chisholm v. Hall, ante* 374; *Jones v. Turlington,* 243 N.C. 681, 92 S.E. 2d 75; *Locklear v. Oxendine,* 233 N.C. 710, 65 S.E. 2d 673; *Mobley v. Griffin,* 104 N.C. 112, where the methods of showing title are summarized. Here plaintiffs did not attempt to show a record title tracing to the soverign nor did they attempt to show title by possession. To support their claim of title, they assert they and defendants claim under a common source from which they have the superior title, with the further contention defendants are estopped by judgment to deny plaintiffs' title.

The assertion of superior title from a common source is based on

these facts: Defendants are the descendants and heirs at law of Stephen Scott and Sophie Scott, who mortgaged the lands described in deeds to Stephen Scott, recorded in Craven County in Book 99, p. 69, and Book 115, p. 192. The lands so mortgaged were sold under the power of sale there given (See *Scott v. Lumber Co.*, 144 N.C. 44.); Blades purchased; plaintiffs have acquired the title of Blades to the mortgaged property.

The mere fact that plaintiffs have acquired Blades' title to the lands mortgaged by Stephen Scott, ancestor of defendants, is not of itself sufficient to establish, *prima facie,* plaintiffs' title. The parties must not only trace their title to a common source, but they must trace title to the land in controversy to that source. *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205; *Seawell v. Fishing Club,* 249 N.C. 402, 106 S.E. 2d 486.

Plaintiffs offered no evidence to show the location of the lands described in the deed to Stephen Scott recorded in Book 99, p. 69.

The description in the deed to Stephen Scott recorded in Book 115, p. 192, is as follows: ". . . adjoining the lands of Wilkins Wetherington, H. Davis and others, bounded as follows, *Viz:* BEGINNING at the feet of Batchelors Creek and runs up the West Prong to School House Branch then up said Branch to the Public Road thence northwardly with said road to Hezekiah Davis thence with his line to Long Branch thence down said Branch to the east prong of Batchelors Creek thence down the same to the BEGINNING containing two hundred acres more or less."

Court surveyors were appointed; they made maps showing the contentions of the respective parties. The maps prepared by the surveyors show the location of the public road, west prong of Bachelor Creek, the main stream of Bachelor Creek, the south prong of Bachelor Creek. The west prong of Bachelor Creek flows southeastwardly. The south prong of Bachelor Creek flows northeastwardly. The northern boundary of the land in controversy is a ditch and the Harmon Wilken Branch which flows into the west prong of Bachelor Creek. The maps do not show nor was any attempt made to locate the lands of Wilkins Wetherington or Hezekiah Davis, Long Branch, or the east prong of Bachelor Creek. A branch makes out of the south prong of Bachelor Creek. It heads in a westwardly direction towards the public highway. This branch is designated on the map of one of the court surveyors as Edie Bachelor Branch, on the map of the other court surveyor as School House Branch or Edie Bachelor Branch. This branch divides the area in controversy into two parts of approximately equal areas. Surveyor Brooks, as witness for plaintiffs, indicated on the court map the location of the land described in Book 115, p. 192. He testified that

he did not know the beginning point called for, and to locate School House Branch he had disregarded the call in the deed, "up the run of the West Prong"; to the contrary he had gone up the run of the south prong; he made no attempt to locate the remaining calls of the deed other than a public road. The correctness of his location is dependent upon his assumption that what the other witnesses referred to as Edie Bachelor Branch is in fact School House Branch, and the other calls for natural boundaries are immaterial. He testified: "It is my understanding, although I'm not sure, that the southward branch is School House Branch. I was not brought up in the neighborhood. The only time I ever heard it called the Edie Bachelor Branch was when Mr. Daniels labeled it that on his map, I believe. I got my information that it was called the School House Branch off of a map that Mr. Potter made in, I don't know the date on it. At the time of this survey I was on the ground. It was pointed out to me that was the School House Branch. I don't recall the man's name who pointed it out to me as School House Branch, but he lived out in that neighborhood. It was a colored man."

Manifestly the testimony is insufficient to locate the land described in the deed to Stephen Scott, recorded in Book 115, p. 192; nor does it identify that land as the land here in controversy. All witness Brooks purported to say was: "The map shows plaintiffs' contentions with respect to the location of the lands mortgaged by Stephen Scott." Brooks did not pretend to make a statement of fact within his knowledge. Plaintiffs failed to carry the burden of identifying the lands which Blades acquired at the foreclosure sale as the lands in controversy.

Plaintiffs, to support their plea of *res judicata,* rely on a judgment of nonsuit rendered in 1956 by the Superior Court of Craven County in an action in which present defendants were plaintiffs and present plaintiffs were defendants. That judgment was affirmed by this Court on 22 May 1957. See *Scott v. Lewis,* 246 N.C. 298, 98 S.E. 2d 294. Plaintiffs lost there for failure to offer evidence to support their allegations. *Winborne, C.J.,* writing for the Court, said: "In the instant case the evidence offered is insufficient to identify the lines and boundaries of any particular portion in actual possession." The mere failure of the plaintiffs in that action, present defendants, to offer sufficient evidence to establish their title did not create titles for present plaintiffs. *Grimes v. Andrews,* 170 N.C. 515, 87 S.E. 341.

The court properly allowed the motions to nonsuit plaintiffs.

Defendant George Scott's assertion of ownership in severalty is directed to two specifically described tracts. The boundaries of these two areas are the edges of fields. There is evidence that George Scott lives on one of these fields and has continuously for more than twenty

years had possession of both areas to the boundaries of the fields, and during said period has asserted that his exclusive right to occupy and cultivate was an incident of his ownership. This evidence was sufficient to require submission of an appropriate issue to the jury. *Prima facie,* he had carried the burden of proof. Its weight was for the jury.

In support of the claim of defendants as cotenants Elijah Brown testified: "I have helped the Scotts cut crossties, wood and tobacco wood on the land in the last 30 or 35 years. These lands on that map excluding those cleared portions have been reputed in the neighborhood for the last 30 or 35 years to belong to the Scotts—Bartha, Elijah, Janie, George, and Majetta's father, John. During the last 30 or 35 years I have cut crossties up and down the south prong from Thursday Hill Branch and back of the church and Lamb Farrow's field.

"The area on the map I pointed out as the George Scott place is reputed in the community to be George Scott's. . . . The defendants worked on all their land other than the areas cut off on the map and they cut wood, etc. Each of the defendants went on each part of the land, all worked together cutting on it. George Scott worked on it like the rest. And there were no lines in there dividing any of it off, saying this part belongs to Elijah and this part belongs to another one of the defendants; they worked the whole thing together."

William Henry Simmons, who had known the land for thirty years, testified: "I always heard the defendants in this suit owned the woodland. They all claimed it together. I do not know of any Scott that is claiming any particular piece other than what I pointed out on the map."

The foregoing testimony and similar testimony in the record differentiate this case and the assertion of title made by present defendants from the testimony in *Scott v. Lewis, supra.*

The boundaries of the land claimed by defendants as cotenants are visible and well known. There is evidence from which the jury can find that this claim of cotenancy is accompanied by continuous and exclusive possession for more than thirty years. Defendants base their claim of cotenancy on an assertion of title and possession by their ancestors Stephen and Sophie Scott.

A claim of title founded on possession of an ancestor descends to his heirs, who, continuing in possession, hold as cotenants. *Barrett v. Brewer,* 153 N.C. 547, 69 S.E. 614; *Shuler v. Lumber Co.,* 180 N.C. 648, 105 S.E. 399. The possession of one cotenant inures to the benefit of all. *Winstead v. Woolard,* 223 N.C. 814, 28 S.E. 2d 507; *Johnston v. Case,* 131 N.C. 491; *Winborne v. Lumber Co.,* 130 N.C. 32; *Tharpe v. Holcomb,* 126 N.C. 365; *Peveto v. Herring,* 198 S.W. 2d 921. It was

not necessary for each cotenant to be on the property during the entire time. The possession of one complemented the possession of the other when their claim was joint and not adverse.

On plaintiffs' appeals—Affirmed.

On defendants' appeals—Reversed.

INDUSTRIAL DISTRIBUTORS, INC. v. R. C. MITCHELL AND MRS. R. C. MITCHELL.

(Filed 11 October, 1961.)

1. Bills and Notes § 4—

Where a purchaser executes a note payable to a bank merely as evidence of the balance due the seller on equipment, receiving nothing from the bank for the note, as between the purchaser and the bank there is no consideration for the note, and the defense of want of consideration may be set up by the purchaser in an action on the note by the bank.

2. Bills and Notes § 9—

Where plaintiff acquires a note from the payee subsequent to the date plaintiff contends the note was due, plaintiff may not assert that he was a holder in due course before maturity, and is not protected by G.S. 25-63.

3. Contracts § 2—

Where one of the parties to a written contract understands an ambiguous provision of the agreement to mean one thing and the other party to the contract understands that such provision means another, there is no meeting of the minds, and the writing does not constitute a binding agreement.

4. Sales § 2½— Agreement for payment of balance of purchase price held ambiguous, and contractual date for payment was question for jury.

Upon the inability of the purchaser to pay the purchase price of a cash sale, he borrowed a part of the purchase price from a bank upon a note secured by a chattel mortgage. Thereafter he executed a contract to pay the balance, secured by a chattel mortgage, "on demand after bank on said equipment." *Held:* The contract merely gave additional security and made the balance payable on demand, if that was the intention of the parties, or extended the due date until after the maturity and payment of the note to the bank, if that was the intention of the parties, or, if one party intended the one and the other party intended the other, there was no binding contract, and the balance of the purchase price was due upon delivery of the goods.

5. Contracts § 12—

The interpretation placed upon the agreement by the parties them-

selves prior to controversy is strong evidence of the meaning of the language used.

6. Limitation of Actions § 18—

Where the evidence raises conflicting inferences for the determination of the jury as to the date the amount sued for was due, the bar of the statute of limitations pleaded being dependent upon which of the possible dates the amount due was payable, the court may not assume that in no aspect could the jury find facts which would bar plaintiff's right of action, and a peremptory instruction in plaintiff's favor is error.

APPEAL by defendants from *Bundy, J.*, May 1961 Term of HALIFAX.

Plaintiff, in section 3 of the complaint, alleges defendant for value executed and delivered to Citizens National Bank a note of which exhibit A attached to the complaint is a copy. Section 4 of the complaint alleges the note was transferred to plaintiff on 15 July 1958.

Defendants denied each of these allegations. As additional defenses they allege (a) a sale by plaintiff of an irrigation system in the summer of 1955 and damages resulting from breach of warranty made in connection with the sale, and (b) the three-year statute of limitations to bar plaintiff's claim.

Exhibit A reads as follows:

"$899.97 EMPORIA, VA., September 1, 1955

"On demand after bank on said equipment _____ days after date, we Promise to pay to THE CITIZENS NATIONAL BANK, Emporia, Va., or order, negotiable and payable, without offset, at said Bank _____ DOLLARS for value received; having deposited with said Bank as collateral security for the payment of this note, the following collaterals 1 4" Gorman Rupp Pump Model 54A-VG4D

"1 4" Suction Set Page 3 of 3
1 4" Suction Strainer
1 160# Pressure Gauge
60' 4" x 30' Mainline Alum. Pipe
480' 4" x 20' Ditto

and _____ hereby give to said Bank, its President, or Cashier, full power and authority to sell and assign and deliver the whole, or any part, of said collaterals, or any substitutes therefor, or any additions thereto, at public, or private sale, at the option of said Bank, or its President, or Cashier, or either of them, on the non-performance of the above promise, or any of them, or at any time thereafter, and without advertising, or giving to _____ any notice thereof, or without making any demand for the payment of this note.

R. C. MITCHELL
MRS. R. C. MITCHELL"

To determine the rights of parties the court submitted this issue: "In what amount, if any, are the defendants indebted to the plaintiff?" The jury, in response to a peremptory instruction, answered: "$899.97." judgment was entered on the verdict and defendants appealed.

Josey & Clark for plaintiff appellee.

Charles M. White, III, John Kerr, Jr., and Gaither M. Beam for defendant appellants.

RODMAN, J. Defendants did not offer evidence sufficient to justify the submission of an issue of damages resulting from the asserted breach of warranty.

Defendants' claim of error is based on their plea that the debt evidenced by the note was due and payable more than three years prior to 30 September 1958, the date this action was instituted. Hence the court could not peremptorily instruct the jury to return a verdict in any sum for plaintiff.

The parties are in agreement on these facts: Plaintiff, in the summer of 1955, sold to defendants, farmers, the equipment enumerated in exhibit A for use in irrigating defendants' crops. It was a cash sale. When the equipment was delivered in July, defendants did not have the monies to pay for it. They borrowed from Citizens Bank of Warrenton $1874.35, and as evidence of the debt so created, the defendant R. C. Mitchell executed a note "due on the 23rd day of October, A.D. 1955" and secured payment of that note by a mortgage on the properties described in exhibit A. That note contains this additional provision: "If $624.79 is paid on due date, balance will be carried provided $624.79 is paid on October 23, 1956 and the balance of $624.77 is paid on October 23, 1957." The note also contained this clause: "All the above property is my own, and no other claim thereon." From the monies so borrowed defendants paid to plaintiff the sum of $1750, leaving a balance owing of $899.97. The note in suit was intended to represent that balance. The vice president of plaintiff testified: "The defendant said that was all the bank would lend him so we then took a note for the difference of $899.97." "Mr. Mitchell asked me to put on that note 'after said bank,' which I had to do in order to go along with him because he had not paid . . . It was Mr. Mitchell's intention at that time to pay me after he had paid off the bank . . ."

The evidence shows absence of consideration as between Citizens National Bank and defendants. Had payee brought an action in its name on the note, defendants' plea of want of consideration would, on the evidence, have sufficed to defeat the claim. *Mills v. Bonin,* 239 N.C. 498, 80 S.E. 2d 365; G.S. 25-33.

Plaintiff, according to its allegation, acquired the note by transfer on 15 July 1958. That date was subsequent to maturity as plaintiff would fix the time for payment. Plaintiff is not the holder of a valid negotiable instrument acquired before maturity. It is not protected by G.S. 25-63.

The instrument was intended as a contract between plaintiff and defendant (1) to fix the time when plaintiff could require payment of the balance owing for the irrigation equipment, or (2) to create a lien on the equipment securing payment of this balance, or (3) both of these purposes.

The parties used this language to express their agreement: "On demand after bank on said equipment _____ days after date, we Promise to pay . . ." What is the meaning of the phrase "after bank on said equipment?" Does it mean that plaintiff could not demand payment until maturity of the debt to the Citizens Bank of Warrenton? Plaintiff now so contends. Or does it mean that the lien created was subordinate to the lien given the Bank of Warrenton? Defendants so contend. The language was inserted at the request of defendant R. C. Mitchell. Plaintiff's vice president who procured execution of the note testified: "It was Mr. Mitchell's intention at that time to pay me after he had paid off the bank at Warrenton, or after the last payment was due in 1957." He further testified: "We started trying to collect the account as soon as the note was signed. We started right away. We sent the note to a lawyer in Warrenton for collection. According to our original agreement, the note was due and Mr. Mitchell knew it was due. . . . I got Mr. Mitchell to sign a note on September 1, 1955, merely as security for Industrial Distributors inasmuch as he had failed to pay the cash all at one time. He had violated his agreement to pay me the cash for the entire system at one time. So, not knowing Mr. Mitchell's financial status too well, I decided it was best to have some evidence of debt, therefore I tried to collect the note then. I did not agree to carry this as an open account. . . . we asked Mr. Mitchell for the money and thought it was a cash deal, and the note was merely some form that I could take back to my company to justify not having the cash. . . . I was trying to collect the note all the time."

The defendant R. C. Mitchell, a witness in his own behalf, was asked: "What does that mean, 'after the bank'?" He replied: "I did not want the mortgage at the bank and him to have another mortgage. I wanted to be sure his man knew the bank had a mortgage at the time." There was additional testimony from defendant which a jury might interpret as meaning defendant used the words "after bank"

as meaning demand for payment could not be made until the time for payment of the note given Bank of Warrenton had passed.

The evidence was sufficient for the jury to find: (1) There was no meeting of the minds as to the meaning of the phrase "after bank on said equipment." In that event the writing did not constitute a binding contract. *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618; *Dodds v. Trust Co.,* 205 N.C. 153, 170 S.E. 652. (2) There was recognition of plaintiff's right to forthwith require payment but the lien on the equipment was junior to the lien of Bank of Warrenton. This interpretation accords with plaintiff's conduct immediately following the execution and delivery of the document. An interpretation of a writing made by the parties at a time when no controversy existed is strong evidence of the meaning of the language used. *Cole v. Fibre Co.,* 200 N.C. 484, 157 S.E. 857. (3) The time fixed for payment had been postponed to the maturity of the note given Bank of Warrenton.

If the jury should find that parties did not make a binding contract on 1 September, defendants' debt was payable on delivery of the equipment. This was in July 1955. Plaintiff's right of action would, in that event, be barred. If the jury should find the parties understood that plaintiff's right to demand payment was not postponed but a lien was given in the hope that forbearance would be extended, plaintiff's cause of action accrued on the date the note was given and hence would be barred. *Caldwell v. Rodman,* 50 N.C. 139. If the jury should find the right to demand payment was postponed until after maturity of the note to Bank of Warrenton, the cause of action was not barred.

It would have been far simpler and better practice, *Baker v. Construction Corp., ante,* 302, to have submitted an appropriate issue addressed to defendants' plea of the statute of limitations rather than a simple issue of debt. The amount of the debt was not in controversy. The peremptory instruction in plaintiffs' favor is necessarily predicated upon the court's assumption that in no event could the jury find facts which would bar plaintiffs' right of action. This assumption was erroneous.

New trial.

RAYMOND EASTER EASON v. JIMMIE GRIMSLEY, DAN BRAXTON t/a DAN BRAXTON TRUCKING COMPANY AND WHITE OWN MOTOR COMPANY.

(Filed 11 October, 1961.)

1. Negligence § 24a; Trial § 21—

In determining a motion to nonsuit made at the close of all of the evidence, defendant's evidence in contradiction of that of plaintiff cannot be considered.

2. Automobiles § 41h—

Evidence that defendant driver attempted to turn left into a dirt road without giving a plain and visible signal of his intention to do so, did not keep a proper lookout, and did not heed plaintiff's warning horn, resulting in a collision with plaintiff's vehicle as plaintiff, travelling in the same direction, was attempting to pass, is sufficient to be submitted to the jury on the issue of negligence. G.S. 20-154.

3. Automobiles § 41a—

Inferences of negligence which arise on the evidence but which are not supported by allegation, cannot be considered in passing upon the sufficiency of the evidence.

4. Pleadings § 28—

Proof without allegation is ineffectual.

5. Automobiles § 50—

The negligence of the driver of a car is ordinarily imputed to the owner riding therein as a passenger, nothing else appearing.

6. Automobiles § 14—

G.S. 20-149(a) does not require that a vehicle must pass at least two feet to the left of the center line of the highway in passing another vehicle travelling in the same direction, but only that it pass at least two feet to the left of the other vehicle.

7. Automobiles § 42c—

Where the evidence supports contrary conclusions as to whether plaintiff, in attempting to pass another vehicle travelling in the same direction, did or did not drive at least two feet to the left of such other vehicle, nonsuit may not be properly entered on the ground of plaintiff's violation of G.S.120-149(a) in this respect.

8. Automobiles § 42a—

Nonsuit may not be allowed on the ground that plaintiff's own evidence established plaintiff's violation of a safety statute when such violation is not pleaded by defendant.

9. Automobiles § 42c— Evidence held not to show contributory negligence as matter of law on part of plaintiff in attempting to pass defendant's vehicle.

The collision in suit occurred when plaintiff's car, while in the act of

passing defendant's tractor-trailer travelling in the same direction, was struck when defendant driver attempted to turn left to enter a dirt road. Defendants contended that nonsuit should be entered upon testimony of a statement, introduced by plaintiff, that defendant driver gave a signal of his intention to turn. The witness further testified that the signal lights of defendant's vehicle would not blink when turned on but would come on and stay on, and were so covered with mud and scum that they could be seen at a distance of only 12 or 14 feet. *Held:* Nonsuit for contributory negligence should have been denied not only because the evidence was conflicting as to whether a proper turn signal was given, but also because it was a question for the jury whether the signal, if properly given, was given sufficiently in advance of the movement to require plaintiff to yield.

10. Automobiles § 8—

The giving of a signal for a left turn does not give the signaler an absolute right to make the turn immediately, regardless of circumstances, but the signaler must first ascertain that the movement may be made safely, and when the circumstances do not allow the signaler a reasonable margin of safety, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. G.S. 20-154(a).

11. Negligence § 26—

Nonsuit on the ground of contributory negligence may not be entered when it is necessary to rely in whole or in part upon defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence.

APPEAL by plaintiff from *Stevens, J.*, March 13, 1961, term of NASH.

This is a civil action to recover damages for injury to plaintiff's automobile in a collision with a tractor-trailer combination, driven by defendant Grimsley and owned or in the service of the other named defendants.

At the close of the evidence the court allowed defendants' motion for nonsuit and entered judgment dismissing the action.

Plaintiff appeals.

Fields & Cooper for plaintiff.

David E. Reid, Jr., James & Speight and W. H. Watson for defendants.

MOORE, J. The sole question is whether or not the court erred in granting nonsuit.

When considered in the light most favorable to plaintiff, the evidence tends to show: On 25 March 1960, about 8:30 A.M., plaintiff was owner of and a passenger in an automobile, driven by his son. It was drizzling rain. The automobile was proceeding eastwardly on

Highway 97 in or near Leggett. The driver observed a slow-moving tractor-trailer ahead, proceeding in the same direction. The highway was straight, and the speed of the automobile about 35 miles per hour. When about 50 yards from the tractor-trailer, the driver of the automobile sounded the horn and pulled to the left to pass. He saw "no indication of the blinker lights blinking off and on the" tractor-trailer. He "saw no signals whatsoever." As the automobile got even with the cab of the tractor, the tractor turned left to enter a narrow, dirt side-road or path at the north edge of the highway. There is no highway marker indicating a side road at this point. The bumper and left fender of the tractor struck the automobile on the right front fender just behind the head lights. The automobile "was close to two feet from the center line when the collision occurred." The tractor-trailer was to the right of the center line when the automobile started to pass. The investigating patrolman found "a little dirt on the center line and approximately 18 inches to 2 feet north or left of the center line." When he examined the electric turn signals on the tractor-trailer and turned them on, the lights on the rear "did not blink; they just came on and stayed on." All of the rear lights were completely covered with mud or road scum, and you could not see them over a distance of 12 or 14 feet to tell whether they were on or off. They were very dim." The driver of the tractor-trailer stated to the patrolman that "he looked in the mirror and did not see a vehicle behind him and that just as he started to turn he looked in the rear view mirror again, and the car was right up along side of him," and that "he gave a signal, but did not hear a horn blow."

Defendants offered evidence contradicting, in material part, most of plaintiff's evidence.

"Where the defendant introduces evidence G.S. 1-183 requires (on motion to nonsuit) a consideration of all the evidence; even so, it is clear that only that part of defendant's evidence which is favorable to plaintiff can be considered, since otherwise the court would have to pass upon the weight and credibility of the evidence." (Parentheses ours). 3 Strong's Index, Negligence, s. 24a, p. 471; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

From the evidence favorable to plaintiff the inference is permissible that defendants were negligent in that they failed to give a "plainly visible" signal of intention to turn left, did not keep a proper lookout, and did not heed plaintiff's warning horn, and that such negligence was a proximate cause of the collision. G.S. 20-154; *Jones v. Mathis,* 254 N.C. 421, 119 S.E. 2d 200; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538. Other inferences of negligence on the part of defendants may be drawn from the evidence, but they were not pleaded and cannot be

considered. There must be both allegation and proof. *Poultry Co. v. Equipment Co.*, 247 N.C. 570, 572, 101 S.E. 2d 458.

Defendants insist that plaintiff's evidence shows that he was contributorily negligent as a matter of law. It is the contention of defendants that the negligence of the automobile driver is imputed to plaintiff, owner-passenger, and therefore plaintiff was contributorily negligent in that the driver (1) failed to pass the tractor-trailer "at least two feet to the left thereof," G.S. 20-149(a), and (2) failed to keep a proper lookout and to give heed to defendants' turn signal.

The owner of an automobile, riding therein as a passenger, ordinarily has the right to control and direct its operation. The negligence, if any, of a party operating an automobile with the owner-passenger's permission or at his request is, nothing else appearing, imputed to the owner-passenger. *Shoe v. Hood*, 251 N.C. 719, 112 S.E. 2d 543; *Dosher v. Hunt*, 243 N.C. 247, 90 S.E. 2d 374; *Baird v. Baird*, 223 N.C. 730, 28 S.E. 2d 225.

The evidence, when considered as a whole, does not establish as an uncontradicted fact that plaintiff's automobile failed to pass at least two feet to the left of the tractor-trailer. G.S. 20-149(a) does not require a vehicle to pass "at least two feet to the left" of the center line of the highway; the requirement is that it pass at least two feet to the left of the other vehicle involved. The evidence on this point will admit of contrary conclusions and under proper pleadings would be for the jury. *Darden v. Bone*, 254 N.C. 599, 119 S.E. 2d 634. Defendants do not allege, either directly or indirectly, a violation of G.S. 20-149(a) on the part of plaintiff, and the failure of plaintiff to comply with that statute, in the absence of proper allegation, cannot be the basis for nonsuit or a jury verdict.

Defendants point out that plaintiff shows by the testimony of the patrolman that defendant Grimsley "said he gave a signal." And defendants insist that the declarations of the automobile driver that he did not see a signal only tend to show he was not keeping a proper lookout, and that on this point the case is controlled by the language in *Moore v. Boone*, 231 N.C. 494, 496, 57 S.E. 2d 783. Defendants overlook the testimony of the patrolman that the rear lights of the tractor-trailer would not blink when turned on, would come on and stay on, and were so covered with mud and scum that they were very dim and could be seen at a distance of only 12 or 14 feet away. Whether the lights would blink, and whether, if they would blink, they were "plainly visible" as required by G.S. 20-154, are questions for the jury. Furthermore, even if the lights were blinking and plainly visible, it was a question for the jury, under all the circumstances, whether plaintiff had the duty to yield. The giving of a turn signal

indicates the intention of the signaler to make the indicated turn and requires other motorists involved to observe caution and use reasonable care, but it does not vest in the signaler an absolute right to make the turn immediately, regardless of circumstances. The signaler must first ascertain that the movement may be made in safety. G.S. 20-154(a). When circumstances do not allow the signaler a reasonable margin of safety, other motorists affected have the right to assume he will delay his movement until it can be safely made. *Simmons v. Rogers*, 247 N.C. 340, 346, 100 S.E. 2d 849; *Ervin v. Mills Co.*, 233 N.C. 415, 419, 64 S.E. 2d 431.

Nonsuit on the ground of contributory negligence may not be entered when it is necessary to rely in whole or in part upon defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiff's evidence. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307.

The judgment below is

Reversed.

JULIA MAE PARKS AND CORNEVA BASS v. VENTERS OIL COMPANY, INC.

(Filed 11 October, 1961.)

1. **Contracts § 12—**

The contract of the parties must be interpreted as written, and it is only in case of doubt and uncertainty as to the meaning of the language used that judicial construction is necessary.

2. **Vendor and Purchaser § 2— Provisions giving both lessor and lessee option held not contradictory, the right of the one being subordinate to that of the other.**

Lessee constructed a filling station on the land of lessors and the lease gave lessors the option to purchase the equipment at a stipulated price, then gave lessee the option to purchase the land at a stipulated price, and then provided that if lessors elected to exercise their option they should give 60 days written notice and that in that event lessee might exercise its option to buy within the 60 day period. *Held:* Lessee had the right to exercise its option at any time during the term in absence of the exercise of their option by lessors, and in the event lessors gave written notice of their intention to exercise their option, lessee had the right to exercise its option within the 60 day period, and, thus construed, the provisions giving both parties, respectively, an option, are not contradictory, and are definite and enforceable. A subsequent section of the lease providing for the sale of lessee's product in the event lessors should

exercise their option, has no bearing upon the construction of the option agreement.

APPEAL by plaintiffs from *Burgwyn, E.J.*, April Civil Term, 1961, of SAMPSON.

Plaintiffs instituted this action to recover amounts allegedly owing by defendant as rent for May, 1959, and subsequent months, on a lot in Jacksonville Township, Onslow County, North Carolina, leased by plaintiffs to defendant in February, 1957.

In compliance with the terms of the lease, defendant erected on plaintiffs' lot a gasoline service station and necessary equipment for the operation thereof at a cost to defendant "of not less than $10,000.00." This was completed in April, 1957. The term of the lease was twenty years from said date of completion. Defendant was to pay each month, as rent, 1½ cents per gallon for gasoline sold by and through said service station. Defendant paid the rent through April, 1959.

Defendant denied it owed plaintiffs any rent. It alleged, as a further defense and cross action, that defendant, on April 27, 1959, notified plaintiffs, in accordance with the provisions of Section 4 of the lease, it was exercising its option to purchase the premises from plaintiffs as of May 1, 1959, for $10,000.00; and that, notwithstanding defendant was and is ready, able and willing to pay the purchase price of $10,000.00, plaintiffs refuse to execute and deliver a deed for said premises to defendant. Defendant prayed for specific performance.

In reply, plaintiffs alleged that, for reasons considered in the opinion, the provisions of Section 4 are void; but, if not void, defendant, under the circumstances, had and has no right to exercise the option.

By agreement, a jury trial was waived; and the hearing was limited to defendant's cross action.

In the lease, plaintiffs are designated "parties of the first part" and defendant is designated "party of the second part." Section 4 provides:

> "4. The parties of the first part are given the right and option to purchase from the party of the second part the said service station and all equipment, including tanks used in connection therewith, for the actual cost thereof to the party of the second part, plus interest on the monies invested at the rate of 6% per annum from the time invested. If the party of the second part should elect to purchase the premises from the parties of the first part, and the parties of the first part hereby give and grant to said party of the second part the right and option so to do, then the party of the second part may purchase the premises from the parties of the first part for the sum of $10,000.00 in cash, the same to be conveyed by the parties of the first part by Warranty Deed,

and free from all liens and encumbrances. If the parties of the first part should elect to purchase as hereinabove provided, they shall give the party of the second part at least 60 days written notice thereof, provided, however, that upon receiving such notice the party of the second part may then, and within said 60 day period, exercise its option to buy if it so elects."

The court made and stated its findings of fact and conclusions of law. In the first five findings of fact, the court reviewed the allegations in the pleadings and quoted Section 4 and also Section 7 of the lease. The remaining findings of fact and the court's conclusions of law are as follows:

"6. On 27 April 1959 the defendant, Venters Oil Company, Inc., by registered mail, notified plaintiffs that it desired to exercise the option as of the first day of May, 1959, and set a time and place for execution and delivery of the deed conveying the lands described in the complaint and in the option to defendant.

"7. On 2 May 1959 plaintiffs, through their attorney, notified defendant that plaintiffs 'will not, so long as they desire to hold on to the right and option given them in section 4 of said lease, execute a deed to any person, firm or corporation, for said property.'

"8. That the defendant, Venters Oil Company, Inc., was ready, willing and able on 27 April 1959, and at all times thereafter, to pay the purchase price for said lands in the amount of $10,000.00, and is now ready, willing, and able to make said payment upon delivery of deed conveying said property to defendant free from all liens and encumbrances.

"9. No actual tender of the purchase price in the amount of Ten Thousand Dollars ($10,000.00) was made by the defendant to plaintiffs until 13 April 1961, when the defendant, through its attorney, tendered to plaintiffs, through their attorney, the sum of $10,000.00, which tender was refused.

"10. The defendant is now in possession of the premises described in the complaint and is selling its gasoline in the station located thereon. The defendant has paid no rents to plaintiffs since May 1, 1959, on which date it offered to exercise its option.

"CONCLUSIONS OF LAW

"1. The plaintiffs, in the lease executed 4 February 1957, gave defendant an option to buy the property described in the lease for the sum of Ten Thousand Dollars ($10,000.00) in cash upon delivery of a warranty deed executed by plaintiffs' conveying said lands free of all liens and encumbrances.

"2. On 27 April 1959, within the option period, defendant notified plaintiffs that it exercised said option and demanded deed.

"3. On 2 May 1959 plaintiffs refused to convey, and by their refusal waived tender by defendant of the purchase price.

"4. The defendant is entitled to have plaintiffs execute and deliver their warranty deed conveying said property, free of all liens and encumbrances, upon payment of the purchase price of $10,000.00 with interest thereon from May 1, 1959."

Thereupon, the court entered judgment ordering that plaintiffs execute and deliver to defendant "a good and sufficient deed of conveyance in fee, with full warranties," upon the payment by defendant into the office of the clerk for plaintiffs' use and benefit "the sum of Ten Thousand Dollars ($10,000.00), with interest thereon from May 1, 1959."

Plaintiffs did not except to any of the court's findings of fact. They excepted to each conclusion of law and to the judgment and appealed.

P. D. Herring and David J. Turlington, Jr., for plaintiffs, appellants.
Hubbard & Jones for defendant, appellee.

BOBBITT, J. The question presented is whether defendant, under the provisions of Section 4, had the right and option, at any time during the term of the lease, to purchase the property from plaintiffs upon payment of $10,000.00 as purchase price therefor.

"Parties have the legal right to make their own contract, and if the contract is clearly expressed, it must be enforced as it is written. *Brock v. Porter*, 220 N.C. 28, 16 S.E. 2d 410. 'The contract is to be interpreted as written.' *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E. 2d 906, 907. The 'only office of judicial construction is to remove doubt and uncertainty.' 12 Am. Jur., Contracts, Sec. 229; *McCain v. Ins. Co.*, 190 N.C. 549, 130 S.E. 186; *Jones v. Realty Co., supra.*" *Johnson, J.*, in *Barham v. Davenport*, 247 N.C. 575, 101 S.E. 2d 367.

Plaintiffs contend the provisions of Section 4 are indefinite, contradictory, disclose there was no "meeting of the minds of the parties," and are therefore void. Careful consideration of Section 4 impels the conclusion that this contention is without merit.

Section 4 consists of three interrelated sentences. True, the options granted plaintiffs and defendant, respectively, in the first and second sentences, standing alone, would be contradictory in that the exercise of one would necessarily preclude the exercise of the other. However, these sentences do not stand alone. The third sentence subordinates plaintiffs' option and gives defendant's option priority. Under its ex-

press terms, plaintiffs' option may be exercised only *if* (1) plaintiffs give written notice to defendant of their election to exercise their option, and (2) defendant then fails to exercise its option within sixty days from the receipt of such notice.

There is no limitation as to the time within which defendant is entitled to exercise the option granted to it by the second sentence of Section 4 unless and until defendant is notified in writing that plaintiffs have elected to exercise the option granted to them by the first sentence. If and when so notified, defendant's *right to exercise its option is unimpaired.* However, in such event, defendant must exercise its option within sixty days after receipt of such notice.

Plantiffs contend the third sentence of Section 4 has no significance in the present factual situation. They base this contention on the fact plaintiffs have made no attempt to exercise the option granted to them in the first sentence. The contention is without merit. If defendant's right to exercise its option is unimpaired, except as to the limitation of time for the exercise thereof, by written notice of plaintiffs' election to exercise their option, it is not impaired by plaintiffs' failure to give such notice. It seems wholly unreasonable it was intended plaintiffs could defeat defendant's right to exercise its option simply by refraining from attempting to exercise their option.

Plaintiffs contend the lease, when considered in its entirety, discloses the provisions of Section 4 are indefinite and contradictory. But the only other provision of the lease to which plaintiffs direct attention is Section 7 thereof. Section 7 provides:

> "7. If the parties of the first part should purchase the building as herein provided it is understood and agreed that Venters Oil Company, Inc. shall have, and it is hereby given, the right to sell and dispense its products upon the premises and the parties of the first part shall not lease or sell the same to any other person or party during the remainder of the term of this Lease except upon written agreement with said person or party that he will or it will sell and dispense only such products as may be agreed upon with Venters Oil Company, Inc., the party of the second part. This covenant and agreement shall be construed as one running with the land."

In our view, and we so hold, the provisions of Section 7 cast no light on the proper construction of the provisions of Section 4. Section 7 would apply if, but only if, plaintiffs had exercised their option under circumstances giving them a right to do so under Section 4 as construed herein.

The decision reached is that the court's conclusions of law are correct and that the judgment of the court below should be, and it is, in all respects affirmed.

Affirmed.

LAWRENCE GATHINGS v. JOHN HENRY SEHORN.

(Filed 11 October, 1961.)

1. Appeal and Error § 42—

An exception to the charge will not be sustained when it clearly appears that the charge, construed contextually, presented the law of the case to the jury in such manner as to leave no reason to believe the jury could have been misled.

2. Appeal and Error § 45—

Appellant may not complain of alleged error in the charge in respect to an issue answered in appellant's favor.

3. Automobiles § 42k—

Conflicting evidence as to whether a construction worker had flagged plaintiff to a virtual stop and was hit when he turned his back to look for traffic from the opposite direction, or whether the workman had no flag in his hand, was standing with his back to plaintiff's car, and stepped backward into plaintiff's car without looking as plaintiff was driving his car slowly around a truck standing on the highway, *is held* to take the issue of plaintiff's contributory negligence to the jury.

APPEAL by plaintiff from *Craven, S.J.*, at April 1961 Special Civil Term of GASTON.

Civil action to recover damages for personal injuries.

Plaintiff, in his complaint, alleges, among other things, that on 21 February 1959, he was employed as a flagman on a construction crew working on Sugar Creek Road in Charlotte, North Carolina; that when so employed, he held a large red flag in his hand and directed traffic around a spot in the road where a gas pipeline was being installed; that on said date defendant, while driving in an easterly direction on said road, approached the spot where plaintiff was standing and holding a large red flag in a manner clearly visible to approaching traffic; that defendant suddenly and without any warning proceeded to drive his automobile into the plaintiff, knocking plaintiff down and injuring him; that the accident was proximately caused by defendant's negligence in that defendant: (a) Failed to maintain a

proper lookout; (b) failed to exercise due care to avoid colliding with a person upon a public highway, and failed to give warning by sounding his horn when necessary, and failed to exercise proper precaution while operating his automobile in violation of G.S. 20-174 (e); (c) failed to exercise due care in operating his automobile in violation of G.S. 20-140; (d) failed to exercise due care in the operation of his automobile in an area which was under construction, and where men were working; and (e) failed to maintain proper control over his vehicle under the road conditions then existing; and that plaintiff has been damaged in the sum of $50,000 as a result of defendant's negligence.

Defendant, in his answer, denies the material allegations of the complaint and specifically denies that plaintiff was working as a flagman at the time complained of.

As a further answer and defense, defendant alleges among other things that he was not negligent, and that any injury which plaintiff may have sustained was a proximate result of plaintiff's contributory negligence in that: (a) Plaintiff failed to keep a proper lookout; (b) plaintiff stepped backward into the side of defendant's automobile without first observing whether or not not such step could be made in safety; (c) plaintiff negligently placed himself in a hazardous position; and (d) plaintiff negligently failed to yield right of way to defendant who had the right of way.

At the trial in the court below plaintiff offered evidence tending to show, among other things, that on 21 February 1959, defendant was operating a 1952 Studebaker in an easterly direction and in the right-hand lane of Sugar Creek Road. The weather on that day was clear, and the road straight for four to six hundred feet up to the area where a construction crew was laying pipe on the shoulder of the road. The road is 18 feet wide where the collision took place, and it has a blacktop surface. The shoulders there are six feet wide each, and the speed limit there is 45 miles per hour. One yellow "caution" sign had been put out by the construction company facing the direction from which defendant came.

Plaintiff was employed by the construction company as a truck driver and on the date in question he was engaged in directing traffic on Sugar Creek Road by means of a red signal flag. At about 4:30 P.M., defendant's car came down the road. Plaintiff flagged him to stop, and he came to an almost dead stop. Plaintiff then turned his back to defendant to see if anything was coming from the other direction, and suddenly felt defendant's car hit him in the back, knocking him a distance of 5 or 6 feet, and throwing him against a dump truck which was being unloaded on the shoulder of the road. At the time

he was struck, plaintiff was standing 3 or 4 inches from the center line of the road, which line was 4 to 5 feet from the side of the aforesaid dump truck. The superintendent for the construction company testified that defendant told him after the collision that he had not seen the flagman, and that the flagman had stepped out into the road into his car. Plaintiff offered evidence of injuries which he sustained as a result of the collision, and rested.

Defendant, because of a heart condition, was unable to attend the trial, but offered as evidence the testimony of his wife which tended to show that she was a passenger in car driven by defendant on the afternoon in question. They were returning home along Sugar Creek Road toward Charlotte in a sort of southeasterly direction. Defendant stopped about 15 feet in front of the truck that was working on the side of the road and waited about five minutes until oncoming cars passed, because he couldn't proceed around the truck without crossing the white line. When the cars had passed, defendant proceeded at about two miles per hour. At the time, plaintiff was standing near the front bumper of the dump truck with his back toward the center of the road and his face turned away from defendant's car. Just as the car was opposite plaintiff, he took a step back without looking around at all, and his hips hit the side of the car between the headlight and the right side door.

The witness further testified that she did not see anything in the hands of plaintiff. She never saw a red flag in his hands. There were a lot of workmen near the truck along the edge of the road. "Mr. Gathings did not signal us to come on; he wasn't looking at us. He didn't signal us to stop. I saw him there."

At the close of all the evidence and upon the charge of the court, the following issues were submitted to the jury and were answered as indicated:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes.

"3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: _____."

Upon the coming in of the verdict, plaintiff moved to set aside the verdict and specifically to set aside the answer of the jury to the second issue. The motion was overruled and judgment was entered that plaintiff recover nothing of defendant, and that he be taxed with the costs of the action. From the signing of this judgment, plaintiff appeals to Supreme Court and assigns error.

Dolley & DuBose for plaintiff appellant.
Hollowell & Stott for defendant appellee.

WINBORNE, C.J. The plaintiff contends that the judge below committed prejudicial error in his charge to the jury in that he included the plaintiff's requested instruction on the issue of contributory negligence in the portion of his charge relative to the first issue, or defendant's negligence. This, the plaintiff contends, confused and misled the jury.

We cannot agree with this contention. The record reveals that the trial judge did explain a portion of the law relative to contributory negligence while discussing negligence, but the record also reveals that the judge made it clear to the jury that he was at that moment discussing "contributory negligence, which I will come to in the next issue." As this Court has often stated: "The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to leave no reasonable cause to believe it was misled or misinformed with respect thereto." *In Re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29; *Barnes v. Caulbourne,* 240 N.C. 721, 83 S.E. 2d 898; *Vincent v. Woody,* 238 N.C. 118, 76 S.E. 2d 356.

Plaintiff further assigns as prejudicial error the failure of the judge to charge the jury with reference to G.S. 20-174 (e) which provides that, "every driver of a motor vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary."

However, as was indicated in *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, this section of G.S. 20-174 states the common law rule of negligence. Since the jury found that defendant was negligent, failure to charge specifically on this statute would not be prejudicial to plaintiff.

Finally, plaintiff contends that the court erred by submitting the question of contributory negligence to the jury. We find no merit in this contention.

In *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903, the facts were similar to those in the instant case. In that case the trial court held the plaintiff-workman guilty of contributory negligence as a matter of law and granted nonsuit. On appeal, this Court, speaking through *Parker, J.,* outlined the rights and duties of a workman working upon a highway, and held that the issue of contributory negligence should have been submitted to the jury. In the present case the issue of contributory negligence was submitted to the jury, there being sufficient evidence to justify a finding either for or against plaintiff. Since the

jury found that plaintiff was guilty of contributory negligence, it would seem that plaintiff has had his day in court.

The case was fairly tried; the jury received proper instructions and rendered its verdict against plaintiff. We find no prejudicial error.

No error.

MARGARET STANCIL v. JOHN W. STANCIL.

(Filed 11 October, 1961.)

1. Appeal and Error § 19—

Where none of the assignments of error is supported by exceptions duly noted, review is limited to whether error of law appears on the face of the record, the appeal itself being taken as an exception to the judgment, but the appeal does not present the findings of fact or the sufficiency of the evidence to support them.

2. Divorce and Alimony § 21—

Where, in an action for divorce, an order for alimony *pendente lite* is entered which recites that the parties had agreed upon the amount of alimony and specifically decrees that the husband should pay the amount agreed upon, such judgment will support contempt proceedings for the willful refusal of the husband to pay the amount stipulated.

APPEAL by defendant from *Hooks, Special Judge,* May Civil Term 1961 of ONSLOW.

This is a contempt proceeding. The record discloses that plaintiff and defendant were married on 1 September 1958. No children were born of the marriage.

On 3 February 1960, the plaintiff instituted an action for alimony and reasonable counsel fees pursuant to the provisions of G.S. 50-16, alleging in her complaint that the defendant had become an excessive drinker; that he refused to provide food for the plaintiff, and had wrongfully turned her out-of-doors, etc.

On 3 March 1960, Judge Bundy, holding the courts of the Fourth Judicial District, upon application of plaintiff for alimony *pendente lite* and reasonable counsel fees, entered an order which in pertinent part is as follows:

" * * * IT APPEARING to the court that the parties hereto have agreed upon the amount of alimony *pendente lite* and reasonable counsel fees pending the final determination of this cause;

"IT IS NOW, THEREFORE, ORDERED that the defendant pay

to the plaintiff alimony and subsistence for herself the sum of $250.00 per month, beginning March 14, 1960, and continuing on the 14th day of each month thereafter until final determination of this action, said payments to be made in the office of the Clerk of the Superior Court of Onslow County."

The foregoing judgment was consented to by the attorneys for the respective parties.

On 30 May 1961, the plaintiff filed a motion and affidavit in this cause in which it was set forth that the defendant had wilfully refused to comply with the order of the court entered on 3 March 1960, and that he was in arrears in his subsistence payments in the amount of $2,400.00 as of 8 May 1961, and prayed that the defendant be required to appear and show cause why he should not be adjudged in contempt for his failure and refusal to comply with the aforesaid order. An order to show cause why he should not be adjudged in contempt was granted.

At the hearing pursuant to the order to show cause, the court found, among other things, that the defendant is an able-bodied person who has earned as much as $100.00 per week a greater portion of the time since the above order was entered by Judge Bundy, and that at the time of the hearing he was earning $65.00 per week. That the defendant has wilfully failed and refused to comply with the order of Judge Bundy, and was at the time of the hearing in arrears in payments due under the order in excess of $1,250.00.

Plaintiff and her counsel in open court agreed that plaintiff will not petition the court for further alimony *pendente lite* pending trial on its merits.

The court adjudged the defendant in contempt and ordered that he be confined in the common jail of Onslow County for a period of thirty days.

It was further ordered that the defendant might purge himself of contempt upon payment of the sum of $1,250.00 into the office of the Clerk of the Superior Court of Onslow County, to be disbursed in accordance with the order of Judge Bundy.

The defendant appeals.

James R. Strickland; Ellis, Godwin & Hooper for plaintiff appellee.
Joseph C. Olschner for defendant appellant.

DENNY, J. The appellant in his case on appeal undertakes to set out six assignments of error. However, no exceptions appear anywhere in the record, not even under the purported assignments of error. Even so, in the absence of any exceptions, or when exceptions have not been

preserved in accordance with the requirements of our Rules, the appeal will be taken as an exception to the judgment. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Therefore, in view of the state of the record on this appeal, we are limited to the question whether or not error appears on the face of the record.

Where no exceptions have been taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759; *Beaver v. Paint Co.,* 240 N.C. 328, 82 S.E. 2d 113; *Donnell v. Cox,* 240 N.C. 259, 81 S.E. 2d 664.

The defendant argues and contends that a contempt proceeding cannot be based on a consent judgment. *Holden v. Holden, supra; Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118; *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529; *Davis v. Davis,* 213 N.C. 537, 196 S.E. 819. An examination of these and similar cases reveals that the husband's obligation to make certain payments was based upon a contract merely sanctioned by the court and the court did not order the payments to be made as it did in the instant case.

Our cases hold that although a judgment may be entered by consent, based on a written agreement, if such judgment orders and decrees that the husband shall pay certain sums as alimony for the support of his wife, a wilful refusal to make the payments as directed therein will subject the husband in a proper proceeding to attachment for contempt. *Dyer v. Dyer,* 212 N.C. 620, 194 S.E. 278; *Davis v. Davis, supra; Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576; *Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370.

It will be noted in *Davis v. Davis, supra,* and *Holden v. Holden, supra,* the judgment entered in these respective cases did not order and direct the husband to pay anything, but merely recited what the parties had agreed upon. Hence, these and similar cases do not control the factual situation revealed on this record.

In the instant case, the court ordered that the defendant "pay to the plaintiff alimony and subsistence for herself the sum of $250.00 per month, beginning March 14, 1960, and continuing on the 14th day of each month thereafter until final determination of this action * * *."

The record does not reveal that the defendant has made any motion for a reduction of the amount of alimony or subsistence, by reason of inability to pay or for any other reason.

The case of *Webster v. Webster,* 213 N.C. 135, 195 S.E. 362, cited by the appellant, contains language that would seem to support the defendant's position. However, an examination of that opinion reveals

that the appeal merely involved a construction of the provisions of the consent judgment with respect to the rights of the parties. The question of contempt was not before this Court, and what was said in the opinion with respect to the judgment being nothing more than a contract between the parties, was mere *dictum,* and we so hold.

In our opinion, the facts found by the court below are sufficient to support the judgment entered, and no errors appear upon the face of the record which would warrant a reversal or a further hearing.

The judgment of the court below is

Affirmed.

T. A. WATKINS v. CITY OF WILSON, A BODY CORPORATE AND POLITIC; JOHN WILSON, MAYOR AND CHAIRMAN OF THE BOARD OF COMMISSIONERS OF THE CITY OF WILSON; THOMAS WATSON, JR., T. F. HACKNEY, WINETTE PETERS, H. P. BENTON, JR., EARL BRADBURY AND EDGER NORRIS, SERVING AS THE BOARD OF COMMISSIONERS OF THE CITY OF WILSON; MRS. CECIL NEWBERRY, MRS. T. L. NOE, MRS. ALBERT THOMAS, W. F. PEABODY, MRS. JOHN G. ASHE, JR., MRS. M W. SUTTON, JR., ALL BEING PRECINCT REGISTRARS APPOINTED FOR THE MAY 2, 1961, ELECTIONS OF THE CITY OF WILSON; MRS. GEORGE THOMAS DANIELS, MRS. W. F. THRASHER, W. L. MORRIS, GARY T. FULGHUM, JOHN HARRISS, MRS. ANNIE BISHOP, JANIE LIVERMAN, MRS. DOVERY WATSON, M. D. JAMES, MRS. RUSSELL LANDEN, MRS. H. T. BARKLEY, MRS. ROBERT PEARCE, ALL BEING PRECINCT, ELECTION JUDGES APPOINTED FOR THE MAY 2, 1961, ELECTIONS OF THE CITY OF WILSON.

(Filed 11 October, 1961.)

1. Constitutional Law §§ 4, 10—

While the Court has the power to declare an act of the Legislature void as contravening the constitution, the Court will exercise this power only at the instance of a person whose constitutional rights are adversely affected or threatened.

2. Elections §§ 4, 10—

The constitutionality of a statute requiring a vote for as many candidates as there are vacancies to be filled for the office of city commissioner may not be challenged by a candidate when he fails to show that the votes for him on ballots accepted plus the number of ballots rejected for failure of the elector to vote for the required number, could alter the result as to him.

APPEAL by plaintiff from *Stevens, J.,* June 1, 1961 Civil Term of WILSON.

This action was begun on 12 April 1961 when plaintiff filed his complaint alleging the charter of the City of Wilson as amended in 1957 prescribing the manner for electing city officials was unconstitutional and void, adversely affecting plaintiff's rights as an elector and candidate for the office of city commissioner at an election to be held on 2 May 1961.

The governing officials of the city are, by charter provision, a mayor and six commissioners. Nonpartisan elections are held in May in odd numbered years for the election of these city officials. Commissioners are elected at large by qualified voters of the city. A single ballot is provided containing the names of all who have given notice of their candidacy for the office of commissioner. The six candidates receiving the highest number of votes are the elected commissioners.

Section 3 of the Act of 1957 amending the charter provides: "No ballot for Commissioners shall be valid unless as many candidates shall be voted for as there are vacancies to be filled."

Plaintiff alleged: He was a candidate for the office of commissioner at the election to be held on 2 May 1961; he and many other electors were unwilling to comply with the requirements of the city charter and vote for a sufficient number of candidates to fill all vacancies; election officials would treat as invalid and refuse to count those ballots where the elector did not vote for six commissioners.

He asked the court to declare the statute requiring electors to vote for six commissioners void, and for an order requiring the officials to show cause why they should not be enjoined from complying with the statute.

The motion for the restraining order was presented to Judge Carr 21 April 1961. He, on that date, issued an order directing defendants to appear on 25 April before Judge Stevens, regularly assigned to hold the courts of the Seventh District. Judge Stevens heard the parties but declined to enjoin compliance with the statute. The election was held in accord with the statutory provision. The official ballot contained thirteen names, including plaintiff's. It informed electors:

"1. To vote for a candidate on the ballot make a cross x mark in the square at the left of his name.

"2. For legal ballot, vote for six candidates.

"3. If you tear or deface or wrongfully mark this ballot, return it to registrar and get another."

The election officials declared the six whose names were marked on ballots conforming to the statute duly elected. They received 2036, 1897, 1885, 1835, 1831, and 1332 votes respectively on complete ballots.

Plaintiff received a total of 211 votes on complete ballots, that is, ballots for six commissioners. There were a total of 761 ballots not

counted for any commissioner because of the failure of the elector to vote for the requisite number. Plaintiff's name appeared upon a substantial number of the 761 ballots not counted. Other names also appeared on the 761 ballots not counted, but on none of them as many as six names appeared. Subsequent to the election, plaintiff moved the court to declare the election void and the quoted statutory provision invalid because of asserted conflict with sections 10 and 37 of Art. I and sections 1 and 6 of Art. VI of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States.

At the hearing the parties stipulated the facts as summarized above. Judge Stevens, being of the opinion that the Act was constitutional, dismissed the action. Plaintiff appealed.

Romallus O. Murphy, Samuel S. Mitchell, and George R. Greene for plaintiff appellant.

Lucas, Rand and Rose for defendant appellees.

PER CURIAM. The power and duty of a court to declare an act of the Legislature void because it violates some constitutional provision was recognized in North Carolina as early as 1787. *Bayard v. Singleton,* 1 N.C. 42. Courts do not, however, exercise this power at the behest of one not adversely affected by the statute. They act only when necessary for the protection of some right guaranteed by the Constitution.

The rule was succinctly stated and aptly applied when the right of *Mr. Justice Black* to serve as a member of the Supreme Court of the United States was challenged. The Court, in denying the right to question the appointment, said: "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Ex parte Albert Levitt,* 302 U.S. 633, 58 S. Ct. 1, 82 L. ed. 493. We have consistently applied the rule so stated. *Greensboro v. Wall,* 247 N.C. 516, 101 S.E. 2d 413; *Fox v. Comrs. of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316; *Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453; *Sprunt v. Comrs. of New Hanover,* 208 N.C. 695, 182 S.E. 655; *Hill v. Comrs. of Greene,* 209 N.C. 4, 182 S.E. 709; *Yarborough v. Park Comm.,* 196 N.C. 284, 145 S.E. 563

On the admitted facts plaintiff is not in a position to call for a

determination of the constitutionality of the statutory provision. Even if credited with all rejected ballots, he would not have enough votes to change the result. The court correctly dismissed the action.

Affirmed.

ERNEST EDWARD TRUETTE v. TEXTRON, INC., AND LEWIS EUGENE QUINN.

(Filed 11 October, 1961.)

APPEAL by defendants from *Sharp, S.J.,* March 20, 1961, Special Civil Term of MECKLENBURG.

This is a civil action to recover for personal injuries and property damage suffered by plaintiff in a collision of motor vehicles at the intersection of North Tryon Street and Duls Lane in the City of Charlotte. The corporate defendant counterclaimed for damage to its vehicle.

North Tryon Street runs north and south and has four marked lanes for vehicular travel, two for northbound and two for southbound traffic. Duls Lane enters Tryon at an angle from the northwest and is about 32 feet wide at the entrance. It "dead-ends" at Tryon. Just south of Duls a railroad overpass crosses Tryon. To the south of the overpass Sixteenth Street enters Tryon from the east. (For a more detailed description of the intersections see *Shoe v. Hood,* 251 N.C. 719, 721, 112 S.E. 2d 543.) The traffic at the Sixteenth Street intersection is controlled by lights. At the Duls intersection traffic in the southbound lanes of Tryon are controlled by lights, but none of the lights face Duls. The lights at the two intersections are synchronized so that the lights facing Tryon traffic are either green or red simultaneously, for both southbound and northbound traffic. The maximum speed limit in this area is 35 miles per hour.

The collision occurred at 5:30 P.M. on 25 August 1958. Plaintiff was driving his automobile southwardly on Tryon in the outside or curb lane, and entered the Duls intersection. He was traveling downgrade. The street was damp. Defendant Quinn, driving a vehicle (station wagon) of the corporate defendant, proceeded northwardly on Tryon in the inside lane. At the intersection he turned left to enter Duls. The front of plaintiff's car collided with the right rear of the station wagon in the western curb lane of Tryon.

Plaintiff's evidence gives the following version of the occurrence: Plaintiff was traveling 20 miles per hour. The traffic light turned green

when he was two or three car lengths from the Duls intersection. Two cars ahead of him in the same lane proceeded through the intersection. There were vehicles to his left in the inside lane and to the best of his recollection were moving. He was watching traffic in both lanes. "A split second before the collision" the station wagon "whipped right out" in front of him. He was about 8 feet from it when he first saw it. He did not know where it came from. A vehicle in the inside lane was blocking his view. Defendant Quinn told the investigating officer that he stopped in the intersection and a driver in the inside lane for southbound traffic motioned him to continue his left turn, which he did, and that he hadn't seen plaintiff's vehicle until it was about 10 feet away, and it was then too late to stop.

Defendants' evidence tends to show: Defendant Quinn came under the overpass and stopped. Cars going south in the curb lane passed a truck standing in the inside lane at the stop light. Quinn waited a few seconds and the truck driver motioned him to make the left turn. He had a pretty good view of the curb lane for a distance north. Across the hood of the truck he could see 25 to 30 feet north. The nearest he could see behind the truck was 300 to 400 feet. He saw one car behind the truck 300 to 400 feet away. He proceeded to make his turn. When he saw plaintiff's car he was half way across the curb lane. He didn't know where it came from. Plaintiff was about 100 feet away. Quinn speeded up as much as he could but plaintiff struck the last two feet of the station wagon. Plaintiff did not apply brakes until he was alongside the truck.

Appropriate issues were submitted to and answered by the jury. The jury answered the issues in favor of plaintiff and awarded him damages.

From judgment upon the verdict defendants appealed and assigned errors.

Bell, Bradley, Gebhardt, DeLaney & Millette for plaintiff.
John H. Small for defendants.

PER CURIAM. Defendants make fifteen assignments of error, based on thirty-eight exceptions. We have carefully considered them all, and we find no error sufficiently prejudicial to warrant a new trial. Plaintiff's evidence was sufficient to make out a *prima facie* case of actionable negligence on the part of defendants. The case was submitted to the jury on instructions free of prejudicial error. It was a matter for the twelve. The jury's factual determinations are conclusive on appeal. We find no new proposition of law justifying extended discussion.

In the trial below we find

No error.

LAWRENCE H. HUNNICUTT v. SHELBY MUTUAL INSURANCE COMPANY, OF SHELBY, OHIO.

AND

PATRICIA ANN HUNNICUTT, BY HER NEXT FRIEND, LAWRENCE H. HUNNICUTT v. SHELBY MUTUAL INSURANCE COMPANY, OF SHELBY, OHIO.

(Filed 18 October, 1961.)

1. Pleadings §§ 2, 19—

Where the complaint contains statements in the alternative, one of which would support the cause of action and the other negate it, the conflicting allegations neutralize each other, but such defect would constitute a defective statement of a good cause of action, and therefore if a demurrer *ore tenus* is sustained, plaintiffs would have legal right to move for leave to amend. G.S. 1-131.

2. Appeal and Error § 1—

Where a new trial is awarded on one ground, the Supreme Court need not decide whether a new trial should also be awarded on another ground.

3. Judgments § 3; Insurance § 65—

Where the injured party obtains judgment against insured on the ground of insured's negligent operation of the automobile in question, without adjudication of insured's ownership of the vehicle, insurer is not estopped by such judgment in a subsequent action against it by the injured party from setting up the defense that insured was the owner of the vehicle and that such vehicle was not the one described in the policy, and therefore was not covered thereby.

4. Insurance §§ 54, 56—

In a suit by the injured party against insurer to recover the amount of a judgment theretofore obtained against insured upon the ground that the vehicle causing the injury, although not described in the policy, was covered thereby under its provision extending liability to vehicles not owned by the insured but used by him temporarily as a substitute for the described vehicle when the described vehicle was withdrawn from use because of a breakdown, the burden is upon plaintiff to prove that the vehicle in question was not owned by insured and was used by him temporarily for the reason and purpose set forth in the policy.

5. Same — Peremptory instruction to answer issue involving reason for insured's use of vehicle belonging to another, held prejudicial.

The liability of insurer for the amount of a judgment obtained against the insured by the injured third party was dependent upon whether the vehicle in question, although not described in the policy, was not owned by insured but was used by him temporarily as a substitute because of breakdown of insured's vehicle. Plaintiff relied largely on testimony of insured and his mother elicited on cross-examination, which testimony was conflicting and given by interested witnesses. *Held:* It was prejudicial error for the court to instruct the jury that if they answered the issue of insured's ownership of the vehicle in the negative and found the facts to

be as the other evidence tended to show, to answer the issue as to whether such vehicle was covered by the policy in the affirmative, the credibility of insured's testimony that he was operating the car involved in the collision because the car described in the policy had broken down, being for the determination of the jury.

6. **Trial § 31—**

A peremptory instruction to the jury to answer the issues as indicated if they found the facts as all of the evidence tends to show, is incomplete, the proper form being for the court to add that if the jury did not so find the facts, to answer the issue in the negative, since the court must leave it to the jury to determine the credibility of the evidence.

APPEAL by defendant from *Campbell, J.*, Regular February Term, 1961, of BUNCOMBE.

Two civil actions, consolidated for trial, to recover on an automobile liability insurance policy issued by defendant to John Robert Huskey.

The policy was in force on February 2, 1959, when *a 1947 Chevrolet,* operated by Huskey, collided with an automobile owned and operated by Lawrence H. Hunnicutt in which Patricia Ann Hunnicutt was a passenger. In prior actions, it was established that Huskey's negligence was the cause of the collision and of damages sustained by plaintiffs; and each plaintiff obtained a final judgment against Huskey. Executions issued thereon were returned unsatisfied and no part thereof has been paid. These actions are to recover from defendant the amount of Huskey's legal liability to plaintiffs as established by said judgments. A copy of the policy and of the judgment in the prior action was attached to each complaint.

The automobile specifically described in the policy issued by defendant to Huskey is *a 1953 Ford.* It was not involved in said collision.

Plaintiffs alleged the 1947 Chevrolet "was owned by either John Robert Huskey, his mother or some other member of his household." They alleged the policy covered Huskey's *temporary use* of the 1947 Chevrolet on the occasion of the collision.

Answering, defendant denied liability for Huskey's operation of the 1947 Chevrolet, alleging, *inter alia,* that the 1947 Chevrolet, at the time of the collision, was owned by Huskey.

Plaintiffs seek to recover under this policy provision: "IV . . . (a) . . . except where stated to the contrary, the word 'automobile' means: . . . (3) TEMPORARY SUBSTITUTE AUTOMOBILE—under coverages A, B and division 1 of coverage C, an automobile not owned by the named insured or his spouse if a resident of the same household, while temporarily used as a substitute for the described automobile, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

In each case, the court submitted and the jury answered these issues:

"1. Was John Robert Huskey the owner of the Chevrolet automobile referred to in the Complaint, on the 2nd day of February, 1959? ANSWER: No.

"2. If so, did John Robert Huskey have outstanding a policy of insurance covering the operation of the Chevrolet automobile, as alleged in the Complaint? ANSWER: Yes."

In each case, judgment was entered in favor of plaintiff for the amount of the judgment such plaintiff had obtained in the prior action against Huskey, together with interest from the date of such prior judgment, and costs. The amounts were within the limits defined in the policy.

Defendant excepted and appealed.

Fisher, Fowler & Sigmon and Willson & Riddle for plaintiffs, appellees.

Van Winkle, Walton, Buck & Wall, Herbert L. Hyde and Roy W. Davis, Jr., for defendant, appellant.

BOBBITT, J. Before evidence was offered, defendant demurred *ore tenus* to each complaint on the ground the facts alleged did not state a cause of action. Specifically, they pointed out plaintiffs' allegation that the 1947 Chevrolet, operated by Huskey on the occasion of the collision, "was owned by either John Robert Huskey, his mother or some other member of his household." Thereupon, this entry was made: "COURT: Let the record show I overruled the demurrer ore tenus at this time." Defendant excepted. No other entry with reference to defendant's said demurrers *ore tenus* appears in the record. Nor does it appear that plaintiffs amended their complaints or requested leave to do so.

In 41 Am. Jur., Pleading § 221, cited in *Lindley v. Yeatman*, 242 N.C. 145, 151, 87 S.E. 2d 5, and in *Lewis v. Lee*, 246 N.C. 68, 72, 97 S.E. 2d 469, it is stated: "Where, however, the complaint alleges in the alternative two statements of fact, one of which would be legally sufficient to constitute a cause of action and the other not, they neutralize each other, and demurrer will lie."

In *Lindley v. Yeatman, supra*, this Court, in opinion by *Johnson, J.*, said: "Moreover, where in stating a single cause of action the complaint alleges two repugnant statements of facts, the repugnant allegations destroy and neutralize each other, and where, with the repugnant allegations thus eliminated, the remaining averments are insufficient to state a cause of action, demurrer will lie." This excerpt is

quoted by *Winborne, C.J.*, in *Lewis v. Lee, supra.* See also McIntosh, N. C. Practice and Procedure, § 353; 71 C.J.S., Pleading §§ 41, 42 and 230(b).

If Huskey owned the 1947 Chevrolet at the time of the collision, the policy did not cover his legal liability. However, if the 1947 Chevrolet was then owned by his mother or some member of his household (other than his spouse, if any), the policy did cover Huskey's legal liability *provided* his 1953 Ford, specifically described in the policy, was "withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction," *and* he was using the 1947 Chevrolet temporarily as a substitute therefor.

The allegations of the complaints do not affirmatively disclose a defective cause of action, that is, that plaintiffs have no cause of action against defendant. If the demurrers *ore tenus* had been sustained, plaintiffs would have had the legal right to move under G.S. 1-131 for leave to amend their complaints in such manner as to remedy the defect in their factual allegations. *Davis v. Rhodes,* 231 N.C. 71, 56 S.E. 2d 43; *Skipper v. Cheatham,* 249 N.C. 706, 711, 107 S.E. 2d 625; *Johnson v. Graye,* 251 N.C. 448, 111 S.E. 2d 595.

We deem it unnecessary to determine whether, under the circumstances here considered, the court's failure to sustain defendant's demurrers *ore tenus* is sufficient ground for the award of a new trial. Having reached the conclusion that defendant is entitled to a new trial on other grounds, attention is called to the fact that plaintiffs may move under G.S. 1-163 for leave to amend their complaints.

Defendant's assignment of error directed to the court's denial of its motions for judgments of involuntary nonsuit is without merit. *Jackson v. Casualty Co.,* 212 N.C. 546, 193 S.E. 703, cited by defendant, is readily distinguishable. Suffice to say, the judgments obtained by plaintiffs in their prior actions against Huskey disclose that no issue was submitted or determination made *as to the ownership* of the 1947 Chevrolet.

While plaintiffs' allegations as to the ownership of the 1947 Chevrolet were as stated above, plaintiffs offered evidence tending to show the 1947 Chevrolet, at the time of the collision, was owned by Mrs. Ellie Huskey, Huskey's mother. This evidence consists largely of the testimony of Huskey and of his mother. Their testimony, considered in the light most favorable to plaintiffs, tends to show the facts set out in the following numbered paragraphs:

1. On February 2, 1959, Huskey worked for Redwood Furniture Company. On that date, and prior thereto, he lived with his mother.

2. Huskey had owned a 1949 Ford. He bought it from his brother.

When he "couldn't finish paying for" it, he gave it to his mother and she "paid it off."

3. In the summer of 1958, Huskey bought the 1947 Chevrolet from a used car dealer for $100.00. His name was "put on the title," but he did not apply for "a new title." The tags of the former owner were left on the car.

4. A month or so after Huskey purchased the 1947 Chevrolet, he was arrested and fined for driving it without having procured liability insurance thereon. It was then taken to the Huskey home and parked. On that very day, Huskey and his mother traded cars.

5. In their trade, Huskey's mother received the 1947 Chevrolet. He gave her "the switch keys, and the title, and the bill of sale on it," but did not then "have the title transferred to her name." In exchange, he received the 1949 Ford he had previously owned and was to receive $50.00. In December, 1958, he traded the 1949 Ford "on this '53 Ford." He then applied for and obtained liability insurance on the '53 Ford. The policy is an assigned risk policy because Huskey was "under 25."

6. From the time he "was caught on the Square for driving it without insurance." Huskey did not again drive the 1947 Chevrolet until February 2, 1959, the day of the collision. Until then, his mother drove it "what little bit it was used."

There are contradictions and discrepancies in the testimony of Huskey as indicated by these excerpts from his testimony on cross-examination: "I am talking about the same automobile, the Chevrolet. I just did not have the money to buy liability insurance at that time so I parked my car. I liked the car and decided to keep it. Around the first of the year, I saw this '53 Ford I have described, and I decided I would like it in addition to my Chevrolet." Again: "I kept both the Ford and Chevrolet at my house sitting out in the yard. It is right that I was just about the only driver of the Chevrolet and also the Ford. Occasionally my mother might drive the Chevrolet, and occasionally she might drive the Ford, but I did most of the driving in the family. Actually, I kept the Chevrolet more or less to fiddle with. I put a new motor in it and put a lot of work in it. I used the Chevrolet around our farm a lot to haul groceries, feed, etc."

In plaintiffs' prior actions, Mrs. Ellie Huskey was named as a co-defendant. Answering, Mrs. Ellie Huskey denied she owned the 1947 Chevrolet at the time of said collision and Huskey asserted his ownership thereof; and, in the Lawrence H. Hunnicutt (prior) case, Huskey alleged a cross action for damages to *his* 1947 Chevrolet. The records of said prior actions disclose that the issues submitted and the judgments rendered did not involve Mrs. Ellie Huskey. There was evidence

that Huskey had testified in the trial of said prior actions, and had stated on other occasions, that he was the owner of the 1947 Chevrolet at the time of the collision.

Further discussion of the evidence relating to the ownership of the 1947 Chevrolet at the time of the collision is deemed unnecessary. Suffice to say, no document or memorandum relevant to the ownership of the 1947 Chevrolet was offered; and plaintiffs' cases depended largely upon the credibility of the testimony of Huskey and of his mother.

The credibility of their testimony was challenged by the evidence as to their pleadings in the prior actions, by evidence as to Huskey's testimony therein, by testimony as to Huskey's prior declarations, and by Huskey's testimony on cross-examination. Moreover, Huskey and his mother were interested witnesses. If verdicts and judgments were rendered in favor of plaintiffs herein, the payment thereof by defendant would extinguish Huskey's personal liability under the judgments rendered against him in said prior actions. Moreover, as long as the judgments against Huskey in the prior actions remain unpaid, Huskey's ability to obtain operating privileges is seriously impaired. G.S. 20-279.13 *et seq.* The interest of Mrs. Huskey is on account of her relationship to and interest in her son.

We forego discussion of assignments of error directed to the court's instruction relating to the first issue. Suffice to say, the court instructed the jury at length with reference thereto. After doing so, the court gave this, and only this, instruction with reference to the second issue:

> "(If you answer the first question NO, the Court instructs you that you would then answer the second question YES, as a matter of law, provided you find the facts to be as all the rest of the evidence tends to show. If you find the facts to be as all the rest of the evidence shows, and you answer the first question NO, then you would answer the second question YES.) On the other hand, if you answer the first question YES, and likewise find the facts to be as all of the rest of the evidence tends to show, then you would answer the second question NO."

Defendant assigns as error, based on exception aptly noted, the two sentences enclosed by parentheses.

Defendant did not tender issues or except to the issues submitted by the court. Even so, analysis of the issues submitted discloses the following: The first issue reads: "1. Was John Robert Huskey the owner of the Chevrolet automobile referred to in the Complaint, on the 2nd day of February, 1959?" Under an issue so phrased, the court properly placed the burden of proof on plaintiffs to establish that Huskey was *not* the owner. Hence, the answer, "No," was in plain-

tiffs' favor. The second issue reads: "*If so,* did John Robert Huskey have outstanding a policy of insurance covering the operation of the Chevrolet automobile, as alleged in the Complaint?" (Our italics) The wording of the second issue was erroneous and confusing. The words, "If not," instead of the words, "If so," would have been appropriate. Indeed, an affirmative answer to the first issue would have defeated plaintiffs' right to recover; and if the jury answered the first issue, "Yes," it would not reach the second issue.

Apart from the foregoing, defendant contends the challenged portion of the peremptory instruction with reference to the second issue was error.

It is first noted that the first sentence in said challenged portion contains the clause, "provided you find the facts to be as all the rest of the evidence tends to show," while the second sentence contains the clause, "(i)f you find the facts to be as all the rest of the evidence shows." Defendant contends this instruction indicated the court accepted as credible the testimony of the witnesses offered by plaintiffs, that no factual determination was to be made by the jury in connection with the second issue and that the second issue was to be answered as a matter of law depending solely upon the jury's answer to the first issue.

Assuming Huskey was not the owner of the 1947 Chevrolet, the burden of proof was on plaintiffs to establish by the greater weight of the evidence that Huskey was using the 1947 Chevrolet temporarily "as a substitute for the described automobile (1953 Ford) when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction." *Ransom v. Casualty Co.,* 250 N.C. 60, 108 S.E. 2d 22.

The portion of Huskey's testimony most favorable to plaintiffs tends to show Huskey was accustomed to drive the 1953 Ford to and from his place of work; that, when he started home from work on the night of February 1, 1959, "the front end started making a noise"; that upon checking the 1953 Ford that night he found the wheel bearings were bad; that he parked the 1953 Ford at his home until he had opportunity to make or have made the needed repairs; and that on February 2, 1959, he was driving the 1947 Chevrolet as a temporary substitute for the 1953 Ford. This testimony, if believed, was sufficient to bring the 1947 Chevrolet within the coverage of the policy. Even so, and apart from the evidence bearing upon Huskey's credibility, there was also in the evidence Huskey's testimony, elicited on cross-examination and quoted above, that he kept "both the Ford and Chevrolet" at his house and was "just about the only driver of the Chevrolet and also the Ford." From this evidence, the jury may have

found that Huskey was accustomed to drive the 1947 Chevrolet as well as the 1953 Ford; and, if so, the jury could have rejected entirely Huskey's testimony as to why he was driving the 1947 Chevrolet on February 2, 1959.

Whether plaintiffs had satisfied the jury from the evidence and by its greater weight that Huskey on February 2, 1959, was driving the 1947 Chevrolet temporarily "as a substitute for the described automobile (1953 Ford) when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction," was the only factual determination to be made by the jury in connection with the second issue. No instruction was given as to what facts the jury must find in order to answer the second issue, "Yes." Indeed, we find nothing in the charge to indicate the jury was instructed that plaintiffs were required to establish by the greater weight of the evidence the factual element involved in the second issue. The jury was instructed to answer the second issue, "Yes," provided they found the facts to be "as all the rest of the evidence tends to show." Surely, if the jury believed the evidence elicited from Huskey on cross-examination, quoted above, and the evidence as to prior conflicting statements made by plaintiffs' principal witnesses, the jury would not be required, as a matter of law, to answer the second issue, "Yes." Moreover, no instruction whatever was given as to how the jury should answer the second issue if it *did not* "find the facts to be as all the rest of the evidence tends to show."

". . . when a peremptory instruction is permissible, conditioned upon the jury finding the facts to be as all the testimony tends to show the court must leave it to the jury to determine the credibility of the testimony." *Shelby v. Lackey*, 236 N.C. 369, 72 S.E. 2d 757; *Reynolds v. Earley*, 241 N.C. 521, 526-527, 85 S.E. 2d 904. This rule applies with full vigor when, as here, the credibility of the testimony of the witnesses offered by the party having the burden of proof is seriously challenged. Clearly, the jury should have been instructed that, if they failed to find the facts to be as plaintiffs contended, it should answer the second issue, "No." The instruction given would seem to exclude this possibility. *Shelby v. Lackey, supra; Reynolds v. Earley, supra.*

Under the circumstances, and for the reasons stated, it is our opinion, and we so hold, that the challenged peremptory instruction was inadequate and erroneous, and that defendant is entitled to a new trial.

New trial.

IN THE MATTER OF THE WILL OF
LANIE ROUSE WILLIAMS SUMMERLIN, DECEASED.

(Filed 18 October, 1961.)

1. Appeal and Error § 19—

The rule requiring that an assignment of error be supported by an exception duly noted in the record is mandatory and will be enforced.

2. Judgments § 22—

A judgment may not be set aside under G.S. 1-220 on the ground that the judgment was taken against movant through his mistake, surprise, or excusable neglect when the motion to set aside the judgment is not made until more than one year after its rendition.

3. Appeal and Error § 21—

A sole exception to the order denying a motion to set aside a judgment presents only whether error of law appears on the face of the record proper, which includes whether the judgment sought to be set aside is regular in form and supported by the verdict.

4. Judgments § 27: Wills § 25— Sole exception to order denying motion to set aside judgment will not be sustained when no error of law appears on face of record.

Where the record discloses that a court having jurisdiction entered judgment for propounder upon the verdict of the jury establishing that the paper writing was executed according to the formalities required by law, that testatrix had sufficient mental capacity to execute same, and that it was not procured by undue influence, the denial of a motion to set aside the judgment on the ground that it was in fact a consent judgment will not be disturbed upon a sole exception to the order denying the motion, there being nothing in the record to suggest that movant asked the court to hear any evidence, offered to present any, or asked the court to find any facts, and there being no error of law appearing upon the face of the record proper in the caveat proceeding.

5. Wills § 12—

The filing of a caveat to a paper writing propounded in common form confers jurisdiction on the Superior Court to try the issue of *devisavit vel non* raised by the caveat.

6. Courts § 3—

The Superior Court of a county is a court of general State-wide jurisdiction.

APPEAL by movent from an order of *Mintz, J.*, denying his motion in the cause at April 1961 Term of LENOIR.

John G. Dawson, Alvin Outlaw and George B. Greene for Propounders, Appellees.

Charles L. Abernethy, Jr., for Appellant (Caveator-Movent), L. S. Summerlin.

PARKER, J. This appears on the face of the record proper:

Lanie Rouse Williams Summerlin, a resident of Lenoir County, died testate on 26 August 1954. On 31 August 1954 her purported will was admitted to probate in common form, and testamentary letters were issued by the court to the executrix therein named.

On 5 January 1955 Lewis S. Summerlin, husband of the deceased testatrix, filed a caveat to the purported will of his deceased wife, in which he alleged that it was not her last will and testament, because its execution was procured by undue influence on the part of some of the propounders, and because of lack of testamentary capacity. The propounders filed an answer denying the allegations of undue influence and lack of testamentary capacity, and averring the purported will was valid as her last will and testament.

The issue of *devisavit vel non* raised by the caveat came on to be heard before Stevens, J., and a jury at 7 October 1957 Term of Lenoir County. The jury found by its verdict that the paper writing propounded was executed by Lanie R. Williams Summerlin according to the formalities required by law to make a valid last will and testament, that at the time of the execution of the paper writing Lanie R. Williams Summerlin had sufficient mental capacity to make and execute a valid last will and testament, that it was not procured by undue influence, and that the paper writing propounded, and every part thereof, is the last will and testament of Lanie R. Williams Summerlin, deceased.

Judge Stevens signed a judgment, in which after reciting that this caveat came on to be heard before him and a jury, and after being heard, the following issues were submitted to and answered by the jury as follows, and then after setting forth the issues and the answers by the jury thereto verbatim, he ordered and decreed that the paper writing propounded as the last will and testament of Lanie R. Williams Summerlin, and every part and clause thereof, is her last will and testament.

On 22 April 1960 Lewis S. Summerlin, the caveator, filed a motion in the cause praying that the court vacate the judgment heretofore entered sustaining his deceased wife's will on the alleged grounds: one, the judgment was taken against him through his mistake, inadvertence, surprise, or excusable neglect; two, the judgment entered was not based upon findings of fact or the answering of issues by a jury; three, his attorney had no power or authority to enter into any consent judgment and "in fact entered into the judgment at a time and after the caveator had objected to the terms"; four, the court was without jurisdiction to enter the judgment. Propounders filed an answer denying the motion's allegations.

The motion came on to be heard before Judge Mintz, who entered an order denying it. Movent excepted to the signing of the order, and appealed to the Supreme Court. This is the only exception movent has.

Movant assigns as errors that Judge Mintz found no facts, and that he erred in not hearing any evidence, though movent and witnesses were present for the purpose of testifying. However, these assignments of error are not before us for decision for the reason that they are not supported by any exception, and we have held repeatedly that an assignment of error not supported by an exception will be disregarded. The rule is mandatory and will be enforced. Our cases to that effect are legion. *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564, where many of the cases are cited; *Moore v. Owens,* 255 N.C. 336, 121 S.E. 2d 540; *Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306.

Nevertheless we note these facts: Movant prays that the judgment be vacated, but he does not request that the jury's verdict be vacated. There is nothing in the record to suggest that movant asked Judge Mintz to hear any evidence, or offered to present any, or asked him to find any facts. Movent cannot avail himself of the provisions of G.S. 1-220 in respect to relief from a judgment taken against him through his mistake, etc., because the judgment was entered at the 7 October Term 1957, and the motion was filed 22 April 1960.

Movant's exception to the order denying his motion, which is the only question presented for decision, raises the question whether any error of law appears on the face of the record proper. This includes the question whether the judgment movent prays be vacated is regular in form and supported by the verdict. *Webb v. Gaskins, supra,* and cases cited; *Moore v. Owens, supra;* Strong's N. C. Index, Vol. I, Appeal and Error, § 21, page 91, *et seq.,* where numerous cases are cited.

It is manifest from the face of the record proper that the superior court of Lenoir County had jurisdiction over the subject matter of the proceeding and of the necessary parties thereto, the exercise of which jurisdiction by it upon a matter of which it had power to take cognizance was invoked by movent, when he filed the caveat. Further, the superior court of Lenoir County is a court of general state-wide jurisdiction, *Jackson, Long, Johnson, Evans, Swann v. Bobbitt,* 253 N.C. 670, 117 S.E. 2d 806, and a *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter, *Williamson v. Spivey,* 224 N.C. 311, 30 S.E. 2d 46.

The face of the record proper shows that the jury heard the issue of *devisavit vel non* raised by movant's caveat, and answered the issues submitted to them. Judge Stevens' judgment is in accord with

and supported by the jury verdict. No error of law appears upon the face of the record proper. Judge Mintz's order is regular in form. The order of the lower court is

Affirmed.

IN RE EDWARD SPENCE, NORA SPENCE, AND MAMIE SPENCE.

(Filed 18 October, 1961.)

APPEAL by petitioner from *Hooks, S. J.*, April 1961 Term of WAYNE.

Edna S. Bailey, mother of the named infants, filed a petition alleging she then had custody of Edward, the oldest child; Zeno Spence, father of the children, had custody of the two youngest; the home maintained by the father was not a suitable place for the children to live, nor was respondent a suitable person to have the custody of the children.

The father answered, denying the allegations with respect to his fitness to have custody. He asserted petitioner abandoned him and the children in September 1957. She went to Nevada and in November 1957 obtained a divorce from respondent, who was by that decree awarded custody of all three children. He had had the care and custody of the children since petitioner abandoned them. He alleged petitioner who had remarried in December 1957, was not a proper person to have custody.

Judge Hooks, after hearing the evidence, made findings of fact. He found respondent to be a fit and suitable person and his home a suitable place for the rearing of the children. His eighth finding reads: "That the best interest and welfare of said three minor children will be served and promoted by being in the care and custody of the respondent, their father, with some regular period of visitation with the petitioner, their mother."

Based on the findings, the court awarded custody to the father, but permitted petitioner to have custody from 15 June to 15 August each year. From the judgment so entered petitioner appealed.

Braswell & Strickland for petitioner appellant.

Paul B. Edmundson, Jr. and William A. Dees, Jr. for respondent appellee.

PER CURIAM. There are no exceptions to the findings of fact. The

judgment awarding custody based on the findings, particularly finding number 8, was properly entered. *In re Gibbons,* 245 N.C. 24, 95 S.E. 2d 85; s.c. 247 N.C. 273, 101 S.E. 2d 16.

The exception to the admission in evidence of letters from petitioner commending respondent for the manner in which he had cared for the children is without merit. They contradict the assertion now made that respondent has always neglected his children.

Affirmed.

GROVER C. STOWE, JR., AND WIFE, CAROLINE M. STOWE, v. HARRY W. BURKE AND GREENTREE CORPORATION.

(Filed 1 November, 1961.)

1. Injunctions § 7— Purchaser may enjoin seller from using adjacent property for particular use in violation of representations inducing the purchase.

In an action by purchasers of a lot to restrain the seller from proceeding with the construction of apartment houses on an adjacent development over which the seller had acquired control, equity may grant the injunctive relief upon allegations and evidence that as a material inducement for the purchase of the lot, the seller had represented that the adjacent development would be restricted to single-family dwellings, and that such contemplated use was in violation of zoning regulations, and the fact that at the time of the institution of the action the seller had begun construction and expended a small per cent of the total cost of the apartment houses does not preclude the equitable relief, there being findings supported by evidence that such expenditures were not made in good faith.

2. Municipal Corporations § 25—

When the owner of property has begun construction of buildings for a then lawful use, under authority of a building permit, and has expended funds in good faith for such construction at the time of the enactment of an ordinance prohibiting such use, such owner ordinarily has the right to complete such structures for such nonconforming use.

3. Same—

When at the time of commencing construction for a particular use the owner knows of the pendency of an ordinance proscribing such use and the hostility of owners of land in the neighborhood to such use, and commences such construction and hurries it along for the purpose of coming within the provisions of zoning regulations as to existing nonconforming uses, and there are findings supported by further evidence that the commencement of such construction was not done in good faith, such

owner does not have a vested right to complete the structure for the nonconforming use.

BOBBITT, J., concurs in result.

HIGGINS, J., dissents.

APPEAL by defendants from *Crissman, J.*, at August 14th Schedule A Civil Term of MECKLENBURG.

Civil action to enjoin defendant from erecting apartment houses on property adjoining that of plaintiffs.

By stipulation, the parties through their respective counsel agree that in accordance with Rule 19 of Rules of Practice of the Supreme Court only the First, Second and Fourth causes of action together with record proper shall constitute the case on appeal.

Plaintiffs in their complaint allege these causes of action: The First, based on fraudulent misrepresentations and concealment by defendant Burke; the Second, based on estoppel by the representations and promises of defendant Burke; and the Fourth, based on violation of the zoning ordinances of the city of Charlotte, North Carolina. Thus plaintiffs pray that defendants be enjoined from proceeding with the construction of any apartment building or multiple dwelling on the property in question and from extending Brookridge Lane for the purpose of providing access to such property.

By agreement of the parties jury trial was waived, and the court heard the evidence and found the facts to be substantially as follows:

Mrs. Lydia W. Brickell is the owner in fee of a tract of approximately 12 and 1/2 acres of land fronting 300 feet on Providence Road and at its nearest point is 1200 feet south of the intersection of Providence Road and Sharon Lane. Greentree subdivision is a subdivision adjacent to the Brickell property on the south. Plaintiffs are the fee simple owners of Lot 14, Block 3, of Greentree subdivision. The rear line of plaintiff's lot adjoins the Brickell property on a diagonal line for a distance of 149.72 feet. Brookridge Lane is one of the dead-end streets within Greentree subdivision and is the street upon which plaintiffs' property fronts. Charlotte Development Company owns the property which separates the northerly terminus of Brookridge Lane from the southerly boundary of the Brickell property.

In the spring of 1960, Charlotte Development Company undertook to develop the Greentree subdivision. Streets were laid out, building lots were subdivided, and building restrictions were placed on the subdivision. Since late August 1960 or early September 1960, defendant Burke has held 51% of the stock of Charlotte Development Company, has controlled its Board of Directors and has been President of

this company. He has since contracted to acquire all of the remaining outstanding stock of Charlotte Development Company.

In August 1960, the plaintiffs entered into negotiations with the defendant Burke, acting as agent for Charlotte Development Company, for the purchase of a tract of land for residential purposes, and the defendant Burke showed plaintiffs a number of lots in Greentree subdivision. In the course of these negotiations, plaintiffs advised defendant Burke that they were planning to sell their house and move to another neighborhood because they wanted to get away from the traffic serving an area of apartment houses and to live in an area that was restricted to single-family residences. Defendant Burke answered that there would be very little traffic in Greentree subdivision because it would be situated in a neighborhood of single family residences and that, in addition, there would be no throughway traffic in the area. By way of explanation, he represented and stated to plaintiffs that he intended to be personally responsible for maintaining the exclusive and restricted character of the Greentree subdivision, and he stated that Brookridge Lane would either continue to be a dead-end street or would only be extended into the property adjoining Greentree subdivision as a road to serve a neighborhood of single-family residences. In response to a direct question by the plaintiff Caroline M. Stowe as to what he would do if he acquired an interest in the Brickell tract, defendant Burke represented that he intended, if he acquired such an interest in said property to develop such property in the same manner as Greentree subdivision had been developed. Also in August 1960, as the plaintiffs were preparing to execute a contract to buy the lot which they now own, they told defendant Burke, "We don't want through traffic," and he replied that he would see that Brookridge Lane would be a dead-end street— under no condition would he ever jeopardize Greentree, his development.

On 30 August 1960, the plaintiff, Dr. Stowe, entered into a contract to purchase their lot from Charlotte Development Company. The plaintiffs knew that the zoning classification of their lot and the area surrounding their lot was Rural as of 30 August 1960.

On 24 February 1961, a deed to their lot was delivered to the plaintiffs from Charlotte Development Company. At that time, defendant Burke repeated that he would not open up Brookridge Lane, and stated that if he got the Brickell property, he would develop one-family dwellings there. Plaintiffs paid Charlotte Development Company $9,000.00 from joint funds as the full purchase price for the lot on 24 February 1961.

On 8 March 1961, defendant Burke stated to Dr. Stowe that he would do all he could to see that single-family residences were placed

on the Brickell property. In reliance on this statement, the plaintiffs entered into a contract with Charlotte Development Company for the construction of a residence on their lot for $27,919.00.

The court further found as fact that no later than the first part of April, 1961, defendant Burke intended to promote the erection of apartments on the Brickell property and to provide for the opening of Brookridge Lane to accommodate traffic from such apartments. On 11 May 1961, the defendant Burke entered into an agreement to lease the Brickell Property from Mrs. Brickell for purposes of constructing the proposed apartment project.

Around the first of April, 1961, plaintiff Mrs. Stowe heard that some apartments were possibly going to go up on the Brickell property. She mentioned this to defendant Burke, who replied, "I don't know anything about it." Mrs. Stowe asked, "Would you open up the road to avail traffic to the apartments?" Mr. Burke replied that he would not open up the road to facilitate traffic to the apartments.

On 5 April 1961, the Charlotte-Mecklenburg Planning Commission presented to the Charlotte City Council a proposed ordinance and a preliminary report for a proposed comprehensive zoning plan as required by G.S. 160-177. The proposed zoning plan would modify the schedule of classification under the Zoning Code of the City of Charlotte and would re-classify large areas within the City of Charlotte which proposed plan was given extensive newspaper publicity and was made available for detailed public inspection on 6 April 1961, and thereafter. The classification of the area including the plaintiffs' property and the Brickell property under the proposed ordinance is Residence 15, a classification permitting basically only single-family dwellings and duplexes on corners. As early as 6 April 1961, the defendant Burke was aware of the existence of the proposed ordinance and the effect it would have on the Brickell property. On 24 April and 1 May 1961, notices of public hearings on the proposed ordinance were published as required by G.S. 160-175, and public hearings were held on 12 May and 19 May, 1961. No objection to the proposed ordinance was raised at these hearings.

On 11 May 1961, a handwritten agreement to lease was entered into between Mrs. Brickell and defendant Burke under the terms of which she agreed to lease her property to the defendant Burke or his assigns for a period of 45 years for the purpose of constructing apartment buildings thereon.

Thereafter, the defendant Burke engaged an architect to prepare plans for the proposed apartments, which plans were submitted to the Charlotte Building Inspection Department in May 1961, and which provided for the extension and opening of Brookridge Lane

to provide access to the apartment development parking lot for 32 family units, and through the development by a ten-foot service road to the single exit therefrom on Providence Road.

On June 1st, 1961, defendant Burke and plaintiff Stowe discussed plaintiffs' new house, and it appeared that all parties were pleased with it. Defendant Burke made no mention of the possibility of apartments on the Brickell property, "just the fact that he would not open up the road to facilitate apartments."

The defendant Greentree Corporation was incorporated under the laws of North Carolina on 6 June 1961. Defendant Burke was the sole stockholder in and president of the defendant corporation. On 14 August 1961, defendant Burke testified that "at the present time" C. H. Carlough is the owner of 50% of the stock in Greentree Corporation. There is no evidence of the date of acquisition of stock by Carlough, and the court below therefore found a presumption that the state of facts existing on 22 June, 1961, sole ownership by Burke, continued to exist until otherwise shown on 14 August 1961.

On 7 June 1961, defendant corporation made formal application to the Charlotte Building Inspection Department for ten building permits to construct ten apartment buildings containing two hundred units on the Brickell property.

On 14 June 1961, defendant Burke, in response to a direct question from Mr. Harvey White, a resident of Greentree subdivision, as to whether defendant Burke knew anything about a proposed apartment project on the Brickell property, stated that he did not know anything about it.

On 19 June 1961, the plaintiffs and other residents of the area filed a petition with the Charlotte-Mecklenburg Planning Commission requesting a change in classification of such area from a Rural District to a Residence-1 District. The petition was set for hearing on 17 July 1961, and notice of the hearing was sent to defendant corporation.

Building permits for the construction of the 200-unit apartment project were issued to defendant corporation on 26 June 1961. These permits were subsequently revoked for technical reasons and were finally reinstated on 7 July 1961.

Work on the building site consisting of surveying, clearing, grubbing, and grading had continued from 28 June, 1961, through 7 July 1961, as a building permit was not required for such site preparation work. The cost of the work done on the site during this ten-day period was $5,600.00 or 0.2% of the total proposed construction cost of $2,620,872.00. Subsequent to 8 July 1961, construction materials were moved to the Brickell property, and the record shows that work on the project proceeded at an extraordinary rate of speed because of the impending

hearing with respect to the zoning reclassification which had been set for 17 July 1961. (Finding of Fact #76) The cost of the work done on the site during this ten-day period was $55,974.00 or 2.1% of the total contract cost. By 17 July, column footings had been poured for eight of the apartment buildings, and over half the column footings had been poured for the remaining two buildings.

On 17 July 1961, the Charlotte City Council adopted Ordinance 36-Z changing the zoning classification of a 262-acre area embracing both plaintiffs' property and the Brickell property from Rural to Residence-1, thereby prohibiting the use of the land in the area for apartment houses. Further construction on the apartment houses was halted on 18 July 1961, by a temporary restraining order issued in this action.

The court below concluded that the plaintiffs were entitled to the relief sought based on each of their three causes of action, and entered judgment that the defendants be permanently enjoined from constructing apartment buildings on the Brickell property and from extending Brookridge Lane for any purpose other than providing access to single-family residences.

From this judgment defendants appeal to Supreme Court, and assign error.

Fleming, Robinson & Bradshaw for plaintiffs appellees.

Bell, Bradley, Gebhardt, DeLaney & Millette for defendants appellants.

WINBORNE, C.J. The court below, in ordering that defendants be enjoined as specified in the judgment, concluded as a matter of law that the work done on the proposed apartment project and liabilities incurred by defendant Greentree corporation with respect thereto was not done and were not incurred in good faith, and that defendant Greentree Corporation has no vested right to construct the proposed apartment project on the Brickell property. Defendants except to these conclusions of law, thereby raising the following questions: (1) Do the facts as found by the court support the conclusion of law that defendant corporation did not act in good faith, and (2) if defendant corporation did not act in good faith, was the court correct in concluding that it has no vested right to construct the proposed project? Both questions must be answered in the affirmative.

(1) The record indicates that on 5 April 1961, the Charlotte-Mecklenburg Planning Commission presented to the Charlotte City Council a proposed zoning ordinance for the entire city of Charlotte and its perimeter area. Under this ordinance, the area in which the Brickell

property is situated is classified as Residence-15, the most restrictive residential classification under the ordinance, and one permitting basically only single-family dwellings with duplexes on corners.

The court below found as a fact that at least as early as 6 April 1961, the defendant Burke was aware of the existence of the proposed ordinance and the effect that it would have upon the Brickell property. Thereafter, with full notice, two public hearings were held concerning the proposed ordinance, and neither the defendants nor anyone else raised any objection to the ordinance.

The record indicates that as early as August, 1960, defendant Burke was aware of plaintiffs' objection to the building of apartment houses on the Brickell property, and that defendant Burke repeatedly asserted to plaintiffs and other residents of the neighborhood that he knew nothing of a proposed apartment project, and that he would do all that he could to maintain the exclusive and restricted character of the subdivision.

The record also indicates that when, on 7 July 1961, defendant corporation finally received building permits to proceed with the proposed construction on the Brickell property, there was pending before the Planning Commission a petition to change the classification of the area in question from Rural to Residence-1. Hearings had been set, and notice had been sent to defendant corporation.

The record further discloses that between 7 July 1961, and 17 July 1961, the date on which Ordinance 36-Z was adopted, defendants incurred expenditures totaling $55,974.00 for foundation work on the proposed apartment buildings.

Thus it appears that when the permits were finally issued, defendant Burke was fully aware of a community of opposition to the project and of pending legislation which, if adopted, would prevent defendants from proceeding with the project. It also appears, however, that in spite of such notice, defendants moved forward with construction at an extraordinary pace in an attempt, as admitted by defendants' counsel in brief filed in Supreme Court, to establish a right to continue the project before the area in question could be rezoned.

On these facts, it appears that the court below was justified in concluding that defendants did not act in good faith in doing the work on the project and in incurring expenditures with respect thereto.

(2) The second question raised in this appeal is this: If the defendants did not act in good faith in incurring the aforementioned expenditures, was the court below correct in concluding that defendant corporation has no vested right to construct the proposed project on the Brickell property?

Section 23-43 of Article II of the Charlotte Zoning Ordinance pro-

vides in pertinent part as follows: "No building or structure shall be erected or altered which does not comply with the building and area regulations of this article for the district wherein located, nor shall any building or premises be used for any purposes other than a use permitted by this article in the district wherein located, except as permitted in Section 23-36 of this article."

Section 23-36 provides: "The lawful use of any building or land existing at the time of the adoption of this article may be continued, but not enlarged or extended, although the use of such building or land does not conform to the regulations of the district in which such use is maintained. An existing non-conforming use of a building or premises may be changed to another non-conforming use of the same or higher classification, but may not at any time be changed to a use of a lower classification."

Defendants contend that under the above section of the zoning ordinance, they should be allowed to continue construction of the apartment project as a non-conforming use. In this connection defendants cite the following: " * * * structures in the course of construction at the time of the enactment or effective date of a zoning law are generally exempted from restrictions or prohibitions thereof. This result has been reached, even in the absence of an express exemption of buildings in the course of construction, where the zoning law provides that no building 'shall be erected' for the prohibited purpose. Indeed, there is authority to the effect that an owner of real estate who is proceeding with construction or alterations at a time when he has a right to do so acquires a vested right to proceed therewith which may not be taken away by subsequent zoning legislation * * * ." 58 Am. Jur. Zoning Sec. 149.

This statement, however, does not distinguish between cases wherein the "structure in the course of construction" were begun in good faith and without notice of an impending zoning change, and those in which, as here, the construction was begun with full knowledge of an impending zoning change and the expenses were incurred in an attempt to establish a right to continue before the impending change should become effective.

From a perusal of the cases in North Carolina, it appears that there is no direct authority for the proposition that to establish a vested right to continue construction in such a case as this, the defendants must have acted in good faith in proceeding to incur expenditures in reliance upon a valid building permit. However, an indication that such a rule would be proper is found in *In Re Appeal of Supply Co.*, 202 N.C. 496, 163 S.E. 462. This case involved a zoning ordinance of the city of Goldsboro and a determination of when "con-

struction * * * shall have been started" within the meaning of the ordinance. *Brogden, J.*, speaking for the Court, stated: "So, in the present case, if the plaintiffs, in good faith, and in pursuance of a permit granted from the City of Goldsboro, had placed filling station equipment and supplies upon the premises with the intention of operating such station in full conformity with authority previously granted, then it cannot be said, as a matter of law, that construction had not started before the expiration of the time limit."

Furthermore, cases in other jurisdictions which have dealt with similar or related problems indicate that the rule requiring reliance in good faith upon a valid building permit would apply to such a case as this. In *Winn v. Lamoy Realty Corp.*, 100 N.H. 280, 124 A. 2d 211, the New Hampshire Court states: "It appears upon analysis of their facts that a majority of these cases allow relief to the landowner only when he has incurred substantial expenditures or legal obligations relying in good faith upon the permit."

In *Pelham View Apts. v. Switzer*, 130 N.Y. Misc. 545, 224 N.Y.S. 56, the New York Court stated: "When a permit to build a building has been acted upon, and where the owner has, as in this instance, proceeded to incur obligations, and, in good faith, to erect the building, such rights are then vested property rights, protected by the federal and state constitutions. * * * This case must be distinguished from the many other cases where the permits were not obtained in good faith, but merely in anticipation of an amendment to the zoning law."

In *Glenel Realty Corp. v. Worthington*, 4 N. Y. App. Div. 702, 164 N.Y.S. 2d 635, the New York Court stated: "It is well settled that one who, in reliance upon a permit validly issued by a municipality, in good faith makes substantial improvements and incurs substantial expense in order to make his land suitable for a specific purpose or use, acquires a vested right to such use even though by reason of such subsequent changes in the zoning ordinance such use has become a prohibited or non-conforming use. (*Riverdale Community Planning Assn. v. Crinnion, Sup.*, 133 N.Y.S. 2d 706, affirmed 285 App. Div. 1047, 141 N.Y.S. 2d 510, appeal dismissed, 1 N.Y. 2d 689, 150 N.Y.S. 2d 616; *Herskovitz v. Irwin*, 299 Pa. 155, 149 A. 195; *City of Buffalo v. Chandeayne*, 134 N.Y. 163, 165-166, 31 N.E. 443, 444; *People ex rel Ortenberg v. Bales*, 224 App. Div. 87, 229 N.Y.S. 550, affirmed 250 N.Y. 598, 166 N.E. 339; *Caponi v. Walsh*, 228 App. Div. 86, 89, 238 N.Y.S. 438, 441; *Pelham View Apts. v. Switzer*, 130 Misc. 545, 224 N.Y.S. 56)."

In *Graham Corp. v. Board of Zoning Appeals*, 140 Conn. 1, 97 A. 2d 564, the plaintiff builder acquired property in an area subject to a zoning classification permitting the erection of multi-family dwellings but requiring a special authorization to construct any dwelling to house

more than eight families. On 27 October 1951, after several technical delays, a permit to build a 195-unit dwelling was issued to plaintiff, and the land was excavated, and concrete footings were poured. On 29 October, adjoining landowners appealed the issuing of the permit, and the action of the building inspector in issuing the permit was upheld on 14 November 1951. On 7 November, however, the town planning commission had amended the zoning regulations, effective 14 November, and, as amended, the regulations prohibited the construction of structures to house more than forty families in the area in question.

In concluding that the plaintiff had not acquired a vested right to continue construction, the Connecticut Supreme Court stated: "In other words, the case under consideration does not present a situation where the plaintiff was unaware of any hostility to its program on the part of the nearby residents of the town. Everything, of course, points unmistakably to the contrary. When, then, the foundation permit was issued under date of 27 October, the plaintiff doubtless expected, in view of its past experience, that the opposition would seek a review of the inspector's action. Such, indeed, proved to be the fact when the adjacent landowners, upon learning of the issuance of the permit, took an appeal to the board on October 29th, thereby staying all further construction activities on the plaintiff's part.

"The record does not establish just what work had been done prior to October 27th but anything which the plaintiff accomplished on Saturday and Sunday, October 27th and 28th, in excavating on the land with the use of power shovels and in pouring concrete footings did not bring the building to the point where it was 'substantially in course of construction', as mentioned in the rule. Nor does the hurried incurring of expenditures on the two days mentioned commend itself to any equitable consideration. The difficulty in which the plaintiff finds itself in this matter of expense was one of its own deliberate choice."

Thus, since the court below found facts sufficient to justify its conclusion that defendant Greentree Corporation did not act in good faith in proceeding to incur the aforementioned expenditures, we concur with the conclusion of the court that defendant corporation has no vested right to construct the proposed apartment project on the Brickell property.

Hence, the judgment of the court below is

Affirmed.

BOBBITT, J., concurs in result.

HIGGINS, J., dissents.

DAVID GREGORY HERRING v. WILLIAM TAFT JACKSON.

(Filed 1 November, 1961.)

1. **Torts § 4—**

The common law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by G.S. 1-240.

2. **Same—**

An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor, and in an action for contribution in the name of the of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor, and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. G.S. 1-57.

APPEAL by plaintiff from *Stevens, J.*, June Civil Term, 1961, of SAMPSON.

Civil action, based on G.S. 1-240, for contribution.

The action is grounded on allegations that plaintiff and defendant, as joint tort-feasors, proximately caused personal injuries sustained by one Curtis Jackson; that plaintiff, in an action brought against him by Curtis Jackson, paid $8,750.00 in satisfaction of the (consent) judgment entered therein; and that plaintiff is entitled to recover from defendant one-half of the amount so paid, to wit, $4,375.00, plus interest.

Answering, defendant alleged, in substance, that the $8,750.00 payment was not made by plaintiff but was made by plaintiff's liability insurance carrier in discharge of its legal liability to plaintiff under its policy, and that plaintiff is not the real party in interest and cannot prosecute the action.

The parties waived jury trial and agreed the court should hear the case "on the admissions in the pleadings and an agreed statement of facts and decide all issues of fact and law, making such findings of fact and conclusions of law as the Court might deem necessary and proper, and enter judgment thereon."

The agreed statement of facts, referred to in said recital, is quoted below:

> "I. On February 23, 1958, at approximately 12:15 o'clock A.M., the defendant William Taft Jackson was operating his 1954 Ford Tudor automobile in a southerly direction on U.S. Highway #301 approximately one-quarter of a mile north of the city limits of

Dunn, Harnett County, North Carolina; that as the defendant was proceeding southward on Highway #301 his car became disabled upon the paved portion of the highway by reason of coming into collision with the rear end of another southbound vehicle; that thereafter the plaintiff David Gregory Herring, who was operating his 1957 Ford automobile southward along Highway #301, approached the defendant's disabled automobile from the rear and ran into it thereby knocking the defendant's 1954 Ford automobile against one, Curtis Jackson, who was standing on the west shoulder of the highway, seriously and permanently injuring the said Curtis Jackson.

"II. Thereafter, and on February 26, 1958, Curtis Jackson instituted a civil action against David Gregory Herring in the Superior Court of Harnett County, North Carolina, for the recovery of $50,000 in damages for personal injuries alleged to have been sustained by him as a result of the alleged negligence of Herring in colliding with the automobile of William Taft Jackson and causing it in turn to collide with Curtis Jackson.

"III. At the time of said accident, Nationwide Mutual Insurance Company (hereinafter called Nationwide) had issued a policy of automobile liability insurance to David Gregory Herring, a copy of which policy is hereto attached and marked as Defendant's Exhibit #1. Subject to its terms and conditions the policy obligated Nationwide to pay on behalf of David Gregory Herring as insured all sums which he should become legally obligated to pay as damages because of bodily injury sustained by any person arising out of the ownership, maintenance or use of Herring's 1957 Ford automobile previously referred to, but not in excess of $10,000 for injuries to one person. Another insuring agreement obligated Nationwide to defend any suit alleging such bodily injury, but gave it the right to make such investigation and settlement of any claim or suit as it might deem expedient. One of the conditions of the policy was that no action should lie against Nationwide 'until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.'

"IV. When David Gregory Herring was served with the complaint and summons in the action brought against him by Curtis Jackson, he delivered the suit papers to Nationwide which thereupon retained counsel and entered upon a defense of the action pursuant to the aforesaid insurance policy. Nationwide notified Herring of the retention of an attorney in his behalf, requested

his cooperation with said attorney and also notified him that he had been sued for an amount in excess of the limits of the policy and informed him that should he so desire, he could retain an attorney to represent him with respect to his liability in excess of that for which the policy afforded protection. Herring did not retain personal counsel in this connection. Nationwide Insurance Company had full control of the Curtis Jackson litigation from the defendant's aspect and the attorney retained as mentioned above prepared an answer which was verified by David Gregory Herring, and it was filed in said cause. In the answer thus filed there was no cross action asserted against William Taft Jackson for any rights of contribution that may have existed.

"V. On April 15, 1958, the defendant herein, William Taft Jackson, instituted an action against David Gregory Herring, the plaintiff herein, in the Superior Court of Sampson County, North Carolina, for the recovery of damages for personal injuries (but not property damage) alleged to have been sustained by William Taft Jackson as a result of the collision between Herring's automobile and the automobile of William Taft Jackson on February 23, 1958, it being the same motor vehicle collision which was the subject of the action instituted by Curtis Jackson against Herring.

"VI. True copies of the pleadings in the two original actions of Curtis Jackson and William Taft Jackson, respectively, against David Gregory Herring are attached as exhibits to the complaint in this action and by this reference are made a part of this agreed statement of facts.

"VII. When the CURTIS JACKSON action came on for trial at the April 1959 Civil Term of Harnett County Superior Court, the defendant, David Gregory Herring, and his counsel, retained as aforesaid by Nationwide, being convinced that the action could not be successfully defended, and being further convinced that trial of the action would in all probability result in a verdict and judgment in favor of Curtis Jackson and against David Gregory Herring in the amount of at least $15,000 entered into negotiations for the settlement of said action and David Gregory Herring made demand upon Nationwide to settle the case of Curtis Jackson if settlement could be reached within limits of the liability coverage afforded by the aforementioned policy of liability insurance. Negotiations conducted by Nationwide's attorney and the attorney for Curtis Jackson, resulted in a proposal by Curtis Jackson to accept the sum of $8,750 in settlement of his action.

"During the course of the negotiation of the settlement of the

Curtis Jackson case, the attorney retained by the Nationwide and defending David Gregory Herring, consulted with Clyde L. Stancil, Claims Attorney for Nationwide, who approved the amount of the suggested settlement and authorized the attorney to agree to pay $8,750 in settlement of said case, provided such rights as might exist to recover contribution from William Taft Jackson as joint tort-feasor pursuant to the provisions of G.S. 1-240 might still be preserved.

"In an effort to preserve such rights it was agreed that Nationwide would issue its draft in amount of $8,750 to its insured, David Gregory Herring, who would in turn endorse the draft to the Clerk of the Superior Court of Harnett County in payment of the judgment in the Curtis Jackson case, and that coincident with this transaction, David Gregory Herring would execute an instrument described as a 'loan receipt,' a copy of which is hereto attached and marked Plaintiff's Exhibit 1.

"VIII. This was agreeable with Herring, and accordingly a consent judgment was entered at the April 1959 Civil Term of Harnett County Superior Court under the terms of which it was adjudged that Curtis Jackson have and recover of David Gregory Herring the sum of $8,750, together with the costs of the action to be taxed. A copy of said judgment is attached to plaintiff's complaint in this action and is marked Exhibit C and by this reference is made a part hereof. Nationwide then issued its draft in the amount of $8,750 to David Gregory Herring. The above mentioned draft was delivered to the attorney retained by Nationwide and representing David Gregory Herring, who in turn delivered it to David Gregory Herring, who endorsed said draft to the Clerk of the Superior Court of Harnett County in satisfaction of the judgment entered in the case of Curtis Jackson by and through his next friend against David Gregory Herring. The draft was then turned over to the attorney representing Curtis Jackson who delivered it to the Office of the Clerk of the Superior Court of Harnett County in satisfaction of said judgment. A copy of said draft is hereto attached and marked as Defendant's Exhibit #2 and it referred to Policy No. 61-41-849, being the policy issued by Nationwide to David Gregory Herring, and in full force and effect at the time of the accident in which Curtis Jackson was injured, and further, referred and was charged to the claim number assigned by Nationwide to the claim of Curtis Jackson, and stated said claimant's name and the date of this accident. It was fully understood and agreed that said draft was to be used in satisfying

the judgment entered in favor of Curtis Jackson and through his next friend.

"IX. Coincident with the delivery of said $8,750 draft to David Gregory Herring by Nationwide he executed a loan receipt agreement in favor of Nationwide, a true copy of which is attached to the plaintiff's reply in this action and by this reference made a part hereof. It was the purpose of the employment of this procedure to enable a subsequent action to be maintained for contribution in the name of David Gregory Herring and it was understood and agreed that such action would be under the complete direction and control of Nationwide.

"X. The court costs in the CURTIS JACKSON case were paid by Nationwide.

"XI. That the injuries sustained by Curtis Jackson in the collision in question were substantially as alleged in paragraph 7 of his complaint and paragraph 18 of the complaint filed in this action, and the amount paid in settlement of the CURTIS JACKSON action, to wit, $8,750, was fair and reasonable.

"XII. The action of 'William Taft Jackson against David Gregory Herring,' subsequently came on for trial at the June 1960 Civil Term of Sampson County Superior Court, during the course of which trial issues were submitted to and answered by the jury against William Taft Jackson and in favor of David Gregory Herring on his counterclaim. A copy of said issues with the answers of the jury thereto and a copy of the plaintiff's complaint in this action and marked Exhibits H and I and by this reference are made a part hereof.

"XIII. William Taft Jackson did not perfect an appeal from said judgment but the same was satisfied by or on his behalf and an entry of satisfaction was made on the judgment docket record in the Office of the Clerk of the Superior Court of Sampson County.

"XIV. On February 21, 1961, this action was brought in the Superior Court of Sampson County in the name of David Gregory Herring, represented by an attorney retained by Nationwide, seeking contribution from the defendant William Taft Jackson, as an alleged joint tort-feasor, under the provisions of G.S. 1-240.

"XV. The recovery sought in this action for contribution would eventually inure to the benefit of Nationwide and none of said recovery would benefit David Gregory Herring except for use in discharging the 'loan'; and should the plaintiff fail to effect a recovery, he would suffer no loss thereby."

The "Loan Receipt," executed by plaintiff under date of May 16, 1959, is quoted below:

> "RECEIVED from Nationwide Mutual Insurance Company, hereinafter referred to as 'Company' the sum of Eight Thousand Seven Hundred Fifty and no/100 ($8,750.00) Dollars as a loan, without interest, repayable only in the event and to the extent of any net recovery which may be made by the undersigned, David G. Herring, Jr., from any person, firm, or corporation whose negligence may have proximately caused or contributed to injuries received by Curtis Jackson in an accident which occurred near Dunn, North Carolina, on February 23, 1958, as a result of which an action was filed in the Superior Court of Harnett County, North Carolina, entitled 'Curtis Jackson, by his next Friend, O. B. Jackson, vs. David Herring, Jr.' As security for such repayment the undersigned hereby pledges to Company all of his claims against said person, firm or corporation, and more specifically against one William Taft Jackson and his insurance carrier, and any recovery which may be made on said claim, for contribution only.
>
> "The undersigned, David G. Herring, Jr., covenants and agrees to cooperate fully with said Company and to allow suit to be commenced in his name, if necessary, to the end that all rights of contribution which he may now have or hereafter acquire, against any party whose negligence proximately caused and contributed to the injuries and damages sued for by Curtis Jackson in the above entitled action may be enforced. It is understood, however, that such action shall be without expense to the undersigned except the duty of the undersigned to attend court and give evidence if required to do so. It is further understood that all legal proceedings are to be under the exclusive direction and control of company."

Judgment dismissing the action, based on findings of fact and conclusions of law set forth therein, was entered.

Plaintiff excepted and appealed.

Dupree, Weaver, Horton & Cockman for plaintiff, appellant.

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

BOBBITT, J. It is unnecessary to set forth with particularity the findings of fact and conclusions of law challenged by plaintiff's exceptions. In gist, the court found and held that the payment by Nation-

wide's draft of Curtis Jackson's judgment against plaintiff and the execution by plaintiff of the "Loan Receipt" was not, in fact, an actual loan by Nationwide to plaintiff but "was a subterfuge device employed by Nationwide, paying that which it was obligated to pay, in an effort to circumvent and subvert the provisions of North Carolina G.S. 1-57 and G.S. 1-240."

The "Loan Receipt," in express terms, obligates plaintiff to cooperate with Nationwide "to the end that all rights of contribution which he may now have or hereafter acquire, against any party whose negligence proximately caused and contributed to the injuries and damages sued for by Curtis Jackson in the above entitled action may be enforced." Plaintiff has nothing to gain or lose by the prosecution of this action. While instituted and prosecuted in plaintiff's name, this action was instituted and is prosecuted by Nationwide solely for Nationwide's benefit. The purpose of the "Loan Receipt" agreement, as set forth therein, is to confer upon Nationwide a right to enforce contribution. In our view, the crucial question is whether, under the agreed facts, *a* right of action for contribution now exists.

Where insured *property* is destroyed or damaged by the tortious act of a third party, and the insurance company pays its insured, the owner, the *full amount* of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case, the insurance company, as the real party in interest under G.S. 1-57, may maintain such action in its name and for its benefit. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Insurance Co. v Moore,* 250 N.C. 351, 108 S.E. 2d 618.

In cases involving loss of or damage to insured property, the owner's cause of action, if any, must be predicated upon allegations and findings that the tortious conduct of the third party was the proximate cause of such loss or damage. Thus, where an insured sustains collision damage, neither the insured nor the insurance company can recover against the third party if the insured's negligence was a proximate cause of the collision. In such cases, the right to recover presupposes the insured *was not* a joint tort-feasor. Here, automobile liability insurance, not property insurance, is involved.

At common law, as between joint tort-feasors, there was no right of contribution. *Hayes v. Wilmington,* 239 N.C. 238, 242, 79 S.E. 2d 792, and cases cited. See Comment Note, "Contribution between negligent tortfeasors at common law," 60 A.L.R. 2d 1366. In this jurisdiction, the common law rule was modified by G.S. 1-240 so as to provide for enforcement of contribution *as between joint tort-feasors* in accordance with its provisions.

If Herring and William Taft Jackson, as joint tort-feasors, proximately caused Curtis Jackson's injuries, Herring, had he discharged his legal liability to Curtis Jackson by use of his own funds, could have maintained an action against William Taft Jackson for contribution. However, under G.S. 1-240, as construed by this Court, this rule, as stated by *Higgins, J.*, is firmly established: "The insurance carrier who pays a joint tort-feasor's obligations to the injured party cannot force contribution from other tort-feasors." *Squires v. Sorahan,* 252 N.C. 589, 591, 114 S.E. 2d 277, and cases cited.

We are advertent to the diversity of decisions in other jurisdictions. In many jurisdictions, the common law rule is retained in its original vigor. 60 A.L.R. 2d 1373 *et seq.* In other jurisdictions, it has been modified by court decisions so as to permit contribution as between negligent joint tort-feasors. 60 A.L.R. 2d 1377. In other jurisdictions, including North Carolina, it has been modified by statute. 60 A.L.R. 2d 1368, Note 2.

In some jurisdictions, where the common law rule has been modified, either by court decisions or by statute, it is held that an insurance carrier of one joint tort-feasor, after having made settlement with the injured party, has the right to maintain an action for contribution against the other tort-feasor(s). *Leitner v. Hawkins* (Ky.), 223 S.W. 2d 988; *Underwriters at Lloyds v. Smith* (Minn.), 208 N.W. 13; *Western Casualty & S. Co. v. Milwaukee Gen. Const. Co.* (Wis.), 251 N.W. 491; *Hawkeye-Security Ins. Co. v. Lowe Construction Co.* (Iowa), 99 N.W. 2d 421. Suffice to say, these decisions are in direct conflict with the established rule in this jurisdiction.

In *Blair v. Espeland* (Minn.), 43 N.W. 2d 274, and in *Aetna Freight Lines v. R. C. Tway Company* (Ky.), 298 S.W. 2d 293, cited and stressed by plaintiff, it was held that the insured was entitled to prosecute the action for the benefit of the insurer notwithstanding the insured's legal liability to the injured party had been fully satisfied with funds paid by the insurer under a "loan receipt" agreement such as that here involved.

In *Blair,* the factual situation was quite similar to that here considered. These excerpts from the opinion are significant: "The intent of the parties to the 'loan receipt' agreement is clear. It was entered into because it enables the insured to bring the action in his own name and permits the insurer, who will benefit if a recovery is had, to remain hidden from view." Again: ". . . for strategic reasons, plaintiff's insurer prefers not to have its name appear as a party litigant, . . ." Again: "The arrangement between plaintiff and his insurer cannot affect defendant financially. Therefore, he need not be concerned. There is no danger of more than one recovery. There seems,

therefore, to be no legal basis for defendant's objections to the 'loan receipt' agreement. Where defendant is not legally affected, he cannot interfere with the freedom of plaintiff and his insurer to contract, through the device of a 'loan receipt' agreement, that the title to the cause of action against a wrongdoer reside wherever they determine by their agreement."

In *Aetna Freight Lines,* the factual situation was similar to that here considered with one exception, namely, the action was not to enforce contribution but was to recover the full amount on the ground defendant was primarily liable for the payment thereof. This excerpt from the opinion is significant: "While it is clear that the difference between a loan of the type under consideration and an absolute payment is mere fiction, that ground alone is insufficient to declare the transaction a nullity. Rather, we will look to *the purpose of the fiction* created by the parties to the transaction. It is clear the purpose of the loan agreement was to insulate Continental from a prejudice which juries frequently apply against insurance companies." (Our italics)

The "loan receipt" agreement is referred to in *Blair* as a "device" and in *Aetna Freight Lines* as a "mere fiction." Decision is based on the grounds (1) that the defendant is not legally affected, and (2) that the sole purpose of the "device" or "mere fiction" is to avoid prejudice that might result if the action were prosecuted by the insurer in its own name.

In Minnesota *(Blair)* and in Kentucky *(Aetna Freight Lines),* the defendant would not be legally (adversely) affected by the "device" or "mere fiction." If it had made direct payment, the insurer could have maintained the action for contribution. The "device" or "mere fiction" simply enabled the insurer to prosecute the action in the name of its insured and thereby avoid possible prejudice.

In North Carolina, the situation is quite different. Here, if it had made direct payment of Curtis Jackson's judgment against Herring, Nationwide could not maintain this action against William Taft Jackson for contribution. Plaintiff, in express terms, purported to confer upon Nationwide a right to enforce contribution. Obviously, if this were permitted, defendant would be legally (adversely) affected. The right to contribution, if any, must be based on G.S. 1-240; and under our decisions Nationwide has no right to contribution. *Squires v. Sorahan, supra,* and cases cited. Manifestly, plaintiff cannot, by the "device" or "mere fiction" of a "Loan Receipt" agreement or otherwise, confer upon Nationwide a right to contribution when such right is denied by the decisions of this Court.

It should be noted that the ground on which this decision is based is absent in actions brought in the name of an insured, pursuant to

a "loan receipt" agreement, to recover for damage to the insured's property by fire, collision or like casualty, allegedly caused by the tortious act of a third party.

The conclusion reached is that plaintiff is not a real party in interest. G.S. 1-57. The action was instituted and is prosecuted solely for the benefit of Nationwide. Since Nationwide has no right to prosecute an action for contribution, such action may not be prosecuted for its sole benefit by plaintiff or in plaintiff's name. For these reasons, the judgment of the court below is affirmed.

Affirmed.

STATE OF NORTH CAROLINA, ON RELATION OF ROBERT S. SWAIN, SOLICITOR OF THE NINETEENTH SOLICITORIAL DISTRICT v. WILLIAM E. CREASMAN, JUSTICE OF THE PEACE FOR ASHEVILLE TOWNSHIP.

(Filed 1 November, 1961.)

1. Courts § 17; Public Officers § 12—

Chapter 275 of the Public Local Laws of 1931 does not require justices of the peace in Asheville Township to pay fees or make any report of the fees paid for service of process to any official of Buncombe County, and therefore failure of the County to receive such fees cannot be charged to a justice of the peace of the Township.

2. Same—

The failure of a justice of the peace to collect fees for the service of civil process upon the issuance of the process at the instance of certain business firms, and his action in waiting until the end of the month to collect such fees, is insufficient to support a finding of malfeasance or bad faith on the part of such justice of the peace which would justify his removal from office, any monetary loss from such practice being recoverable by action against such justice of the peace personally and on his official bond. G.S. 7-115.

3. Same—

Although Section 3, Chapter 275, Public Local Laws of 1931, requires all civil process issuing out of the office of a justice of a peace for Asheville Township to be delivered to and served by the constable for such township or his agent, where, during a period of years, the constable is not available for the service of such process, and a justice of the peace, by arrangement with the Sheriff and Commissioners of the County, delivers process to a deputy sheriff appointed for the purpose of serving such process, his act in so doing under such circumstances cannot be held malfeasance warranting his removal from office.

SWAIN *v.* CREASMAN.

APPEAL by respondent from *McLean, J.*, at Chambers, on 28 January 1961, at Asheville, BUNCOMBE County, North Carolina.

This is a proceeding to remove the respondent from the office of Justice of the Peace for Asheville Township.

Under date of 15 December 1960, the Solicitor of the Nineteenth Solicitorial District informed the respondent by letter that he was required by Chapter 275, Section 3, of the 1931 Public-Local Laws of North Carolina, to deliver to the Constable for Asheville Township all civil process issuing from his office. The letter further informed the respondent that "(y)ou are not at liberty to select your process agent under the law."

The respondent expressed the view that he did not believe he was required to deliver process from his office to the Constable, and expressed a desire to have the law tested. Thereafter, on 16 January 1961, the Solicitor filed a petition for his removal from office.

It is alleged in the petition that respondent and James E. Dayton, Jr., conspired to cheat and defraud Buncombe County out of fees collected for service of process from May 1960 until the present time.

The petition likewise alleged that the respondent was guilty of violating the law by issuing process for certain business firms and not collecting the required fees until the end of the month.

The respondent in his answer denied the material allegations of the petition and as a further answer and defense alleged, in pertinent part, as follows: (1) That for six years or more preceding December 1960, the incumbent Constable for Asheville Township was able to serve few, if any, processes issuing from the courts of Justices of the Peace; (2) that as a result of this difficulty, the defendant "conferred with officials of Buncombe County, to wit, County Attorney, County Treasurer and Auditor and the Sheriff of Buncombe County, with regard to the method of securing service of process issued by him; and that as a result of this conference this defendant was authorized and directed to deliver all civil processes issued by him to James E. Dayton, Jr., for service, and was further instructed to deliver the fees collected for such service to James E. Dayton, Jr., and that no report or accounting for these moneys should be made to the County Auditor and Treasurer for Buncombe County."

It is alleged in the petition that the Solicitor is acting under the provisions of Chapter 128, Sections 16 and 17, of the General Statutes of North Carolina. However, when the matter came on for hearing, the court stated that it was not proceeding under those statutes but would proceed under G.S. 7-115.

The respondent was appointed a Justice of the Peace for Asheville

Township, Buncombe County, North Carolina, by the Resident Judge of the Twenty-eighth Judicial District.

The evidence tends to show that the respondent did not direct any process to the former Constable, Alex P. Digges, or to Herman T. DeWeese, who qualified as Constable for Asheville Township on 5 December, 1960.

The evidence of the petitioner and the respondent was to the effect that fees for serving process were paid directly to James E. Dayton, Jr., and not to the Treasurer and Auditor of Buncombe County.

The court below on the facts found, concluded as a matter of law as follows:

"1. That the delivery of civil process issued from the office of the respondent William E. Creasman, as Justice of the Peace for Asheville Township, to James E. Dayton, Jr., was unlawful.

"2. That the respondent's failure to deliver all civil process issued from his office as Justice of the Peace for Asheville Township to the Constable of Asheville Township for service was unlawful.

"3. That the payment of fees for service of civil process to James E. Dayton, Jr., as Special Deputy Sheriff by the respondent William E. Creasman, Justice of the Peace of Asheville Township, was unlawful misapplication of public funds.

"4. That the failure of William E. Creasman to pay fees for service of civil process by a Deputy Sheriff of Buncombe County issued from his office as Justice of the Peace for Asheville Township to the Treasurer of Buncombe County was unlawful misapplication of public funds.

"5. That the issuance of civil process by William E. Creasman, Justice of the Peace of Asheville Township, without first receiving the fees therefor was in violation of the law.

"6. That the violations of the law above set forth, and each of them, amount to maladministration, nonfeasance, misfeasance by the respondent William E. Creasman, in the office of Justice of the Peace for Asheville Township, Buncombe County, North Carolina, and constitute good cause for the removal of said respondent from the office of Justice of the Peace of Asheville Township, Buncombe County, North Carolina."

Thereupon, the court entered judgment removing the respondent from the office of Justice of the Peace of Asheville Township, Buncombe County, North Carolina. The respondent appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Moody for the State.

I. C. Crawford and W. M. Styles for respondent.

DENNY, J. Any justice of the peace appointed by the resident judge of a judicial district, after due notice and hearing, may be "removed from office by the resident judge of the superior court of the district in which the county is situated, for misfeasance, malfeasance, nonfeasance or other good cause." G.S. 7-115.

The evidence and findings of fact by the court below warrant the conclusion that before the respondent was originally appointed a Justice of the Peace for Asheville Township in Buncombe County, North Carolina, in August 1956, Alex P. Digges was the duly elected, qualified and acting Constable for Asheville Township and that he continued to hold such office until 5 December 1960.

The court found as a fact that during the time Alex P. Digges was Constable for Asheville Township, he received a salary from the County of Buncombe each month and that all fees paid for the service of civil process issuing from the several offices of the Justices of the Peace for Asheville Township became the lawful property of Buncombe County; that it was the duty of said Constable to turn said fees over to the Treasurer and Accountant of Buncombe County each month, together with his report of the fees collected.

The court further found that the respondent on or about 25 January 1960, commenced giving all civil process issuing from his office of Justice of the Peace to James E. Dayton, Jr., for service, and paid said Dayton the lawful fees for service of same; that Dayton kept the fees for service of such process for his own personal use and did not pay the same into the Treasury of Buncombe County.

Even so, it is well to note that there is nothing in Chapter 275 of the 1931 Public-Local Laws of North Carolina, or in the amendments thereto, requiring this respondent to pay such fees to Buncombe County or to make any report of the fees paid for service of process to the Treasurer of Buncombe County or to anyone else. Therefore, any failure, if there was any such failure in law, to turn over to the Treasurer of Buncombe County the fees earned by serving process issued by Justices of the Peace in Asheville Township, such failure is not chargeable under the law to the Justice of the Peace who issued such process.

It is true that Section 3, Chapter 275, of the 1931 Public-Local Laws of North Carolina, during the period of time under consideration, required that all civil process issuing out of the office of Justices of the Peace for Asheville Township be delivered to and served by the Constable for Asheville Township or his agent. It is equally true, according to the evidence adduced in the hearing below, that for several years prior to the election and qualification of Herman T. DeWeese as Constable for Asheville Township on 5 December 1960, his predecessor

in office, Alex P. Digges, had not been available for the service of such process. The fact that the voters of Asheville Township failed to elect a Constable who was ready, able and willing to discharge the duties of that office, cannot be charged to this respondent to any greater extent than to any other citizen and voter of the township.

The record, we think, discloses that a well-nigh intolerable situation existed. However, the question to be determined on this record is not whether Buncombe County has lost money by reason of the use of Special Deputies to serve the processes issued from the office of the Justices of the Peace in Asheville Township, but the question is simply this: Has this respondent acted wrongfully or in bad faith in doing what he has done in light of the existing situation?

The respondent testified that he discussed the situation with several County officials and that Wayne Roberts was appointed as a Special Deputy Sheriff for the purpose of serving such process. That thereafter he directed his process to Roberts for service and paid to him the fees for such service; that Roberts had turned over all his checks for such service to the County Treasurer and had received the Treasurer's check each month for an amount equal to the total fees for serving process. Roberts resigned and James E. Dayton, Jr., was appointed to succeed him on 25 January 1960.

According to the affidavit of Roy A. Taylor, admitted in evidence in the hearing below, he had been County Attorney for Buncombe County for ten years prior to 25 June 1960; that in consultation with Sheriff Brown and the Commissioners of Buncombe County, he advised the County Commissioners that they had authority to appoint an additional Deputy Sheriff and to set his salary pursuant to the provisions of the Home Rule Bill, but that fees for service must under the law be paid to the County Accountant. It was agreed that Wayne Roberts be named a Special Deputy to serve process issued by the Justices of the Peace in Asheville Township and that all fees for such service be paid promptly into the office of the County Accountant and that the monthly check to Mr. Roberts at the end of each month should be in an amount equal to the total service fees paid him as set out above. Mr. Taylor did not recall having any negotiations with respect to the appointment of Mr. Dayton.

Laurence E. Brown, Sheriff of Buncombe County, testified that he knew the respondent and that his character is good. That he did not have sufficient regular deputies to serve process issued by the Justices of the Peace; that he knew of the appointment of James E. Dayton, Jr., to serve such process; that Dayton had performed his duties efficiently.

Other witnesses whose character and integrity were not questioned,

testified that before the appointment of a Special Deputy Sheriff to serve process issued by Justices of the Peace, "it had been almost impossible to secure service of process, but since his (Dayton's) appointment service had been prompt and diligent."

Gordon Ramsey testified that he had been for several years desk officer for the Sheriff of Buncombe County, having the responsibility of receiving legal process directed to the Sheriff for service. That for more than two years prior to 25 January 1960 he had received numerous requests to serve process directed to the Constable of Asheville Township. That during said period he knew of his own knowledge that the incumbent Constable, Alex P. Digges, was not available to serve such process. That he knew of the appointment of James E. Dayton, Jr., as Special Deputy Sheriff to serve process issued by Justices of the Peace in Asheville Township, and that since his appointment all such process had been promptly served.

The respondent further testified that when Mr. Dayton was appointed a Special Deputy Sheriff that he and Dayton went to the office of the County Treasurer and talked with the Treasurer, James C. Garrison; that they were told by the Treasurer that the fees were to be paid directly to Dayton and that it would not be necessary to make any report thereof. That thereafter he directed all process from his office to Dayton and paid him all the fees for serving such process. Dayton likewise testified that the Treasurer of Buncombe County told the respondent to pay him (Dayton) his fees and that it would not be necessary to make any report of such fees.

The Treasurer denied making such an arrangement. He also denied any knowledge of the appointment of Dayton and testified that he had absolutely nothing to do with his appointment. However, when confronted with Defendant's Exhibit #5, in the form of an affidavit sworn to before a Deputy Clerk of the Superior Court of Buncombe County on 25 January 1960 by James C. Garrison and others, recommending the appointment of James E. Dayton, Jr., as Special Deputy Sheriff for Asheville Township for the express purpose of "serving Constable's papers only," he admitted he signed the recommendation, and then testified that he signed many petitions without informing himself as to their contents.

The evidence further discloses that James E. Dayton, Jr., took the oath of office as a Special Deputy Sheriff of Buncombe County on 25 January 1960 before a Deputy Clerk of the Superior Court of Buncombe County; that he gave bond for the faithful performance of his duties and that the premium for said bond was paid by Buncombe County.

With respect to the conclusion of the court below that it was a

violation of the law for the respondent to issue process for certain business firms and not collect the fees therefor until the end of the month, there is no evidence tending to show that Buncombe County or anyone else has lost any money as a result of such practice. If such practice should result in a monetary loss to Buncombe County, it may proceed against the offending Justice of the Peace personally and on his official bond. However, such practice is not sufficient to support a finding of malfeasance or bad faith on the part of the respondent which would justify his removal from office. *S. v. Meek,* 148 Iowa 671, 127 N.W. 1023; *S. v. Hoglan,* 64 Ohio St. 532, 60 N.E. 627.

It is quite clear that, if it was unlawful for the respondent to use Dayton as a process server and to pay him fees for such service after May 1960, it was likewise unlawful for him to use him and pay him fees from 25 January 1960, the date of his appointment, until May 1960; and if it was unlawful for process to be delivered to Dayton for service as a Special Deputy Sheriff, it was likewise unlawful for process to be delivered to Wayne Roberts as a Special Deputy Sheriff prior thereto.

If the services of a Special Deputy Sheriff were no longer necessary when Herman T. DeWeese qualified as Constable for Asheville Township on 5 December 1960, then the procedure that should have been followed was to inform the Sheriff of Buncombe County and the Board of Commissioners of said County that DeWeese had qualified as Constable and was ready, able and willing to perform the duties of his office (if indeed he was), and that a Special Deputy Sheriff to serve process issued by Justices of the Peace in Asheville Township, in lieu of a Constable, was no longer necessary and to request that his appointment be terminated.

It appears, however, from the testimony of Herman T. DeWeese that while he had qualified as Constable of Asheville Township, he made little use of the office in the courthouse set aside for the Constable of Asheville Township. He testified that he had spent most of his time in the office of the Western Carolina Bonding Company. A careful consideration of his testimony leads to the conclusion that up to the time of the hearing below he had made no effort whatever to assume and discharge the duties of his office as Constable. In fact, he testified that he had not requested that any process be directed to him for service. "That he carried a badge, but did not wear it where everybody could see it."

In our opinion, to hold that the arrangement entered into by the Sheriff of Buncombe County and the Commissioners of said County, pursuant to the advice of the County Attorney, in an effort to solve the urgent problem with respect to service of civil process issuing from

the office of Justices of the Peace in Asheville Township, was illegal and warrants the removal of the respondent from office on the ground that his conduct in using the Special Deputies appointed pursuant to the agreement entered into by the above officials amounts to maladministration, nonfeasance and misfeasance in office, would constitute a gross miscarriage of justice. *S. v. Meek, supra.*

We call attention to the fact that Chapter 393 of the 1959 Session Laws of North Carolina placed the Constable of Asheville Township on a fee basis beginning on the first Monday in December 1960, and that Chapter 275 of the 1931 Public-Local Laws of North Carolina was repealed by Chapter 1057 of the 1961 Session Laws of North Carolina.

The judgment of the court below is

Reversed.

GULF LIFE INSURANCE COMPANY, AND SHERWOOD H. SMITH, JR., TRUSTEE, v. CHARLES A. WATERS AND WIFE, MALLIE M. WATERS.

(Filed 1 November, 1961.)

1. Pleadings § 18—

A further answer and defense, as well as a complaint, may be challenged on the ground of misjoinder of parties and causes of action by demurrer.

2. Pleadings § 3; Parties §§ 3, 8—

G.S. 1-73, authorizing the court to bring in new parties under certain conditions, and G.S. 1-69, prescribing who may be defendants, are subject to the limitations of G.S. 1-123, prescribing what causes may be joined, and it is improper to join additional parties defendant to litigate a separate cause of action between the original defendant and such additional defendant when such cause may not be properly joined with the cause of action alleged by the original plaintiff against the original defendant.

3. Pleadings § 3—

If an action involves title to several tracts of land and all of the parties are not interested in all of the tracts, there is a misjoinder of parties and causes.

4. Same; Pleadings § 8— Demurrer to further answer and defense for misjoinder of parties and causes held properly sustained.

In an action on a note and to foreclose a deed of trust securing same defendants alleged that they owned lots 6, 7, and 8 and that through mistake defendants conveyed to plaintiffs as security and to the respec-

tive purchasers of each of the other two lots, a lot other than that intended to be conveyed, and prayed that the respective purchasers of the other two lots be joined as parties defendants and that all three conveyances be reformed to convey the lot intended to have been conveyed by the instruments, respectively. *Held:* Plaintiffs and the respective additional defendants were not all interested in each of the lots and the respective causes of action do not arise out of the same transaction or transactions connected with the same subject matter, and plaintiffs' demurrer to the further answer and defense was properly sustained.

APPEAL by defendants Charles A. Waters and wife, Mallie M. Waters, from *Hooks, S.J.*, 14 August 1961 Special Civil B Term of MECKLENBURG.

Civil action to collect a debt evidenced by a note secured by a deed of trust upon certain real property, heard on a demurrer on the ground of a misjoinder of parties and causes to the further answer and defense of the defendants Waters.

The complaint alleges that this debt in the amount of $16,500.00 arose out of Gulf Life Insurance Company's payment on behalf of Charles A. Waters and wife, Mallie M. Waters, of two construction loans which had been undertaken by the Waterses to erect a residence upon a certain Lot 6 in Block F as shown on an unrecorded map of Moore's Park, which property is situate in Berryhill Township, Mecklenburg County, and that the payments required by the note on this debt are in arrears. Ancillary to this cause of action to collect the debt evidenced by the Waterses' note in the amount of $16,500.00, the complaint prays that the court direct the foreclosure of a duly recorded deed of trust, executed by Charles A. Waters and wife, Mallie M. Waters, dated 28 July 1958, covering this Lot 6, which is fully described by metes and bounds in the deed of trust, and which Lot 6 had been conveyed by the deed of trust to Gulf Life Insurance Company as security for the debt to Gulf Life Insurance Company.

Charles A. Waters and wife, Mallie M. Waters, filed an answer containing a further answer and defense and motion to make new parties defendant, which admits they are indebted to Gulf Life Insurance Company in the sum of $16,500.00 evidenced by their note, and which further admits that they executed and delivered a deed of trust on the said Lot 6 to Gulf Life Insurance Company to secure the payment of this note.

The further answer and defense alleges in substance: The Waterses purchased from the developers of Moore's Park a tract of land fronting 320 feet on the east side of Virginia Circle and immediately to the north of Lot 5, Block 7, as shown on a recorded map.

On the first 110 feet of this frontage from Lot 5 the defendants

Waters built a house and a swimming pool, and designated it as Lot 6. The defendants Waters contracted to sell to Robert E. Stastny and wife this Lot 6 and the house and swimming pool thereon, and delivered possession thereof to them. The Stastnys borrowed money on this house and lot on Lot 6 from the First Federal Savings & Loan Association, and gave it a deed of trust to secure the loan.

On the next 100 feet of this frontage the defendants Waters built a house, and designated it as Lot 7. The defendants Waters contracted to sell to Ernest W. Cates and wife this Lot 7 and the house thereon, and delivered possession thereof to them. The Cateses borrowed money on this house and lot from the Gulf Life Insurance Company, and gave it a deed of trust on the property to secure the loan.

The remaining 110 feet of this frontage is a vacant lot, which the defendants Waters designated as Lot 8.

No dates in respect to the Stastnys' and Cateses' transactions are set forth in the Waterses' answer.

Thereafter, at a time when the Waterses had a number of houses under construction in Moore's Park, they intended to borrow on one of these houses under construction from the Gulf Life Insurance Company the sum of $16,500.00, and this insurance company intended to lend them on one of these unidentified houses $16,500.00, and did so lend them this sum.

In the Stastnys' transaction the contracts, deed, deed of trust and note were all handled by agents of the Stastnys and the First Federal Savings & Loan Association. In the Cateses' transaction all the similar things were handled by Cates, their agents, and Gulf Life Insurance Company. In the transaction relating to the $16,500.00 loan to defendants Waters by Gulf Life Insurance Company on some unidentified house in Moore's Park, all things were handled by the Gulf Life Insurance Company.

By mutual mistake of the defendants Waters, the purchasers, the Stastny's, and the lender, First Federal Savings & Loan Association, the Cateses' house and Lot 7 were conveyed to the Stastnys and First Federal Savings & Loan Association instead of Lot 6 and the house and swimming pool thereon. By mutual mistake of the defendants Waters, the purchasers, the Cateses, and the lender, Gulf Life Insurance Company, the vacant Lot 8 was conveyed to the Cateses and Gulf Life Insurance Company instead of Lot 7 and the house thereon.

Justice demands that the court enter decrees directing that corrective deeds and deeds of trust be exchanged so that the Stastnys should have title to Lot 6 and the house and swimming pool thereon, and First Federal Savings & Loan Association should have a deed of trust on said property, and so that the Cateses should have title to

Lot 7 and the house thereon and Gulf Life Insurance Company should have a deed of trust on the vacant Lot 8 (sic), to the end that the intent of the parties shall be carried out.

Gulf Life Insurance Company in the case of Lot 6 caused title insurance to be purchased from Lawyers Title Insurance Company of Richmond, Virginia, and in case of Lot 8 caused title insurance to be purchased from Kansas City Title Insurance Company, Kansas City, Missouri, and the defendants Waters allege, on information and belief, that the two title insurance companies have paid under their policies some unknown amount to Gulf Life Insurance Company, and have taken subrogation interests in the properties from Gulf Life Insurance Company, and are now the real parties in interest.

The Stastnys, the Cateses, First Federal Savings & Loan Association and the two title insurance companies are all proper and necessary parties to a full and final determination of the matters here in controversy and the defendants Waters pray that they be made parties defendant. The clerk of the superior court of Mecklenburg County entered an order making all of them parties defendant as prayed, and giving them 30 days within which to plead.

Plaintiffs demurred to the further answer and defense of the defendants Waters for the reason that it appears on the face thereof there is a misjoinder of parties and causes of action, in that all causes do not affect all parties to the action. Plaintiffs specify the ground of their demurrer as follows: Plaintiffs' complaint alleges a cause of action against defendants Charles A. Waters and wife, Mallie M. Waters, to collect a debt to it evidenced by their note and to secure a foreclosure sale of a specific lot of realty conveyed by them in a deed of trust as security for the debt. Defendants Waters' further answer and defense alleges multiple actions against other parties based on various contracts and alleged mutual mistakes, and they pray for equitable decrees directing corrective deeds and deeds of trust between other parties concerning other lots of realty, which do not affect all parties to this action.

The judge hearing the demurrer issued an order sustaining the demurrer, directing that the further answer and defense and the motion to make new parties defendant be stricken from the answer of the defendants Waters, and that the order of the clerk making new parties defendant be vacated.

From the order entered the defendants Waters appealed.

Lassiter, Moore and Van Allen By: Sherwood H. Smith, Jr., for plaintiffs, appellees.

Richard M. Welling, attorney for defendants, Charles A. Waters and wife, Mallie M. Waters, appellants.

PARKER, J. We are concerned here with a question of proper pleading. A demurrer is the proper procedure to test the question as to whether or not there is a misjoinder of parties and causes of action. *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420; *Bank v. Angelo,* 193 N.C. 576, 137 S.E. 705.

The several causes of action which may be united or joined in the same complaint are classified and enumerated in G.S. 1-123, and in addition the following limitation is expressly incorporated therein: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

Appellants in their brief have omitted any reference to G.S. 1-123, but rely on G.S. 1-73, which authorizes the court to bring new parties into an action under certain conditions, and on G.S. 1-69, who may be defendants. This Court said in *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655, in reference to G.S. 1-73: "It is not intended to authorize the engrafting of an independent action upon an existing one which is in no way essential to a full and complete determination of the original cause of action." The Court in that decision quotes the following sentences, *inter alia,* from *McDonald v. Morris,* 89 N.C. 99, in reference to The Code § 184 and § 189, which are now substantially G.S. 1-69 and G.S. 1-73: "But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action." It seems clear that G.S. 1-69 and G.S. 1-73 are subject to the limitation expressly incorporated in G.S. 1-123 quoted above.

This Court has held on numerous occasions where an action concerns the title to several tracts of land there is a misjoinder of parties and causes of action if all the parties are not interested in all the tracts of land. *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706; *Holland v. Whittington,* 215 N.C. 330, 1 S.E. 2d 813; *Greene v. Jones,* 208 N.C. 221, 179 S.E. 662; *Rogers v. Rogers,* 192 N.C. 50, 133 S.E. 184.

This Court held in *Edgerton v. Powell,* 72 N.C. 64, that an action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land, the causes not arising out of the same transaction, or connected with the same subject of action.

The question presented by the demurrer for decision is whether all parties are affected by all the causes of action alleged in appellants' further answer and defense, not whether some parties may be affected by some causes of action. It is obvious that the multiple causes of action alleged in appellants' further answer and defense do not affect all the parties to the action, do not arise out of the same transaction, nor are all the transactions connected with the same subject of action.

For instance, plaintiffs are not affected by the alleged cause of action to correct and reform appellants' deed to the Stastnys and the deed of trust from the Stastnys to First Federal Savings & Loan Association. This alleged cause of action does not arise out of the transaction between plaintiffs and appellants alleged in the complaint, nor is it connected with the same subject of action as plaintiffs' subject of action. It appears from appellants' further answer and defense that the appellants' transaction with the Stastnys occurred sometime after appellants' deed of trust declared upon in the complaint had been recorded in the public registry of Mecklenburg County. In passing on the demurrer we can only consider the face of appellants' further answer and defense, however, it may not be entirely amiss to state that the Stastnys in their answer allege that appellants practiced fraud and deceit upon them in the transaction, and that appellants in respect to the transaction instituted an action against them in the superior court on 10 March 1959, which is now pending. The same is true in respect to the alleged cause of action to correct and reform appellants' deed to the Cateses, and their deed of trust to Gulf Life Insurance Company. Patently the Cateses and Kansas City Title Insurance Company are not affected by plaintiffs' cause of action against appellants.

An analysis of the case indicates that even the most liberal principles would not justify a joinder of all the parties and causes of action asserted by the defendants Waters. In the first place, the causes lack a unifying thread like provisions of a trust or will or misapplication of funds by principal defendants. Secondly, the facts alleged in these multiple causes of action do not constitute a connected series of transactions connected with the same subject of action so as to invoke the rule laid down in *Trust Co. v. Peirce,* 195 N.C. 717, 143 S.E. 524; *Barkley v. Realty Co.,* 211 N.C. 540, 191 S.E. 3; *Leach v. Page,* 211 N.C. 622, 191 S.E. 349; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382; *Erickson v. Starling,* 233 N.C. 539, 64 S.E. 2d 832.

It is clear that the Waterses' further answer and defense and motion to make new parties defendant and the joinder of the additional parties by order of the clerk have created a misjoinder of parties and

causes of action which is fatal, and causes a dismissal of the Waterses' further answer and defense and a striking of it from their answer. *Johnson v. Scarborough, supra; Atkins v. Steed,* 208 N.C. 245, 179 S.E. 889; *Teague v. Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345; *Utilities Com. v. Johnson,* 233 N.C. 588, 64 S.E. 2d 829.

The appellants rely on G.S. 1-57, actions must be prosecuted by the real party in interest. The decision here does not deprive appellants of the provisions of that statute, which is still available to them as a defense, if applicable.

The plaintiffs instituted this action to collect a debt from the defendants Waters. The multiple causes of action alleged in the further answer and defense of the appellants depend upon very different facts not arising out of the same transaction, or transactions connected with the same subject matter, and different principles of law, involving different causes of action, and would tend to create confusion and uncertainty in the trial of plaintiffs' action, if permitted to remain in the case. The appellants and any of the additional defendants made parties defendant by the clerk's order may litigate whatever controversies they have, if they so desire, in independant actions.

The order below sustaining the demurrer, and vacating the clerk's order making additional parties defendant, is

Affirmed.

IN THE MATTER OF JAMES A. SHULER, S. S. NO. 242-44-3064, CLAIMANT-EMPLOYEE, ROBERT T. MEDFORD, S. S. NO. 242-34-3723, CLAIMANT-EMPLOYEE AND DAYCO SOUTHERN DIVISION OF DAYCO CORPORATION (FORMERLY THE DAYTON RUBBER COMPANY), WAYNESVILLE, NORTH CAROLINA, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA.

(Filed 1 November, 1961.)

Master And Servant § 105—

Benefits received by a laid-off employee from a trust fund set up pursuant to a collective bargaining agreement should not be deducted from unemployment insurance benefits due such employee under the Employment Security Act. G.S. 96-8.

APPEAL by James A. Shuler and Robert T. Medford, claimants-employees, and Dayco Southern Division of Dayco Corporation (formerly The Dayton Rubber Company) Waynesville, North Carolina, employer, from *Froneberger, J.,* May, 1961, Civil Term, HAYWOOD Superior Court.

The above claimants Shuler and Medford applied to the Employment Security Commission (ESC) of North Carolina for unemployment insurance benefits by reason of their temporary lay-off by the Dayco Corporation at its Waynesville, North Carolina, plant. For the week ending June 26, 1960, Shuler received $13.63 and Medford $16.46 from the trustee of a supplemental unemployment benefit fund (SUB) set up by the employer according to the terms of its contract with Local Union No. 277, United Rubber, Cork, Linoleum and Plastic Workers of America, the workers' bargaining agent, of which both claimants were members. The Commission treated these payments as wages and reduced unemployment insurance benefits accordingly. The claimants protested the deduction. They followed procedural steps leading to a formal hearing before the Commission. After hearing, the Commission held the SUB payments to Shuler and Medford were deductible from the State unemployment insurance benefits. Both claimants and their employer appealed to the Superior Court of Haywood County. The superior court entered judgment sustaining the commission's order. The claimants and Dayco Southern appealed.

W. D. Holoman, R. B. Billings, D. G. Ball, for Employment Security Commission, appellee.

William Medford, James V. Barbuto, for claimants, and Dayco Southern Division of Dayco Corporation, appellants.

Leonard Lesser, Feller, Bredhoff & Anker, for Industrial Union Department AFL-CIO, Amicus Curiae.

Joyner, Howison & Mitchell, Harry Flynn, for Aluminum Company of America, Amicus Curiae.

Womble, Carlyle, Sandridge & Rice, for Ford Motor Company, Amicus Curiae.

HIGGINS, J. The appellants assign as error the judgment of the superior court that supplemental employment benefits from the trust fund set up by their employer are deductible (as wages) from the State unemployment insurance benefits due laid-off employees under Chapter 96, General Statutes of North Carolina.

As a basis for enacting Chapter 96, the North Carolina General Assembly declared: "Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State . . . The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor

relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." For a full discussion of Chapter 96, General Statutes, see *In re Tyson,* 253 N.C. 662, 117 S.E. 2d 854.

Qualification for benefits under the employment security law are provided in G.S. 96-8(11): "An individual shall be deemed 'totally unemployed' in any week with respect to which no wages are payable to him and during which he performs no services." G.S. 96-8(13): "From and after March 10, 1941, 'wages' means all remuneration for services from whatever source." A laid-off employee is therefore entitled to the insurance benefits under the State law if he is totally unemployed; that is, if he does not work, and is not paid and not due pay for services.

Under the wage and service test fixed by G.S. 96-8, do the payments to its laid-off employees under the Employer's Supplemental Unemployment Benefit plan (SUB) constitute wages? The plan is a contract between the employer and Local Union No. 277, the workers' bargaining agent, of which the claimants are members. The employer has set up a trust fund according to a fixed formula for the benefit of its laid-off employees. "It is the purpose of the plan to supplement State system unemployment benefits to the levels herein provided and not to replace or duplicate them. . . . Neither the company's contributions nor any benefit paid under the plan shall be considered a part of any employee's wages for any purpose. No person who receives any benefit shall for that reason be deemed an employee of the company. . . . In order to qualify for SUB payments a laid-off employee must be certified to the trustee as unemployed by the State unemployment insurance agency."

The question is presented here for the first time. The Supreme Court of Ohio is the only court of last resort which has passed on the question, though most of the states have agencies comparable to our ESC and many industries have SUB plans similar to Dayco's contract with the Local Union No. 277. In the Ohio case, (*Steel Workers v. Doyle,* 168 O.S. 324, 154 N.E. 2d 623), the state administrative agencies deducted the SUB payments from unemployment benefits. On appeal to the Court of Common Pleas of Mahoning County the administrative decision was reversed. The Court of Appeals affirmed. The Supreme Court of Ohio reversed the judgment, holding SUB payments are remuneration for personal services for that the worker during the lay-off period retained (1) his status as an available employee,

(2) his seniority, pension, and severance pay rights, (3) was required to report to the employer and to register for State compensation. However, the court's argument in the majority opinion, based on *Cross v. Steel Workers*, 174 Fed. 2d 875, and *Nierotko v. Social Security Board*, 327 U.S. 358, seems to have been fully answered in the dissenting opinion of *Judge Taft* in which *Judge Zimmerman* concurred. The *Cross* case dealt with the question whether a health and accident insurance plan was sufficiently related to "wages" to form a proper subject for collective bargaining, and the *Nierotko* case dealt with back pay. Following the *Doyle* decision, the General Assembly of the State of Ohio, 1959, Vol. 128, Session Laws, amended its law, directing the Bureau of Unemployment Compensation to recognize SUB payments as valid and not deductible from unemployment insurance benefits.

In another court decision rendered by the Superior Court of Los Angeles County, California, the SUB payments were held deductible. The California legislature promptly amended the law, disallowing the deduction. The State of Maine, by an unreviewed administrative decision, required deduction of SUB benefits. Virginia, by Act of Assembly, specifically requires the deduction.

The North Carolina administrative decision and the affirming superior court judgment now under review hold the deduction valid. Administrative decisions in the other states pay full insurance benefits and do not deduct the SUB benefits.

The contract between Dayco and Local Union No. 277 under which SUB payments are authorized, specifically provides: "Neither the company's contribution nor any benefit under the plan shall be considered a part of any employee's wages for any purpose." Another condition of SUB payments is that State law must permit "supplementation" which is defined as "recognition of the right of a person to receive both a state system unemployment benefit and a weekly supplement benefit under the plan for the same week of lay-off . . . and without reduction of the state system unemployment benefit." Of course, the agreement of the parties as to their rights is persuasive but not necessarily binding on the Commission.

Supplementation of unemployment insurance benefits is designed to assist those employees who, on account of a lay-off due to no fault of their own, are out of work. It is a method by which the employer, as suggested in G.S. 96, recognizes its public duty. The employer and the laid-off employee keep their connections each with the other. The relationship thus continued is likely to lead the employee to return to his job if and when it is available. Can it be said, therefore, that Dayco, by setting up the trust, and Shuler and Medford, by participating in it as laid-off employees, to the extent of their participation,

received pay for work during the week beginning June 26, 1960? The reasons advanced and the cases cited in the Commission's excellent brief do not justify an affirmative answer.

Hence we conclude the Superior Court of Haywood County, and consequently the Employment Security Commission, erroneously deducted SUB payments from the unemployment insurance benefits due Shuler and Medford. The judgment of the superior court is set aside. The superior court will remand the case to the Employment Security Commission of North Carolina for disposition in accordance with this opinion.

Reversed.

MARY R. POOLE v. HARVEY MOTOR COMPANY, INCORPORATED, AND KENNETH HUGH HILL, ORIGINAL DEFENDANTS; AND CARSON R. POOLE, AND W. ROY POOLE, INC., ADDITIONAL DEFENDANTS.

(Filed 1 November, 1961.)

Trial § 49—

Movant made it appear that a person who was an eyewitness to the collision in suit disclosed to movant that he was an eyewitness only after the witness had read in the newspaper of the verdict of the jury in the case, and that the witness would give material testimony as to how the collision in suit occurred. *Held:* There was sufficient showing to invoke the discretionary power of the court to order, during the trial term, a new trial for newly discovered evidence, and the court's action in granting the motion is affirmed.

APPEAL by original defendants, Harvey Motor Company, Incorporated, and Kenneth Hugh Hill, from *Mintz, J.*, April 1961 Term of LENOIR.

Civil action to recover for damage to an automobile, resulting from a collision between an automobile owned by plaintiff and being driven by her husband, and a station wagon owned by Dr. W. T. Parrott and being driven by Kenneth Hugh Hill, an employee of Harvey Motor Company, Incorporated, who was acting in the course of his employment, which occurred about 2:30 o'clock p. m. on the afternoon of 4 May 1959 at the intersection of Stockton Road and Woodview Road in the city of Kinston.

Plaintiff alleged that the collision was caused by the actionable negligence of Harvey Motor Company, Incorporated, and of Kenneth Hugh Hill, its employee. These defendants deny that they were negli-

gent, and allege that if it should be shown upon the trial that they were negligent, Carson R. Poole, husband of plaintiff and driver of her automobile at the time as an employee of W. Roy Poole, Incorporated, in the course of his employment, and W. Roy Poole, Incorporated, were negligent and that their negligence concurred with the negligence of the original defendants as a proximate cause of the damage to plaintiff's automobile, and pray that Carson R. Poole and W. Roy Poole, Incorporated, be made parties defendant for the purpose of enforcing contribution pursuant to the provisions of G.S. 1-240. The court entered an order making them parties defendant, and the original defendants filed a cross action against the additional defendants to enforce contribution, if they, the original defendants, should be found guilty of actionable negligence.

When the action was tried before Judge Mintz and a jury, three eyewitnesses to the collision testified, Carson R. Poole for plaintiff, and Kenneth Hugh Hill and John DeVane, an employee of Harvey Motor Company, Incorporated, for the original defendants. Carson R. Poole was knocked unconscious in the collision, and in a daze was carried to a hospital.

The jury found by its verdict that plaintiff's automobile was not damaged by the negligence of the original defendants, and did not get to the issue of the amount of damage to plaintiff's automobile, the issue of whether the additional defendants were negligent, and the issue in respect to contribution.

One George I. Ford, a resident of Kinston, was an eyewitness to the collision. He did not disclose to plaintiff that he was an eyewitness to the collision until after he read in the Kinston Free Press, an afternoon daily in Kinston, an article stating that the jury had decided the case against plaintiff.

Plaintiff first learned of this new evidence during the trial term. Whereupon, plaintiff during the trial term and before judgment on the verdict made a motion for a new trial on the ground of newly discovered evidence.

Judge Mintz at the trial term, and before judgment, entered an order to the following effect: It appeared to the court, upon a consideration of plaintiff's motion for a new trial on the ground of newly discovered evidence, and after hearing the argument of counsel for the parties, that the motion should be allowed in the discretion of the court, and that the verdict before rendered should be set aside and a new trial granted. Whereupon, Judge Mintz in his discretion ordered that the verdict be, and it hereby is, set aside, and further ordered in his discretion a new trial be had.

From the order entered the original defendants appealed.

Jones, Reed & Griffin for plaintiff, appellee.

Whitaker and Jeffress for Harvey Motor Company, Inc., and Kenneth Hugh Hill original defendants, appellants.

PARKER, J. This Court said in *Frye & Sons, Inc., v. Francis,* 242 N.C. 107, 86 S.E. 2d 790: "Similarly, a motion for new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his decision, whether granting or refusing the motion, is not reviewable in the absence of an abuse of discretion. *Farris v. Trust Co.,* 215 N.C. 466, 2 S.E. 2d 363; *Bullock v. Williams,* 213 N.C. 320, 195 S.E. 791; *Fleming v. R. R.,* 168 N.C. 248, 84 S.E. 270; *Carson v. Dellinger,* 90 N.C. 226."

"A motion for new trial on the ground of new evidence, discovered during the trial term, is addressed to the discretion of the trial judge, and his decision, whether granting or refusing to grant the new trial, when made in the exercise of such discretion, is not ordinarily subject to review." *Farris v. Trust Co.,* 215 N.C. 466, 2 S.E. 2d 363.

Appellants' contention is that there was an abuse of discretion by Judge Mintz, for the reason that plaintiff in her motion for a new trial on the ground of newly discovered evidence has made an insufficient showing to invoke a discretionary ruling in her behalf by Judge Mintz.

Three eyewitnesses testified about the collision: Carson R. Poole, husband of plaintiff, and Kenneth Hugh Hill, a defendant, and John DeVane, an employee of Harvey Motor Company, Inc., another defendant. The written statement of George I. Ford, who is apparently a disinterested witness, is that he was sitting in his automobile parked on the north side of Woodview Road about 50 feet east of the intersection in which the collision here occurred, and saw the collision. That plaintiff's automobile entered the intersection first, and that as her automobile approached the intersection he saw the automobile which struck her automobile as it came off of Jones (Carey) Road into Stockton Road at a speed sufficient to cause the tires to squeal as he turned into Stockton Road, and as he traveled southwardly on Stockton Road the station wagon he was driving veered to the left and then back to the right and was traveling at least 40 to 45 miles per hour as it entered the intersection of Stockton Road and Woodview Road. Plaintiff's automobile in the collision was knocked southwardly some several feet from the point of impact, and Carson R. Poole was thrown from the automobile on to the street. The operator of the station wagon said in his presence he did not see plaintiff's automobile before he struck it.

The prerequisites to the granting of a motion for a new trial for newly discovered evidence are set forth fully in *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690; *Brown v. Hillsboro*, 185 N.C. 368, 117 S.E. 41; *Brown v. Sheets*, 197 N.C. 268, 148 S.E. 233; *S. v. Casey*, 201 N.C. 620, 161 S.E. 81; *Love v. Queen City Lines*, 206 N.C. 575, 174 S.E. 514.

The new evidence here, presented by plaintiff at the trial term and before judgment entered, goes to the heart of the case, to wit, the collision of the two automobiles. An examination of the affidavits offered by plaintiff in support of her motion shows compliance with the required tests. When compared with the evidence introduced at the trial of the case in the superior court, it appears that the newly discovered evidence is not merely cumulative, and it does not tend only to contradict a former witness or witnesses, or to impeach or contradict him or them. No one could possibly be so well advised as to the justice and propriety of granting or refusing a motion for a new trial for newly discovered evidence as the judge who has just heard the facts developed in the trial. Plaintiff has made out a showing of newly discovered evidence sufficient in law to invoke the discretionary ruling here of Judge Mintz at the trial term. No abuse of discretion on his part is shown.

The discretionary order of Judge Mintz, setting aside the verdict and granting a new trial on the ground of newly discovered evidence at the trial term, is

Affirmed.

STATE v. L. L. HODGES AND BURLIE GOSNELL.

(Filed 1 November, 1961.)

Homicide §§ 10, 27— Evidence held to raise questions of one defendant's right to kill in defense of her daughter and other defendant's right to kill in defense of sister-in-law who was a member of his household.

Defendants' evidence tended to show that deceased and his brother, both armed, made a violent and unprovoked assault upon a certain person who was the daughter of one defendant and the sister-in-law of the other defendant, and defendant's evidence raised the permissible inferences that one defendant entered the affray in response to screams of her daughter for help and in an effort to defend her, and that the other defendant, a number of shots having been fired, shot deceased in defense of his sister-in-law, inflicting fatal injuries. *Held:* It was incumbent upon the court to charge the jury upon the right of defendants to kill in defense of the vic-

tim of the assault, which right was coextensive with the right of the victim of the assault to act in her own self-defense, and the failure of the court to give instructions on this aspect of the case is prejudicial error.

APPEAL by defendants L. L. Hodges and Burlie Gosnell from *Riddle, S.J.*, July, 1961, Term, MADISON Superior Court.

Criminal prosecution upon a bill of indictment charging the defendants and Dorothy Mae Gosnell with the murder of Creanes Gosnell. Upon arraignment, the defendants pleaded not guilty.

The evidence disclosed that the deceased, Creanes Gosnell, and the defendant, Burlie Gosnell, were husband and wife, though living in a state of separation. Dorothy Mae Gosnell is their daughter. Bertha Mae Hodges is another daughter. The defendant L. L. Hodges is a brother of Wade Hodges — Bertha Mae's husband. The evidence indicates that bad feeling existed between Creanes Gosnell on the one hand, and his wife, daughters and Wade Hodges, (not involved) on the other hand.

Prior to November 12, 1960, Burlie Gosnell lived in the home of Celola Ramsey on U. S. Highway No. 70 near Marshall. Dorothy Mae Gosnell, Bertha Mae Hodges and the defendant L. L. Hodges lived in the same household in Kingsport, Tennessee. The deceased, Creanes Gosnell, lived in the home of his brother, Suard Gosnell, near Marshall.

In the afternoon of November 12, 1960, the defendant L. L. Hodges, his sister-in-law, Bertha Mae Hodges, and Dorothy Mae Gosnell came to the Ramsey home for the purpose of delivering a washing machine to Burlie Gosnell. While the machine was being unloaded from the Hodges' Jeep, the deceased passed in his automobile on two or more occasions. Shortly before the difficulty he drove by again with his brother Suard Gosnell, and parked at a filling station near the Ramsey home. As to what happened thereafter, the evidence is conflicting.

According to the defendants' version, Dorothy Mae Gosnell, knowing her father was armed and had made threats against her mother and Hodges, and fearing he had stopped to carry them out, she, as a peacemaker, approached her father's automobile to remonstrate with him not to cause any trouble; that the deceased and his brother, both armed with pistols, violently assaulted her with their fists, seized her, threw her into the back seat of the automobile where Suard held her; that she screamed, and continued to scream for help. Burlie Gosnell, in answer to Dorothy's call, secured a pistol and started to the rescue. As she was approaching the automobile, Suard Gosnell shot at her through the rear glass. Dorothy Mae scuffled with him for possession of his pistol. In the meantime, Creanes Gosnell began shooting

at Burlie Gosnell, who fired some shots at the deceased. Bertha Mae Hodges, unarmed, started to the scene of the difficulty. Thereupon the deceased began shooting at her. At this stage the defendant L. L. Hodges took a rifle from his Jeep, advanced towards the trouble, fired one shot in the ground to warn the deceased not to fire again at Bertha; but when the warning was not heeded, he fired a shot at the deceased's legs. One bullet, apparently from Hodges' rifle, struck Creanes Gosnell in the groin, causing his death later on that day.

At the close of all the evidence the defendants' demurrer thereto was sustained as to Dorothy Mae Gosnell but overruled as to the appellants. The jury convicted L. L. Hodges of murder in the second degree and Burlie Gosnell of manslaughter. From the judgments imposed, the defendants appealed.

T. W. Bruton, Attorney General, G. A. Jones, Jr., Asst. Attorney General, for the State.

A. E. Leake, Elmore & Martin, By: Harry C. Martin, for defendants, appellants.

HIGGINS, J. The trial court in the charge to the jury accurately reviewed the evidence and correctly instructed the jury as to the law governing murder and manslaughter. The court likewise charged as to the right of each defendant to defend his or her self. However, the court failed to charge or refer to any conditions or circumstances under which Burlie Gosnell might fight in defense of her daughter, or L. L. Hodges in defense of his brother's wife.

The defendants' evidence, heretofore quoted in the statement of facts, tends to show that Burlie Gosnell entered the fight by reason of the screams of her daughter for help and in an effort to defend her. She did not claim that she entered the difficulty in defense of herself. Likewise, the evidence tends to show that L. L. Hodges shot in defense of his sister-in-law and not in defense of himself. These are permissible inferences from the defendants' evidence. The credibility of the evidence is for the jury — not for the court. Hence the State's evidence is omitted.

The defendants' evidence required the court to charge the jury that if Dorothy Mae Gosnell was assaulted by the deceased or by the deceased and his brother Suard, acting in concert, under such circumstances as entitled Dorothy to fight in self-defense, then the mother, Burlie Gosnell, would have an equal right to defend her daughter. The mother's right was coextensive with the right of the daughter to defend herself. *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271. "*Non constat* the defendant relied upon his right to defend his wife

and not upon his right to kill in his own necessary defense, the court reiterated the charge that the jury must convict unless they found the defendant was fighting in his own defense — a plea not made, and unsupported by evidence. . . . As the evidence favorable to the defendant tends to indicate that defendant acted in defense of his wife, instructions as to his right to defend himself are inapplicable and misleading." (Citing *State v. Lee,* 193 N.C. 321, 136 S.E. 877.)

Likewise this Court held in *State v. Mosley,* 213 N.C. 304, 195 S.E. 830: "1. That one may kill in defense of himself or his family when necessary to prevent death or great bodily harm. . . . 2. That one may kill in defense of himself or his family when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

The foregoing rules apply to the right of Burlie Gosnell to defend her daughter and likewise to the right of L. L. Hodges to defend his brother's wife who was a member of his household. *State v. Cloud,* 254 N.C. 313, 118 S.E. 2d 789.

The learned judge inadvertently failed to charge the jury with respect to the rights of the defendants to defend the members of their families. The failure so to charge is the subject of Assignment of Error No. 15. The assignment is sustained. The defendants are entitled to a New trial.

ROBERT L. SMITH v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 1 November, 1961.)

Insurance § 26—

Where the admissions in the pleadings and the stipulations of the parties make out a *prima facie* case of liability on a policy of life insurance, the fact that the proof of death introduced by plaintiff has the word "suicide" printed in ink under the heading "cause of death" does not entitle insurer to nonsuit or a peremptory instruction on the affirmative defense of suicide when plaintiff testifies that he signed the paper in a hurry at the instance of insurer's agent and that at that time the word "suicide" did not appear thereon.

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

APPEAL by defendant from *Pless, J.,* June, 1961, Term, CALDWELL Superior Court.

The plaintiff, beneficiary, brought this action to recover on an in-

surance policy issued by the defendant on the life of plaintiff's wife, Katherine P. Smith. The defendant answered, admitting the execution, delivery of the policy, payment of the premium, and the death of the insured. It denied liability, however, upon the ground the insured's death resulted from suicide.

"For the purpose of eliminating the issues not in controversy," the parties entered in the record the following: "It is stipulated and agreed that on or about the 10th day of February, 1958 the defendant issued its Policy No. L-10-K-1042497 issued on the life of Katherine P. Smith in the principal sum of $1,000.00; that Robert L. Smith, the plaintiff herein, was the primary beneficiary named in the said Policy; that Mrs. Smith died on or about the 30 day of August, 1959 at which time the premiums were paid."

The plaintiff offered the policy in evidence, testified that he had not been paid, and rested. The defendant likewise rested and moved for a directed verdict for the defendant. The motion was denied. Whereupon, the plaintiff asked that the case be reopened and he be permitted to offer further evidence. The court permitted this to be done over defendant's objection. The plaintiff offered "the Proof of Loss" and testified he signed this paper brought to him by defendant's agent; that when he signed it it was blank except for his wife's name, and that there was nothing 'printed' on it. The photostat of the paper sent up with the record on appeal has the word "Suicide" printed in ink under the heading "Cause of Death."

The policy contained the following: "If insured shall die as a result of suicide, while sane or insane, within 2 years of the policy date, the liability of the company under this policy shall be limited to the premiums paid."

At the close of the evidence the defendant moved for nonsuit and for a peremptory instruction to answer the first issue, Yes. The court denied the motions. The jury answered the issues as here indicated: "1. Did Mrs. Katherine P. Smith die as a result of suicide? Answer: No. 2. What amount is the plaintiff entitled to recover? Answer: $1,000.00." From the judgment on the verdict, the defendant appealed.

Claude F. Seila, Ted G. West, for plaintiff, appellee.
Townsend & Todd, By: Folger Townsend, for defendant, appellant.

HIGGINS, J. The policy, the admissions in the answer, and the stipulations of the parties made out a case of liability for the face value of the policy. The defendant sought to escape liability on the ground that death resulted from suicide. Nothing in the evidence sug-

gested suicide save the word inserted by pen in the "Proof of Loss" which, for some reason, the plaintiff introduced. However, he testified he signed the paper in a hurry at the instance of the defendant's agent and at the time he signed it the word suicide was not on it. The court submitted the suicide issue under proper instructions and the finding of the jury is conclusive.

No error.

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

STATE v. WOODROW STEWART.

(Filed 1 November, 1961.)

1. Robbery § 6—

An indictment charging an assault with a deadly weapon and that defendant by means of such weapon and threats of violence took personal property from the person of his victim is sufficient to charge common law or highway robbery, but is insufficient to charge robbery with firearms or other deadly weapon, G.S. 14-87, there being no allegation that the life of a person was endangered or threatened by the use of a dangerous instrument or means, and therefore the maximum sentence upon conviction under such indictment, or upon defendant's plea of guilty of highway robbery, cannot exceed ten years, G.S. 14-2.

2. Criminal Law § 127—

Where consecutive sentences are imposed upon the defendant for separate offenses, the fact that the first sentence is in excess of that allowed by law does not render the sentences void for ambiguity or uncertainty and the defendant is not entitled to his discharge, but the cause will be remanded for imposition of proper sentence in lieu of the excessive sentence vacated, with credit for time served, and the imposition of sentences to begin at the expiration thereof for the other offenses.

PETITION for *certiorari*.

PER CURIAM. Petitioner Woodrow Stewart was tried in case No. 38 of the criminal docket of Watauga County Superior Court at the September Term 1945, Gwyn, J., presiding. It is charged in the bill of indictment in that case that Woodrow Stewart and another on 27 July 1945 "unlawfully, wilfully and feloniously, at and in and near the public highway, did commit an assault upon one H. J. Teague, with a deadly weapon, to wit, a club and by means aforesaid and by

threats of violence did steal, take and carry away from his person and did rob him, the said H. J. Teague, of the sum of $718.00, the property of the said H. J. Teague." The court minutes for that term show the following: "No. 38 . . . Highway Robbery. Defendants plead guilty. It appearing to the Court that the defendants robbed the prosecuting witness . . . in the day time on the public highway, by means of a deadly weapon, the defendants being masked; it is ordered and adjudged that the defendants be confined in the State's Prison for not less than 18 nor more than 20 years." Petitioner was committed to serve the sentence thus imposed.

In September 1961 Stewart petitioned for writ of *habeas corpus* and alleged that the sentence imposed is excessive as a matter of law and requested that he be discharged. The petition was heard by Gambill, J., 13 September 1961 at chambers. Judge Gambill ruled that "the punishment of not less than 18 nor more than 20 years . . . is not excessive . . . within the purview of" G.S. 14-87.

Highway robbery is a common law offense and is frequently denominated "common law robbery." Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834; *State v. Burke,* 73 N.C. 83. It is punishable by imprisonment in the State's prison for a term not to exceed 10 years. G.S. 14-2. *In Re Sellers,* 234 N.C. 648, 68 S.E. 2d 308.

G.S. 14-87, entitled "Robbery with firearms or other dangerous weapons," creates no new offense. "It does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed." *State v. Hare,* 243 N.C. 262, 90 S.E. 2d 550; *In Re Sellers, supra; State v. Keller,* 214 N.C. 447, 199 S.E. 620; *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364; *State v. Bell, supra.* It "superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed 'with the use or threatened use of . . . firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened.' " *State v. Rogers,* 246 N.C. 611, 99 S.E. 2d 803. To support a judgment imposing a prison term in excess of ten years the bill of indictment must allege facts sufficient to bring the case within this "additional requirement" and in accord with the tenor and substance of G.S. 14-87.

The bill of indictment in case No. 38 upon which petitioner was tried is sufficient to support a plea or conviction of highway robbery, for the facts alleged are sufficient to charge robbery by intimidation

or violence, which is the gist of common law robbery. *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764; *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *State v. Burke, supra.* But it does not allege that the life of a person was endangered or threatened by the use or threatened use of a dangerous weapon, instrument or means. Compare the indictment herein with those in *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876, and *State v. Mull, supra.* It is our opinion that the indictment does not contain the additional allegations required in order to permit the more severe punishment provided for in G.S. 14-87.

But even if the indictment had charged the offense in accordance with G.S. 14-87, there is a further reason that the punishment may not exceed a term of 10 years in this case. The court minutes show that petitioner pleaded guilty to highway robbery. And highway robbery is a lesser offense embraced in the charge of robbery with firearms or other dangerous weapon. *State v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684; *State v. Bell, supra.* Upon a plea of highway robbery the court may not change the effect of the plea by finding facts and thereby expose defendant to greater punishment than the plea will support.

In pronouncing judgment the court was bound by the provisions of G.S. 14-2, which fixes ten years as the maximum which may be imposed for highway robbery.

The order of Gambill, J., finding that "the punishment of not less than 18 nor more than 20 years . . . is not excessive" and denying the petition for *habeas corpus,* is vacated and set aside. However, the petitioner is not entitled to a discharge. The plea of guilty of highway robbery stands and proper judgment must be entered. *State v. Shipman,* 203 N.C. 325, 166 S.E. 298. To that end the judgment pronounced in case No. 38, Watauga County Superior Court, September Term 1945, against Woodrow Stewart shall be vacated and the cause remanded to the Superior Court of Watauga County with direction that a proper sentence be imposed, the term thereof not to exceed ten years. The Superior Court of Watauga County in pronouncing sentence should be careful to so condition its judgment as to allow petitioner credit for the time he has served in the execution of the sentence hereby directed to be vacated.

It has come to the attention of this Court that judgments have been entered in other cases imposing prison sentences against petitioner, these sentences to run consecutively, and the first of them to begin at the expiration of the sentence in case No. 38, from Watauga. If the Superior Court of Watauga County finds that petitioner has already served, under the vacated judgment in case No. 38, a term equal to or in excess of that which shall be imposed pursuant to this opinion, petitioner, notwithstanding, shall be recommitted to serve the sentence

in the other cases which were pronounced to begin at or after the expiration of the sentence in case No. 38.

In any event the invalidity of the sentence in case No. 38 does not render void for ambiguity or uncertainty as to the time of the beginning of the sentences imposed in other cases, the terms of which begin at or after the expiration of the sentence in case No. 38. *In Re Sellers, supra.*

This cause is remanded to Judge Gambill that he may forthwith enter an appropriate order directing that the procedure herein prescribed be carried out. He shall further order that the proper officials of the State's Prison deliver custody of petitioner to the sheriff of Watauga County prior to the convening of the term of the Superior Court for the trial of criminal cases to be held in Watauga County next after the entry of his order.

Error and remanded.

J. MACK THOMPSON v. ANDREW GENNETT, N. C. W. GENNETT, JR., AND JULIA G. LAMBETH, PARTNERS, DOING BUSINESS AS GENNETT LUMBER COMPANY AND AS GENNETT OAK FLOORING COMPANY, AND GENNETT OAK FLOORING COMPANY, INC.

(Filed 1 November, 1961.)

Judgments § 2—

Where the judge does not enter an order in the cause during the trial term but merely indicates upon the hearing that he would do so, and after adjournment of the term and outside the county and district enters the order without notice to or consent of a party, such order may not stand notwithstanding it states that it is entered *nunc pro tunc.*

APPEAL by plaintiff from an order signed April 22, 1961, in Asheville, North Carolina, in an action pending in YANCEY Superior Court.

A regular two-week term of Yancey Superior Court convened on Monday, March 6, 1961. Honorable W. K. McLean, the Regular Judge holding the courts of the Twenty-Fourth Judicial District for the first six months of 1961, presided. This case was calendared for trial on Wednesday, March 8th.

At the call of the calendar on Monday, March 6th, and after discussion in open court by counsel for plaintiff and defendants, Judge McLean stated it would not, in his opinion, be proper for him to preside at the trial of this case. In explanation, he stated his former law

firm, while he was a member thereof, was employed to represent and did represent the defendants in this case; and that he had become acquainted to some extent with the facts and circumstances as contended by defendants. Thereupon, Judge McLean "ordered in open Court and in the presence and hearing of said attorneys that this cause be transferred to an adjoining Judicial District for trial and stated that he would sign an order to that effect during the two-weeks term of Court for Yancey County."

No order purporting to transfer the cause was signed during said term. However, on April 22, 1961, in Asheville, North Carolina, Judge McLean signed an order concluding, "This the 6th day of March, 1961, nunc pro tunc," and mailed it. It was received and filed by the Clerk of the Superior Court of Yancey County on April 24, 1961. The order purports to transfer this cause from Yancey Superior Court to Buncombe Superior Court and directs that the Clerk of the Superior Court of Buncombe County "shall calendar this cause for trial at the next available civil term of said Court according to the customs and rules of said Court."

Plaintiff excepted to said order and appealed.

Anglin & Bailey for plaintiff, appellant.
Elmore & Martin for defendants, appellees.

PER CURIAM. This cause was properly instituted in Yancey County. At said March 6th Term it was for hearing in the superior court upon exceptions to the report (dated January 25, 1961) of a referee. Contracts and transactions with reference to lumber operations in Yancey County are the subject of controversy. Both plaintiff and defendants had excepted to the order of reference; and, in filing exceptions to the referee's report, had tendered issues and demanded a jury trial thereon.

On March 6th, Judge McLean did not, by the announcement then made, purport to transfer the cause to any designated county or to any designated adjoining judicial district. Rather, he indicated he would sign, during the term, a specific order of transfer. He did not do so. Nor did plaintiff consent that such an order might be signed after adjournment of the term.

No order, oral or written, purporting to transfer the cause from Yancey County to Buncombe County was made until Judge McLean signed, in Asheville, N. C., the order of April 22, 1961. This order was made and signed (1) after adjournment of the March 6th Term, (2) outside the county, (3) outside the district, and (4) without notice to or consent of plaintiff or his counsel.

The order signed April 22, 1961, was made "in the discretion of the Court and on the Court's own motion."

The order of April 22, 1961, was signed as follows: "W. K. McLEAN, Judge Presiding, March 6, 1961, Term, Yancey County Superior Court." Absent consent, the judicial authority vested in Judge McLean as Presiding Judge at said March 6th Term terminated upon adjournment thereof. Hence, Judge McLean lacked judicial authority to enter said order of April 22, 1961. Accordingly, the order of April 22, 1961, must be and is vacated. In view of this conclusion, the validity of the purported order of transfer, if it had been entered during the March 6th Term, need not be considered.

Order vacated.

AGNES G. FISHEL v. DONALD E. CARPENTER.

(Filed 1 November, 1961.)

Automobiles §§ 41i, 44—

Evidence tending to show that defendant attempted to enter heavy traffic on a street from a filling station and collided with plaintiff's vehicle, which was traveling in its proper lane, *is held* insufficient to warrant the submission of an issue of plaintiff's negligence, either on the question of contributory negligence or on the question of negligence upon defendant's counterclaim.

APPEAL by defendant from *Crissman, J.*, March 20, 1961, Term, FORSYTH Superior Court.

This civil action grew out of a collision between the plaintiff's 1954 Chevrolet and the defendant's 1958 Ford, just north of the intersection between South Main Street and Clemmonsville Road in Winston-Salem. South Main is a three-lane street, two for south-bound and one for north-bound traffic. The accident occurred about 4:30 p.m. on June 5, 1961. The traffic was heavy. The plaintiff, driving south in the middle lane of Main Street, intended to make a left turn and enter Clemmonsville Road. The defendant attempted to enter the stream of traffic from a filling station located on the west side of South Main Street. The evidence indicates the collision occurred in the plaintiff's lane of traffic.

The defendant tendered an issue of plaintiff's negligence, both as a bar to her right of recovery and as a basis for his counterclaim. However, all the evidence indicated the defendant attempted to break into

the heavy stream of traffic within the block and that the plaintiff was in her proper traffic lane. The jury answered the issues of negligence and damages in favor of the plaintiff. From a judgment on the verdict, the defendant appealed.

Hoyle C. Ripple; Deal, Hutchins and Minor, By: Roy L. Deal, for plaintiff, appellee.

Hudson, Ferrell, Petree, Stockton & Stockton, By: R. M. Stockton, Jr., Norwood Robinson, for defendant, appellant.

PER CURIAM. The defendant assigns as error the refusal of the court to submit an issue of plaintiff's negligence both as a bar to plaintiff's recovery and as a basis for defendant's counterclaim. The evidence, however, was insufficient to permit a reasonable inference of plaintiff's negligence. The assignment of error is not sustained. Reason does not appear why the judgment should be disturbed.

No error.

DAVIS H. BOWEN v. AMERICAN HOME ASSURANCE COMPANY.

(Filed 1 November, 1961.)

Insurance § 29—

The evidence, considered in the light most favorable to plaintiff, *is held* sufficient to support the jury's findings that plaintiff's tobacco was damaged to the extent of five per cent or more by hail alone within the provisions of the policy of hail insurance sued on.

APPEAL by defendant from *Hall, J.*, March Civil Term, 1961, of VANCE.

Civil action to recover on CHIAA Standard Crop-Hail Policy, issued by defendant to plaintiff, on account of damage to plaintiff's tobacco crop allegedly caused by wind and hail. The court submitted, and the jury answered, these issues: "1. Was the tobacco crop in question directly damaged by hail alone on July 10, 1959, in an amount of at least five per cent? Answer: Yes. 2. If so, in what percentage was the tobacco crop in question directly damaged by hail and wind simultaneously accompanied by hail? Answer: 30%. 3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,170.00."

From judgment for plaintiff, in accordance with the verdict, defendant appealed.

Perry & Kittrell for plaintiff, appellee.
Joyner, Howison & Mitchell for defendant, appellant.

PER CURIAM. There was ample evidence that, during the late afternoon of July 10, 1959, there was a storm, consisting of a hard wind, hail and rain, in the vicinity of plaintiff's 6.44-acre tobacco field; and that, as a result of said storm, plaintiff's tobacco was severely damaged.

The critical issue with reference to defendant's liability to plaintiff under the policy, was whether plaintiff's tobacco was damaged *by hail* and, if so, whether plaintiff's tobacco was damaged "to the extent of 5% or more by hail only." As to this, the evidence offered by plaintiff and defendant was in sharp conflict. Defendant's evidence tended to show the damage to plaintiff's tobacco was caused solely by wind. However, when considered in the light most favorable to plaintiff, we think the evidence was sufficient to support the jury's finding (on the first issue) in plaintiff's favor.

Consideration of each of defendant's assignments of error discloses that error, if any, in the conduct of the trial, was not sufficiently prejudicial to defendant to justify the award of a new trial. Hence, the verdict and judgment will not be disturbed.

No error.

LUTHER DIXON v. HOUSTON YOUNG, ORIGINAL DEFENDANT AND WALTER HOLMES ADAIR, JR., ADDITIONAL DEFENDANT.

(Filed 1 November, 1961.)

Trial § 52—

A motion to set aside the verdict and grant a new trial solely on the issue of damages on the ground that the damages assessed by the jury were inadequate, is addressed to the discretion of the trial court and, in the absence of a showing of abuse of discretion, the denial of the motion will not be disturbed.

APPEAL by plaintiff from *Hall, J.*, May Civil Term 1961 of PERSON.

This is a civil action to recover for personal injuries sustained by the plaintiff on 12 July 1958 about 8:00 p.m. while riding in the rear of an open jeep on U. S. Highway No. 501 in Person County. There was

a collision between the jeep driven by the additional defendant, Walter Holmes Adair, Jr., and a Ford automobile driven by the original defendant, Houston Young.

Issues of negligence as to both defendants were answered in the affirmative. The issue of damages was answered in the amount of $1,000.00. Plaintiff moved to set aside the verdict on the issue of damages only. Motion denied, plaintiff appeals, assigning error.

George W. Miller, Jr. and Donald J. Dorey for plaintiff appellant.
Robert P. Burns and Charles B. Wood for original defendant Young.
R. B. Dawes for additional defendant Adair.

PER CURIAM. The plaintiff assigns as error the refusal of the trial judge to set aside the verdict on the issue of damages only and to grant a new trial thereon on the ground that the damages assessed by the jury were inadequate.

"The granting or the denying of a motion for a new trial on the ground that the damages assessed by the jury are excessive or inadequate is within the sound discretion of the trial judge." *Hinton v. Cline,* 238 N.C. 136, 76 S.E. 2d 162, and cited cases.

In such cases, in the absence of an abuse of discretion, the ruling of the trial judge is not reviewable on appeal. An abuse of discretion has not been made to appear on this appeal.

No error.

MARY PETREE HALL, PLAINTIFF, v. BEN W. ATKINSON, JR., AND FORSYTH COUNTY, DEFENDANTS.

(Filed 1 November, 1961.)

Appeal and Error § 41—

The admission of evidence over objection cannot be held prejudicial when it appears that evidence of like import had been given by the same witness on cross-examination immediately theretofore without objection.

APPEAL by plaintiff from *Crissman, J.,* Second Week of 29 May 1961 Term of FORSYTH.

Civil action to recover for personal injuries and damages to an automobile, resulting from an intersection collision in the city of Winston-Salem, North Carolina, between an automobile driven by

plaintiff and a fire truck owned by Forsyth County and driven by its employee, Ben W. Atkinson, Jr. Forsyth County had purchased a policy of automobile liability insurance covering the operation of the fire truck.

The jury found by its verdict that plaintiff was injured by the negligence of defendants as alleged in her complaint, and that she by her own negligence contributed to her injuries, as alleged in defendants' answer.

From a judgment entered on the verdict that plaintiff recover nothing, she appeals.

Averitt, White and Crumpler By: James G. White and Leslie G. Frye for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice By: I. E. Carlyle and H. G. Barnhill, Jr., for defendants, appellees.

PER CURIAM. Plaintiff assigns as error that James D. Redding, a witness for her, was permitted by the court over her objection to answer on cross-examination the question, "And there wasn't a thing in the world to prevent Mrs. Hall from seeing all the way, was there, if she had looked?", as follows: "If she was looking in that direction, there wasn't — no." This assignment of error cannot be sustained, for the reason that evidence of like import had been given by the same witness on cross-examination immediately before without objection. *Leonard v. Insurance Co.*, 212 N.C. 151, 193 S.E. 166; *McKay v. Bullard*, 219 N.C. 589, 14 S.E. 2d 657; *Edwards v. Junior Order*, 220 N.C. 41, 16 S.E. 2d 466; *White v. Disher*, 232 N.C. 260, 59 S.E. 2d 798. See also *Spears v. Randolph*, 241 N.C. 659, 86 S.E. 2d 263.

All plaintiff's other assignments of error, except formal ones, relate to the court's charge to the jury. A careful reading of the charge in its entirety, and a meticulous consideration of plaintiff's assignments of error in respect thereto, fail to show prejudicial error sufficient to justify the awarding of a new trial. Therefore, the verdict and judgment below will be upheld.

No error.

MYRBLE ROBERTSON, ADMINISTRATRIX OF NOAH LEON ROBERTSON AND MYRBLE LOVING ROBERTSON v. CLETUS FRANKLIN ROBERTSON AND THURMAN SPEASE ROBERTSON, HEIRS AT LAW.

(Filed 1 November, 1961.)

APPEAL by defendants from *Crissman, J.*, March 20, 1961 Term of FORSYTH.

On the prior appeal in this case we said, in an opinion filed 23 November 1960: "Apparently no attempt has been made to establish the location of the boundaries of the lot occupied by N. L. Robertson as his family home. The cause is remanded for this factual determination." *Robertson v. Robertson*, 253 N.C. 376, 116 S.E. 2d 849.

Following the remand the case was calendared and tried at the February 13, 1961 Term of Forsyth. An issue was then submitted to a jury for the purpose of determining the location of the eastern boundary of the lot occupied by N. L. Robertson at his death. The jury answered the issue as contended by purchaser. Judgment was entered on the verdict declaring the purchaser the owner of the land bounded as fixed by the jury's answer to the issue.

At the March 1961 Term defendants moved to set the verdict and judgment entered thereon at the February 1961 Term aside because of asserted mistake, surprise, and excusable neglect. They alleged they did not know the cause was calendared for trial at the February 1961 Term, that the issue submitted was confusing, and the witness on whose testimony the jury fixed the boundary mistakenly testified as to the true location of the line separating the N. L. Robertson homeplace from the land of defendants. Judge Crissman heard the motion and found as facts that "(a) the judgment heretofore entered in this cause on the 24th day of February 1961, as appears of record, was not taken against movants, or either of them, through their mistake, inadvertence, suprise or excusable neglect; and (b) that the movants have failed to establish or to show a good or meritorius defense that would affect the judgment as heretofore entered." Based on these findings, he denied the motion. Defendants excepted to the judgment and appealed.

Geo. W. Braddy for plaintiff appellee.
Buford T. Henderson for defendant appellants.

PER CURIAM. The motion is made pursuant to the provisions of G.S. 1-200. To succeed it is necessary for movant to show both excusable neglect and a meritorious defense. *Pate v. Hospital*, 234 N.C. 637, 68 S.E. 2d 288; *Roediger v. Sapos*, 217 N.C. 95, 6 S.E. 2d 801. Here the court found neither existed.

There is no exception to the findings of fact. The findings support the judgment. This is sufficient. *Utilities Commission v. Gas Co.*, 254 N.C. 734, 120 S.E. 2d 77.

Appellants now contend that Judge Crissman, at the February 1961 Term, misinterpreted what was said in the opinion filed in November 1960, and because of such misinterpretation the trial had at the February 1961 Term and the judgment based on the jury's verdict were void. Seemingly the issue submitted sufficed to fix the disputed boundary and to locate the boundaries of the N. L. Robertson home as directed in the opinion filed in November 1960; but if the court had misunderstood what was then said, and because of such misunderstanding failed to submit an issue locating all the boundaries of the property, the judgment entered on the verdict would not be void. It would merely be erroneous. 5B C.J.S. 646-7. Defendants do not suggest the location of any other boundary is in dispute.

Affirmed.

STATE v. FOREST LEE FRAZIER AND DELLA WILES.

(Filed 1 November, 1961.)

APPEAL by defendants from *Phillips, J.*, at June 1961 Term of WILKES.

Criminal prosecution upon a bill of indictment for fornication and adultery.

Plea: "Not guilty to the bill of indictment."

Verdict: "Guilty as charged."

Judgments: Pronounced as to each defendant as set out in the record. Defendants and each of them except and appeal to Supreme Court, assigning error.

Attorney General Bruton, Assistant Attorney General H. Horton Rountree for the State.

Larry S. Moore for defendants appellants.

PER CURIAM. The case was tried upon evidence offered by the State. The defendants offered none. They rely upon the weakness of the State's case.

A careful examination of the evidence leads us to the conclusion that it is insufficient to support the verdict. Hence, the motion for judgment as of nonsuit, made at the close of the State's evidence, should have been sustained. Therefore, the judgment entered below is

Reversed.

STATE v. RAY WHITTEMORE.
AND
STATE v. ELMER WHITTEMORE.

(Filed 8 November, 1961.)

1. Rape § 12—

Some penetration of the sexual organ of the female by the sexual organ of the male is an essential element of the offense of carnal knowledge by a male person of a female person between the ages of twelve and sixteen. G.S. 14-26.

2. Crime Against Nature—

Some penetration of or by the sexual organ is an essential element of the crime against nature, G.S. 14-177, and this essential element of the offense was not affected by G.S. 14-202.1, which supplements the former statute.

3. Rape § 15; Crime Against Nature—

Testimony that defendant put his private parts against the private parts of prosecutrix and had his private parts "at" the private parts of prosecutrix, and put his mouth on her private parts, is insufficient, standing alone, to establish the "penetration" constituting an essential element of the offense of carnal knowledge of a female between the ages of twelve and sixteen, or the offense of crime against nature, and in the absence of further evidence on this aspect, defendant's motions to nonsuit must be allowed.

4. Criminal Law § 71—

An extrajudicial confession is competent only when made understandingly and voluntarily, and a defendant who has sufficient mental capacity to testify has sufficient mental capacity to confess.

5. Same—

It is error for the court upon the challenge of the competency of a confession to refuse to hear evidence on the *voir dire* that defendant was of low mentality, had great imagination, and would believe anything told him, it being the duty of the court to hear and weigh such evidence in determining whether the confession was in fact understandingly and voluntarily made.

6. Criminal Law § 101—

The uncorroborated confession of a defendant, standing alone, is insufficient to be submitted to the jury on the question of guilt, but a confession may be corroborated by circumstantial evidence, and it is not required that the evidence *aliunde* the confession be sufficient within itself to establish each element of the *corpus delicti*, but it is sufficient if evidence *aliunde* is explained and given criminal import by the confession as to each essential element.

7. Rape § 15; Crime Against Nature—

Evidence that defendant placed his private parts against the private parts of prosecutrix together with a confession by defendant that he rub-

bed his sexual organ through the lips of the sexual organ of the prosecutrix, is sufficient to be submitted to the jury on the question of penetration constituting an esential element of the offenses of crime against nature and the offense of carnal knowledge of a female person between the ages of 12 and 16, the evidence *aliunde* the confession being subject to explanation and interpretation by defendant himself upon the question of penetration.

8. Indictment and Warrant § 17; Criminal Law § 107; Constitutional Law § 21—

While time is not ordinarily of the essence of an offense, when the State specifies the date in the indictment and defendant offers evidence of an alibi, relating to such date, the State may not, after the defendant has rested his case, introduce evidence tending to show defendant's commission of the proscribed act on a later date, and an instruction to the effect that the jury might convict if they found beyond a reasonable doubt that defendant committed the act on either date, must be held for prejudicial error as depriving defendant of his constitutional right of opportunity to rebut the State's evidence. Constitution of North Carolina Art. I, sec. 11.

APPEALS by defendants from *Campbell, J.*, April 1961 Criminal Term of BUNCOMBE.

Ray Whittemore was charged in separate bills with commission of two crimes on 19 March 1961: (1) "the abominable and detestable crime against nature with one Barbara _____, age 13," conduct declared criminal by G.S. 14-177; and (2) "did abuse and carnally know Barbara _____ a female child over twelve and under sixteen years of age, who at said time had never before had sexual intercourse with any person, he, the said Ray Whittemore, a male, being at the time over eighteen years of age," conduct declared criminal by G.S. 14-26.

Elmer Whittemore was charged in separate bills with identical crimes on the same date and place with Patricia _____, twelve years of age.

The names of the females are shown in the bills of indictment but are here purposely omitted. They are half sisters. Elmer is the father of Ray.

By consent the cases were consolidated for trial. Verdicts of guilty as to each defendant on each charge were returned. Each defendant was sentenced to prison on each count, the sentences to run concurrently.

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

Don C. Young and Lamar Gudger for defendant appellants.

RODMAN, J. Each defendant's motion for nonsuit was overruled. Hence the first question for determination is: Was there any evidence to establish each essential ingredient of each crime?

Ervin, J., in his usual clear-cut and concise manner, stated what it was necessary to prove in order to convict a defendant for violating G.S. 14-26. He said: "Three essential ingredients must coexist to render a male person guilty of the statutory felony of obtaining carnal knowledge of a virtuous girl between the specified ages. They are: (1) The male person must have carnal knowledge of the girl; (2) the girl must be over twelve and under sixteen years of age; and (3) the girl must never before have had sexual intercourse with any person. *S. v. Swindell*, 189 N.C. 151, 126 S.E. 417. The terms 'carnal knowledge' and 'sexual intercourse' are synonymous. There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. (Citing authorities.)" *S. v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107.

Conduct declared criminal by G.S. 14-177 is sexual intercourse contrary to the order of nature. Proof of penetration of or by the sexual organ is essential to conviction. This interpretation was put on the statute in *State v. Fenner*, 166 N.C. 247, 80 S.E. 970, decided in 1914. The Legislature has not disapproved of the interpretation then given by amending the statute. That interpretation accords with the interpretation generally given to similar statutes. The Supreme Court of Maine said: "(I)t does not follow that every act of sexual perversion is encompassed within the definition of 'the crime against nature' . . . The crime against nature involving mankind is not complete without some penetration, however slight, of a natural orifice of the body. The penetration need not be to any particular distance." *S. v. Pratt*, 116 A. 2d 924; *S. v. Hill*, 176 So. 719 (Miss.); *People v. Angier*, 112 P. 2d 659 (Cal.); *Hopper v. S.*, 302 P. 2d 162 (Okla.); *S. v. Withrow*, 96 S.E. 2d 913 (W. Va.); *Wharton v. S.*, 198 S.E. 823 (Ga.); 81 C.J.S. 371; 48 Am. Jur. 550.

An article entitled "The Law of Crime against Nature" was published in 32 N.C. Law Rev. 312 in 1954. The author traces the history of the statute, takes note of the few times this Court had been called upon to interpret the statute and the need of additional legislation to specifically define criminal sexual conduct. The Legislature, at the session following the publication of this article, enacted c. 764 S.L. 1955, now G.S. 14-202.1. That Act supplements G.S. 14-177. *S. v. Lance*, 244 N.C. 455, 94 S.E. 2d 335. The law as declared in *S. v. Fenner supra*, remains in force.

To support the conviction of defendant Elmer Whittemore the State relies on testimony of Patricia. She testified that he invited her into an uninhabited house. "He then told me to pull off my pants . . . I pulled my pants below my knees. After I pulled my panties down below my knees, he put his privates against mine. He was laying on his back and made me lay down on him. I stayed inside the house about two or three minutes before he told me to pull my panties down. After he went in the house, he pulled his trousers off of one leg and laid down flat on his back on the floor. He made me put my hands on his privates and he put his hand on my privates. He kept it there about two or three minutes; he just left it there. After he had done that for two or three minutes, he put his mouth on my breast and after that he put it on my privates and kept his mouth there about one or two minutes. He just left it there . . . He had his privates at my privates rubbing it up and down. I said at. He did that about one or two minutes . . ."

No matter how disgusting and degrading defendant's conduct as depicted by the witness may have been, his conviction should not be sustained unless the evidence suffices to prove the existence of each essential ingredient of the crimes for which he was being tried. The evidence is insufficient to establish the "penetration" necessary for a conviction under each of the statutes. We conclude the motion of defendant Elmer Whittemore for judgment of nonsuit as to each of the charges for which he was on trial should have been allowed.

Ray Whittemore has suffered from cerebral palsy since birth. He finds it difficult, if not impossible, to get around without assistance. Such relations as he had with Barbara took place in the truck in which he, his father, and the two girls had been riding. Without setting out her testimony in detail with respect to what she did and what defendant Ray Whittemore did, suffice it to say that her testimony substantially duplicates the testimony of Patricia with respect to her relations with the defendant Elmer. Barbara's testimony standing alone, therefore would not suffice to convict the defendant Ray Whittemore of either of the crimes because of the failure to establish penetration.

But the State was not content to rely solely on the testimony of the girls to convict Ray Whittemore. As to him it sought to fortify their testimony by a purported confession.

When the confession was offered, defendant objected and asked to be heard on the question of admissibility in the absence of the jury. The jury was excused. The record discloses this colloquy between counsel and the court:

"MR. YOUNG: Well, sir, if your Honor please, I want to put on some evidence as to the admissibility of anything that he said to him about it.

"COURT: Go ahead and ask him.

"MR. YOUNG: I want to put on some other witnesses.

"COURT: As to whether or not it was a voluntary statement?

"MR. YOUNG: As to whether or not he is capable of making it, knowing what he was doing.

"COURT: He operates a grocery store.

"COURT: What you have brought out so far, the boy is incapable of walking, you haven't brought out anything that he is incapable of talking.

"MR. YOUNG: Yes, sir but this witness doesn't know about that. I think I can show by the doctor, Dr. Waller, here, as to his condition.

"COURT: You mean that he is mentally incompetent?

"MR. YOUNG: Yes, sir.

"COURT: Has he ever been committed?

"MR. YOUNG: No, sir, not that I know of.

"COURT: Ever been adjudicated incompetent?

"MR. YOUNG: Not that I know of.

"COURT: Well, I am going to let it in. This is the first time I have heard the plea of insanity in the case.

"MR. YOUNG: No, sir, I am not pleading insanity. I am pleading inadmissibility of the statement, anything about it.

"COURT: I will overrule the objection. Bring the jury back in."

Thereupon, over defendant's objection, the witness was permitted to testify that on Saturday morning, 8 April, while in jail, Ray Whittemore told him that on Sunday, 19 March, he went to the Moss home where Patricia and Barbara lived; he asked the girls if they wished to ride up the mountain and turn around. Ray then told the witness: "We drove up the mountain and came to an old house. I asked Patsy and Barbara if me and my dad could do it to them, and they said yes . . . After Daddy left with Patsy, Barbara pulled her pants off and I started to play with her privates . . . After we played with each other for a while, I was lying on my back and told her to get up on top, and she did. I took my privates and rubbed it through the lips of her privates."

An extrajudicial confession is competent only when made understandingly and voluntarily. *S. v. Davis*, 253 N.C. 86, 116 S.E. 2d 365; *S. v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572. A subnormal mental condition, standing alone, does not render incompetent a confession that is voluntary and understandingly made. If accused has sufficient mental capacity to testify, he has sufficient mental capacity to confess. *Artesani v. Gritton*, 252 N.C. 463, 113 S.E. 2d 895; *S. v. Isom*, 243 N.C. 164, 90 S.E. 2d 237, 69 A.L.R. 2d 358; 23 C.J.S. 226-227; 20 Am. Jur. 449. But mental capacity, or rather the lack of such capacity, is an

important factor to be considered with other factors in determining whether in fact the purported confession was voluntary. *Blackburn v. Alabama,* 361 U.S. 199, 80 S. Ct. 274, 4 L. ed. 2d 242; *Fikes v. Alabama,* 352 U.S. 191, 77 S. Ct. 281, 1 L. ed. 2d 246. What confessions are admissible is the subject of an extensive annotation following the *Fikes* case, 1 L. ed. 2d 1735.

Defendant in his brief filed here contends the evidence subsequently offered in his defense clearly establishes the confession was not in fact voluntary and should have been excluded.

The officer to whom the statement was given testified after the confession was admitted: "I do not know whether Ray Whittemore went to school or not. I do know that Ray Whittemore is severely handicapped. I remember that Ray Whittemore asked for aspirin while I was talking with him and I sent and had two aspirins brought to him. Ray Whittemore told me that he was nervous and that he did not sleep well. That was the morning after he spent the night in jail. I do know that he can't get around by himself at all, and when he was put in jail, his crutches were taken away from him. I did not bring Ray Whittemore out of the jail to talk to him, and I wrote up his statement up there in the jail at that time."

Doctors Waller and Atkins, both of whom had attended the defendant Ray testified to his physical and mental condition. Dr. Waller said he did not believe that defendant was normal mentally. He further testified: "There is a difference between insanity and full menticulture. Ray Whittemore is very slow and labored in his speech. He has a very limited vocabulary and is mentally dull. I would say that his IQ is about 80." Dr. Atkins likewise testified that Ray Whittemore did not have normal intelligence but in his opinion is able, within "certain limits" to understand what he is saying and to relate to a limited degree incidents that have occurred. Mrs. Goldie Woody, with five years of experience in teaching handicapped children in a Buncombe County school system, taught defendant Ray for five years. In that period he learned to write his name and learned to read through a Second Grade reader. "He had a great imagination and could be persuaded any way. If you told him anything, he would really believe it."

It is, we think manifest that counsel and the court misunderstood each other as to the basis of defendant's objection. If the court had heard, before admitting the confession, the testimony subsequently given, it would have been his duty to weigh the evidence and determine whether the confession was in fact understandingly and voluntarily made.

Defendant argues that his guilt has not been established even if the purported confession was in fact free and voluntary. His position is that the *corpus delicti* has not been established except by the confession, and a confession cannot be used to prove any essential element of the alleged crime, contending it can only be used to corroborate other evidence sufficient of itself to establish each essential ingredient of the crime. To support his contention he cites and relies upon *S. v. Cope,* 240 N.C. 244, 81 S.E. 2d 773.

Defendant would stretch the *Cope* case far beyond the question then propounded and answered. The question then for decision was: "Is a naked extrajudicial confession, uncorroborated by any other evidence, sufficient to sustain a conviction of a felony?" The answer given is in this language: "In view of the fact that the overwhelming authority in this country is to the effect that a naked extrajudicial confession of guilt by one accused of crime, unaccompanied by any other evidence, is not sufficient to warrant or sustain a conviction, the answer to the first question under consideration should be in the negative."

Evidence to corroborate the confession need not be direct. It may be circumstantial. *S. v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300. While there is difference of opinion in the appellate courts of the country with respect to the necessity for evidence *aliunde* the confession to clearly establish each element of the crime, the weight is, we think, with the rule as stated in *Masse v. U. S.,* 210 F. 2d 418. It is there said: "A conviction cannot be had on the extrajudicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti.* Full, direct, and positive evidence, however, of the *corpus delicti* is not indispensable. A confession will be sufficient if there be such extrinsic corroborative circumstances, as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." *S. v. Morro,* 281 S.W. 720; *S. v. Knowles,* 83 S.W. 1083; *Brower v. S.,* 64 So. 2d 576; *Vanderheiden v. S.,* 57 N.W. 2d 761; *S v. La Louche,* 166 A. 252; *Daeche v. U. S.,* 250 F. 566; *Mills v. S.,* 59 S.W. 2d 147; *Campbell v. Commonwealth,* 75 S.E. 2d 468; *Pearlman v. U.S.,* 10 F. 2d 460; *Opper v. U.S.,* 348 U.S. 84, 99 L. ed. 101, 75 S. Ct. 158, 45 A.L.R. 2d 1308.

We do not think it now necessary to determine the extent to which the corroborating circumstances must go. Suffice it to say that the evidence offered by the State was subject to an explanation and interpretation by defendant himself. As said in *Vanderheiden v. S., supra*: "Circumstances capable of an innocent construction may be interpreted in the light of defendant's admissions, and the fact under investigation be thus given a criminal aspect." We have said that Barbara's use of the word "at" was not, standing alone, sufficient to establish pene-

tration. It left the question too conjectural. But defendant's explanation of what occurred is, we think, sufficient to remove the doubt as to the meaning of the word "at."

If the confession was in fact voluntary, the evidence offered by the State was sufficient to support a conviction.

As noted above, the confession dealt with matters alleged to have occurred on Sunday, 19 March, the date charged in the bill of indictment, but the confession was not limited to matters occurring on that date. It purported to describe similar sexual conduct by both defendants with both girls "on or about April the first." It quotes Ray as saying he discontinued his relations with Barbara on that occasion because he was seen by some boys and knew he was caught. This portion of the confession was admitted over defendant's objection.

The State's evidence prior to the time it offered the confession was limited to 19 March 1961, as charged in the bill of indictment. Both girls definitely fixed that day as the time. Patricia not only fixed the day of the month but the day of the week, Sunday. Barbara specifically testified this was the only time she went with defendants to the Cole place.

To support their pleas of not guilty, each defendant contended he was a man of good character and was not in the vicinity of the place named by the State's witnesses on the day the crimes were alleged to have been committed. Several witnesses testified in support of defendants' contentions. Defendant Elmer was a witness. He denied his or his son's guilt, stating in detail where they were on the day of the crime as stated in the bill of indictment. Defendant Ray did not testify.

After defendants rested, the State offered in rebuttal the testimony of two boys, Kermit Cole and Dan Garrison. The Cole boy testified: "I saw Ray Whittemore and Barbara _____ in the truck about 6:30 in the evening. Barbara was sitting on top of Ray. As we came by the truck, Barbara _____ jumped up." He fixed the time as "about the middle or at the last of March when this happened . . . I do not know what day it was nor what day of the week. We were going to the mountain to get some fence wire. Dan and I had been to school that day and it was not on a Sunday."

Dan Garrison testified: "I went with Kermit to the upper Cole place and we saw the truck. We walked on the right side of the truck and the door was open. We saw Ray and Barbara _____ and Barbara was on top of Ray. Barbara's clothes was off and she jumped up when she saw us."

The court in its charge reviewed the evidence of the defendants to establish an alibi. It charged: "(I)t is incumbent upon the State of North Carolina to satisfy you from the evidence and beyond a reason-

able doubt that the defendant Ray Whittemore, on the 19th day of March, 1961 carnally knew or abused Barbara _____, she being over twelve and under sixteen years of age, and she never before having had sexual intercourse with any person, so that before you would be justified or entitled to find the defendant guilty of that offense, it would be incumbent upon the State to satisfy you from the evidence and beyond a reasonable doubt, first, that Barbara _____ was a virtuous girl, that is, she had never before had sexual intercourse with any person."

When the court finished its charge, it inquired:

"COURT: Any further requests from either counsel?

"MR. YOUNG: No, Sir.

"SOLICITOR: Your Honor, I looked for this yesterday and didn't find it until this morning. If it is not too late, in accordance with the decision in *STATE v. GILLYARD*, 246 N.C. 217, and *STATE v. TRIPPE*, in 222 N.C. at 600, the State would ask that an instruction to the effect that time is not of the essence, that if the jury should find that the acts complained of occurred on some other day than that charged in the indictment, it would not relieve the defendant of criminal responsibility. I have those decisions here if your Honor would indulge me a moment.

"COURT: I am going to let the charge stand as I have given."

The jury retired at 10:21. At 12:08 the jury returned, requesting further instructions.

"COURT: Members of the jury, I understand there is a question which you desire to ask?

"JUROR: As to the date of the crime committed do we have to confine our decision to the date of March 19, or can we form a decision that the crime was committed?

"COURT: Members of the jury, with regard to the date, the Court will instruct you that if you are satisfied from this evidence and beyond a reasonable doubt that the crime was committed bearing in mind that with regard to the crime of carnal knowledge it is necessary for the State to satisfy you as to the element that is that the girl in each case that is Barbara _____ in the one case and Patricia _____ in the other case that at the time they had neither of them or the respective one as to the respective defendant had never had sexual intercourse with any other person prior to that time bearing in mind that that is one of the necessary elements of that particular crime; then as far as the date is concerned if your are satisfied from this evidence and beyond a reasonable doubt that the crime or crimes were committed even though it was on a date other than the particular date of March 19, 1961 the Court instructs you that you could return

a verdict of guilty even though the date may not have been that particular day. Does that answer the question?

"JUROR: Yes."

The jury thereupon retired and returned a verdict of guilty at 12:13.

Manifestly the jury was in doubt as to the guilt of defendants of *the* crime charged in the bill of indictment—that is sexual misconduct as described *on 19 March 1961*. It had heard the solicitor request and the court refuse to give an instruction that the time of commission was not a material factor. The State's evidence in chief other than the purported confession of defendant Ray, related to one and only one date on which the prohibited sexual conduct occurred. The confession fixed two dates on which prohibited conduct occurred. This confession was in the possession of the State when the bills were drawn and returned by the grand jury. Notwithstanding the State's knowledge of what Ray had confessed, the bill of indictment did not charge criminal acts committed the last of March or early April.

Defendants prepared for trial relying on the time fixed in the bills. They offered numerous witnesses to prove their claimed alibi. Manifestly the jury was impressed with the evidence offered. They remained out for 1-3/4 hours without agreement; but when the court in effect told them that the date charged was immaterial, they reached a verdict in less than five minutes. The charge in effect told the jury the evidence offered by the defendants was not material on the question of defendants' guilt and in effect told the jury they could convict if the offenses charged occurred the last of March or the first of April.

True the time named in a bill of indictment is not usually an essential ingredient of the crime charged, and the State may prove that it was in fact committed on some other date. G.S. 15-155; *S. v. Bryant*, 228 N.C. 641, 46 S.E. 2d 847; *S. v. Baxley*, 223 N.C. 210, 25 S.E. 2d 621; *S. v Trippe*, 222 N.C. 600, 24 S.E. 2d 340. But this salutary rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense. The State did not contend that there was confusion as to the time named in the bill of indictment. It insisted the date named was in fact the true date; but when defendants' evidence, if believed, would establish their innocence, it then contended the jury could, nevertheless, convict for the subsequent asserted wrongful acts. The testimony of young Cole and Garrison, offered only after defendants had rested, relates to conduct subsequent to that charged in the bill and tends to corroborate the confession. Defendants were without any opportunity at that time to refute the State's evidence in rebuttal.

To permit a conviction on this evidence would do violence to rights guaranteed by our Constitution, Art. I, sec. 11. *S. v. Ray,* 92 N.C. 810; *S. v. Corpening,* 191 N.C. 751, 133 S.E. 14; *S. v. Harbert,* 185 N.C. 760, 118 S.E 6; *S. v. Wilkerson,* 164 N.C. 431, 79 S.E. 888. In *S. v. King,* 50 Wash. 312, 16 Ann. Cas. 322, defendant was charged with obtaining money by false and fraudulent pretenses. His defense was alibi. The trial court, charging the jury with respect to the time fixed in the bill of indictment, said: "I will say in that connection that the exact date is immaterial. It does not make any difference, so far as the crime is concerned, if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed." In answering this statement of the trial court, the appellate court said: "The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of February, 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an *alibi* was based upon that time. It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of *alibi.*" *People v. McCullough,* 101 P. 2d 531; *S. v. Severns,* 125 P. 2d 659; *S. v. Clark,* 146 P. 1107; 53 Am. Jur. 498.

The time elapsed between the alleged offense and the trial was relatively short. The record does not disclose the date of trial, but it was during a two weeks' term which began on 17 April. Under the factual situation depicted by this record we are of the opinion that the time charged in the bill was material and vital to defendants' defense. We hold the court erred in charging otherwise.

As to defendant Elmer

Reversed.

As to defendant Ray

New trial.

ROY S. WYNN AND JAMES D. MARTIN, ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS OF THE COUNTY OF MECKLENBURG, STATE OF NORTH CAROLINA, V. TRUSTEES OF THE CHARLOTTE COMMUNITY COLLEGE SYSTEM, A BODY CORPORATE, J. MURREY ATKINS, CHAIRMAN; THOMAS M. BELK, C. A. McKNIGHT, JOHN A. McRAE, DR. E. A. BEATY, SHELDON P. SMITH, DR. THOMAS WATKINS, SR., J. MURREY ATKINS, R. L. TAYLOR, JOHN PAUL LUCAS, ADDISON H. REESE, LINN D. GARIBALDI, AND OLIVER ROWE, TRUSTEES OF CHARLOTTE COMMUNITY COLLEGE, A BODY CORPORATE; J. N. PEASE & COMPANY, INC., A NORTH CAROLINA CORPORATION, AND DICKERSON, INC., A NORTH CAROLINA CORPORATION.

(Filed 8 November, 1961.)

1. Pleadings § 12—

A demurrer for failure of the complaint to state a cause of action will be determined solely on the basis of whether the facts alleged in the complaint, liberally construed in favor of the pleader, are sufficient for this purpose.

2. Taxation § 34—

A taxpayer may maintain an action to restrain the levy of a tax on the ground that the tax is in itself illegal or invalid or is for an illegal or unauthorized purpose. G.S. 105-406.

3. Same; Schools § 1— Trustees having statutory authority may not be restrained from establishing second unit of college on ground that single unit is more economical.

The trustees of a community college are given statutory authority to establish more than one unit within the boundary of a county, G.S. 116-49, and therefore where the board of trustees of such college determines in the exercise of its discretion and judgment that the establishment of two separate units at separate locations within the county would afford the benefits of the college to a greater number of prospective students, and bonds for the construction of such separate units are duly authorized by the voters of the county, taxpayers may not enjoin the use of the proceeds of the bonds in establishing the second unit on the ground that it would be more economical to provide a single unit for all prospective students and that the construction of the second unit would result in a waste of tax money, since the bond or tax is not in itself illegal.

4. Same; Constitutional Law § 4—

Taxpayers of a county may not enjoin the construction of a second unit of a community college in the county on the ground that the board of trustees of the college were establishing separate units for the unlawful purpose of segregating the students in the two units on the basis of race, there being no allegation that plaintiffs would be affected otherwise than being subject to the ad valorem tax levied to provide funds for the payment of the bonds or allegation that any qualified prospective students had been or will be excluded from attending either college solely on the basis of race.

5. Constitutional Law § 4—

A constitutional question may not be raised by a person unless his rights are directly affected.

APPEAL by plaintiffs from *Sharp, Special Judge,* May 22, 1961, Special Civil Term of MECKLENBURG.

Civil action to enjoin defendants "from proceeding with the construction of Carver College" and "from the payment of public money for such construction of Carver College." At the hearing on plaintiffs' application for a temporary restraining order, defendants demurred to the complaint for that, on grounds distinctly specified, the complaint did not state facts sufficient to constitute a cause of action.

The allegations of the complaint (exclusive of the prayer for relief) are set forth in fifty-one numbered paragraphs. Plaintiffs' said allegations, summarized or quoted, are stated below.

Plaintiffs are citizens, residents and taxpayers of Mecklenburg County.

"The Trustees of the Charlotte Community College System" is a body corporate organized and existing under authority of G.S. 116-47 through G.S. 116-62. The individual defendants (hereafter referred to as the trustees) are the duly constituted trustees of the Charlotte Community College System, hereafter called "College System." The College System, as administered by said trustees, "is presently comprised of two separate and distinct college units," to wit, Charlotte College and Carver College, with student enrollments of 696 and 261, respectively, for the fall term of 1960.

Charlotte College and Carver College have been operated as segregated colleges for members of the white and Negro races, respectively. The classes of Charlotte College have been held in a public school building "formerly occupied by school children substantially all of which were of the white race." The classes of Carver College have been held in a public school building "now and formerly occupied by school children of the Negro race."

The trustees have purchased or acquired two tracts of land: (1) A tract of 267 acres, for the location and construction of Charlotte College, "in a substantially rural area away from areas primarily populated by members of the Negro race"; and (2) a tract of 50 acres for the location and construction of Carver College, "situated adjacent to an area populated primarily by members of the Negro race."

On November 8, 1960, "pursuant to an election duly authorized by law, the citizens and residents of Mecklenburg County, State of North Carolina, authorized, by a majority of those qualified and voting, the issuance by Mecklenburg County, State of North Carolina, of $975,-

000.00 in bonds and a special increase in county taxes to repay the principal and interest on said bonds and said bonds to be designated as Charlotte Community College bonds, with the proceeds to be used by the Charlotte Community College System for construction of new campuses for Charlotte College and Carver College." The bonds so authorized "have been sold, or are about to be sold, and money has been placed, or is about to be placed, at the disposal of the defendant trustees for the purpose of constructing two new college sites for Charlotte College and Carver College to serve as Community Colleges in accordance with the terms of North Carolina General Statutes 116-47 to 116-62."

The tax on all taxable property, including real and personal property owned by plaintiffs, will be specifically increased by an amount sufficient to pay the principal and interest on said bonds.

Approximately $287,000.00 of the funds from said bond issue have been allocated "for construction of initial buildings and grounds of Carver College."

J. N. Pease & Company, Inc., and Dickerson, Inc., North Carolina corporations, have contracts for the construction of the initial portion of the proposed Carver College campus. When this action was instituted (May 15, 1961), "only a small amount of work (had) begun under said contracts, in that only a small amount of grading, piping, and footings (had) been begun or completed."

The Charlotte College catalogue for 1960-1961 (Exhibit B) states "a correlated program in cooperation with North Carolina State College has been developed whereby a student may complete the first two years of engineering at Charlotte College and then transfer to North Carolina State College for the final two years, if qualified." North Carolina State College, supported by public funds and located in Raleigh, North Carolina, has "a faculty, administration, and student body substantially all of which being members of the white race."

The Carver College catalogue for 1960-1961 (Exhibit A) states: "Arrangements have been made between Carver College and the Agricultural and Technical College of Greensboro, North Carolina for a four-year co-operative program in engineering. The first two years of the program may be completed at Carver College and then the student may transfer to the Agricultural and Technical College to complete the final two years of the undergraduate work in the same branch of engineering provided the grades are satisfactory." Agricultural and Technical College, supported by public funds and located in Greensboro, North Carolina, has "a faculty, administrative personnel, and students, all, or substantially all, being members of the Negro race." Exhibit A also states: "Should serious illness occur during the

school day, students are referred to the school physician or taken to Good Samaritan Hospital." Good Samaritan Hospital, one of four major general hospitals in Charlotte, "is the only one of said general hospitals operated exclusively for members of the Negro race regularly admitting only Negro patients."

Charlotte College and Carver College "are substantially similar with respect to general purpose and general curriculum each being a substantial duplication of the other with respect to the general type of courses offered, except that a greater number of courses are offered at Charlotte College than at Carver College."

If both college units are constructed, Charlotte College, upon completion of its new campus, will continue to be operated by said trustees "as a segregated or largely segregated institution for members of the white race, with the faculty, instructors, administrative personnel, and regularly enrolled students substantially all being members of the white race"; and Carver College, upon completion of its new campus, will continue to be operated "as a segregated institution for members of the Negro race, with the faculty, instructors, administrative personnel and students all being members of the Negro race."

A large majority of students attending these colleges will reside in Mecklenburg County, will have received their preparatory training from the Charlotte and Mecklenburg County public school system, which is to all intents and purposes "a racially segregated public school system." If both proposed college units are constructed, "the graduates of the largely segregated public school system of Charlotte and Mecklenburg County will feed into a segregated Charlotte Community College System, the result of which will be an unlawful perpetuation of racial segregation of the Charlotte Community College System with the full support of the State of North Carolina."

The said trustees, in their official capacity under authority of and in behalf of the State of North Carolina, "have set upon a course of conduct to construct two separate colleges comprising the Charlotte Community College System which will have the effect of maintaining and perpetuating completely or substantially racially segregated publicly supported colleges within the said System."

The said trustees "have set upon a course of conduct whereby a library, eating areas, classroom facilities, athletic areas and administrative areas will be constructed at Charlotte College to be used as facilities of said college, all costing hundreds of thousands of dollars of public funds"; and "whereby a library, eating areas, classroom facilities, athletic areas and administrative areas will be constructed at Carver College to be used as facilities of said college, all costing hundreds of thousands of dollars of public funds."

The said trustees, "by reason of their aforesaid duplication or proposed duplication of facilities and services are acting in a manner which amounts to a manifest abuse of their discretion resulting in a greatly increased cost for such total facilities and therefore a needless waste of public funds and taxpayers' money." ". . . the construction of only one college facility under the Charlotte Community College System would be adequate and sufficient and would more efficiently discharge the purpose of the System." The tract of land obtained for the construction of Charlotte College (267 acres) contains "adequate area in which to construct needed facilities for all students enrolled in the Charlotte Community College System," and "full utilization of said tract of land would more easily and efficiently discharge the purpose of the Community College System and save hundreds of thousands of dollars of public money."

Plaintiffs allege they "bring this action as taxpayers of Mecklenburg County, State of North Carolina, and in behalf of all other taxpayers of Mecklenburg County, North Carolina, similarly situated, for an order enjoining the spending of public funds for the construction and operation of Carver College, a part of the Charlotte Community College System operating under the act hereinabove referred to, on the ground that such expenditure would be for the unconstitutional and thereby illegal purpose of continuing and operating a racially segregated public college facility in violation of the Fourteenth Amendment of the Constitution of the United States and on the ground that North Carolina General Statutes 116-47 to 116-62, as administered by the defendant trustees in their official capacity is in violation of the Fourteenth Amendment of the Constitution of the United States, and on the ground that such expenditure of public funds would be a waste of taxpayers' money brought about by a manifest abuse of discretion of the defendant trustees acting in their official capacity." Plaintiffs allege they have no adequate remedy at law and that they, as taxpayers, will suffer irreparable injury if the injunctive relief they seek is not granted.

Judgment, sustaining defendants' said demurrer and dismissing the action, was entered. Plaintiffs excepted and appealed.

J. Charles Morris for plaintiffs, appellants.

Helms, Mulliss, McMillan & Johnston, E. Osborne Ayscue, Jr., and McCleneghan, Miller & Creasy for defendants, appellees.

BOBBITT J. The demurrer tests the sufficiency of the complaint. The rules applicable have been often stated and are well settled. *Pressly v. Walker*, 238 N.C. 732, 78 S.E. 2d 920, and cases cited; *Glover v.*

Brotherhood, 250 N.C. 35, 108 S.E. 2d 78, and cases cited. Our task is to determine whether plaintiffs, upon the *facts* alleged, liberally construed in their favor, have a cause of action.

The remedy of injunction is available to a taxpayer when a tax levy or assessment, or some part thereof, is challenged on the ground (1) the tax or assessment is itself illegal or invalid, or (2) for an illegal or unauthorized purpose. *Barbee v. Comrs. of Wake,* 210 N.C. 717, 719, 188 S.E. 314, and cases cited; G.S. 105-406.

Plaintiffs allege ad valorem taxes levied by Mecklenburg County will be specifically increased in the amount required to pay the principal and interest on the "Charlotte Community College Bonds." They do not challenge the validity of the bonds or of the tax levied for the payment thereof. Indeed, they allege, clearly and positively, that the bonds and tax were *duly authorized,* "with the proceeds to be used by the Charlotte Community College System for construction of new campuses for Charlotte College and Carver College."

Plaintiffs allege they will suffer irreparable injury unless injunctive relief is granted. They base this allegation solely on their status as taxpayers of Mecklenburg County. Thus, the question presented is whether plaintiffs, as taxpayers, may enjoin the use of any portion of the bond proceeds for the construction of Carver College.

"The Community College Act" of 1957 (S.L. 1957 c. 1098) is now codified as G.S. Chapter 116, Article 3, §§ 116-47 through 116-62. A "community college," as defined therein, is an educational institution dedicated primarily to the particular needs of a community or an area, offering the freshman and sophomore courses of a college of arts and sciences and/or the first or first and second year courses of a two-year technical institute of college grade, with authority to offer (in addition thereto) a variety of occupational, vocational, avocational and recreational training programs. "Such college may consist of one or more units operating within the boundaries of one county." G.S. 116-49.

The body corporate, "The Trustees of the Charlotte Community College System," as directed by its governing body, the board of trustees, established two units. The statute expressly authorized it to do so.

Plaintiffs do not challenge the use of the bond proceeds for the construction of Charlotte College on the 267-acre tract. Indeed by asserting the College System should be limited to one unit, namely, Charlotte College, they imply all proceeds from the sale of the *duly authorized* bonds should be used solely for the construction of Charlotte College. Clearly, it makes no difference, in respect of the amount of taxes plaintiffs will be required to pay, whether the bond proceeds are

used in part for the construction of Carver College or solely for the construction of Charlotte College.

Whether the College System should consist of one or more units was for determination by the board of trustees. Its primary responsibility was to provide educational facilities, at junior college level, to serve the particular needs of the community. It was well within the authority of the board of trustees, in the exercise of its discretion and judgment, to determine that a greater number of prospective students would be afforded and take advantage of the educational opportunities offered by the College System by establishing Charlotte College and Carver College at different locations and as separate units. The board of trustees made its determination prior to the bond election; and, as plaintiffs allege, voters *duly authorized* (1) the issuance of the bonds (2) the levy of the tax, and (3) the use of the bond proceeds "for construction of new campuses for Charlotte College and Carver College."

Plaintiffs allege the construction of Carver College will result in a duplication of college facilities and services and that such duplication is wasteful. In view of our decision that the board of trustees had full authority to establish Charlotte College and Carver College in different locations and as separate units, it is sufficient to say that the expenditure of public funds to provide necessary facilities and services at each unit is not an expenditure for an illegal or unauthorized purpose.

Plaintiffs, in their prayer for relief, sought to enjoin defendants "from proceeding with the construction of Carver College" and "from the payment of public money for such construction of Carver College." For the reasons stated, plaintiffs, on the facts alleged, are not entitled to such injunctive relief.

True, plaintiffs allege the use of bond proceeds for the construction of Carver College is for an illegal and unauthorized purpose on the ground Carver College will be operated as "a racially segregated public college facility in violation of the Fourteenth Amendment of the Constitution of the United States." They contend such operation would be in violation of the 1954 and 1955 decisions of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180, and 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753. The decisions in the *Brown* case were considered and discussed by this Court in 1956 in *Constantian v. Anson County*, 244 N.C. 221, 93 S.E. 2d 163. On this appeal, no further discussion of the significance of the *Brown* decisions is deemed necessary or appropriate.

Plaintiffs and all other property owners are subject to the ad valorem

tax levied to provide funds for the payment of the bonds. No fact alleged indicates plaintiffs will be otherwise affected by the construction and operation of Carver College. Upon the facts alleged, no constitutional right of plaintiffs has been denied. "A constitutional question may not be raised by one whose rights are not directly and certainly affected." 16 C.J.S., Constitutional Law § 76, p. 233. The numerous decisions cited fully support this statement.

It is noted that plaintiffs do not allege that any qualified prospective student has been or will be excluded from attending either Charlotte College or Carver College solely on the basis of race. Suffice to say if and when the constitutional rights of any person, white or Negro, are denied, a remedy is available to such person for the vindication and enforcement of such rights. Neither Charlotte College nor Carver College may be operated in such manner as to deny to any person rights guaranteed to such person by the Fourteenth Amendment to the Constitution of the United States.

Having reached the conclusion that, for the reasons stated, the facts alleged disclose plaintiffs are not entitled to injunctive relief, it is unnecessary to discuss the additional and separate grounds of demurrer asserted (1) by J. N. Pease & Company, Inc., and Dickerson, Inc., and (2) by the individual defendants. Suffice to say, the judgment of the court below, as to all defendants is affirmed.

Affirmed.

SAM GREENLEE, EDD GRIER, GEORGE GRIER, CHARLES GRIER, EVAGALIN GRIER, MARY ETTA GRIER, JASON McKINNEY, CHARLES McKINNEY, JOE McKINNEY, AUGUSTUS McKINNEY, OARA McKINNEY, IMMA LOU McKINNEY HENSLEY, MYRTLE LOIS McKINNEY, KATHLYN McKINNEY YORK, RALPH McKINNEY, LEWIS McKINNEY, NELL McKINNEY, CARRIE MEDFORD, POLLY GOWAN, SUE McKINNEY, KATE McKINNEY ALLEN, JAMES McKINNEY, MARY McKINNEY VANCE, MAGGIE McKINNEY DAVENPORT, ETTA McKINNEY LUSK, OSWELL McKINNEY, MRS. JOHN McKINNEY, AVERY McKINNEY, GEORGE McKINNEY, PAUL McKINNEY, BILL McKINNEY, YANCEY HALL, PLATO HALL, MARY YOUNG, NORA ABERNATHY, HALL HAUPE, BRACK McKINNEY, EDITH McKINNEY, GLADAS KELLEY, INEZ WILLIS, CLARA GARLAND, EULA KNOWLES, JOYCE McCALL, WAYNE McCALL v. DAN QUINN.

(Filed 8 November, 1961.)

GREENLEE *v.* QUINN.

1. Descent and Distribution § 8; Bastards § 12—

G.S. 49-12 is retroactive as well as prospective in effect, and where the parents of an illegitimate child marry, such child is legitimated even though born before the enactment of the statute, and the legitimate children of such child inherit from their grandfather through their mother even though their mother dies prior to the death of their grandfather. G.S. 29-1(3).

2. Same—

The legitimate children of a legitimated child inherit from a legitimate paternal half-sister of their deceased mother when such half-sister dies intestate without lineal descendants, since a legitimated child has the same right to inherit from collateral relations as if born in wedlock, and the children of such legitimated child take her interests.

APPEAL by petitioners from *McLean, J.*, at April 1961 Term of MITCHELL.

Special proceeding before the Clerk of Superior Court for partition for sale of four described tracts of land to which the petitioners allege title as tenants in common. Defendant Dan Quinn, by answer, denies that the petitioners own the land as tenants in common and alleges that he is sole owner in fee simple and is rightfully in possession of the four described tracts. By reason of the issues raised by the answer, the cause was placed on the civil issue docket for trial in term.

By agreement of the parties jury trial was waived, and this matter was heard by the court upon stipulations agreed to between the parties.

The parties stipulated as follows: "It is stipulated and agreed between the parties plaintiffs and parties defendants and their counsel that this action was started as a partitioning proceeding by the petitioners seeking to sell lands described as four several tracts located in Mitchell and McDowell Counties which plaintiffs claim to own in fee simple, together with the two minor defendants named as tenants in common.

"2. That the defendant Dan Quinn was made a party because he also claimed the land described.

"3. That Dan Quinn filed answer alleging sole seizin and the cause was by law converted into an ejectment proceeding and was called for trial on 13 April, 1961, at the Regular April 1961 Term of Mitchell County Superior Court.

"4. The plaintiffs and defendants submit the following Stipulations and agree that the facts stated are true and are the facts pertinent and necessary for a complete and final adjudication of the cause by the court;

"a. That prior to 1884 William Biddix was the father of illegitimate child named Sallie and hereinafter called Sallie.

"b. That the mother of said child was Martha Mattie Hall.

"c. That during the year 1884 William Biddix, hereinafter called William, married Martha Mattie Hall.

"d. That shortly thereafter Martha Mattie Hall Biddix died.

"e. That in 1888 William married Emma McKinney Biddix, hereinafter called Emma.

"f. That thereafter Susannah Flossie Biddix Gage, hereinafter called Flossie was born of that marriage legitimate.

"g. That Sallie died intestate in the year 1926 leaving legitimate issue surviving.

"h. That William died intestate in 1928 leaving surviving him his widow, Emma, and his only lineal descendants, a daughter Flossie and the children of Sallie— his grandchildren.

"i. That Emma died intestate in 1947.

"j. That Flossie died intestate in January 1956 without issue.

"k. That William D. Biddix died in 1928 seized of Tract No. 1 described in the Petition by virtue of a Deed of Purchase dated 24 July 1890 from Merritt S. McKinney and wife, Elizabeth McKinney to him, recorded in Mitchell County Deed Book 33, page 92, and title thereto passed by descent unto his heirs at law.

"1. That Flossie Susannah Biddix Gage died intestate during the year 1956 seized of Tract No. 2 described in the Petition by virtue of a Deed of Purchase dated 10 February 1923, from W. D. Biddix and wife, Emily L. Biddix, to Flossie S. Biddix, recorded in Mitchell County Deed Book 79, page 332, and upon her death title thereto passed by descent unto her heirs at law.

"m. That Emma McKinney Biddix in 1947 died seized of Tract No. 3 described in the Petition by virtue of a Deed of Purchase dated 15 December 1894, from James C. Hall and wife, Mary M. Hall, to Emily L. Biddix, recorded in Mitchell County Deed Book 33, page 97, and title thereto passed by inheritance unto her only daughter Flossie Susannah Biddix Gage, who died seized thereof.

"n. That William D. Biddix died seized of a portion (8 acres) of tract No. 4 described in the Petition by virtue of a Deed of Purchase dated 1 April 1891 from J. D. Conley Executor, to W. D. Biddix, recorded in Mitchell County Deed Book 25, page 341, and title thereto passed by descent unto his heirs at law.

"o. That William D. Biddix died seized in fee simple of all of said 4th tract by adverse possession including the 8 acre part referred to in paragraph n above. Upon his death it descended to his heirs at law.

"p. That defendant Dan Quinn is the sole owner and entitled to possession of all said lands, if any, that passed by, through or under Will D. Biddix, Flossie Gage or Sallie Carpenter to the children and

grandchildren of Sallie Carpenter from whom he has Deeds sufficient in form to convey said lands to him.

"q. That petitioners are the children and grandchildren of brothers and sisters of the whole blood of Emma Biddix."

The parties further stipulated as follows:

"(1) that Myrtle Lois McKinney is a minor and was originally one of the petitioners; that Joyce McCall is a minor and was originally one of the defendants, but that by Order of the court she was duly made a party petitioner instead of a party defendant; that Frank H. Watson, attorney at law, was duly appointed next friend of both of said minors; that a compromise and settlement without prejudice to any other party to this proceeding was made as to all claims of said minors in the lands involved in this proceeding as a result of which settlement defendant Dan Quinn became and is now the owner in fee simple of all right, title and interest that said minors had or might have in said lands; that the compromise, settlement and conveyance of the interests of said minors in said lands was made with the sanction, direction, approval and confirmation of the court as provided by law; that the interests of said minors in said lands is not now involved in this controversy; (2) that the allegation in the petition that Wayne McCall was a minor was an error; that by order of the court Wayne McCall was duly made a party petitioner instead of a party defendant and is now a party petitioner; and (3) that all parties petitioners and the party defendant are properly before the court represented by counsel."

Upon consideration of the foregoing stipulations, the court found them to be true, adopted same as its findings of fact, and rendered judgment as follows:

"(1) That Dan Quinn be and he is hereby declared the owner and entitled to possession of Tracts 1, 2 and 4 as described in the Petition;

"(2) That the petitioners other than Myrtle Lois McKinney and Joyce McCall be and they are hereby declared to be the owners and entitled to possession of Tract 3 as described in the Petition, excepting therefrom a 1/252nd interest and a 1/72nd interest which is to be conveyed in accordance with the Judgment and subsequent Orders relative to the interests of Myrtle Lois McKinney and Joyce McCall infants."

((3) Not pertinent to appeal).

The petitioners except to the portion of the judgment adverse to them, and appeal to Supreme Court.

R. W. Wilson for petitioners appellant.

John C. McBee II, Warren H. Pritchard, Anglin & Bailey for defendant appellee.

WINBORNE, C.J. This appeal presents the following questions: (1) Did the legitimate children of a deceased mother, the mother having been born out of wedlock and legitimated by the subsequent intermarriage of her parents, inherit any interest in the real property of their maternal grandfather who died intestate in 1928? (2) Did said legitimate childen inherit any interest in the real property of a legitimate paternal half-sister of their deceased mother, which half-sister died intestate in 1956 without lineal descendants?

Both questions must be answered in the affirmative.

(1) The record indicates that William Biddix died intestate in 1928 seized of Tracts 1 and 4 described in the petition, and that he was survived by his widow, Emma Biddix; his legitimate daughter, Flossie Gage; and the children and grandchildren of his deceased legitimated daughter, Sallie Carpenter. Accordingly, the rights of the parties in Tracts 1 and 4 must be determined by the laws of descent as they pertained in 1928.

At that time C. S. 1654 provided as follows: "Rule 3. * * * The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living."

By the express language of this statute, upon the death of William Biddix in 1928 the children of Sallie Carpenter inherited that interest in Tracts 1 and 4 which she herself would have inherited had she been living.

What interest then would Sallie have inherited? The record discloses that she was born out of wedlock prior to 1884; that her father was William Biddix, and her mother was Martha Mattie Hall, and that during the year 1884 William Biddix married Martha Mattie Hall.

In 1917 the General Assembly of North Carolina enacted a statute which in 1928 was C.S. 279. It provided as follows: "When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."

In this connection, the petitioners contend that "At the time William Biddix married Martha the mother of Sallie, the marriage did not legitimate Sallie, and she remained illegitimate until the Act of 1917, which Act gave her the mere right, or possibility of inheritance. She died before her father, and consequently inherited nothing from

him." Thus, petitioners argue, all of the lands of which William Biddix was seized at his death descended to his legitimate daughter, Flossie.

We cannot agree with this contention. In *Stewart v. Stewart,* 195 N.C. 476, 142 S.E. 577, this Court, speaking of C.S. 279 said: "By its express language, the statute is retroactive as well as prospective." Therefore, a child who was born out of wedlock on 8 July 1895, and whose mother and reputed father subsequently married on 29 July 1895, was held to be the heir of the reputed father who died intestate in 1926, even though the legitimation statute, C.S. 279, had not been enacted at the time of the intermarriage of the parents.

Therefore, in the instant case, had Sallie been living when her father died intestate in 1928 she and her paternal half-sister Flossie would each have inherited, subject to the widow's dower, a one-half undivided interest in all of the lands of which the deceased father died seized in fee. Since, however, Sallie was not living at that time, her lineal descendants, by representation, took that interest which Sallie would have inherited— a one-half undivided interest in Tracts 1 and 4 described in the petition.

(2) Prior to 1955, this Court held that statutes dealing with legitimation and creating rights of succession to property in a legitimated child are in derogation of the common law. Hence, they are strictly construed. *In re Estate of Wallace,* 197 N.C. 334, 148 S.E. 456. Thus, in the *Wallace* case the Court reached the conclusion that since C.S. 279 did not specifically provide for inheritance by a legitimated child except from his mother and father, such child could not inherit from a maternal uncle dying intestate.

However, in 1955 the Legislature, by Chap. 540, amended the statutes of descent and distribution and the statutes dealing with legitimation, and in each instance provided, in substance, that the legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. G.S. 28-149, G.S. 29-1, G.S. 49-11, and G.S. 49-12 (C.S. 279), all as amended by Chap. 540, P. L. 1955.

By Chap. 813 the Legislature enacted similar amendments to the statutes relating to inheritance by an adopted child. As amended, these statutes provide, in substance, that an adopted child shall be entitled to inherit property by, through, and from his adoptive parents as if he were born the legitimate child of the adoptive parents. G.S. 28-149, G.S. 29-1, and G.S. 48-23, all as amended by Chap. 813, P. L. 1955.

In construing the adoption statutes as amended, this Court, in *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510, reached the conclusion that

an adopted child may inherit from a deceased brother of said child's adoptive parent.

Applying a similar interpretation to G.S. 29-1 and G.S. 49-12, as amended by Chap. 540, P. L. 1955, we must conclude that the Legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had had it been born in lawful wedlock.

Thus, had Sallie Carpenter been living in 1956, she would have been the next collateral relation of Flossie Gage, and, as such she would have inherited all of Flossie's interests in the lands in question on this appeal— Tracts 1, 2 and 4 described in the petition. Since Sallie Carpenter was not living at that time, her lineal descendants took such interests by representation, which interests were conveyed to defendant Quinn as stipulated above.

Hence, the judgment of the court below is

Affirmed.

STATE v. DALE JUNIOR ROOP.

(Filed 8 November, 1961.)

1. Negligence § 31—

Culpable negligence as a predicate for a charge of manslaughter or, under some circumstances, of murder, implies something more than actionable negligence in the law of torts, and is such recklessness or carelessness as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, which recklessness or carelessness is a proximate cause of death.

2. Same—

The wilful, wanton, or intentional violation of a safety statute, or the unintentional or inadvertent violation of such statute when accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences or heedless indifference to the safety of others, is culpable negligence.

3. Criminal Law § 99—

On motion to nonsuit, the State is entitled to have the evidence considered in the light most favorable to it, and defendant's evidence must be disregarded unless it is favorable to the State or is not in conflict therewith and tends to explain and make clear the State's evidence.

4. Automobiles § 59— Evidence held insufficient to show culpable negligence on the part of defendant.

The State's evidence tending to show that defendant, a short time before the fatal collision had drunk some intoxicating beverage, but without evidence that defendant was intoxicated or that either his physical or mental faculties were impaired, that he was operating his automobile on a gravel and tar road with no center line, passed one car traveling in the opposite direction, and then struck the car in which deceased was riding, which was following the preceding car at a distance of 100 to 150 feet, that defendant's car was some two feet on its left side of the highway at the time of the impact, but without evidence as to how far defendant's car traveled after passing the first car before it came over on the wrong side of the road, *is held* insufficient to establish an intentional, wilful, or wanton violation of G.S. 20-148 on the part of defendant or culpable negligence on his part in an unintentional or inadvertent violation of the statute, and defendant's motion to nonsuit in this prosecution for manslaughter should have been allowed.

APPEAL by defendant from *Sink, E.J.*, July 1961 Regular Term of ASHE.

Criminal prosecution upon an indictment charging the felony of manslaughter.

Plea: Not Guilty. Verdict: Guilty as charged in the indictment.

From a judgment of imprisonment, defendant appeals.

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

Bowie, Bowie & Vannoy for defendant, appellant.

PARKER, J. Defendant assigns as error the denial by the court of his motion for judgment of involuntary nonsuit made at the close of all the evidence. G.S. 15-173.

The State's evidence shows the following facts:

About 6:30 p.m. o'clock on 21 November 1959 Mack Spencer, 18 years old, was driving a 1955 Ford automobile north on N. C. Highway 194 in Ashe County at a speed of 40 or 45 miles an hour. Bobby Gene Campbell, 20 or 21 years old, the owner of the automobile, was sitting in the front seat on the right hand side. He had asked Spencer to drive, telling him he had drunk too much wine, and was too high to drive. About four hours previously Spencer had taken a little drink of wine out of Campbell's bottle. Spencer was following an automobile in front of him and driving about 100 to 150 feet in its rear. It was dark, Spencer had his lights on dim, and could see ahead about 75 to 100 feet. The highway is a gravel and tar road, 18 feet wide, with 8 feet shoulders on each side, and has no center line painted on it. At and near the scene of collision, hereafter set forth, the highway is

practically level, and has a slight curve. Spencer was driving downgrade, but the grade is not steep. He was intermittently braking his automobile.

Spencer first saw an automobile with its lights on meeting him, when it was passing the automobile in front of him. The grade for this automobile was up. Spencer does not know how far the approaching automobile was from him when he first saw it, nor how much time elapsed from his first seeing it until the collision occurred. The approaching automobile seemed to be coming pretty fast, but Spencer would not attempt to estimate its speed. It was coming straight into Spencer's automobile. Spencer pulled his automobile over as far as he could get to his right without going off the road into a high bank below him. The approaching automobile kept coming on, and hit Spencer's automobile in his right hand lane of travel. It was a head-on collision. In the collision Spencer was seriously injured, and Campbell received injuries resulting in his death en route to a hospital. The approaching automobile was a 1953 Pontiac driven by defendant Roop, 20 years old.

William Valentine, a highway patrolman, arrived at the scene about 7:40 p.m. o'clock. When he arrived the Ford was sitting completely off the highway on the north side headed in a northerly direction toward the edge of the highway. The Pontiac was sitting practically crossways in the highway. The automobiles were 7½ feet apart. Valentine testified: "Officer Burkett and I measured skid marks where the Pontiac was sitting after the point of impact, a distance of 66 feet, headed in a south direction. . . . I did not find any skid marks at or near the scene of the accident on the side of the road the Ford vehicle was proceeding on." He could find no skid marks for the Ford. Most of the mud, grease, and "stuff" he found on the highway were in the right hand lane headed north of the Ford automobile. He saw freshly "chipped places" in the gravel and tar road, "two feet from the center or 11 feet from the side, which would be two feet from the center line," where the front end of one of the automobiles had fallen down and cut out places in the road. The Pontiac automobile had in it the ordor of an alcoholic beverage.

Jimmy Sexton, a college student, saw defendant Roop at Marvin Spencer's service station about a mile from the scene of the collision a short time before the collision. Roop was a perfect stranger to him. He had no conversation with him. He was about a foot from him. From observation of Roop's actions he thought Roop had been drinking some intoxicating beverage.

Mack Spencer told the officers investigating the collision several times the deceased Campbell was driving the automobile, and did

not tell them he was driving it, until a month after the wreck, when presented with evidence that he, Spencer, was driving it at the time of the collision.

Darwin Walker, a witness for the State, carried Roop, Mack Spencer, and Campbell to the hospital in an ambulance. When Walker was recalled by the defendant, he testified he talked with Roop, and smelt no alcoholic odor on him or his breath.

The defendant's evidence tended to show that Mack Spencer was driving the Ford 70 to 75 miles an hour, travelling behind an automobile travelling at a like speed, that Spencer attempted to pass the automobile in front of him, and that the collision occurred on defendant's side of the road. That defendant was driving about 35 miles an hour. Defendant Roop had drunk no alcoholic beverage that day.

Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances guilty of murder. *S. v. Cope,* 204 N.C. 28, 167 S.E. 456; *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868; *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *S. v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132.

Culpable negligence in the law of crimes necessarily implies something more than actionable negligence in the law of torts. *S. v. Stansell,* 203 N.C. 69, 164 S.E. 580; *S. v. Cope, supra; S. v. Becker,* 241 N.C. 321, 85 S.E. 2d 327; *S. v. Phelps, supra.*

Mere proof of culpable negligence does not establish proximate cause. To culpable negligence must be added that the act was a proximate cause of death to hold a person criminally responsible for manslaughter. *S. v. Everett,* 194 N.C. 442, 140 S.E. 22; *S. v. Satterfield,* 198 N.C. 682, 153 S.E. 155; *S. v. Lowery,* 223 N.C. 598, 27 S.E. 2d 638; *S. v. Phelps, supra.*

This Court said in *S. v. Cope, supra:* "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due care — commensurate care under the circumstances — proximately resulting in injury or death to another. It may be a negligent act or omission. Foreseeability of injury is a requisite of proximate cause. *Davis v. Light Co.,* 238 N.C. 106, 76 S.E. 2d 378; *S. v. Cope, supra.*

This Court speaking by *Denny, J.,* said in *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491: "The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation stand-

ing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others."

It is familiar learning that on a motion for judgment of nonsuit the State is entitled to have the evidence considered in its most favorable light, *S. v. Reeves*, 235 N.C. 427, 70 S.E. 2d 9, and that defendant's evidence, unless favorable to the State, is not to be considered, except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence, *S. v. Bryant*, 235 N.C. 420, 70 S.E. 2d 186.

The State's evidence, considered in the light most favorable to it, is that a short time before the fatal collision the defendant Roop by his actions caused a State's witness to form the opinion he had been drinking some intoxicating beverage. But there is no evidence that Roop was intoxicated, or under the influence of intoxicating liquor, or that his ability, either physically or mentally, to operate an automobile was impaired in any way.

The State's evidence, considered in the light most favorable to it, is that Roop was operating his automobile on a gravel and tar road with no center line painted on it some two feet on the wrong side of the road in Mack Spencer's lane of traffic, when the collision occurred, in violation of G.S. 20-148, and that skid marks extended 66 feet back of Roop's automobile. There is no evidence that the skid marks were on Roop's wrong side of the road. Patrolman Valentine's testimony for the State is: "I did not find any skid marks at or near the scene of the accident on the side of the road the Ford vehicle was proceeding on." Roop's automobile had passed the automobile Spencer was following at a distance of 100 to 150 feet behind it. The State has no evidence how far Roop's automobile was from the Spencer automobile, after it had passed the front automobile, before it came over on the wrong side of the road in Spencer's lane of traffic. There is no evidence that Roop's automobile was being driven at an unlawful rate of speed.

The facts in *S. v. Stansell, supra,* are distinguishable. In that case the defendant was operating his automobile on the wrong side of the road, at an unlawful rate of speed, while intoxicated.

We realize that many head-on collisions of automobiles are caused by one automobile being on its wrong side of the road, and that under such facts the erring motorist is guilty of actionable negligence in a tort action. The State's evidence here, considered in the light most favorable to it, shows actionable negligence on defendant's part suf-

ficient for a tort action, but, in our opinion, and we so hold, it fails to show on his part an intentional, wilful or wanton violation of G.S. 20-148 or an unintentional violation of the statute accompanied by such recklessness or carelessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences or a heedless indifference to the safety of others, as imports criminal responsibility, and it also fails to show culpable negligence on defendant's part, as culpable negligence is defined in numerous decisions of this Court.

The ruling of the trial court on the motion for judgment of nonsuit at the close of all the evidence is

Reversed.

DONALD D. PRIVETTE v. ROBERT W. LEWIS.

(Filed 8 November, 1961.)

1. Automobiles § 7—

A nocturnal motorist, like every other, is charged with the duty of exercising ordinary care for his own safety and will be held to the duty of seeing that which he ought to see in maintaining a proper lookout in his direction of travel, but he will not be held to the duty of being able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not have reasonably anticipated.

2. Automobiles § 10—

The fact that a motorist is not required to anticipate that an automobile will be stopped on the highway ahead of him at night without lights or warning signal required by statute, does not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and of proceeding as a reasonably prudent person would under the circumstances to avoid collision with the rear of a vehicle stopped or standing on the road.

3. Automobiles § 42—

Whether a motorist is guilty of contributory negligence in hitting the rear of another vehicle stopped on the highway in his lane of travel at nighttime without lights must be determined with regard to the facts of each particular case, taking into consideration any evidence of concurrent circumstances, such as fog, rain, glaring headlights, color of vehicles, traffic, etc.

4. Same—

Evidence tending to show that plaintiff was traveling at nighttime in heavy traffic so that he had his headlights on dim, that he had passed

a truck, then entered a curve, passing two or three automobiles, and then saw defendant's car standing in his lane of travel some 25 or 30 feet away, that defendant's car had no rear lights burning and no glass reflectors on its rear and no flares set out, and that plaintiff applied his brakes immediately upon seeing defendant's car but could not stop in time to avoid collision, *is held* not to establish contributory negligence on plaintiff's part as a matter of law.

APPEAL by defendant from *Sharp, S.J.*, Special February Civil Term 1961 of WAKE.

Civil action to recover for damages to an automobile. Defendant in his answer denies any negligence on his part, pleads a counterclaim for damages to his automobile, and further pleads contributory negligence of plaintiff as a defense.

The case was heard by Judge Sharp sitting without a jury — a jury trial having been expressly waived by all parties. G.S. 1-184.

Judge Sharp answered the issues to the effect that plaintiff's automobile was damaged by the negligence of the defendant as alleged in his complaint, that plaintiff was not guilty of contributory negligence, and that he was entitled to recover from defendant for damages to his automobile in the sum of $650.00.

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

Teague, Johnson and Patterson By: Ronald C. Dilthey for plaintiff, appellee.

Fletcher, Lake & Boyce By: G. Eugene Boyce and Arendell, Albright & Green By: Ted R. Reynolds for defendant, appellant.

PARKER, J. Plaintiff's evidence shows the following facts:

About 11:00 p.m. o'clock on 5 February 1958 he was driving his automobile around 40 to 45 miles an hour north on U. S. Highway #1 about two miles north of the city limits of Raleigh and about one mile north of the Westinghouse plant. The highway at this place is a two lane paved road. Plaintiff met several automobiles, traffic was heavy, and he had his headlights on dim. Plaintiff passed a truck, and entering a curve passed two or three automobiles, and then saw 25 or 30 feet ahead of him standing still on the highway in his lane of traffic an automobile with no rear lights burning and no glass reflector on its rear and no flares set out. The stopped automobile was a station wagon and belonged to defendant, who had driven it there and stopped it on the highway. As soon as plaintiff saw this stopped automobile he applied his brakes, but could not avoid colliding with its rear end. There at the scene defendant told plaintiff: "Well, I just come out from Corbett's. . . . I stopped, I was confused, was supposed to go

back to Raleigh and I headed north when I came out of the driveway and was waiting to find where I was, so as to go back to Raleigh. . . . We had a little party out there, and I think I had a little too much to drink." Defendant had a strong odor of alcohol on his breath.

Defendant assigns as error the denial of his motion for judgment of nonsuit made at the close of all the evidence. In his brief he presents this one question for decision: "Conceding the negligence of the defendant herein, does the plaintiff's own evidence show contributory negligence as a matter of law?"

A nocturnal motorist, like every other person, is charged with the duty of exercising ordinary care for his own safety. *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276. It is written in the *Chaffin* case: "The duty of the nocturnal mortorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. Any such requirement would be tantamount to an adjudication that it is negligence to drive an automobile on a highway in the nighttime at all."

In *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330, it is said: "It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen."

Plaintiff was not required to foresee or anticipate that an automobile would be stopped on the highway ahead of him at night without lights or the warning signals of danger required by statute, but this did not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and of proceeding as a reasonably prudent person would under the circumstances to avoid collision with the rear end of a motor vehicle stopped or standing on the road ahead. *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533; *Dawson v. Transportation Co.,* 230 N.C. 36, 51 S.E. 2d 921; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; Strong's N. C. Index, Vol. I, Automobiles, § 10.

A serious and troublesome question is continually arising as to how far a court will go in declaring certain conduct of a plaintiff contributory negligence, and take away the question of contributory negligence from the jury. *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825.

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

law to bar recovery, and in the second line contributory negligence has been held to be an issue for the jury.

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

When we consider the traffic plaintiff was meeting and the heavy traffic on the highway and all the concurrent circumstances then and there present, it is our opinion that the facts necessary to show contributory negligence are not 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. "Only when plaintiff proves himself out of court is he to be nonsuited on the evidence of contributory negligence." *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601. We think the facts of the instant case bring it within the second line of decisions above referred to, which hold that contributory negligence was an issue for a jury.

Judge Sharp properly overruled defendant's motion for judgment of nonsuit made at the close of all the evidence. No reason has been shown which would justify disturbing the trial below.

Affirmed.

J. CURRON HILL v. JOHNNY AVERY EDWARDS, WILLARD HARDISON AND R. H. BOULIGNY, INC.

(Filed 8 November, 1961.)

Judgments § 29—

Where, in an action by a passenger in one car against the driver of the other car involved in the collision, such defendant has the other driver joined for contribution pursuant to G.S. 1-240, and plaintiff recovers judgment against the original defendant and the original defendant obtains judgment for one-half of the recovery against the additional defendant, *held* the rights and liabilities of the drivers *inter se* are put in issue by their pleadings and the judgment in such action will bar a subsequent action instituted by the driver of one car against the driver of the other.

APPEAL by plaintiff from *Mintz, J.*, February Term 1961 of LENOIR.

This is a civil action arising out of an automobile collision between a 1956 Chevrolet automobile owned and operated by the plaintiff, and a 1953 Plymouth automobile operated by the defendant Johnny Avery Edwards and owned by the defendant Willard Hardison.

The collision occurred on North Carolina Highway No. 11 at a point about eleven miles south of the City of Kinston, North Carolina, on 13 May 1957, about 6:00 a.m.

The plaintiff alleged in his complaint, filed on 18 June 1957, that his automobile was damaged as a result of the negligence of the defendant Johnny Avery Edwards, who, at the time of the collision was acting as the agent of the defendant Hardison and within the scope of his employment with the defendant R. H. Bouligny, Inc.

The defendants filed answer to the complaint on 17 July 1957. Thereafter, judgments as of nonsuit were entered as to the defendants Willard Hardison and R. H. Bouligny, Inc.

On 18 June 1957, Charlie Carter, a passenger in plaintiff's automobile at the time of the collision alleged in the plaintiff's complaint, filed suit for personal injuries against Johnny Avery Edwards and the other defendants above named. On 17 July 1957, the defendant Johnny Avery Edwards filed a joint answer and motion with the other two named defendants in which they moved that J. Curron Hill (plaintiff herein) be made an additional defendant under the provisions of G.S. 1-240, for the purpose of contribution, on the grounds that if said defendants were negligent as alleged in the complaint, that said Hill was also negligent and that such negligence concurred in jointly and proximately causing the alleged injuries to Charlie Carter.

Judgments of nonsuit were entered as to defendants Willard Hardison and R. H. Bouligny, Inc., at the April and November Terms 1959 respectively.

At the April Term 1960 of the Superior Court of Lenoir County the Carter case was tried before a jury and resulted in a verdict against the defendant Edwards for $700.00 and a verdict against J. Curron Hill for one half of said amount, or $350.00, in favor of Edwards on his cross action for contribution.

At the May Term 1960 of the Superior Court of Lenoir County a motion was granted allowing defendant Edwards to amend his answer and set up therein the judgment roll, including final judgment in the action entitled *"Charlie Carter v. Johnny Avery Edwards, et al,"* as a defense and plea in bar to this action.

The motion to dismiss this action on the ground that the judgment in the *Carter* case constitutes an estoppel and bar to plaintiff's right

to maintain this cause of action against Johnny Avery Edwards was granted and judgment entered accordingly.

The plaintiff appeals, assigning error.

Jones, Reed & Griffin for plaintiff appellant.
Whitaker & Jeffress for defendant appellee Edwards.

DENNY, J. This appeal presents for determination whether or not the court below committed error in its ruling to the effect that the judgment in the case of *Carter v. Edwards* constitutes an estoppel and bar to the plaintiff's right to maintain this action against Johnny Avery Edwards.

"(W)here the initial action is instituted by the passenger in one vehicle against the driver of the other vehicle, in which the passenger's driver is joined for contribution, adjudication that the passenger's driver was not guilty of negligence constituting a proximate cause of the accident, is *res judicata* in a subsequent action between the drivers." Strong's North Carolina Index, Volume III, Judgments, Section 29, page 45 citing *Jenkins v. Fowler,* 247 N.C. 111, 100 S.E. 2d 234.

It is equally true in such a factual situation, where the plaintiff recovers judgment against the original defendant, and the jury finds the additional defendant guilty of negligence and that such negligence concurred in jointly and proximately causing plaintiff's injuries and gives the original defendant a verdict for contribution pursuant to the provisions of G.S. 1-240, such judgment is *res judicata* in a subsequent action between such drivers, based on the same facts litigated in the cross action in the former trial.

The plaintiff is relying on *Gunter v. Winders,* 253 N.C. 782, 117 S.E. 2d 787, for reversal of the judgment below. The *Gunter* case is not controlling on the facts in this case. The decision there was based on the fact that the pleadings did not allege joint and concurrent negligence on the part of the co-defendants in the prior action. Moreover, a judgment against two or more defendants in a tort action should not be held conclusive *inter se* unless their rights and liabilities were put in issue by their pleadings.

In the *Gunter* case the plaintiff and the defendants were all original defendants in the prior action. Therefore, they were not adversaries and could not settle their differences *inter se. Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833.

The ruling of the court below will be upheld on authority of *Jenkins v. Fowler, supra; Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345;

Snyder v. Oil Co., 235 N.C. 119, 68 S.E. 2d 805; *Tarkington v. Printing Co.*, 230 N.C. 354, 53 S.E. 2d 269, and similar cases.

The judgment of the court below is

Affirmed.

GEORGE T. CHILTON, T/A CHILTON'S CAFE, PETITIONER, v. WILLIAM S. HUNT, J. IRVIN MORGAN, JR. AND CLINT NEWTON, AS MEMBERS OF THE BOARD OF ALCOHOLIC CONTROL, STATE OF NORTH CAROLINA, RESPONDENTS.

(Filed 8 November, 1961.)

Administrative Law—

Where a party cited to appear before an administrative board or officer fails to appear, and the board hears evidence and finds facts supporting its order revocating the beer license of such party, the order of such administrative board will not be disturbed upon review, there being no exception to the evidence adduced at the hearing before the board or to its findings of fact based on such evidence.

APPEAL by petitioner from *Carr, J.*, 20 April 1961 Term of WAKE.

The death of William S. Hunt, one of the respondents named in this proceeding, has been suggested by the Attorney General. Victor Aldridge, the duly appointed successor to William S. Hunt, has been made a party defendant in this proceeding.

It appears from the record that the petitioner was duly cited to appear before a hearing officer of the Board of Alcoholic Control on 3 May 1960, at a designated time and place in Raleigh, North Carolina, to show cause why his beer permit should not be revoked or suspended. The petitioner failed to appear.

Evidence was taken and submitted to the Board of Alcoholic Control for its consideration and action.

The Board of Alcoholic Control, pursuant to its findings of fact based on the evidence adduced in the aforesaid hearing, revoked the retail beer permit held by the petitioner on 25 May 1960. Thereafter, on 25 May 1960, the petitioner applied to his Honor, Hamilton H. Hobgood, Judge holding the courts of the Tenth Judicial District, and obtained a stay of the order of the Board of Alcoholic Control pending the final outcome of the judicial review of the administrative decision of said Board.

This cause came on for hearing on 20 April 1961 before Judge Carr, presiding at the April Term of the Superior Court of Wake County.

Judge Carr reviewed the administrative decision and held that the findings of fact and decision of the respondents are supported by competent, material and substantial evidence and that the substantial rights of the petitioner have not been prejudiced; that said decision is in compliance with applicable constitutional provisions, within the statutory authority or jurisdiction of the respondents pursuant to law and lawful procedure, and should be affirmed. Thereupon, the court dissolved the preliminary stay order previously entered, affirmed the decision of the respondents, dismissed the proceeding, and taxed the costs against the petitioner.

The petitioner appeals, assigning error.

Attorney General Bruton, Staff Attorney Richard T. Sanders for the State.

Benjamin R. Wrenn for petitioner.

PER CURIAM. The petitioner having entered no exceptions to the evidence adduced at the original hearing, or to the findings of fact made by the Board of Alcoholic Control based on such evidence, and since such findings support the judgment, the judgment will be upheld. *Goldsboro v. R.R.*, 246 N.C. 101, 97 S.E. 2d 486; *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223; *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759.

Affirmed.

G. W. HUNTLEY, JR., VIVIAN S. HUNTLEY, JACK F. LONGEST, CLARA W. LONGEST, ALEX W. LEWIS, PATSY M. LEWIS, STEVE BEACHAM, JR., HILDA BEACHAM, FISH MEAL CO., BY HARVEY W. SMITH, PRES., HAROLD I. HOLBROOK, MARGARET H. HOLBROOK, NORVIE W. DAY, PEARL DAY, BILLY J. BOLES, MARTINA BOLES, RAYMOND A. TAYLOR, MARGIE B. TAYLOR, AUBREY ARVIS McGEHEE, ROWENA S. McGEHEE, A. B. WADE, LEONA S. WADE, CECIL WILLIS, DOLLY WILLIS, EMMETT WILLIS, EVELYN WLLIS, SAM GIBBS, JOYCE GIBBS, CATHERINE N. PIGOTT, RUTH GIBBS, LAURA GIBBS, L. C. DICKINSON, LETHA E. DICKINSON, ARTHUR STAFFORD, JR., MINNIE P. STAFFORD, C. V. ANDREWS, MRS. C. V. ANDREWS, TULL E. WILLIAMS, DAVID R. HOLCOMB, GRACE MARIE HOLCOMB, SALVATORE J. PALAZZO, DALTON G. EUBANKS, HILDA EUBANKS, MRS. SAMUEL E. PINER, W. ROY WILLIS, ZULEKIA N. WILLIS, M. D. PITTMAN, EMMA PITTMAN, RAY PITTMAN, FRANCES PITTMAN, DICK CONWAY, EVA CONWAY, MAMIE C. GILLIKIN, GLADYS JONES, NORMA E. JONES, EARL B. JONES, HORACE LEWIS, PHEARLIE LEWIS, MRS. BESSIE KING, CHARLIE

T. STYRON, MRS. CHARLIE STYRON, ROY LANEY, MRS. ROY LANEY, CHARLES C. PITTMAN, MRS. CHARLIE C. PITTMAN, MAMIE LAUGHINGHOUSE, J. B. MORTON, JOHN S. MASON, MIRIAM MASON, PERCY E. GARNER, LEDREW NORMAN, RUBY NORMAN, R. W. SAFIT, C. A. ROBINSON, BESSIE ROBINSON, T. P. ALLEN, MARGARET ALLEN, ALONZO WILLIS, DELLA WILLIS, MRS. BERYL TOSTO, M. P. WILLIAMS, MRS. M. P. WILLIAMS, G. W. COLLINS, JR., H. B. WHITEHURST, THURSTON HILL, EVA WILLIS HILL, R. W. SAFRIT, JR., R. C. SLATER, IRENE SLATER, B. L. JONES, CARRIE LEE HANCOCK, HOWARD C. JONES, JR., MRS. JACK WINDLEY, HOWARD JONES, SR., ROY CLEMMONS, MARIE CLEMMONS, RUSSELL R. KLEMM, PATSY H. KLEMM, S. T. VICK, ELIZABETH VICK, K. E. JOHNSON, EILEEN C. JOHNSON, LENNIS MORRIS, CARL CHADWICK, JR., LOUISE P. CHADWICK, EARL LEWIS, LYDE T. LEWIS, FRED DAVIS, MRS. FRED DAVIS, N. A. AVERY, EMMA AVERY, C. M. VELLINES, EVELYN T. VELLINES, EARL TAYLOR, MARIE TAYLOR, W. E. ROLISON, IDA ROLISON, H. W. SMITH, ROBERT L. SMITH, LUCILLE S. SMITH, FRANCES P. ARTHUR, ANNIE E. ARTHUR, GEORGE C. MORRIS, DOLLIE O. MORRIS, GASTON SIMPSON, MINNIE S. SIMPSON, JAMES H. MILLER, SUSAN N. MILLER, ROBERT M. WHITE, ANN WHITE, JAMES L. RANGE, NINA RANGE, SANFORD C. WHITE, EVELYN WHITE, JOSEPHINE S. McCABE, JULIUS TAYLOR, LEONDA TAYLOR, ROXIE TAYLOR, WALTER GOODWIN, JULIA A. GOODWIN, JETHRO H. QUIDLEY, LILA D. KIRK, MARGARET RUMER, F. E. KIRK, JEAN D. MORRISON, JOHN D. WEBB, BURL DENNIS, OLLIS LEWIS, E. C. RHUE, A. J. RHEA, J. R. BALL, BERKLEY SIMPSON, RUTH G. BALL, MRS. BERKLEY SIMPSON, JOHN CHADWICK, JOHN P. BUTLER, RUTH L. BUTLER, W. L. RUDDER, LENA H. RUDDER, N. C. CORBETT, MRS. N. C. CORBETT, D. P. CLAWSON, MRS. DAVE CLAWSON, JOHN C. MEASE, CATHERINE MEASE, L. Y. SAFRIT, MRS. L. Y. SAFRIT, JOHN JOHNSON, EVA JOHNSON, W. T. LEWIS, SR., EUNICE M. LEWIS, JACK O. WILLIAMS, EVIE K. WILLIAMS, JOHN A. LUPTON, MILDRED E. LUPTON, R. W. ADAMS, ANNE ADAMS, GEORGE H. AUTRY, BESSIE AUTRY, O. G. GASKILL, CLEO GASKILL, MARY E. JARVIS, THOMAS J. ADAMS, JEAN B. ADAMS, N. A. McNEILL, ELEANOR C. McNEILL, FREDERICK E. SMITH, PAULINE M. SMITH, P. N. THOMAS, JR., MRS. PHIL THOMAS, JR., GUY L. BROOKS, GEORGIA W. BROOKS, WILLIAM I. LOFTIN, JR., DOROTHY LOFTIN, ERIC HILL, LOUISE HILL, EUGENE GARNER, INA G. GARNER, DR. LUTHER FULCHER, ALGER F. FULCHER, PETITIONERS, v. W. H. POTTER, MAYOR; WILLIAM DAVIS, D. C. FARRIOR, W. R. HAMILTON, MATH CHAPLAIN, BERTIE BROOKS, COMMISSIONERS OF THE TOWN OF BEAUFORT; AND THE TOWN OF BEAUFORT, A MUNICIPAL CORPORATION OF THE STATE OF NORTH CAROLINA, RESPONDENTS.

(Filed 22 November, 1961.)

1. Municipal Corporations § 2—

Upon review in the Superior Court of a municipal annexation ordinance enacted pursuant to Article 36, Subchapter VI, Chapter 160, the record of the proceedings, including the report and annexation ordinance, must

show *prima facie* complete and substantial compliance with the Act as a condition precedent to the right of the municipality to annex the territory.

2. Same—

Where, upon review in the Superior Court of an annexation ordinance, the record of the proceedings shows *prima facie* that there has been substantial compliance with the requirements and provisions of the annexation statute, the burden is upon petitioners to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in the proceedings which materially prejudice the substantive rights of petitioners.

3. Public Officers § 3—

As a general rule, it will be presumed that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him, and the burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence.

4. Municipal Corporations § 2—

A statement in an annexation ordinance that the area to be annexed is in the process of being developed for urban purposes and that more than 60 per cent of the area is in use for residential, commercial, industrial, governmental or institutional purposes, and at least 60 per cent of the total acreage, not counting the acreage so used, consists of lots and tracts five acres or less in size, does not meet the requirements of G.S. 160-453.4, the statement being a mere conclusion without specific findings or showing on the face of the record as to the method used by the municipality in making its calculations or any showing as to the present use of any particular tract.

5. Same—

Where the record discloses the plans of the municipality for extending municipal services to the area annexed, itemizing the cost, and that such cost would be obtained from current taxes, the record supports a finding by the court of compliance with G.S. 160-453.3, and such finding will not be disturbed in the absence of evidence to the contrary of sufficient weight to overcome the *prima facie* presumption of regularity.

6. Municipal Corporations § 16—

Where a municipality annexes territory served by private water or sewer lines, the owners of such lines may not recover the value thereof from the municipality in the absence of provisions for payment by contract or ordinance unless the municipality appropriates such private lines and controls them as proprietor, and the mere extension of the city limits to include such lines or the voluntary maintenance of such lines by the city does not amount to an appropriation of such lines by the municipality.

7. Municipal Corporations § 2—

An annexation ordinance may not be attacked on the ground that the municipality has no plans to purchase or finance the purchase of private water and sewer systems existing in the annexed territory, since the mere

existence of such private systems within the territory to be annexed does not compel the city to purchase or acquire ownership of them.

8. Same—

Annexation of territory by a municipality is a legislative and not a judicial act, and in the absence of statutory directive, the court, on appeal from an annexation ordinance, cannot divide the territory and annex a part thereof and refuse to annex the remainder.

9. Same—

Where an order is issued restraining the operation of an annexation ordinance as to the entire area pending review, G.S. 160-453.6 (e) has no application, since the statute permits the court to approve the annexation of a part of the proposed area only when no question for review has been raised as to such part.

10. Same—

The Superior Court may permit, under G.S. 160-453.6(h), an annexation ordinance to be effective with respect to a part of the area proposed only when there is no appeal in regard to such part and the municipality agrees to the order for such partial annexation.

APPEAL by petitioners from *Cowper, J.*, at Chambers on 21 June 1961 in CARTERET.

The town of Beaufort is a municipality having a population of less than 5,000 according to the 1950 census. The governing board of the municipality in October 1959 began to consider, pursuant to G.S. 160-453.1 to G.S. 160-453.12, the annexation of an area adjacent to and north and east of the boundaries of the town.

On 26 October 1959 the governing board adopted a resolution declaring its intent to consider the annexation. Notice was published announcing a public hearing to be held on 30 November 1959. More than 14 days prior to the public hearing date there was filed in the office of the town clerk a report setting forth plans for extension of services to the area being considered for annexation.

The portions of the report pertinent on this appeal are summarized in part and quoted in part, as follows (numbering ours):

(1). "The area to be annexed is in the process of being developed for urban purposes and . . . more than 60% of same is in use for residential, commercial, industrial, institutional or governmental purposes, and that at least 60% of the total acreage, not counting the acreage used . . . for commercial, industrial governmental or institutional purposes, consists of lots and tracts five (5) acres or less in size. . . ."

(2). The town does not own a water system. Carolina Water Company, a corporation, is under contract with the town to supply water. It has water mains in much of the area to be annexed, and will establish other mains in accordance with consumer demand.

(3). The town's sewerage systems are based on gravity outfall toward navigable waters bordering the town. These systems have created a nuisance by reason of the depositing of raw sewerage in navigable waters, and the town has employed engineers to make plans for a general sewerage system of an approved type to serve the town and the area to be annexed, to be constructed in the future to replace the systems now in use. ". . . (T)he Board at this time does not deem the extension of the present sewer outfall . . . to be proper, economical or expedient." There is a privately owned sewer system in a portion of the area to be annexed. It is of the same type as those now being maintained by the town. If the privately owned system "is taken over by the municipality following annexation . . . an effort by arbitration to determine the value of this system shall be effected and . . . payment shall be made to those parties who are the true owners . . . , if their ownership is established." Much of the area to be annexed is served by septic tanks, and the town will provide equipment and two additional town employees for pumping out and cleaning septic tanks. The town will maintain all existing sewerage systems in the area to be annexed pending the installation of a new system.

(4). The town's fire-fighting equipment, herein described, is entirely adequate for protection of the area to be annexed, and is adequately manned. The water company, under its contract, will establish 22 additional fire hydrants at the points herein designated, and the fire alarm systems will be extended to the area to be annexed and boxes placed at 8 locations herein designated. Pending completion of hydrant and fire alarm extensions a "dummy box system" will be effected and fires will be reported by telephone.

(5). "Street Maintenance: The to-be annexed area will require 15.6 miles of mowing; 3½ miles of grading and would require the repair and refurnishing of a grader already the property of the town, hydraulic cylinders for one dump truck and one tractor mower." Dual use of personnel for street work and septic tank cleaning will be effected.

(6). The cost of extension of municipal services to the area will be $9,329.00. ". . . (T)he necessary revenues to pay this expense will be effected from current tax collections."

The public hearing was held 30 November 1959, at which the foregoing report was explained. Statements both for and against annexation were heard.

At a regular meeting of the governing board of the town on 11 January 1960 an ordinance was adopted annexing the area referred to in the report and specifically described in the ordinance, and extending the limits of the town to include the described area. The ordi-

nance declared the effective date of annexation to be 1 March 1960. The contents of the report heretofore set out were incorporated in the ordinance in part verbatim and in part by reference.

Within 30 days following the adoption of the annexation ordinance more than 200 owners of property within the annexed area signed a petition, which was verified by oath of one of them, and caused it to be filed in the superior court of Carteret County. The petitioners appealed from and sought review of the action of the governing board. The petition alleges that the petitioners believe they will suffer material injury by failure of the municipality to comply with the procedures required by law, and that the requirements and provisions of G.S. 160-453.3 and G.S. 160-453.4 had not been complied with. Nine exceptions are set out and specified in considerable detail. The pertinent exceptions are discussed in the opinion. The petition prays that it be treated as an affidavit of the facts therein stated, temporary injunction be granted, the annexation proceedings be reviewed, and the annexation ordinance be declared null and void.

On 26 January 1960 Bundy, J., entered an order, on motion of petitioners, enjoining respondents from putting the annexation ordinance into effect pending the outcome of the review.

The cause came on for review before Cowper, J., on 21 June 1961. ". . . (A)fter reading the petition (offered as an affidavit by petitioners, objection by defendants overruled), the ordinance for annexation and the report setting forth plans as to services to (the annexed area), the petitioners offered as evidence that portion of the report . . . as it related to sewerage; whereupon petitioners rested. . . ."

The respondents offered evidence tending to show that in a relatively small segment (of the annexed area), lying generally on both sides of Ann Street, there is a sewerage system, not owned by the town, which was installed by Carteret Lumber Company a great many years ago. The area served by this sewerage system is specifically described in Judge Cowper's judgment and designated "Tract No. One."

Respondents also offered evidence tending to show that the town's sewerage system serves a small territory (within the annexed area), generally in the angle between Highway 70 and Lennoxville Road; and that another sewerage system, not owned by the town, lies in the Hancock Park area to the west of Highway 70 and within the annexed area, and was installed and paid for "by the people who reside in the area." The two territories referred to in this paragraph are specifically described, as a single tract, in Judge Cowper's judgment and designated "Tract No. Two."

In rebuttal, petitioners offered the testimony of a resident of "Tract No. One," tending to show that Carteret Lumber Company installed

the sewerage system in this tract in "the late 1920s," and that he paid "his pro rata portion or use of the sewer," amounting to $10.00 or $15.00.

The court found facts, among others the following:

"7. That the Board of Commissioners has found as a fact and incorporated same in said ordinance that the said area for annexation is developed for urban purposes and that more than sixty (60%) per cent of the total number of lots and tracts of the area at the time the proceeding for this annexation began were used for residential, commercial, industrial, institutional or governmental purposes and that said area is subdivided into lots and tracts such that at least sixty (60%) per cent of the total acreage, not counting the acreage used at the time of the annexation for commercial, industrial, govermental or institutional purposes consists of lots and tracts five (5) acres or less in size;

"8. The Court further finds that the plans for extending municipal services to the to-be annexed area embraces each major municipal service performed within the respondent municipality at the time of annexation except sewerage and that, with the exception of sewerage, the plans for extending said services are ample, sufficient and complete. That the plans for extending sewerage lines into the to-be annexed area are not shown in the report setting forth plans as to services and, in fact, the report does not consider the extension of sewerage outfalls necessary for reasons as contained therein;

"9. That the Court finds that certain portions of said area are already served as to sewage facilities on a basis equivalent to that already in existence in the respondent municipality and that said areas are as follows:" Here tracts One and Two above referred to are set out by boundary descriptions. These tracts are relatively small portions of the area described in the annexation ordinance.

The court's conclusions of law and judgment are as follows:

"1. That the petition filed herein does not explicitly state what exceptions are taken to the action of the governing board of the respondent and what relief the petitioners seek as to individual petitioners except as to the failure of the respondent municipality to provide in its plan for extension of sewerage services in the to-be annexed area;

"2. The Court concludes that the petition fails to show how the alleged failure of respondent Town to comply with the procedures set forth in this part or to meet the requirements set forth in G.S. of N.C. 160-453.4 materially affect the individual property of the petitioners except as to the provisions as to sewerage facilities;

"3. The Court further concludes that the respondent municipality has fully complied with the requirements of the Act as it relates to

that portion of the to-be annexed area described in Finding of Fact #9 above; and the Ordinance of January 11, 1960, is affirmed as to these areas and these areas are hereby decreed to be annexed as a part of the municipality of the Town of Beaufort pursuant to said Ordinance and subject to the report setting forth plans as to services as to annexed area as same relates to said area.

"4. That the Ordinance should be, and same is hereby remanded to the Board of Commissioners for amendment of the plans providing sewerage facilities only to the area described as 'the annexed area,' excepting, however, those areas of same described in Findings of Fact #9 above, and the said Board of Commissioners shall cause to be filed an amendment to its report for plans as to services as to sewerage facilities within ninety (90) days in the Office of the Clerk Superior Court of Carteret County; and that, if it shall fail to so file said amendment within said time provided, then the Ordinance as to said area, excepting the areas described in Finding of Fact #9 above shall be null and void.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that those areas described in Finding of Fact #9 above are hereby declared to be annexed to and a part of the Town of Beaufort as of the date of this judgment; and that the respondent municipality shall cause an accurate map of such annexed territory, together with a copy of an amended ordinance declaring said area to be annexed, to be recorded in the Office of the Register of Deeds of Carteret County;

"IT IS FURTHER ORDERED that the area to be annexed, excluding the areas above described, shall immediately become subject to the provisions of remand set forth hereinabove."

Petitioners "residing in" Tracts One and Two appealed and assigned errors.

Gene C. Smith for petitioners, appellants.

C. R. Wheatly, Jr. and Thomas S. Bennett for respondents, appellees.

MOORE, J. Petitioners contend that the report, prepared by the municipality pursuant to G.S. 160-453.3, which was made a part of the annexation ordinance, is insufficient on its face (1) to show that the area to be annexed is "developed for urban purposes," (2) to show that the municipality plans to extend major municipal services, including sewerage, fire protection and street maintenance, to the area to be annexed "on substantially the same basis and in the same manner as such services are provided" within the town, and (3) to show

that adequate provision has been made for financing service extensions. Petitioners further contend that it was incumbent on the municipality, and the municipality failed, to offer evidence at the review hearing in superior court that it is able to carry out its plans with respect to extension of services and that the plans comply with statutory requirements. In short, petitioners contend that the municipality, as a condition precedent to the right to annex, must file a report showing on its face strict compliance with statutory requirements, and that upon review in superior court has the burden of sustaining the regularity, adequacy, veracity and validity of the report and annexation ordinance by competent evidence. Petitioners point out that the municipality offered no evidence in support of the record and procedures except some testimony with respect to sewerage systems in Tracts One and Two, and they insist that the municipality has failed to carry the burden of proof and that the annexation ordinance should have been declared null and void. Thus, at the threshold we are confronted with the question: Who has the burden of proof in a superior court review of annexation records and procedures?

"A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it." 37 Am. Jur., Municipal Corporations, s. 24, pp. 640-1. See Anno: 64 A.L.R., Municipal Boundaries — Power to Extend, pp. 1341-1354. "The only discretion given to the governing board of . . . municipalities is the permission and discretionary right to use this new method of annexation (Art. 36, Subchapter VI, Chapter 160, General Statutes of North Carolina) provided such boards conform to the procedure and meet the requirements set out in the Act as a condition precedent to the right to annex." (Parentheses added.) *In Re Annexation Ordinances*, 253 N.C. 637, 647, 117 S.E. 2d 795. In the procedures established by the Act, including the report of plans for extending services and the annexation ordinance, the governing board must comply with and conform to statutory provisions and requirements, and the record of the annexation proceedings must show *prima facie* complete and substantial compliance. Substantial compliance means compliance with the essential requirements of the Act. *People v. Omen*, 124 N.E. 860, 863. If the record of annexation proceedings on its face fails to show substantial compliance with any essential provision of the Act, the superior court upon review must remand to the governing board for amendment with respect to such non-compliance. G.S. 160-453.6(f), (g). The court itself is without authority to amend

the report, ordinance or other part of the record. This is true even if evidence is presented which justifies amendment. "The annexation of territory to a municipal corporation is a legislative function which may not be delegated to a court. . . ." 37 Am. Jur., Municipal Corporations, s. 25, p. 641.

However, where an appeal is taken from the annexation ordinance and a petition has been filed, pursuant to G.S. 160-453.6, requesting review of annexation proceedings, and where such proceedings show *prima facie* that there has been substantial compliance with the essential provisions of the Act, the burden is upon petitioners to show by competent evidence failure on the part of the municipality to meet requirements of G.S. 160-453.3 or G.S. 160-453.4 as a matter of fact, or irregularity in proceedings which materially prejudice the substantive rights of petitioners. The burden is upon petitioners in such case by reason of the presumption "that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Construction Co. v. Electrical Workers Union,* 246 N.C. 481, 488, 98 S.E. 2d 852. Accord: *In Re Housing Authority,* 233 N.C. 649, 656, 65 S.E. 2d 761; *Kirby v. Board of Education,* 230 N.C. 619, 627, 55 S.E. 2d 322. ". . . (I)t is, as a general rule presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him, and that he will not do any act contrary to his official duty or omit to do anything which such duty may require." 31 C.J.S., Evidence, s. 146, pp. 800-802. "The presumption . . . applies in favor of the acts of . . . a city council. . . ." *ibid.,* p. 812. "It is . . . presumed, as an element of the general rule, that a public officer, in discharge of his official duties, . . . acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest." *ibid.,* pp. 804-806. "The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . ." *ibid.,* pp. 808-9.

Petitioners except to the court's finding of fact 7 and assert that the annexation ordinance contains no specific findings that the area to be annexed is developed for urban purposes. We agree. The report of plans for extending services states: ". . . the area to be annexed is in the process of being developed for urban purposes and, as such, more than 60% of same is in use for residential, commercial, industrial, in-

stitutional or governmental purposes and that at least 60% of the total acreage, not counting the acreage used on the aforementioned date for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five (5) acres or less in size." This statement is repeated almost verbatim in the annexation ordinance, and there is no other finding in the record as to whether or not the area to be annexed is developed for urban purposes. The statement is a general conclusion couched in the wording of the statutory definition of "area developed for urban purposes," as set out in G.S. 160-453.4(c). It merely adopts the definition as the only showing relative to the nature of the area. The Act requires that the annexation ordinance contain *"specific findings* that the area to be annexed meets the requirements of section 160-453.4." (Emphasis added.) See G.S. 160-453.5(e) (1). It is provided in G.S. 160-453.10 that: "In determining degree of land subdivision for purposes of meeting the requirements of § 160-453.4, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in § 160-453.4 have been met in appeal to the superior court under § 160-453.6, the reviewing court shall accept the estimates of the municipality: . . . (2) As to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five per cent (5%) or more." The ordinance in the instant case makes no reference to the method used by the municipality in making its calculations. Nor does it state what the percentages of development actually are. The map appearing in the record does not show on what lots or tracts buildings or other establishments are located. "Used for residential purposes" means any lot or tract of five acres or less in size on which is constructed a habitable dwelling unit. G.S. 160-453.9(2). Furthermore, the map shows no acreage computations. There are no specific findings and no showing on the face of the record to support the general conclusion stated. Therefore, the record on its face fails to show substantial compliance with statutory requirements that there be specific findings that the area to be annexed is developed for urban purposes. Because of such failure the annexation ordinance should have been remanded to the governing board for compliance and, if necessary, amendment of boundaries. G.S. 160-453.6(g) (2).

Petitioners except to the following portion of the court's finding of fact 8: ". . . the plans for extending municipal services to the to-be annexed area embraces each major municipal service performed within the respondent municipality at the time of the annexation except

sewerage and . . . , with the exception of sewerage, the plans for extending said services are ample, sufficient and complete." Petitioners insist that the plans for extension of fire protection, street maintenance and sewerage to the area to be annexed do not provide for such extensions "on substantially the same basis and in the same manner as such services are provided" within the municipality, and, further, that the report and ordinance do not "set forth the method under which the municipality plans to finance extension of these services into the area to be annexed."

We have in our statement of facts briefly summarized the plans for these extensions of services. These plans are set out in the record fully and in detail. Costs are itemized and provision made for needed revenues from current tax collections. As to financing, and extension of fire protection and street maintenance, the report and ordinance show *prima facie* substantial compliance with the requirements of the Act. But petitioners contend they have offered evidence which shows the insufficiency of these plans and proposals. The only evidence offered by petitioners, other than the rebuttal evidence referred to in our statement of facts, is the petition for review. It was admitted in evidence as an affidavit over the objection of respondents. The admissibility of the petition as evidence is not before us on this appeal. It is apparent, however, that the court did not consider it of sufficient weight to overcome the *prima facie* showing of the report and annexation ordinance. In the making of the challenged finding of fact we perceive no error.

In findings of fact 8 and 9 the court states: ". . . the plans for extending sewerage lines into the to-be annexed area are not shown in the report setting forth plans as to services and, in fact, the report does not consider the extension of sewerage outfalls necessary for reasons as contained therein; . . . the Court finds that certain portions of said area are already served as to sewage facilities on a basis equivalent to that already in existence in the respondent municipality and that said areas are as follows:" Here Tracts Nos. One and Two are specifically described. As already indicated, they are small portions of the total area the municipality desires to annex. The court concluded that the municipality had fully complied with the requirements of the Act with reference to Tracts One and Two, affirmed the ordinance with respect to these tracts, decreed that they be annexed to and become a part of the town of Beaufort as of the date of the judgment, June 21, 1961. As to the remainder of the area to be annexed the ordinance was remanded to the governing board of the municipality for "an amendment to its report for plans as to services as to sewerage facilities. . . ."

The appellants herein reside in tracts One and Two and except to the court's conclusion that the municipality has fully complied with the requirements of the Act with respect to these tracts. Appellants contend that there is no showing in the report and ordinance, or otherwise, that the town plans to purchase the private sewerage systems in tracts One and Two, or has plans for financing the purchase of these systems, but that "it is incumbent on a municipality to purchase sewer systems taken into the municipal area as set forth in *Jackson v. Gastonia,* 246 N.C. 404, and *Mfg. Co. v. Charlotte,* 242 N.C. 189."

In the report the municipality proposes to "maintain all sewerage systems in use," and states: ". . . (I)n the event that the present privately owned sewerage system in a portion of the annexed area is taken over by the municipality following annexation . . . an effort by arbitration to determine the value of this system shall be effected and . . . payment shall be made to those parties who are the true owners of said system, if their ownership is established."

The *Gastonia* and *Charlotte* cases relied on by appellants have no application to the actual situation here presented. In the *Gastonia* case it was stipulated that the City of Gastonia had "taken over, used and controlled . . . water and sewer lines to the same extent as if said lines had been installed by defendant (City) originally." It was held that plaintiffs were entitled to recover on *quantum meruit.* In the *Charlotte* case the City contracted orally to purchase plaintiff's sewer line when the area was annexed. This Court declared that plaintiff was entitled to recover on *quantum meruit* even though the contract was void because not in writing.

Where a private owner installs water or sewer lines at a time when there is a City ordinance which provides that such lines shall become the property of the City if the territory served thereby is annexed, the private owner may not recover therefor by reason of a subsequent annexation of the territory and a taking over of the lines by the City. *Spaugh v. Winston-Salem,* 234 N.C. 708, 68 S.E. 2d 838. Where there is a contract and agreement between the private owner of water or sewer lines and a City, the rights of the parties are to be determined, upon annexation, by the terms of the contract. *Styers v. Gastonia,* 252 N.C. 572, 114 S.E. 2d 348; *Honey Properties, Inc. v. Gastonia,* 252 N.C. 567, 114 S.E. 2d 344.

Where there is no contract or municipal ordinance involved and the territory served by private water or sewer lines is annexed to a municipality, the owner of the lines may not recover the value thereof from the municipality unless it appropriates them and controls them as proprietor. The bare extension of the city limits does not amount to a wrongful taking or appropriation of the lines. Maintenance as a

voluntary act on the part of the city does not amount to a taking of the property. *Farr v. Asheville,* 205 N.C. 82, 170 S.E. 125.

In the instant case the town of Beaufort proposed, as an extension of service, to maintain the sewerage systems in question. Its report recognizes that they are privately owned, and declares that payment will be made if they should be taken over by the municipality and if the identity of the owners can be determined. There is no proposal to appropriate the systems as a part of the extension of services, and the Act does not require that they be purchased. Furthermore, there is no requirement that a municipality duplicate services, in an area to be annexed, which are already available in the area. The town of Beaufort proposes at some future time to install a modern system, according to current standards of health and sanitation, and it is logical to conclude that there is no present intention to acquire the ownership of these gravity outfall systems, even though they are of the same type as those presently owned by the town. Appellants' exceptions are not well taken.

However, there remains the question as to whether or not the court below had the authority to carve out and order annexed portions of the area which the ordinance purported to incorporate within the limits of the town, and remand the ordinance as to the remainder. The acts of the court are judicial in nature; the adoption of an ordinance by the governing body of a municipality is a legislative act. Certainly, in the absence of statutory directive, the court cannot divide the territory, annex a part and refuse to annex the remainder. The court may enter such judgments as are outlined in G.S. 160-453.6(g).

There are two provisions of the statute which permit the court to divide an area and order an annexation of a portion. G.S. 160-453.6(e) provides that, pending the outcome of review, the court may make an order staying the operation of the annexation ordinance, and in the stay order "may permit annexation of any part of the area . . . concerning which no question for review has been raised." In the record on this appeal there is an order which stays the operation of the ordinance as to the entire area pending review. So this provision of the statute has no application to the division made in the review judgment. It is provided in G.S. 160-453.6(h) that any party to the review proceedings may appeal to the Supreme Court, and "that the superior court may, with the agreement of the municipality, permit annexation to be effective with respect to any part of the area concerning which no appeal is being made. . . ." There was an appeal to Supreme Court with respect to tracts One and Two, and therefore the order annexing these tracts as a portion only of the area was improper. Furthermore, there is no showing that it was done "with the agreement of the mu-

nicipality." The ordinance should have been remanded with respect to the entire area.

This cause is remanded to the superior court with direction that it enter a judgment remanding the annexation ordinance to the governing board of the town of Beaufort (1) for *specific findings* that the area to be annexed is developed for urban purposes, as required by the Act, (2) for plans for extension of sewerage to the area to be annexed, and (3) for amendment of the boundaries of the area to be annexed, if such is necessary in making the area comply with G.S. 160-453.4, or if necessary in meeting the requirements for extending sewerage, but in no event to add territory to the area as originally described, G.S. 160-453.6(g) (2); all subject to action by the governing board within three months, as provided in G.S. 160-453.6(g).

Error and remanded.

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF JACKSONVILLE, NORTH CAROLINA, 18 APRIL 1961.

(Filed 22 November, 1961.)

1. Municipal Corporations § 2—

Upon review in the Superior Court of a municipal annexation ordinance enacted pursuant to parts 2 and 3 of Article 37, Subchapter VI, Chapter 160, the record of the proceedings, including the report and annexation ordinance, must show *prima facie* complete and substantial compliance with the Act as a condition precedent to the right of the municipality to annex the territory.

2. Same—

Where, upon review in the Superior Court of an annexation ordinance, the record of the proceedings shows *prima facie* that there has been substantial compliance with the requirements and provisions of the annexation statute, the burden is upon petitioners to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in the proceedings which materially prejudice the substantive rights of petitioners.

3. Same—

The record of the annexation proceedings in this case is held to show *prima facie* full compliance with the requirements of G.S. 160-453.16 as to the character of the area to be annexed and full compliance with G.S. 160-453.15 in regard to extension of police and fire protection to the area to be annexed.

4. Same—

Where the area proposed to be annexed by a municipality, when con-

sidered as a whole, meets the requirements of G.S. 160-453.16(b), (c), the fact that a part of the area is an undeveloped tract which does not comply with the standards set out in the statute does not require that such part be excluded from annexation.

5. Same—

A municipality may not limit its obligations to maintain streets in the area to be annexed by it to those streets which are improved to stipulated standards by the landowners and developers in the area, G.S. 160-453.15 (3) a. Any obligation of the landowners and developers to the city to improve the streets is a matter between them and the municipality and is irrelevant to the question of the sufficiency of the annexation ordinance to meet the requirements of the statute.

6. Same—

Where an annexation ordinance contains no plans for the municipality to extend water and sewer services in the area to be annexed beyond those services presently in existence in the area unless the water and sewer lines are extended by landowners and developers in the area, the ordinance fails to meet the requirements of G.S. 160-453.15(3) b.

7. Municipal Corporations § 4—

As a general rule, when a municipality engages in supplying water to its inhabitants, it has the duty to supply equal service to all consumers within its corporate limits.

APPEAL by petitioners from *Hooks, S.J.*, May 1961 Mixed Term of ONSLOW.

The City of Jacksonville is a municipality having a population of more than 5,000 according to the 1960 census. In March 1961 the city council began to consider, pursuant to G.S. 160-453.13 to G.S. 160-453.24, the annexation of an area containing 105 acres, adjacent to the limits of the city and lying north of that section of the city known as Northwoods. The area consists of a subdivision known as Forest Hills, a 4.5 acre tract of the Onslow County Board of Education, a 4.5 acre tract of St. Anne's Episcopal Church, and an undeveloped tract of 15.5 acres. The undeveloped tract lies between the city limits and Forest Hills and to the west of the Episcopal church property.

On 7 March 1961 the city council adopted a resolution declaring its intent to consider the annexation of this area. Notice was published announcing a public hearing to be held on 10 April 1961. A report was prepared setting forth plans for extension of services to the area. The report was approved by the city council on 21 March 1961. The public hearing was held at the time announced. On 18 April 1961 the city council adopted an ordinance purporting to annex the area referred to above.

The ordinance contains, among other things, the following (numbering ours.):

(1). A specific description of the area.

(2). For compliance with G.S. 160-453.16, entitled "Character of area to be annexed," the statement: ". . . The total area is contiguous to the City's boundaries. . . . The aggregate external boundary of the area is 11,208+ feet of which 4,950+ feet or 44.2 per cent (44.2%) coincides with the present City Boundary. . . . No part of the area is included within the boundary of another incorporated municipality. . . . (T)he total area is 105 acres and has a population determined by actual count to be 239 persons, which is in excess of two persons per acre . . . and . . . it . . . is subdivided in lots and tracts such that 85.2 per cent . . . of the total acreage consists of lots and tracts 5 acres or less in size and such that 96.8 per cent . . . of the total number of lots and tracts are one acre or less in size. . . . If taken separately, the undeveloped 15.5 acre portion could be qualified in accordance with G.S. 160-453.16(d); however, since the entire area was qualified under the two sections of G.S. 160-453.16(c), further qualification was considered to be redundant."

(3). For compliance with G.S. 160-453.15, entitled "Prerequisites to annexation; ability to serve; report and plans," the statement:

"The City proposes to extend City services to the area described herein and finance the same in the following manner:

"*Police Protection.* The Jacksonville Police Department has jurisdiction for one mile beyond the present City Limits and presently provides protection for residential areas within the City Limits on a regular patrol basis. The patrol coverage enables the department to respond to calls for aid in an average time of 5.5 minutes.

"If annexed into the City, the routine patrol through the Northwoods Area will be extended into the Forest Hills Area providing coverage to the new area on substantially the same basis as presently provided in the existing City.

"The minor additional expense in lengthening the present patrol route will be provided for in subsequent fiscal year budgets following annexation.

"*Fire Protection.* There is presently one fire station serving the City of Jacksonville. This department serves the entire City Limits Area and is available for calls on the outside of the City Limits on a payment basis. The normal average time of response to a fire call in the western section of the Northwoods Residential Area, which adjoins the Forest Hills Area, is 4 minutes. If annexed into the City, fire services on substantially the same basis would be provided in the Forest Hills Area. The existing water distribution system in the Forest

Hills Area has substantially the same flow and pressure as the Northwoods Residential Area; therefore, the time of response and present water system would render substantially the same fire protection in the Forest Hills Area as now exists in the present Northwoods Area.

"The citizens of Jacksonville recently approved a bond issue which provides funds for water feeder mains through the Northwoods Area and around two sides of the Forest Hills Subdivision. The bond issue also includes necessary funds for the construction of a new fire station with necessary fire-fighting equipment, which is to be located in the Northwoods Residential Area. At such time as additional water feeder mains and the construction of the new fire station are completed, the area within the now existing City would have increased fire protection. If annexed, Forest Hills Area would obtain the same benefits. Construction of the water feeder mains and fire station is expected to be completed within approximately 18 months."

"*Street Maintenance.* The City has sufficient equipment and personnel to provide street maintenance service in the area proposed to be annexed, on substantially the same basis and in the same manner as this service is provided within the present City Limits, immediately upon annexation.

"Full and continuous street maintenance will be afforded for all streets in the area, which have complete permanent improvements including proper and adequate storm drainage, concrete curb and gutter and street paving.

"It is the City's policy that streets and (in) new developments shall be constructed and improved by the developer and shall include proper and adequate storm drainage, concrete curb and gutter and street paving — all meeting the specifications and requirements of the City. In the sections of the area proposed for annexation where full permanent improvements have not been constructed, this policy will apply. At such time as the streets in these undeveloped portions are fully developed and improved in accordance with the above requirement, they shall be accepted for full and continuous maintenance.

"The cost of street maintenance in this area will be included in subsequent budgets following annexation with the aid of 'Powell Funds' provided by State Statutes."

". . . (W)ater and sewer services: The developed portions of the Forest Hills Subdivision is presently served by adequate water and sewer service mains. These water and sewer mains were installed by the owners of Forest Hills Property and connected to the City Lines by permissions granted by the City Council on June 4, 1957, by resolution which reads as follows: 'That Mr. Morton be allowed to tie into the water and sewer provided that he follows the past procedures.'

The past procedures and the established policy of the City of Jacksonville requires that permission is granted for the extension of water and sewer mains to new subdivisions lying beyond the City Limits providing all installations are made in strict conformance with the standards prescribed by the City and that upon annexation of the entire area or any part of the area in which such water and sewer lines are installed, the same shall become the property of the City of Jacksonville. This procedure and policy first became effective and has been continuously followed since 1951.

"The undeveloped portion of the area to be annexed will conform to past procedures of policy which requires the developer to install water and sewer mains, water and sewer lateral lines, and water meters for each individual lot and to provide concrete curb and gutter, storm drainage and street paving.

"The area proposed for annexation is now properly served with major sewer outfall facilities.

"Due to the rapid and continued growth of the City of Jacksonville and the demands placed upon its water and sewer plant facilities, the City has presently in progress plans for additional plant facilities and water feeder mains. In the development of a new source of water supply, the City's consulting engineers and the city officials decided to locate the new proposed well field and new proposed water plant in the northwestern section of the City. This being direction and area where development is most likely, the site chosen for the new source of supply and treatment facilities is located immediately adjacent to the northwest corner of the Forest Hills Subdivision property. The new source of supply will consist of four wells 10 inches in diameter. The water treatment plant will include water softening facilities and will be designed for an initial capacity of one million gallons per day and an ultimate capacity of four million gallons per day. In order to properly equalize the flow and pressure in the City's water system, the City proposes the erection of a 500,000-gallon elevated storage tank at the plant site and the installation of a 12-inch water feeder main connecting the same with the two existing elevated tanks. This 12-inch water feeder main will be installed in streets immediately adjacent to the area proposed for annexation, to wit: David Place and Henderson Drive. The water distribution system now existing in the area proposed for annexation will be tied in and connected with the feeder main at various points in these two streets; thereby providing increased flow and pressure in the Forest Hills Area. It is proposed that construction on these hereinbefore described improvements to the water system will begin in the early summer of 1961. These im-

provements must be installed in any event regardless of the final decision of the annexation of the Forest Hills Area.

"Funds for the proposed improvements to the water system will be provided by a bond issue, which was approved in a referendum on February 7, 1961."

Only those parts of the ordinance which are material and pertinent on this appeal are copied here. The quoted portions of the ordinance are in strict accord with the report. A map was attached to the report and made a part of the ordinance.

Within 30 days following the adoption of the annexation ordinance 98 persons and two corporations filed a verified petition in the superior court of Onslow County appealing from and seeking review of the ordinance. The exceptions taken to the ordinance, insofar as is necessary for determination of the questions raised, are discussed in the opinion.

The cause came on for hearing before Hooks, S.J. Evidence was offered by petitioners and respondents. Members of the City Council, the City Manager, City Engineer, Chief of Police, Fire Chief and many others gave testimony.

Over the objection of petitioners, there was testimony that "It is the City's policy that streets in new developments shall be constructed and improved by the developer and shall include proper and adequate storm drainage, concrete curb and gutter and street paving — all meeting the specifications and requirements of the City," and further that the "policy of the City of Jacksonville requires that permission is granted for the extension of water and sewer mains to new subdivisions lying beyond the city limits providing all installations are made in strict conformance with the standards prescribed by the City and that upon annexation of the entire area or any part of the area in which such water and sewer lines are installed, the same shall become the property of the City of Jacksonville."

There was documentary evidence, including ordinances and resolutions appearing on the minutes of the City Council, and letters, showing that the City of Jacksonville annexed three areas, the Cates-Cavenaugh property, Northwoods, and Oak Grove, from 1951 to 1960. In each of these the developers requested annexation and agreed to install water and sewer lines and improve streets without expense to the City, and the developer was required to comply before services were extended or the area was annexed.

The following appears in Minute Book 7, page 88, under date of 4 June 1957:

"Mr. Cecil Morton appeared before the Council in regards

to getting permission to tie into the City Water for his property on Henderson Drive just outside the City Limits.

"Motion by A. D. Guy, seconded by Jack Koonce, that Mr. Morton be allowed to tie into the water and sewer providing that he follows the past procedures.

Voting Ayes	All
Opposed	None."

There was testimony that Mr. Cecil Morton was one of the developers of Forest Hills. Henderson Drive is in the south edge of Forest Hills.

The following excerpt from minutes of the City Council was admitted in evidence:

"REPORT ON PROPOSED ANNEXATION
ELIZABETH LAKE AREAS.
PUBLIC HEARING TUESDAY, FEBRUARY 23
1960 CITY HALL 8 P. M.
CITY OF JACKSONVILLE, NORTH CAROLINA

The policy of the City now is to extend water and sewer lines 100 feet to any house without these services, with the property owner being responsible for additional cost in distance. The same policy would exist in the proposed annexed area with respect to all of the businesses and residences now in this proposed area. It would be the responsibility of any builder in an undeveloped area or subdivision to extend water and sewer thru their subdivision after it has been made available to their property line by the City. Work should be started or contracts let and construction begun on such water and sewer lines within 6 months following the effective date of annexation."

The City Manager testified that the citizens of Jacksonville approved a bond issue of $1,400,000.00 for improving and enlarging water and sewer facilities, none of the money has been expended and these funds will be available for the Forest Hills area if the City Council sees fit; that the City is proposing the installation of a 12-inch feeder main along Henderson Drive (in Forest Hills and near the 15.5 acre undeveloped tract), and the developed portions of Forest Hills Subdivision is presently served by adequate water and sewer mains.

It appears from the testimony of a number of witnesses that there are no houses on the 15.5 acre tract, and it contains no water or sewer lines. There is no recorded map showing any streets or avenues in this tract. It was also testified that no major outfall sewer lines are required for this tract, that it could be served with water and sewer by connecting with the Northwoods area.

There was further testimony tending to show that there are streets without curb and gutter and unpaved streets both within the City of Jacksonville and in Forest Hills, and that the City maintains such streets within its present limits.

The Chief of Police and Fire Chief testified as to the equipment and personnel of their departments, and plans and means for extending services to the annexed area.

The court made findings of fact and conclusions of law, in part as follows:

"2. That included in the property annexed is an area of approximately 16 acres, which is owned by some of the petitioners, which area is contiguous to the present City Limits and is undeveloped in that it contains no improvements such as paved streets, curb and gutter, or water and sewer facilities."

"7. That the evidence was sufficient to show plans of the City of Jacksonville for extending to the area to be annexed the same police protection as is now being furnished by the City on substantially the same basis and in the same manner as such service is provided within the rest of the municipality prior to annexation; and that the report setting forth such plans sufficiently shows that such service will be furnished and can be furnished on the date of annexation.

"8. That the evidence was sufficient to show plans of the City of Jacksonville for extending to the area to be annexed the same fire protection as is now being furnished by the City on substantially the same basis and in the same manner as such service is provided within the rest of the municipality prior to annexation; and that the report setting forth such plans sufficiently shows that such service will be furnished and can be furnished on the date of annexation.

"9. That there is no evidence tending to show that the area to be annexed will not be provided, or does not already have provided, adequate storm drains, adequate sewer facilities; that the policy of the City of Jacksonville in this respect is sufficiently established and set forth in this annexation report and substantiated by official minutes and documents of the City introduced in evidence by the petitioners for purpose of attack; that the said report contains a sufficient statement of the City's plans and timetable to show that the area to be annexed will be furnished with the major municipal services performed within the City at the time of annexation or at the time the City is required to furnish said services in accordance with its established policy.

"10. That there is no evidence tending to show that the newly annexed area will not be furnished with, or does not now have adequate and sufficient street improvements and street maintenance in accord-

ance with the established policy of the City and on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation."

"13. . . . . .

"(a). That the so-called 16-acre undeveloped tract lies between the present municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is not adjacent to the municipal boundary; that said undeveloped area is adjacent, on at least sixty (60%) per cent of its external boundary, to any combination of the municipal boundary and the boundary of an area developed for urban purposes as defined in G.S. 160-453.16(c). . . .

"The Court further finds as a fact with respect to said 16-acre tract that no major sewer outfall lines will be required to be installed and that adequate water and sewer facilities can be provided by the City by proper connections with existing City sewer and water lines and with such lines as are planned in the manner set forth in the annexation report, and that adequate financial provision has been made by the City as evidenced by the approval of the voters of the City of Jacksonville in a bond referendum held on February 7, 1961, in the amount of One Million Three Hundred and Seventy-eight Thousand ($1,378,000.00) Dollars, which amount included eighty thousand ($80,000.00) Dollars for a fire station and equipment to be erected in that portion of the City of Jacksonville immediately adjoining and to the south of the area being annexed.

"The Court further finds as a fact in this connection that the City of Jacksonville had, at the time of the passage of the annexation ordinance, an established policy requiring that streets in new developments must be constructed by the developers and must include proper and adequate storm drains, concrete curb and gutters and street paving, all meeting the specifications and requirements of the City; and further, that sewer and water facilities must be installed by the developers according to the specifications and requirements of the City. . . .

"(b) The Court finds that the report setting forth the plans for providing adequate storm drains, concrete curb and gutter, street paving, water mains and sewer mains to the annexed area is adequate to provide such facilities on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation and that the report sets forth the City's plans for the financing of all such improvements on a timetable which meets the requirements of the law."

"(e). The Court finds that the petitioners have failed to show that the statutory procedure was not followed, as required by G.S. 160-

453.17, and other sections of the annexation statute, and the Court finds that said procedure was complied with.

"(f). The Court finds that the petitioners have failed to show that the provisions of G.S. 160-453.15 were not met, and the Court finds that such provisions were met.

"(g). The Court finds that the petitioners have failed to show material injury to themselves or to their property as a result of the annexation of the area described in the annexation ordinance."

Upon the findings of fact and conclusions of law the Court entered judgment affirming the annexation ordinance without change.

Petitioners appealed and assigned errors.

Ellis, Godwin & Hooper and Jones, Reed & Griffin for petitioners, appellants.

Venters & Dotson and Ward & Tucker for respondents, appellees.

MOORE, J. In annexation proceedings under parts 2 and 3 of Article 36, Subchapter VI, Chapter 160 of the General Statutes of North Carolina (hereinafter referred to as the "Act"), the record of the proceedings, including the report and annexation ordinance, must show *prima facie* complete and substantial compliance with the Act, as a condition precedent to the right of the municipality to annex. Where an appeal is taken from an annexation ordinance and a petition has been filed requesting review of the annexation proceedings, and the proceedings show *prima facie* that there has been substantial compliance with the requirements and provisions of the Act, the burden is upon petitioners to show by competent evidence failure on the part of the municipality to comply with the statutory requirements as a matter of fact, or irregularity in proceedings which materially prejudice the substantive rights of petitioners. *Huntley V. Potter, ante,* 619.

Our examination of the annexation proceedings in this case compels the conclusion that the report and ordinance show *prima facie* full compliance with the requirements of G.S. 160-453.16 as to the "character of the area to be annexed," and full compliance with G.S. 160-453.15 in relation to plans for extension of police protection and fire protection to the area to be annexed on "substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." The court below in substance made such finding and correctly so. Petitioners failed to carry the burden of showing otherwise, with respect to these matters.

Petitioners contend that the 15.5 acre undeveloped tract (referred to in the judgment as 16-acre tract) is not property of the character

which may be annexed under the Act, does not comply with the standards set out in G.S. 160-453.16, and should have been excluded from the area to be annexed. This contention is untenable. It is true that there are no buildings on the 15.5 acre tract, no persons reside thereon, and it has not been subdivided and contains no improved streets or utilities. But when considered with the remainder of the area to be annexed, the area as a whole complies with the requirements of G.S. 160-453.16(b) and (c). Petitioners have not shown otherwise. This is sufficient to qualify this tract for inclusion in the annexation. Furthermore, the 15.5 acre tract qualifies for annexation under the provisions of G.S. 160-453.16(d) which declares: "In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area . . . is adjacent, on at least sixty per cent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c)." A casual examination of the annexation map shows that more than 60% of the external boundary of the 15.5 acre tract is adjacent to the city limits and the Forest Hills Development. The court found this to be a fact, though such finding was unnecessary since the area as a whole qualified under G.S. 160-453.16(c). Where an area to be annexed, when considered as a whole, meets the requirements of G.S. 160-453.16(b) and (c), a portion of the area may not, as a matter of right, be excluded from annexation merely because it, taken alone, does not meet these requirements. Petitioners' argument to the contrary is based on the following language in G.S. 160-453.16(a): "A municipal governing board may extend the municipal corporate limits to include any area . . . *every part of which* meets the requirements of either subsection (c) or subsection (d)." (Emphasis added). When considered with the other provisions of the section it is clear that the construction placed thereon by petitioners is contrary to the intent of the Legislature. A vacant lot in a subdivision does not comply with subsection (c), but the Legislature did not intend that all vacant lots in an otherwise qualified area be excluded from annexation. The language simply means that where a developed tract and an undeveloped tract are included in an area to be annexed, and the developed tract complies with subsection (c), but when the undeveloped tract is added the area as a whole does not so comply, then the undeveloped tract must be excluded unless it complies with one of the requirements of subsection (d).

In the report of plans and the annexation ordinance the plan for street maintenance is:

"Full and continuous street maintenance will be afforded for all streets in the area, which have complete permanent improvements including proper and adequate storm drainage, concrete curb and gutter and street paving.

"It is the City's policy that streets and new developments shall be constructed and improved by the developer and shall include proper and adequate storm drainage, concrete curb and gutter and street paving — all meeting the specifications and requirements of the City. In the sections of the area proposed for annexation where full permanent improvements have not been constructed, this policy will apply. At such time as the streets in these undeveloped portions are fully developed and improved in accordance with the above requirement, they shall be accepted for full and continuous maintenance."

The uncontradicted evidence is that there are unpaved streets and streets without curb and gutter within the area to be annexed and within the present limits of the city, and those within the city limits are maintained by the city. Yet the plan for extension of service states in effect that the city will maintain in the area to be annexed only such streets as are paved and have adequate storm drainage and concrete curb and gutter. It is stated that land owners and developers must put the streets in the annexation area in this condition before they will be accepted for "full and continuous maintenance." Whether the land owners and developers in the area in question are under a contractual duty to the city to make such improvements after annexation, whether the city has the legal right to impose such duty upon them after an annexation, peremptory and involuntary as to the land owners, or whether an *ex parte* statement of policy on the part of the city, if indeed there is such statement of policy, is binding on such owners, are questions beside the point and may not be determined in this case. Of course an established policy of the city may be considered in determining whether or not it plans to extend street maintenance service to the new area "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality," but there is no evidence that the city has a policy not to maintain unpaved streets and streets without curb and gutter, even in newly annexed areas; the evidence is to the contrary. Even if the property owners and developers in the area to be annexed are under duty to the city to pave all streets and provide storm sewers and curb and gutter, the city is in no position to rely on this obligation in the annexation proceeding and thereby shift to others the duty which the Act imposes on the city as a condition

precedent to annexation. So far as the annexation proceeding is concerned, the primary duty of street maintenance in the area in question, after annexation, is upon the city, and it must in good faith make plans to maintain the streets, whether paved or unpaved, "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." G.S. 160-453.15(3)a. If there are others who have an obligation to relieve the city of the duty of maintaining streets which are not improved to the indicated level, it is a matter strictly between such other parties and the city, and the nature, extent and validity of the obligation may not be litigated in this cause. The court below should have found that the plans for street maintenance do not comply with the requirements of G.S. 160-453.15.

The plans for water and sewer extension to the area to be annexed present a very similar problem. The plans for water and sewer set out in considerable detail proposed improvements in lines and mains and additional plant facilities and water feeder mains for the city as well as the area to be annexed, construction to begin within a year and to be financed from the proceeds of a bond issue heretofore authorized by vote of the citizens of Jacksonville. In this phase of the matter the plans are entirely adequate. But the over-all plans for water and sewer extension to the new area state that the developed portion is presently served by adequate water and sewer mains connected to city lines, that under an established policy of the city these facilities will become the property of the city when the area is annexed, and that in the undeveloped portions of the area city policy requires land owners and developers to install water and sewer mains, lateral lines and water meters for each individual lot. There are no plans for the city to extend water and sewer service beyond that presently in existence, unless lines are extended by land owners and developers. The question as to whether or not the city will own the water and sewer installations upon annexation does not arise here; it will only arise if and when the city appropriates the installations. *Styers v. Gastonia,* 252 N.C. 572, 114 S.E. 2d 348. The instant proceeding is concerned with extension of services, not ownership of facilities. Furthermore, the question as to whether or not the city may impose upon the owners of undeveloped portions of the area, after annexation and after city lines have been connected to facilities in the area, the obligation to install water and sewer mains, lateral lines and meters, has no place in this litigation.

The evidence as to city policy is that areas outside the city desiring to connect with city mains have been required to install lines and facilities in keeping with city standards, before connections were made

and before those areas were annexed and brought within the city limits, all without any expense to the city. In these instances the developers requested annexation. In a public hearing relative to the annexation of an "Elizabeth Lake" area, it was stated:

> "It would be the responsibility of any builder in an undeveloped area or subdivision to extend water and sewer thru their subdivision after it has been made available to their property line by the City. Work should be started or contracts let and construction begun on such water and sewer lines within 6 months following the effective date of annexation."

In this area the developers desired annexation and apparently agreed to the terms. In the instant case the annexation is peremptory and, as to the petitioners, adverse.

There is evidence that the 15.5 acre undeveloped tract may be served by making connections with facilities in the Northwoods development, but there is no plan for such service. In short, there is no plan to extend services to any parts of the area to be annexed other than those portions which have existing installations, and such additional portions in which land owners and developers shall install water and sewer mains, lateral lines and meters. Thus the plans for extension of water and sewer services are purely conditional. The Act requires that the services be provided on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. When a municipality engages in supplying water to its inhabitants, it owes the duty of equal service to consumers within its corporate limits, as a general rule. *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368. The city must furnish major municipal services to areas annexed as provided by the Act. The performance of this duty may not be made to depend upon a doubtful contingency, and may not be delegated to others by the city so as to relieve the city of the duty. If other parties are obligated to the city to perform such duty, the city must enforce the obligation directly against such parties and may not be otherwise relieved of its primary duty to the area which it seeks to make a part of the city for all other purposes. Plans for extension of services may, of course, take into consideration all circumstances and provide only for services if and when needed. Besides, the cost of water and sewer extensions may be assessed upon the lots or parcels of land abutting directly on lateral mains of water and sewer systems. G.S. 160-241 to G.S. 160-248, and G.S. 160-255. The court should have found that the plans for water and sewer extensions are not in compliance with the Act.

The requirements of the Act that plans for extension to the area

to be annexed of all major municipal services performed within the municipality at the time of annexation is a condition precedent to annexation. *Huntley v. Potter, ante,* 619; *In Re Annextion Ordinance,* 253 N.C. 637, 647, 117 S.E. 2d 795.

Except as above indicated, the record shows full and substantial compliance with the Act.

This cause is remanded with direction that the Superior Court of Onslow County enter an order remanding the proceedings to the City Council of Jacksonville for amendment of plans as to street maintenance and water and sewer extension so that these plans will comply with the requirements of G.S. 160-453.15. See G.S. 160-452.18 (g) (3).

Error and remanded.

RICHARD F. HELMS v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, AND C. W. EDGE, CHIEF BUILDING INSPECTOR.

(Filed 22 November, 1961.)

1. Municipal Corporations § 25—

A municipal zoning ordinance is valid if it is enacted pursuant to statutory authority, has a reasonable tendency to promote the public safety, health, morals, comfort, welfare, or prosperity, and if its provisions are not arbitrary, unreasonable or confiscatory.

2. Municipal Corporations § 26—

A municipal zoning ordinance will be presumed valid, with the burden upon the complaining property owner to show invalidity or inapplicability.

3. Municipal Corporations § 25—

The mere fact that the value of property is depreciated by a zoning restriction does not, standing alone, establish the invalidity of the ordinance.

4. Municipal Corporations § 26—

Where divergent conclusions may be reasonably entertained as to whether a municipal ordinance is unreasonable, arbitrary, or discriminatory the question should be resolved in favor of the validity of the ordinance, since a court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

5. Municipal Corporations § 25—

Where change of a zoning regulation has been advertised for two successive weeks in a newspaper printed in the municipality, the statutory notice is sufficient, G.S. 160-176, and the contention that the statutory

notice did not meet the requirements of due process because no notice was served on the property owners, that plaintiff had no actual knowledge of the hearing, and that the advertisement, although giving a boundary description of the area proposed for rezoning, did not refer to plaintiff's property by lot number or by reference to a recorded map, is untenable.

6. Municipal Corporations § 34; Estoppel § 5—

The fact that a municipal official issues a permit for a non-conforming use after the enactment of a zoning ordinance does not estop the municipality from enforcing the ordinance.

7. Municipal Corporations § 25—

It is not a prerequisite to the validity of a zoning ordinance that the zoning district lines should coincide with property lines.

8. Same—

A municipal zoning ordinance is confiscatory and invalid in its application to a particular lot if it is practically impossible to use such lot for the purpose permitted by the ordinance so that the ordinance renders such property valueless for practical purposes.

9. Same; Municipal Corporations § 34—

Plaintiff's property was rezoned from an industrial to a residential district. The court found upon supporting evidence that a residence could be built upon the property in conformity with the municipal regulations but did not find whether, if such house were constructed, the value of the house and lot would be more or less than the cost of constructing such a residence. *Held:* There being no finding or conclusion as to whether the land had any reasonable value for the permitted use and that such use was practical, judgment sustaining the validity of the ordinance is not supported by the findings.

10. Appeal and Error § 49—

Where the court fails to find an ultimate material fact, the cause must be remanded for definite findings sufficient to support a judgment.

APPEAL by plaintiff from *McLean, J.*, June 19, 1961, Civil "B" Term of MECKLENBURG County.

This is an action by plaintiff to have a zoning ordinance of the City of Charlotte declared invalid as to lots owned by him, and for writ of mandamus requiring defendants to issue a building permit for construction of a small office building on his lots.

The parties waived trial by jury and agreed that the court might find the facts from the evidence and stipulations of the parties.

The findings of fact by the court are summarized as follows (numbering ours):

(1). On 8 July 1957 plaintiff purchased from W. Erdmond Love lots 1 and 2 in block 3 of Greenville Heights. In 1951 the City of Charlotte adopted a comprehensive zoning ordinance for the City, and the property now owned by plaintiff was thereby located in an

"Industrial District" in which the operation of an oil distribution business was permissible.

(2). On 26 January and 2 February 1957, the City advertised in the Charlotte News, a newspaper of general circulation in the City, a public hearing on proposed ordinance No. 368 for change of zoning from "Industrial" to "Residence 1" affecting a specified area on both sides of Oaklawn Avenue and west of Irwin Creek. This area includes plaintiff's property, but the advertisement did not refer to it "by reference to lot and block number, or to any map of record." On 20 February 1957 the proposed ordinance was adopted. Neither Mr. Love nor plaintiff had any personal notice or actual knowledge of the public hearing or adoption of the ordinance.

(3). From 1947 to 1957 there were, and still are, many business establishments located on Oaklawn Avenue east of Irwin Creek and in an "industrial district," and the territory on Oaklawn Avenue west of Irwin Creek to within 200 to 300 feet of Beaty's Ford Road (a distance of 7 or 8 blocks) had no business establishments located thereon, except a city cemetery and city cemetery office. (Irwin Creek crosses lot 2 of plaintiff's property.)

(4). In July 1957 the surface of plaintiff's lots was 6 to 8 feet below the surface of Oaklawn Avenue. The lots are located as shown on maps offered in evidence. Irwin Creek is 22 feet wide, "its banks extend approximately 36 feet west of the center of said creek," and at the time of the 1957 zoning change surface drainage from Oaklawn Avenue entered upon plaintiff's property.

(5). Before the sale to plaintiff, Mr. Love obtained a permit for industrial use of the lots but did not make use of the permit. On 23 July 1957, after consulting the Chief Building Inspector, plaintiff obtained from the City a permit to "bury oil tanks" on the lots, and pursuant to the permit the lots were filled in to street level and the tanks were "buried" thereon at a cost of approximately $5,500.00. Thereafter plaintiff applied for a permit to construct an 8 by 10 office building on the lots to be used in connection with his intended oil distribution business. The permit was denied on the ground that the property was zoned "Residence 1." Plaintiff then petitioned for a rezoning of the lots to conform with his intended use. The petition was denied. The lots are worth about one-third as much for residential as for industrial use.

(6). The City's zoning ordinances provide that: (a) No building shall be erected (on any lot) which does not comply with building and area regulations; (b) buildings in "Residence 1" districts shall be constructed on lots having a minimum of 7,500 square feet of lot area for each dwelling, unless the size of a lot of less area has been

fixed by recorded map or deed prior to the adoption of the zoning ordinance for the City of Charlotte on the 14th day of January, 1947, in which case a minimum of 5,000 square feet of lot area for each dwelling; (c) in "Residence 1" districts, for each main building there be a front yard of 25 feet minimum depth, a rear yard of 30 feet minimum depth or of a minimum depth of 20% of the average depth of the lot if the lot is less than 150 feet deep, and a side yard on each side of the main building of the minimum depth of 6 feet — "the aggregate width of the two side yards shall not be less than" 20% of the average width of the lot.

(7). The City's building code requires the following minimum areas (in square feet): Principal room, 150; first bedroom, 100; other bedrooms, 70; kitchen and dining room, 100. Baths are required, and no room shall be less than 7 feet in width.

(8). Plaintiff can build upon his lots in compliance with zoning and building code requirements a residence having a minimum square footage on the first floor in excess of 390 square feet, and including a principal room, 150 square feet, bedroom, 100 square feet, dining room and kitchen, 100 square feet, bathroom 40 square feet. A second floor could be added. Plaintiff has never requested a variance permit under the zoning ordinance of the City of Charlotte for a partial waiver of front, rear or sideline set-back provisions.

The court concluded as a matter of law: (1) Zoning ordinance No. 368 was validly adopted, and this ordinance and G.S. 160-175 and G.S. 160-176 are in full force and effect and are "presumed to be constitutional"; (2) the advertisements in the Charlotte News were sufficient to reasonably notify property owners of the public hearing on Ordinance No. 368; (3) plaintiff can build a residence in accordance with the zoning ordinance and building code on the lots in question; and (4) the burden of proof on the issues raised by the pleadings and evidence was upon plaintiff, and plaintiff failed to carry the burden.

The court entered judgment denying the relief prayed by plaintiff, and dismissing the action.

Plaintiff appealed and assigned errors.

John G. Newitt for plaintiff.
John D. Shaw and John T. Morrisey, Sr., for defendants.

MOORE, J. As a general rule a zoning ordinance of a municipality is valid and enforceable if it emanates from ample grant of power by the Legislature to the city or town, if it has a reasonable tendency to promote the public safety, health, morals, comfort, welfare and prosperity, and if its provisions are not arbitrary, unreasonable or

confiscatory. "But there is always a marginal area where it is difficult to say that the preference of the public interest over private interest opposing zoning is reasonable and constitutional. In this marginal area each case must be determined on its own facts." McQuillin: Municipal Corporations, Vol. 8, s. 25.43, pp. 96, 97. When it is shown that a zoning ordinance has been adopted by the governing board of a municipality, there is a presumption in favor of the validity of the ordinance and the burden is upon the complaining property owner to show its invalidity or inapplicability. *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870.

The mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough, standing alone, to establish its invalidity. "When the most that can be said against such ordinance is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals or general welfare." *In re Appeal of Parker,* 214 N.C. 51, 55, 197 S.E. 706.

Plaintiff contends that Ordinance No. 368 of the City of Charlotte, which purports to change the classification of the greater part of the area of his lots from "Industrial" to "Residence 1," is invalid and ineffective for the reason that it was adopted without notice and opportunity to be heard or with "such limited notice that due process of law has not been observed."

The only notice of a public hearing on the proposal to adopt Ordinance No. 368 was two publications in the Charlotte News, one on Saturday, January 26, 1957, and the other on Saturday, February 2, 1957, for a hearing to be held February 13, 1957. No notice was served on Mr. Love, the then owner of lots 1 and 2 in block 3 of Greenville Heights. Neither he nor plaintiff had any actual knowledge of the public hearing or the adoption of the ordinance. The advertisements gave a boundary description of the area proposed for rezoning but did not refer to plaintiff's property by lot and block number or by reference to a map. The owner was not named in the publications.

No zoning "regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. A notice of such public hearing shall be given once a week for two successive calendar weeks in a newspaper published in such municipality. . . ." G.S. 160-175. ". . . (R)egulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or

repealed. . . . The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments." G.S. 160-176.

Plaintiff does not suggest that the statutory requirements for giving notice were not complied with. He insists that the notice required by the statute is insufficient and does not meet the requirements of due process. We do not agree. This identical question was before the Virginia Court in *Blankenship v. City of Richmond,* 49 S.E. 2d 321 (Va. 1948). The Virginia statute is in all material particulars similar to ours. Michie's Code (Va. 1942), ss. 3091(4), 3091(5). Notice of a public hearing on a proposed amendment to the zoning ordinances was given by advertisement in a local newspaper. The Court held the notice sufficient and stated: "The fact that the complainants did not see the notice certainly cannot affect the validity of the ordinance in question when everything required by the statute was done before its adoption. It is a matter of almost daily occurrence that rights are affected and the status of relationships is changed upon the giving of similar notice, but no one may successfully contend that acts predicated upon such notice are rendered invalid because persons affected did not see the notice in the newspaper." This is in accord with the prevailing majority view throughout the country. See *Walker v. Elkin,* 254 N.C. 85, 118 S.E. 2d 1; *Braden v. Much,* 87 N.E. 2d 620 (Ill. 1949). The case of *Walker v. City of Hutchinson, Kansas,* 77 S. Ct. Rep. 200 (1956), relied on by plaintiff, relates to a materially different statutory requirement and is readily distinguishable.

An official of the City of Charlotte mistakenly issued to plaintiff a permit to install subterranean oil tanks on the property in question five months after the adoption of Ordinance No. 368. In exercising the purported privilege thus conferred, plaintiff incurred expense of approximately $5,500.00. These facts do not estop the City of Charlotte from insisting upon the enforcement of the ordinance. A municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting the violation. *Raleigh v. Fisher,* 232 N.C. 629, 635, 61 S.E. 2d 897, and cases there cited.

Irwin Creek crosses the east end of plaintiff's lot 2. The Creek is one of the boundaries of the district described in Ordinance No. 368. A part of the description is: ". . . thence in an easterly direction with said margin (of Oaklawn Avenue) . . . to Irwin Creek; thence in a southerly direction with the Creek about 1350 feet. . . ." Thus the middle or thread of the stream is the boundary of the district described in the Ordinance in question. *Rose v. Franklin,* 216 N.C. 289, 291, 4 S.E. 2d 876. Therefore, that portion of lot 2 of plaintiff's property

lying to the east of the center of Irwin Creek is in an "industrial" district. Lot 1 and the remainder of lot 2 are situate within the area described in Ordinance No. 368. But it is not a prerequisite for the validity of a zoning ordinance, and it is not required by statute, that zoning district lines coincide with property lines. *Penny v. Durham,* 249 N.C. 596, 600, 107 S.E. 2d 72; *Ciaffone v. Community Shopping Center,* 77 S.E. 2d 817 (Va. 1953).

Finally, plaintiff contends that Ordinance No. 368 involves the destruction of all practical use and value of his lots, and as to his property the ordinance is void. It is his contention that the findings of fact and conclusions of law by the court, insofar as they relate to the practicality of the use of the lots for residential purposes under the provisions of the zoning ordinances and building code of the City of Charlotte, and other pertinent facts and circumstances, are insufficient to support the judgment.

"It is a general rule that zoning connot render private property valueless. The burdens of government must be equal. In other words, if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid. . . . A zoning of land for residential purposes is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for residential purposes." McQuillin: Municipal Corporations, Vol. 8, s. 25.45, pp. 104, 105.

Oschin v. Redford Township, 24 N.W. 2d 152 (Mich. 1946) involves an unplotted strip of land fronting on a street 540 feet and having a depth of 36 feet. In 1940 a fence was built around the property and a steel shed was erected thereon. The property was used for lumber storage until 1944. Plaintiffs acquired the property in 1945 and opened a lumber and building supply business thereon the same year. The plaintiffs were notified that such use of the property would be prohibited by reason of a township zoning ordinance adopted in 1942 which included this property in a residential district. The zoning ordinance provided for a front yard as to residence property of a minimum depth of 25 feet and for a rear yard minimum depth of 20 feet for a one-story building and of 25 feet for a two-story building. The ordinance also provided for discretionary variations or waivers of set-back requirements with respect to dwellings. At the trial, to illustrate the alleged utility of the property for residential purposes, defendant offered in evidence a sketch or drawing providing a living room, kitchen, bedroom, bathroom and bed closet, and a front yard having a depth of 15 feet, and a rear yard having a depth of 9 feet. A witness testified: "In my opinion a house of that type would be salable. There are

numerous people who would like to have single bedroom homes. . . . You could add another bedroom and a full sized . . . (bath) and you might be able to work out a three bedroom affair." The trial court enjoined the enforcement of the ordinance, and the Supreme Court affirmed, saying:

> "Defendant township did not tender to plaintiffs any modification of its zoning ordinances that would permit a building such as that described by witness . . . to be erected. (Citation of authority). It appears to us that such a building would be out of line with other buildings in the locality, if it had been permitted. We further find the proposed residential use is impractical, and that the building described by witness . . . would be unsightly.
>
> "It is practically impossible to use the lands in question for residential purposes. We find that the zoning ordinances as applied to the property in question are unreasonable and confiscatory and therefore illegal."

For cases involving property bisected by zoning district lines and of which portions were rendered valueless for permissible uses, see *Hecht-Dann Construction Co. v. Burden,* 208 N.Y. Supp. 299 (1924) and *Buffalo Park Lane Inc. v. City of Buffalo,* 294 N.Y. Supp. 413 (1937).

In the instant case plaintiff's deed to lots 1 and 2, block 3, of Greenville Heights refers to a recorded map for description. According to the recorded map lot 1 has a frontage of 41 feet on Oaklawn Avenue, its western side line is 45 feet, its eastern side line is 59 feet, and the back line is 40 feet. The map shows that lot 2 has a frontage of 51 feet on Oaklawn Avenue, its western side line is 59 feet, its eastern side line is 73 feet and the back line is 77.5 feet. The side lines are not perpendicular to Oaklawn Avenue. Therefore, the lengths of the side lines are not indicative of the depth of the lots. The depth of the lots is relatively less than sideline measurements. At the time of the passage of the ordinance in February 1957 the surface of the lots was 6 to 8 feet below the surface of Oaklawn Avenue. Irwin Creek is a large drainage creek and at this property its normal bed is 22 feet wide. It has sloping banks and the top of the bank on the west side is approximately 36 feet from the center of the stream. Prior to the filling in of the lots in July or August 1957 surface water ran from the Avenue onto the lots. The sloping banks of the Creek were not filled in. G.S. 77-14. There is now a concrete drain or flume 18 feet long and 5 to 8 feet wide, crossing the northeast corner of lot 2, through which the water is drained from the Avenue into the Creek. The

Creek and Creek bank apparently occupy in excess of one-fourth of the area of lot 2. In rainy seasons the Creek rises and on occasion the water has been as high as the Avenue bridge.

By agreement of the parties the court ordered that "the City Engineering Department . . . make an actual survey of the property and . . . prepare an accurate map" for use at the trial. The city surveyor did not find any iron stakes or other monuments at the lot corners, but he found an iron corner in another part of Greenville Heights. Assuming the correctness of its location and using it as a control point, he surveyed the lots and made a map. According to this map the depth of the lots is approximately 6 feet more than is shown on the recorded map to which plaintiff's deed refers. Whether the adjoining lot owners would consider this added depth an encroachment does not appear.

By either map the total area of both lots is less than 7,500 square feet. Excluding the Creek and "the sloping edge of the bank," the "lot area remaining of lot 1 and 2 . . . figures 3,075 square feet," according to the testimony of the city surveyor. If the sloping edge of the bank is added, it is apparent that the total lot area west of the Creek is less than 5,000 square feet. The zoning ordinance provides that in "Residence 1" districts "There shall be a minimum of . . . 7,500 square feet of lot area for each dwelling, unless the size of the lot area has been fixed by recorded map or deed prior to the adoption of the zoning ordinances . . . on the 14th day of January 1947, in which event" there shall be "a minimum of 5,000 square feet of lot area for each dwelling designed for not more than two families." Under these provisions lots 1 and 2, even when considered as one area, do not qualify for residential use. The City Board of Adjustment may, of course, vary these requirements in cases of practical difficulty and hardship "so that the spirit of the ordinance shall be observed, public safety and welfare served and substantial justice be done." G.S. 160-178. It does not appear in evidence when the areas of lots 1 and 2 were fixed "by recorded map or deed," but it is clear that the areas were fixed either before there was a zoning ordinance or while the property was in an "Industrial" district. It would seem, from the sizes, shapes, and nature of the lots, they were laid out for business rather than residential uses.

Plaintiff offered in evidence a map showing lot dimensions in accordance with the recorded map to which plaintiff's deed refers, showing required set-backs, and purporting to show that the only practical building that could be erected thereon would be 59 feet long and 13 feet wide for most of the distance but only 9 feet wide at the west end. Defendant offered in evidence a map showing lot dimensions in accordance with the city survey, showing required set-backs, and

purporting to show a floor plan for a house 48 feet long and of three widths varying from 20 feet to 17 feet, containing 3 rooms. This floor plan presents a shot-gun type house with a straight front and irregular rear and with the three rooms side by side. The plan entails a foundation and roof variation for each room. Neither floor plan takes into consideration wall thicknesses. The building code fixes minimum areas for rooms in dwellings (in square feet) as follows: Principal room, 150; first bedroom, 100; other bedrooms, 70; kitchen and dining room, 100. No room to be less than 7 feet in width, and baths to be provided.

The court found as a fact that plaintiff can build on the lots in compliance with zoning and building code requirements a residence having "a minimum square footage on the first floor of in excess of 390 square feet," containing three rooms and a bath, that a second floor could be added, and that plaintiff had never requested a variance permit relating to set-back requirements. The court concluded as a matter of law that "plaintiff can build a residence in accordance with the zoning Ordinance . . . and the Building Code. . . ." Even so, the real issue raised by the pleadings and the evidence remains unanswered. This is the real question for decision: Is it practical to use the lots for residential purposes and do they have any reasonable value for residential use under zoning regulations, the building code and other pertinent circumstances?

The answer to the crucial question involves many things. There is evidence that there are many business establishments along Oaklawn Avenue from Irwin Creek eastwardly, and none for several blocks west of the Creek, but there is a city cemetery and cemetery office along the Avenue west of the Creek. There is also evidence that Oaklawn Avenue is a truck route. There is no evidence as to the sizes of other lots or as to the size and character of residences, if any, in the district in the vicinity of the lots in question. There is a picture in evidence showing one residence, a large and commodious two-story frame dwelling. There was the following testimony at the trial relative to the lots and the surrounding area: "To the south of those lots there is a big open field with high grass. It is low land. . . . In 1957 it was just a rough undeveloped section of the city. There are stores east of that. I would describe it as industrial use. . . . The cemetery is right beyond it. . . . I am not an architect or engineer, it has been my job to make up cost analysis controls, estimates on various houses and what not, it is my opinion if you did build a house on this lot it would have to be a unique design, unique construction and it would in my opinion . . . (be) a slum breeder because it would be . . . too small, unless it was two story. . . . It is foul land. . . ." The effect of any variance permits with respect to area and set-back should be con-

sidered both as to the enlargement of use and desirability of variances. It is possible that, if a residence was erected on the lots, upon completion the market value of the house and lots would be less than the cost of constructing the residence. In such case the lots would be valueless for residential purposes. There is also the consideration as to whether an unsightly and out-of-line residence would be less injurious to nearby property than a business establishment.

The findings of fact and conclusions of law with respect to the indicated question do not support the judgment on this issue. The court found that a residence could be built, but it did not find that it would be practical, desirable and of reasonable value. In short, the court did not find that the lot had any reasonable value for residential use and that such use was practical.

When jury trial is waived and it is agreed that the judge may find the facts, the court must make findings sufficient to support its judgment as to each determinative fact in dispute. *McMillan v. Robeson,* 225 N.C. 754, 36 S.E. 2d 235. Where the court fails to find an ultimate material fact, the case must be remanded for definite findings sufficient to support a judgment. *Jamison v. Charlotte,* 239 N.C. 423, 79 S.E. 2d 797.

This cause is remanded with direction that the court hear evidence and determine whether or not the lots in question are, under all the circumstances, practical and of any reasonable value for residential use.

Error and remanded.

WILLIAM MARSHALL SPARKS, BY HIS NEXT FRIEND, THOMAS D. SPARKS, PLAINTIFF, v. J. H. PHIPPS AND E. F. CRAVEN COMPANY, DEFENDANTS.

(Filed 22 November, 1961.)

1. Negligence § 1—

Negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise in like circumstances, the standard of care being constant while the degree of care varies with the exigencies of the occasion, since an ordinarily prudent man increases his watchfulness in proportion to the apparent danger.

2. Automobiles §§ 32, 46—

In this action to recover for injuries to a thirteen year old boy resulting from a collision between the bicycle he was riding and defendants' automobile, the charge of the court *is held* to have correctly in-

structed the jury as to the legal duties defendants owed plaintiff to keep the vehicle under control, keep a proper lookout, to sound the horn, or reduce speed or stop the car, or turn it in a manner to avoid the collision, arising on the evidence tending to show that defendant driver saw or should have seen the child riding his bicycle on the street.

3. Automobiles §§ 19, 32, 46—

In this action to recover for injuries to a thirteen year old bicyclist who was riding his bicycle down a slight grade without observing oncoming traffic and collided with defendants' car, traveling in the proper lane in the opposite direction, it *is held* that all of the evidence does not show that the emergency was brought about by defendants' negligence, and therefore the court properly instructed the jury on the aspect of sudden emergency upon the question of the negligence of defendant driver in turning his car to the right rather than to the left, which would have avoided the accident.

APPEAL by plaintiff from *Preyer, J.*, 10 July 1961 Term of FORSYTH.

Civil action to recover damages for personal injuries and property damage, resulting from a collision between a bicycle plaintiff, a 13-year-old boy, was riding and an automobile driven by the male defendant, who, according to an admission in the joint answer filed by the defendants, and also by an admission of defendants' counsel made during the trial, was an employee of the corporate defendant, and was driving the automobile at the time in the scope of his employment and in furtherance of his employer's business.

Plaintiff's evidence shows:

About 3:45 P.M. o'clock on 17 October 1958 plaintiff, who is generally called Butch, was riding his bicycle in a northerly direction down a moderately declining hill on Butler Street in the city of Winston-Salem. At the same time defendant Phipps was driving an automobile in a southerly direction down a moderately declining hill on the same street. No other traffic was on the street at the time. The crests of the two hills were about three-tenths of a mile apart, the street between them was straight, and there was no obstruction of view. Butler Street has tar and gravel hard surfacing 18 feet wide. The weather was clear, the street was dry. No center line was painted on the street. Plaintiff was going down the hill on the left side of the street a foot or two from the shoulder about 20 miles an hour so as to get far enough up the hill ahead so he wouldn't have to pedal too hard. He was riding with his head down all the way to the scene of the collision, looking at the grass go by so as to keep to the very edge of the street. Defendant Phipps was approaching him on his side of the street at about 35 miles an hour, and told Harry Tucker, a police officer and witness for plaintiff, in substance, he saw the boy approaching him on a bicycle at a speed of about 35 miles an hour with his

head down, he watched him, and when they were 30 or 40 feet apart, he noticed the boy was coming into his line of traffic and he applied his brakes and pulled to the right. Phipps did not blow his horn. Plaintiff testified: "I stayed on the very side of the road all the way down. I kept riding on the very edge of the road till I got right here, and that is the last thing I remember." He collided with the Phipps automobile near the foot of the hill. The collision occurred on defendant's side of the street, and the Phipps automobile was damaged on its extreme left front, right at the fender and headlight. In the collision plaintiff sustained serious injuries.

Defendants' evidence shows:

Phipps was travelling in a southerly direction down a hill on Butler Street between 30 and 35 miles an hour. He saw a boy riding a bicycle approaching him riding a little to the right of the center of the street in the direction the boy was going. Just as the boy got to the bottom of the hill he noticed the boy was looking down at the road, and when the boy reached the lowest part at the bottom of the hill and was 30 to 40 feet from his automobile, the boy started "angling" toward his automobile in his lane of traffic. He applied his brakes and pulled over on the shoulder, which at the time was composed of red dirt and soft, as far as he could to keep from going over a fill to his right. Just as he stopped, the boy rode right into his left front light and fender at an angle. At the time of impact the right front wheels of his automobile were three feet off of the hard-surfaced part of the street on the shoulder and his left wheels were on the tar and gravel. He didn't blow his horn, because he thought it would frighten the boy and he would probably come right over into him. He thought at any moment the boy would cut back straight on his side.

Issues of negligence, contributory negligence, last clear chance, and damages were submitted to the jury, who answered the first issue as to negligence, No.

From a judgment in accord with the verdict that plaintiff recover nothing, he appeals.

James J. Booker and Eugene H. Phillips for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice By Charles F. Vance, Jr., for defendants, appellees.

PARKER, J. All of plaintiff's assignments of error, except formal ones, relate to the court's charge to the jury.

Plaintiff assigns as error that the court failed to instruct the jury in respect to the first issue of negligence as to the legal duties defendants owed plaintiff arising on the evidence given in the case.

Plaintiff relies on what is said in *Greene v. Mitchell County Board of Education*, 237 N.C. 336, 75 S.E. 2d 129: "We have repeatedly held that the presence of children on or near a highway is a warning signal to a motorist. He must recognize that children have less capacity to shun danger than adults; are more prone to act on impulse, regardless of the attendant peril; and are lacking in full appreciation of danger which would be quite apparent to a mature person. When, therefore, he sees, or by the exercise of due care should see, that children are on the highway, he must immediately bring his vehicle under control and, in the exercise of ordinary care, proceed in such manner and at such speed as is reasonably calculated to enable him to avoid striking such child or children."

And he further relies on what is said in *Pope v. Patterson*, 243 N.C. 425, 90 S.E. 2d 706: "It has been repeatedly declared by this Court that a legal duty rests upon a motorist to exercise due care to avoid injuring children whom he sees, or by the exercise of reasonable care should see, on or near the highway. (Citing authority). A motorist must recognize that children have less judgment and capacity to appreciate and avoid danger than adults, and that children are entitled to a care in proportion to their incapacity to foresee, to appreciate and to avoid peril."

The trial court, after placing the burden of proof of the first issue on plaintiff, and properly defining negligence and proximate cause, and saying we have a number of laws and rules of the road which regulate the operation of motor vehicles on the highway, and a failure to observe these laws constitutes negligence, stated in a correct and elaborate manner plaintiff's contentions arising on the evidence, with some law stated in the contentions, as follows:

"Now the plaintiff, Mr. Sparks, contends that Mr. Phipps violated certain of these rules of the road and that, therefore, he is negligent. In the first place, he contends that Mr. Phipps violated our speed law. Now under our law a person, in the situation of this case, breaks our speed law if he drives at a speed in excess of 35 miles an hour, that being the speed at this location. However, our law further provides that a person shall operate his car at a speed that is reasonable and prudent under the traffic, weather and highway conditions existing at the time; so that it is possible that a person may be violating our speed law even though he is driving within the speed limit. Now our speed law further provides that a driver, when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, shall decrease his speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway.

"Now the plaintiff, Butch Sparks, contends that in this case Mr. Phipps saw, or should have seen, a thirteen-year-old boy riding a bicycle on the highway, and the plaintiff contends that that constitutes a special hazard within the meaning of that section, since he should have observed a child and, therefore, realized that that would require a higher order of care. So that in the first place Butch Sparks contends that Mr. Phipps violated our speed law, and that under the circumstances he should have reduced his speed more than he did, or come to a stop.

"Now he further contends that Mr. Phipps failed to keep his car under proper control, and failed to keep a proper lookout. Now the court instructs you that irrespective of any law which we might have about operating a motor vehicle, it is the duty of the operator of a motor vehicle to exercise the care which a man of ordinary prudence would exercise under similar circumstances to prevent injury to persons or property; and 'ordinary care' requires a driver to keep his car under proper control; that is, under the type of control that a reasonably careful driver would under the same circumstances; and it requires him to keep a reasonably careful lookout.

"Now the plaintiff contends that under the circumstances of this case that when Mr. Phipps saw the plaintiff on a bicycle that he failed to blow his horn, and that he failed to give timely warning to Butch Sparks of his presence there, and that he failed to stop, or that he failed to turn to the center of the street instead of turning to the right. So that he says that under all of the circumstances of the case that he failed to exercise the care which a reasonably careful driver would have under the same circumstances.

"Now on the first issue the Court instructs you that if the plaintiff, Butch Sparks, has satisfied you by the greater weight of the evidence that Mr. Phipps operated his car at a speed that was greater than was reasonable and prudent under the circumstances; or that he failed to keep his car under proper control, or failed to keep a proper lookout; or that he failed to use due care under all of the circumstances in failing to blow his horn or give timely warning; or that he failed to stop his car or turn his car in a manner to avoid the collision; and if you further find by the greater weight of the evidence that his, Mr. Phipps', negligence in any one of those respects, if you so find that he was negligent, was one of the proximate causes of the injuries to Butch Sparks, then you would answer the first issue 'Yes'; if you fail to so find, you would answer the first issue 'No.'"

After the part of the charge quoted above, the court elaborately reviewed the evidence given in the case in respect to the first issue.

Plaintiff contends that the vice in the quoted part of the charge

is that the court in charging in respect to the duty of a motorist to exercise the quantity of care required of him in order to meet the standard of care required of him, when he sees or by the exercise of ordinary care should see children on a highway, stated it as a contention of plaintiff, and not as the law of the case. In support of his contention he relies on what this Court said in *Dixon v. Wiley,* 242 N.C. 117, 86 S.E. 2d 784: "Moreover, it is error simply to state the contentions of a party and not declare and explain the law applicable to the facts which the jury might find from the evidence offered in support of such contentions." And also on what this Court said in *Keith v. Lee,* 246 N.C. 188, 97 S.E. 2d 859, to the same effect.

"There are no degrees of care so far as fixing responsibility for negligence is concerned. The standard is always that care which a prudent man should use under like circumstances. . . . In short, negligence is a want of due care; and due care means commensurate care, under the circumstances, tested by the standard of reasonable prudence and foresight. . . . This is the invariable standard of care applicable in all negligence cases. But a prudent man increases his watchfulness as the possibility of danger mounts. So then the degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not nearly so great. Thus, the degree — that is the quantity — of care necessary to measure up to the standard is as variable as the attendant circumstances. . . . Hence the quantity of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. And whether defendant exercised or failed to exercise ordinary care as understood and defined in our law of negligence is to be judged by the jury in the light of the attendant facts and circumstances." *Rea v. Simowitz,* 225 N.C. 575, 35 S.E. 2d 871, 162 A.L.R. 999. "The care exercised or which should be exercised by an ordinarily prudent man is the standard of ordinary care, while the degree of care which such person exercises varies with the exigencies of the occasion." *Jackson v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817.

After a careful study of the charge in respect to the first issue of negligence, it is our opinion that the court adequately declared, explained, and applied the law arising on the evidence given in the case in respect to the degree of due care required of defendants in order to meet the standard of care required of them, when the Phipps automobile was meeting plaintiff riding his bicycle, and that this does not appear only in the court's statements of the plaintiff's contentions.

Plaintiff assigns as error that the court in its charge gave defendants the benefit of the sudden emergency doctrine, and that this was

error because this doctrine was not applicable to the evidence, for the reason that all the evidence shows that defendant by his own negligence brought about or contributed to the emergency, if there was an emergency. Plaintiff further assigns as error that the court's instructions on the sudden emergency doctrine were contradictory.

Defendants pleaded the doctrine of sudden emergency as a defense in their answer. After a careful study of all the evidence in the record, it is our opinion that the doctrine of sudden emergency arose on the evidence given in the case, that all the evidence does not show, as plaintiff contends, that the defendants by their negligence brought about or contributed to the emergency, that the court properly charged on it, and its charge in that respect was not contradictory.

Plaintiff's other assignments of error to the charge have been examined and all are overruled. No new question is raised which needs discussion.

In the collision here a very bright and intelligent boy 13 years old was grievously injured. The case was tried in accord with substantial legal principles, and no sufficient cause has been shown to disturb the verdict and judgment below. All plaintiff's assignments of error are overruled.

No error.

C. W. DAVIS AND WIFE, MARY G. DAVIS v. H. B. LUDLUM, DOING BUSINESS AS H. B. LUDLUM & SONS; THE CITY OF WILMINGTON; KATHERINE G. ROGERS; J. V. TOMBERLIN, DOING BUSINESS AS J. V. TOMBERLIN CONSTRUCTION COMPANY.

(Filed 22 November, 1961.)

1. Trial § 57—

A judgment in a trial by the court under agreement of the parties, in the same manner as a judgment upon the verdict of a jury, cannot be based upon inconsistent and repugnant factual conclusions; nevertheless findings of the court will be reconciled if possible by interpretation in the light of the pleadings and evidence.

2. Same; Damages § 4— Findings in regard to quantum of damages held not repugnant when construed in the light of pleadings and evidence.

In this action to recover for damages to plaintiff's building resulting from the negligent manner in which the building on the adjacent lot was demolished by defendants, the court found the difference in the market value of plaintiff's building before and after the demolition in

a specified sum, and then found that plaintiff's building had been damaged through the negligence of defendants in a much smaller sum. *Held:* When interpreted in light of the pleadings and evidence, the first finding related to a diminution in value to plaintiff's building resulting not only from defendants' negligence but also from a change in use of the adjacent property and the disclosure of defects in plaintiff's building which were hidden and became apparent when the adjacent building was removed, while the subsequent finding related to damages to plaintiff's building which resulted from the negligent manner in which the adjacent building was removed, and therefore the findings are not repugnant and support judgment for the lesser sum.

3. Damages § 12—

Where the quantum of damages resulting to plaintiff's building from the negligent manner in which the building on the adjacent lot was demolished is in issue, with evidence as to the value of plaintiff's property before and after the incident complained of and testimony as to the condition of plaintiff's building when purchased and the repairs and improvements subsequently made, it is competent to ask plaintiff on cross-examination as to the price paid for the property by her some eighteen years prior to the institution of the action for the purpose of impeaching plaintiff's testimony as to values.

4. Appeal and Error § 41—

Where an expert has testified that the cracks in the wall of plaintiff's building resulted from settling and had existed for many years prior to the negligent act of defendants which further damaged the wall, further testimony by the expert as to the cause of the settling, if incompetent, could not be prejudicial, since the cause of the settling could in no manner relate to the liability of defendants.

5. Appeal and Error § 40—

A new trial will not be awarded for mere technical error but only for error which prejudiced appellants' case.

APPEAL by plaintiff Mary G. Davis from *Paul, J.*, April 1961 Term of NEW HANOVER.

This action was begun by C. W. Davis and wife to recover damages assertedly negligently done to their two-story brick building when the building on the adjoining lot owned by defendant Rogers, leased by her to City of Wilmington for use as a parking lot, with authority to demolish her building, was torn down by defendants Ludlum and Tomberlin pursuant to a contract between Wilmington and defendant Ludlum.

The property demolished was purchased by C. W. Davis and wife, Mary G., in 1942 for $5,870. C. W. Davis died subsequent to the institution of, but before trial of, this action.

During the trial it became necessary to withdraw a juror. Thereupon the parties agreed to waive jury trial, agreeing that the court

might find the facts. By agreement, and at the request of all parties, the court inspected the properties and, based on the evidence and his personal inspection, made findings of fact and conclusions of law. So far as material to this appeal the findings are:

"4. That the Davis building is an old building of more than sixty years; that at the time of the lease by the defendant Rogers to the City of Wilmington there was a three-story building on the Rogers property extending from Water Street to a depth some distance beyond the eastern wall of the Davis building. It is apparent on examination of the northern wall of the Davis building and the remaining portion of the southern wall of the Rogers building that when the Rogers' southern wall was constructed, said walls were about as close to each other as they could be built without being one wall; that more than 75 or 80 indentations in the Davis wall appeared; that approximately one-half of these indentations had been bricked in joining or tieing the two walls together."

"6. That the northern wall of the Davis building was of considerable age, in considerable disrepair including two cracks running from the top downward; that the roof of said Davis building had been damaged during one of the hurricanes in 1954, and approximately one-half of said roof or the metal thereon replaced following said hurricane.

"7. That in the demolition of the southern wall of the Rogers building, the defendants Ludlum and Tomberlin used such force, striking said wall with metal weights as to damage the northern wall of the Davis building and the roof to said building . . .

"8. That prior to the demolition of the Rogers building, the defendants Ludlum, Tomberlin and the City of Wilmington knew, or an inspection of the manner and construction and the relationship of the northern wall of the Davis building was such that they could have foreseen either (1) that in the natural course of such demolition, injurious consequences to the Davis wall could be expected unless means were adopted to prevent such consequences, or (2) such work, in the ordinary course of events, would occasion injury or damage to the Davis wall unless precautions were taken in tearing down the Rogers wall; that in the demolition of said Rogers wall such steps and precautions were not taken to prevent injury or damage to the Davis wall; that the defendants Ludlum and Tomberlin did not use due care in the demolition of Said Rogers wall adjacent to the Davis wall, and that such negligence on their part proximately caused damage to the Davis' northern wall.

"9. That the evidence in this case as to the difference in the fair market value of plaintiffs' property before the demolition of the Rogers building and immediately after said demolition is $11,500.00.

"That the estimated cost of a new northern wall to the Davis building is approximately $10,200.00, and estimated cost of a new roof for said building is $997.00.

"The undisputed evidence shows that one-half of the roof to said building is at least 18 years old, and that the other one-half was repaired or replaced in 1954; that the northern wall of said building is more than sixty years of age, no evidence being offered that said wall had ever undergone repairs.

"The Court viewed said building and said wall as closely as a layman could. In viewing said building, the Court also observed the condition of the other walls of said building and observed their deterioration through lapse of more than sixty years.

"10. The plaintiff Mary G. Davis, through the actionable negligence of the defendants, has been damaged in the sum of $3,500.00."

"The Court concludes as a matter of law that the plaintiff Mary G. Davis is entitled to have and recover of the defendants Ludlum, Tomberlin, and the City of Wilmington the sum of $3,500.00."

Based on the findings and conclusions, judgment was entered in plaintiff's favor and against defendants Ludlum, Tomberlin, and Wilmington for the sum of $3,500.

Plaintiff excepted to parts of the findings of fact, the conclusions of law, and appealed.

Isaac C. Wright and John J. Burney, Jr. for plaintiff appellant.
C. D. Hogue, Jr. and Yow and Yow for the City of Wilmington.
Elbert A. Brown for H. B. Ludlum.
Solomon B. Sternberger for J. V. Tomberlin.

RODMAN, J. Plaintiff's assignments of error raise these questions: (1) Are findings of fact 9 and 10 repugnant, thereby making it impossible to base a judgment on the facts found? (2) Was there prejudicial error in the admission of evidence over plaintiff's objections?

A judgment cannot be based on inconsistent and repugnant factual conclusions. It matters not whether the facts are determined by jury verdict or made by the court acting as a jury. 89 C.J.S. 468. When a judgment has been entered on seemingly inconsistent findings of fact, it is the duty of the reviewing court to reconcile the findings and uphold the judgment if practicable. *Bradham v. Robinson,* 236 N.C. 589, 73 S.E. 2d 555. To ascertain if in fact there are conflicting findings, it is the duty of the court to examine the pleadings, the evidence, and the charge, if there be a charge. *Wynne v. Allen,* 245 N.C. 421, 96 S.E. 2d 422.

The complaint states a cause of action based on the way the Rogers

building was removed, not the fact of removal. Plaintiff alleges: "Instead of taking precaution to prevent injury and damages to the wall and building of the plaintiffs, the defendants used great force and violence . . . caused the roof to leak, knocked great holes in the wall of plaintiffs' building, causing same to crack in many places . . ." The complaint states a cause of action for injuries negligently inflicted. The case was tried on that theory. Plaintiff, in stating the questions for consideration by this Court, speaks of "a negligent damage to a brick business building." Finding 8 establishes the negligence of defendants.

A review of the evidence discloses sharp conflict with respect to the extent of the damage done to the roof and the wall by the demolition of the Rogers building. Particularly was this true with respect to two cracks running from the top to the bottom of plaintiff's wall. Did these cracks exist before the demolition of the Rogers building or were they caused by the work then done? Defendants maintain they were not responsible for the weakened condition of plaintiff's wall due to the cracks, because these cracks were caused by settling long prior to the construction of the Rogers building and were in no way related to the removal of that building. A witness for plaintiff testified: "I saw two big cracks from the top to the bottom, and this was before the Rogers building was torn down, and they have been there as long as I have been observing the Davis building." The witness had previously testified that he knew the building many years prior to the demolition of the Rogers building. This witness also testified: "Until the south wall of the Rogers property was torn down it was impossible to have seen the north wall of the Davis property, except from the inside, but, after it was torn away, you could see the condition of the north wall of the Davis property, but not until then."

Defendants would not be liable in damages because the removal of the Rogers building disclosed the decrepit condition of the Davis wall, nor would they be liable for a differing and changed use of the Rogers property so long as that use was a proper and legal use.

The ninth finding is primarily based on the testimony of plaintiff's witness Johnson. He testified that the market value of plaintiff's property before the removal of the Rogers building was $32,000 and $20,500 immediately following the removal. He did not say this diminution in value was due to any negligence of defendants. He testified: "Its (the Davis building) adaptability for what he has been using it for is not the same it was before the construction of the parking lot. The elements are causing quite a bit of damage in the building . . ."

When viewed in the light of the evidence, it is, we think, apparent that the court in finding 9 was dealing with all factors causing a

diminution in value of plaintiff's property, both those resulting from negligence of defendant and those resulting from changed use of the adjacent property and the disclosure of defects hidden and only apparent when the Rogers building was taken away. Those due to the negligence of defendants are compensable. The others are *damnum absque injuria*. The court did not indicate that the difference in value stated in finding 9 was caused by negligence of defendants. It proceeded with the next finding to determine the amount of damages caused by defendants' negligence, and for the damages negligently done it entered judgment in plaintiff's favor.

Plaintiff, without fixing in dollars and cents her estimate of damage tortiously inflicted, had testified to the condition of the building when purchased and the repairs and improvements subsequently made. On cross-examination she said she and her husband purchased in 1942. She was then asked if the purchase price was not $5,000. Plaintiff objected. The objection was overruled. She answered that the purchase price was $5,870. We think the question was competent on cross-examination. A similar conclusion was reached in *Palmer v. Highway Comm.*, 195 N.C. 1, 141 S.E. 338, on a substantially identical factual situation.

Two witnesses having many years of engineering and construction experience testified to the cracks in plaintiff's wall. These witnesses, over plaintiff's objection, expressed their opinion as to the cause of the cracks. The witness Von Oesen testified without objection: "(T)he wall had broken in two places and was showing signs of settlement and the mortar bond between the brick was disintegrated and the mortar itself was coming out of most joints. It had several areas where minor cracks had developed and brick sections had cracked. The wall is fairly plumb, but it had settled towards the river in a longitudinal direction along the line of the wall, and it had two fissures or cracks that were very wide open, and weight deterioration to its entire structurability . . . I have an opinion that the cracks had been in the Davis wall for twenty years or more. This opinion is based on the fact that there is much mortar having fallen into the cracks; that there was soot and rotten wood. There were several places where those cracks had been repaired by brick and cement mortar, and the brick and mortar itself seemed to be twenty or more years of age." After cross-examination by counsel for plaintiff, he was re-examined by counsel for one of the defendants. He then testified: "It is my opinion that the wall is built on an unstable strata of material. We have made special examinations of the soil in this vicinity for a proposed extension of Broadfoot's building, and we found a varying low and very shallow strata of rock. . . . It is my opinion that the

eastern end of the Davis building is bearing on this strata, and the western end on silt deposits near the river and over a period of time you could have a normal settlement which would cause the wall to crack as it has, and to me it is merely the incident of a time settlement." The evidence involving the witness's opinion as to the cause of the cracks was admitted over plaintiff's objection.

This assignment of error does not warrant another trial. The evidence seemingly is, in view of the witness's prior testimony, competent; but if it were not proper to call for opinion as to the cause of settling, the evidence could not be prejudicial since the witness had previously and without objection expressed the opinion that settling had occurred many years prior to the demolition of the Rogers building. If so, the cause of settling could in no manner relate to the liability of defendants. New trials are not awarded because of technical error. The error must be prejudicial. *Parks v. Washington*, 255 N.C. 478; *Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767; *Mercer v. Mercer*, 253 N.C. 164, 116 S.E. 2d 443. The objection to the evidence of the witness Glazier assigned as error falls in the same category as the Von Oesen testimony, and for the reasons given with respect to that testimony must be held not to warrant a new trial. Upon a review of the record and the assignments of error, we find nothing which would justify awarding a new trial.

No error.

BEVERLY ANN ROBINSON, BY HER NEXT FRIEND, BETTY ROBINSON, v. LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 22 November, 1961.)

1. Evidence § 45—

While the amount of alcohol in the bloodstream as shown by proper chemical tests is competent in evidence on the question of intoxication, proper foundation for such evidence must be laid by showing that the blood was taken from the person in question within a reasonable time of the incident under investigation, by indentifying the blood specimen from the time it was taken to the time of the analysis, and by establishing the qualifications of the person making the analysis as an expert in the field, and further, if the specimen was taken from the body of a decedent, that it was taken before any extraneous substance had been injected into the body.

2. Same—

Testimony of a witness that he obtained a sample of the blood of the

decedent and that an analysis of the blood was made under his supervision and that the result of the tests were in his report, is properly striken and the report properly excluded from evidence when there is no evidence as to how long after the death of the decedent the blood was taken from his body, or who took the specimen of blood and, if actually taken from the body of decedent, whether it was taken before or after any extraneous substance had been injected into the body.

3. Evidence § 24; Public Officers § 8—

The presumption of regularity of the official act of a public officer obtains as to transactions done by him or before him under his direction, but not as to transactions done out of his presence, and thus the record or certificate of a public officer as to transactions occurring out of his presence are generally inadmissible.

4. Same; Coroners; Evidence § 45—

The report of the coroner as to the alcohol content of a blood specimen purportedly taken from the body of decedent is incompetent when the coroner testifies that he could not remember whether the specimen was taken from the body while he was present and there is no evidence as to the manner in which the specimen was handled after it was taken or as to who took the sample of blood.

5. Coroners; Evidence § 24—

G.S. 8-35 has no application to an uncertified copy of a coroner's report but only to a duly certified copy.

APPEAL by defendant from *Sink, Emergency Judge,* May 8, 1961, "A" Civil Term of MECKLENBURG.

This is a civil action to recover of the defendant the sum of $1,000 pursuant to the provisions of an insurance policy issued by it.

The parties at the trial below, through their counsel, stipulated in open court as follows:

"1. That the plaintiff, Beverly Ann Robinson, was a minor and that Betty Robinson was duly appointed her next friend.

"2. That the defendant is a corporation duly authorized to engage in the insurance business in the State of North Carolina.

"3. That on or about February 19, 1959, the defendant issued to one William F. Ardrey, as a member of Nationwide Motorist Association, an accident insurance certificate number 659 which provided, among other things, that if the said William F. Ardrey, insured, 'loses his life as a result of a collision or other accident to any automobile * * *, inside of which the insured is riding or driving on a public highway,' the defendant would pay the beneficiary of said policy the sum of $1,000.

"4. That the minor plaintiff is the beneficiary of said policy or certificate.

"5. That the insured, William F. Ardrey, died as a result of a col-

lision which occurred on July 18, 1959, when he was driving his automobile on a public road in Mecklenburg County, North Carolina.

"6. That at the time of the death of William F. Ardrey all premiums of the defendant's certificate or policy had been paid up to and including July 18, 1959.

"7. That the plaintiff made due proof of the death of the insured and performed all other conditions required of a beneficiary by said policy or certificate.

"8. The defendant's said policy or certificate contains the following language:

'EXCLUSIONS AND LIMITATIONS. 1. This insurance does not cover the Insured: (c) for loss fatal or otherwise suffered while intoxicated or under the influence of or while affected by or resulting directly or indirectly from intoxicants or narcotics used by the Insured.' "

Following the entry of the above stipulations, the court ruled that a *prima facie* case for the plaintiff had been made out. The court further held that since the defendant's sole defense was the policy exclusion (set forth in stipulation #8 above), that this was an affirmative defense upon which the defendant had the burden of proof.

Defendant offered Dr. W. M. Summerville as a medical expert. It was stipulated that Dr. Summerville was a medical expert, specializing in the field of clinical pathology, and that he was also Coroner of Mecklenburg County. The witness testified that he knew how to make a chemical analysis of human blood so as to determine alcoholic content, and also that he was familiar with the effects certain percentages of alcohol in the blood stream had upon a person; that on or about 18 July 1959, he obtained a sample of the blood of William F. Ardrey; that an analysis of this blood was made under his supervision; and that the results of that test were in his report.

At this point, counsel for plaintiff moved to strike all of the testimony of Dr. Summerville because the defendant had not laid a proper foundation for the questions submitted to the witness. The court held that counsel for plaintiff might cross-examine the witness about the previous testimony in the absence of the jury. The jury was excused, and the following cross-examination occurred: "To the best of my knowledge I was in the funeral home when the blood was taken. To the best of my knowledge I saw the blood taken myself although it is not incorporated in my report. * * * No sir, I would not remember if I were present. * * * I see about 450 a year * * *. I cannot say that I was present. * * * I obtained blood in the manner that I said, but I am not certain about it. * * *"

Following this cross-examination, the defendant offered in evidence

a paper identified by Dr. Summerville as a copy of his report as Coroner of the death of William F. Ardrey. The pertinent parts of this report stated: "Blood was obtained for alcohol determination. * * * The test for blood alcohol revealed a concentration of 0.3%." Plaintiff's objection to the introduction of this report in evidence was sustained, and defendant excepted. Also, the court sustained plaintiff's motion to strike the evidence of Dr. Summerville relative to the procurement of blood purported to have been taken from the body of William F. Ardrey, the decedent, and the result of the test thereof. Plaintiff's objections to subsequent testimony of Dr. Summerville as to the effect of the percentage of alcohol in the blood as shown in the report were also sustained.

Thereafter the jury returned. Defendant offered additional evidence. At the close of all the evidence, appropriate issues were submitted to the jury and answered in favor of the plaintiff.

The defendant appeals, assigning error.

W. B. Nivens for plaintiff appellee.
Dockery, Ruff, Perry, Bond & Cobb for defendant appellant.

DENNY, J. The defendant's first assignment of error is based on its exception to the refusal of the court in the trial below to allow the defendant to introduce in evidence the paper identified by Dr. Summerville as a copy of his report as Coroner filed with the Clerk of the Superior Court of Mecklenburg County.

It is well settled in this jurisdiction that the effect of alcohol in the blood stream as shown by proper chemical tests is competent evidence on the question of intoxication. *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573; *S. v. Moore*, 245 N.C. 158, 95 S.E. 2d 548; *S. v. Willard*, 241 N.C. 259, 84 S.E. 2d 899. See also Anno. — Intoxication — Scientific Tests, 159 A.L.R. 209, *et seq.;* Anno. — Evidence — Specimen From Human Body, 21 A.L.R. 2d 1219, *et seq.*

However, as to whether or not a blood alcohol test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field. In other words, a foundation must be laid before this type of evidence is admissible. *S. v. Willard, supra.* Moreover, it should be made to appear that the blood was taken from the body of the deceased before any extraneous matter had been injected into it. *McGowan v. City of Los Angeles*, 100 Cal. App. 2d 386, 223 P. 2d 862, 21 A.L.R. 2d 1206.

The evidence introduced at the trial below does not show how long after the death of the insured the blood was taken from the body or

who took the blood from the body, and, if actually taken from the body of William F. Ardrey, whether it was taken before or after any extraneous substance had been injected into the body.

McCormick on the Law of Evidence, section 176, page 377, in discussing chemical tests to determine the degree of intoxication, says: "The party offering the results of any of these chemical tests must first lay a foundation by producing expert witnesses who will explain the way in which the test is conducted, attest its scientific reliability, and vouch for its correct administration in the particular case."

In *McGowan v. City of Los Angeles, supra,* the Court considered the identical question now before us. Section 1920 of the Code of Civil Procedure of California reads: "Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of facts stated therein." In light of the provisions of this statute, the Court said: "If it had been proved that the blood analyzed by the county coroner's office had been taken from the body of Cox before any extraneous matter had been injected into his body, the coroner's record of the analysis would have been admissible and prima facie evidence of the facts therein stated." The Court quoted with approval from Wigmore on Evidence, pp. 530, 531, as follows: " 'Where the officer's statement is concerned with a *transaction* done, not by him or before him, but *out of his presence* (and out of the presence of his subordinates), the case is one in which obviously he can have no personal knowledge; the assumption must therefore be that his statement is inadmissible. It is to be noted, however, that the sufficient explanation is usually that the officer's duty does not extend to transactions out of his presence, and thus the recording or certifying of them is not covered by his official duty. * * * Thus, for matters not occurring in the presence of the officer, his record or certificate is inadmissible, not only because in general a witness must have personal knowledge, but also because an officer's duty is usually concerned only with matters done by or before him.' " The Court further stated: "There was no evidence that any blood was ever taken from the body of Cox, or, if any was taken, the identity of the person who took it or when it was taken — whether before or after embalming fluid which contains alcohol was injected into the body — how, when, and the identity of the person by whom the container was labeled, or who delivered the bottle to the coroner's office, or that the blood analyzed was that of Cox. Neither the label nor the bottle was identified, offered or received in evidence. No excuse, explanation or justification was given for fail-

ure to lay the necessary foundation. The court did not err in refusing to admit the paper in evidence."

In the instant case, the Coroner's testimony left the question in doubt as to whether he was or was not present when the blood was supposed to have been taken from the body of William F. Ardrey. In fact, he positively stated that he could not remember whether he was present or not. "I cannot say that I was present." Furthermore, there is no evidence tending to show who took the sample of blood from the body of the insured, or as to whether or not it was taken before or after embalming fluid had been injected into his body. Likewise, there was no evidence as to the manner in which the blood was handled after it was taken, if actually taken, from the body of the insured.

In the case of *Benton v. Pellum,* 232 S.C. 26, 100 S.E. 2d 534, the chemist at the Medical College in charge of running blood tests, testified that he received two blood specimens bearing the names of the appellant and another party; that he unwrapped the package and alcohol tests were run on both specimens; that his only knowledge as to whose blood was being tested was from the label on the bottle. The testimony as to the result of the test run on the specimen bearing the name of the appellant was rejected. The Court said: "(I)t is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. *Joyner v. Utterback,* 196 Iowa 1040, 195 N.W. 594. As stated in *Rodgers v. Commonwealth,* 197 Va. 527, 90 S.E. 2d 257, 260, 'Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.'"

The appellant contends that the Coroner's report was admissible under the provisions of G.S. 8-35, the pertinent parts of which provide: "All copies * * * from the books or papers on file, or records of any public office of the State or the United States * * * shall be received in evidence and entitled to full faith and credit in any of the courts of this State when certified to by the chief officer or agent in charge of such public office * * * to be true copies, and authenticated under the seal of the office * * * concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate * * *, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed." This contention of the appellant is without merit.

The appellant did not offer a certified copy of the report sought to be introduced in evidence pursuant to the requirements of the

statute. Therefore, in view of the equivocal nature of the evidence with respect to the identity of the blood tested, we hold that the court below properly refused to admit the uncertified copy of the Coroner's report in evidence.

In view of the conclusion we have reached with respect to the exclusion of the purported copy of the Coroner's report, we deem it unnecessary to discuss the remaining assignments of error.

In the trial below, we find.

No error.

LESTER R. HORTON v. HUMBLE OIL & REFINING COMPANY, JESSE A. KISER AND G. S. ATKINS.

(Filed 22 November, 1961.)

1. Contracts § 1—

In order to constitute a valid contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite.

2. Same; Contracts § 27— Evidence held to establish negotiations for agreement but not execution of definite contract.

Evidence to the effect that plaintiff terminated his employment and went to a training school in consideration of defendant's agreement to lease him a filling station, aid him in financing essential equipment, and that the station would be "fully equipped" by the time plaintiff returned from the training school, without any evidence as to what the parties meant by the term "fully equipped" and with further evidence tending to show uncertainty in regard to the agreement of financial assistance and credit, together with evidence that the parties contemplated signing a lease containing the specific terms of the agreement, and that the lease was delivered to plaintiff but never executed by him, *is held* insufficient to show a binding agreement between the parties but tends to establish only negotiations for a written agreement which was not executed.

3. Same—

Evidence that defendant represented that plaintiff could earn at least a specified sum in the operation of a filling station to be leased to him by defendant is insufficient to establish a binding contract in regard thereto, since such promissory representation amounts to nothing more than a statement of opinion upon which plaintiff had no right to rely.

DENNY and PARKER, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Mintz, J.*, at April 1961 Term, of LENOIR.

Civil action to recover damages alleged to have been sustained by plaintiff as a result of breach of contract with the defendant Humble Oil & Refining Company relative to the lease of a gasoline service station at the corner of Highland Avenue and N. C. Highway No. 11, near the city limits of Kinston, North Carolina.

Plaintiff alleged in the complaint, among other things, that defendant Oil Company agreed: (1) To lease to him the aforementioned service station, and to guarantee him an income of at least $100.00 per week for the first year of operation and at least $10,000.00 for the second year; (2) to fully equip and stock said station; (3) to arrange for plaintiff to attend a training school for service station operators in Charlotte, N. C.; (4) to finance plaintiff in equipping and stocking said station to the extent of $4,000.00, in addition to the $2,500.00 which plaintiff agreed to invest for said purposes; (5) to assist and supervise plaintiff in the operation of the station for two-weeks; and (6) to acquaint, aid, and assist plaintiff in the operation of the business.

Plaintiff further alleged that he agreed: (1) To terminate his employment with E. I. DuPont de Nemours & Company; (2) to invest his savings up to $2,500 in equipping and supplying the said station; (3) to borrow an additional $4,000 with the assistance of the corporate defendant for equipping and supplying the station; (4) to take the eight weeks training course for service station operators in Charlotte, North Carolina; (5) to lease the station; and (6) to operate the station.

Plaintiff further alleged that he complied with the terms of the contract to the extent he was permitted so to do by said defendants, but that defendants failed to comply with the terms of the contract. Thus, plaintiff alleged damage in specified amounts as a result of the alleged breach of contract.

Defendants in their answer denied the material allegations of the complaint. Defendants Kiser and Atkins demurred *ore tenus* to the complaint, and judgment sustaining the demurrer was entered dismissing the action as to them, to which plaintiff did not assign error.

At the trial, the sole testimony offered was that of plaintiff. He testified, relative to the creation of the alleged contract between himself and defendant Oil Company, that in July, 1957, he had been working for the DuPont Company at Kinston for six and one-half years, his salary at that time being $100.40 per week. Mr. Cooper of Harvey Oil Company contacted him at that time and asked him if he could come and meet a representative of defendant Oil Company. Plaintiff then went to the Harvey Oil Company offices, where

he was introduced to defendant Kiser who, as plaintiff was told, was a representative of Esso and had jurisdiction of the new station on Highland Avenue. Mr. Kiser told plaintiff that he "looked like a young, healthy man that they could place there and train, and that this would be a superior investment and would pay off materially."

Plaintiff further testified that defendant Kiser mentioned a number of factors that indicated that the station would be a success and would "pump" 20,000 gallons of gasoline per month. After plaintiff told defendant Kiser about his employment situation with DuPont, and the amount of money that he needed to meet his monthly obligations, defendant Kiser said: "The school we are sending you to in Charlotte would make a first-class operator out of you. I can guarantee you will make the payments you are making, and with the build-up of that station, you could make $10,000 a year, and that would certainly be bettering yourself."

As to the financial arrangements necessary to open the filling station, plaintiff testified that he informed Mr. Kiser that he could raise nearly $2,500. Mr. Kiser replied that plaintiff would need at least another $4,000. When plaintiff stated that he could not raise that amount, Mr. Kiser said: "I will take care of that. I will call Mr. Harvey; he owns his own bank and operates Harvey Oil Company; I will make arrangements for that."

Plaintiff further testified that Mr. Kiser informed him as to what he would have to do to enter the training school. He then took plaintiff to the Commercial Bank where plaintiff applied for credit, and later introduced plaintiff to Mr. Smith, the regional manager of defendant Oil Company. After a period of general discussion, Mr. Smith told plaintiff: "I assure you that you will not lose anything with Esso behind you, worth millions of dollars, and Harvey worth millions of dollars. You can't lose anything."

Mr. Kiser then told plaintiff that he would give plaintiff the necessary assistance for selection of proper equipment, and for setting up and opening the station. In plaintiff's words: "Mr. Kiser told me that all of that (equipment) would be selected by my assistants while I was in school, with everything complete when I got out of school, and when I came back from school, the station would be ready to open the doors and take in full service in business. With reference to assisting me after the station was opened, he said that I would get complete assistance from him; that he was (salesman of) * * * tires, batteries and accessories. That was why he was handling the territory in that capacity. He said if he was here when I got back from school * * * I was to get two weeks assistance in opening the station, getting everything set up, and taking in new business if I needed it."

As to the necessity of earning an amount sufficient to pay his living expenses and also to pay his monthly bills, plaintiff testified: "He (Mr. Kiser) said he could guarantee me the amount to meet them certainly; that I would be cheating myself, being a business man of my ability, not to take the proposition. He assured me of the one hundred dollars a week, and he assured me that at the end of the year, I would make ten thousand dollars the second year. I saw there was an opportunity to better myself, and I told him that I would take it."

Plaintiff further testified that he went to the training school as arranged, but that when he returned he found "that the arrangements for the equipment had not been exercised," and that "credit had not been set up for me at Esso Headquarters. * * * The station was not equipped when I returned from school, not a desk or anything."

Nevertheless, plaintiff opened the station and hired two men to assist him in operating it. After a short period, however, plaintiff "* * * saw that if something wasn't done to make the station a paying proposition that I had been promised, I would never be able to make it." At the suggestion of defendant Atkins, plaintiff reduced the price of gasoline and displayed signs to that effect, but the business failed to prosper. Thus, plaintiff testified, shortly thereafter he settled all accounts with the distributor, Harvey Oil Company, and closed the station.

On cross-examination, plaintiff testified that it was contemplated that a written lease for the filling station would be drawn and signed by him, and that such a lease was handed to him by defendant Atkins around the first of October. In plaintiff's words, "I kept it (the lease), read through part of it, and never did sign it. I kept it until I closed the station. In a week or two, or a month, Mr. Atkins called me and asked if I could bring it to Harvey Oil Company. He said he had another application. I took it to him. I tried to cooperate. I stayed there five weeks without paying any rent, without signing any lease, and operated the filling station. The lease was about 12 or 15 pages, and I read through most of it and saw what the contents of it were. Up until that time, Esso hadn't followed through on their obligations and I was afraid to bind myself by signing a lease then. I didn't know what would take place."

On both direct and cross-examination, plaintiff testified that at the time he was about to close the station, he was told by defendant Atkins that defendant Oil Company had stations which it operated as a "project" wherein the station operator was an employee on a salary-commission basis. Plaintiff testified that he asked defendant Atkins why this station was not operated that way, and defendant Atkins replied that the station in question was built by the Harvey firms and leased to Esso Standard, and that Esso Standard then gave Harvey

Oil Company the right to supply the station so that Esso couldn't supply it as they would supply their own station.

At the close of plaintiff's evidence, defendant Oil Company made motion for judgment as of nonsuit. The motion was allowed by the court below, to which plaintiff objects, excepts and appeals to Supreme Court, and assigns error.

Jones, Reed & Griffin for plaintiff appellant.

Whitaker & Jeffress, Lassiter, Moore & Van Allen, John T. Allred for defendant appellee.

WINBORNE, C.J. The pivotal question presented on this appeal is this: Is there sufficient evidence, when viewed in the light most favorable to plaintiff, to establish the existence of a contract between plaintiff and the defendant Oil Company? The answer is No.

In *Williamson v. Miller,* 231 N.C. 722, 58 S.E. 2d 743, this Court said: " 'To be binding, the terms of a contract must be definite and certain or capable of being made so.' *Elks v. Ins. Co.,* 159 N.C. 619, 75 S.E. 808; *Sides v. Tidwell,* 216 N.C. 480, 5 S.E. 2d 316."

In *Elks v. Ins. Co., supra,* this Court said: "It is elementary that it is necessary that the minds of the parties meet upon a definite proposition. 'There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. A contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual.' 1 Par. Con., 475."

In the instant case, there is not sufficient evidence that the parties ever achieved a meeting of the minds upon the definite and certain terms of a contract. Plaintiff testified that the defendant Oil Company agreed to "fully equip" the filling station by the time that the plaintiff had returned from school, but there is neither sufficient evidence of what is generally meant by this term, nor evidence of what either party actually understood it to mean.

As to the financing of this equipment, plaintiff testified at one point that, "Payment for the small equipment was to be set up for 36 months, and heavy equipment could be set up on 48 months, and there would be a small down payment I would be billed for. That was the method of paying for the equipment to be furnished me by Standard Oil." At another point, however, plaintiff testified that an agent of defendant Oil Company took him to the Commercial Bank in Kinston to assist him in getting a loan which "was to be used to purchase additional equipment and stock, I reckon."

This and similar uncertainty revealed in the testimony relative to

the other terms of the alleged contract indicate that the parties did not reach that meeting of the minds necessary to the formation of a binding contract.

However, there is evidence that the parties contemplated entering into a written contract. Plaintiff testified that a written lease for the filling station was given to him; that he kept it and read part of it; but that he did not sign it because "I was afraid to bind myself by signing a lease then."

In *Elks v. Ins. Co., supra,* it is said: "If the minds of the parties meet upon a proposition which is sufficiently definite to be enforced, the contract is complete, although it is in the contemplation of the parties that it shall be reduced to writing as a memorial or evidence of the contract; but if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then there is no contract until the writing is executed. *Winn v. Bull,* 7 Ch. D., 31; *Pratt v. RR,* 21 N.Y. 308; *Steam Co. v. Swift,* 41 Am. St. 553 (86 Me. 248); *Rankin v. Mitchem,* 141 N.C. 277."

Plaintiff lays stress upon the fact that he relied on the statements made by agents of defendant Oil Company as to the income that he would receive from the business. However, it appears that, under these circumstances, such statements amount to no more than what this Court has referred to as "sales talk" or "huffing". As was said in *Pritchard v. Dailey,* 168 N.C. 330, 84 S.E. 392, "The representations of the defendant seem to be what are called 'promissory representations', looking to the future as to what can be done to the property, how profitable it was, and how much could be made by the investment. Representations which merely amount to a statement of opinion go for nothing. One who relies on such affirmations made by a person whose interest might prompt him to invest the property with exaggerated value does so at his peril and must take the consequences of his own imprudence. *Cash Register Co. v. Townsend,* 137 N.C. 652; Kerr on Fraud and Mistakes, p. 83."

Thus it appears that the court below was correct in allowing defendant's motion for judgment as of nonsuit. As this ruling is determinative of the case, it is unnecessary to discuss plaintiff's assignment of error relative to the measure of damage.

Hence, the judgment of the court below is

Affirmed.

DENNY, and PARKER, JJ., took no part in the consideration or decision of this case.

CLINTON RONALD PITTMAN, BY HIS NEXT FRIEND, ETHEL B. PITTMAN, v. DONALD LEE SWANSON.

(Filed 22 November, 1961.)

1. Automobiles § 25—

The standard of care fixed by the Legislature in the operation of motor vehicles is absolute.

2. Same—

A violation of G.S. 20-141(c) is negligence *per se*.

3. Trial § 33—

It is the duty of the court, even in the absence of request for special instructions, to charge the jury upon all substantive features of the case arising on the evidence, and when both the common law and statutory law are applicable the court must charge upon the statutory as well as the common law, and an instruction applying only the common law to the evidence must be held insufficient. G.S. 1-180.

4. Same—

In charging the jury upon statutory law it is preferable for the court to give a simple explanation of the statute rather than read its technical language.

5. Automobiles § 46— Charge held for error in failing to instruct jury on duty to reduce speed when approaching a curve.

In this action by a guest to recover for negligent operation of the automobile in which he was riding, plaintiff contended that defendant operated his vehicle around a sharp curve at an excessive speed, proximately causing the accident in suit. *Held:* A charge on the statutory law relating to reckless driving, G.S. 20-140, and the statute relating to speed limits, G.S. 20-141(b), and the duty not to drive at a speed greater than is reasonable and prudent under the existing conditions, G.S. 20-141(a). and the common law duty to exercise the care of an ordinarily prudent man, but failing to charge upon the statutory duty to decrease speed when approaching and going around a curve, G.S. 20-141(c), must be held for prejudicial error in failing to instruct the jury on a material aspect of the law arising upon the evidence.

6. Negligence § 7—

Foreseeability is an essential element of proximate cause.

APPEAL by plaintiff from *Pless, J.*, March 1961 Term of BURKE.

Civil action to recover damages for personal injuries.

Plaintiff's evidence is to this effect:

On the night of 7 April 1960 plaintiff, 17 years old, his brother Tommy Pittman, 16 years old, and defendant Donald Lee Swanson were at Smith's skating rink in Icard. About 9:30 P.M. o'clock they left the skating rink in defendant's 1952 Ford automobile to be taken to their home in Hildebran, a distance of about 2½ miles. Defendant

was driving, Tommy Pittman was sitting in the middle, and plaintiff was sitting to the right of Tommy. At the caution light at Icard defendant got on Highway #10. This is a curving two lane black top road 18 feet wide from the place where defendant got on it to where the wreck occurred. Defendant was driving at a speed of 50 to 60 miles an hour. One Eddie Hicks was driving his automobile behind them. Defendant went around several curves, and approached without slackening speed a very sharp, nearly 90 degrees, flat curve, which had sand on it. No automobile at that time was meeting them. As defendant drove down the road, plaintiff told defendant to slow down, he had wrecked there before. Defendant's automobile slid in the sand on this curve as he was driving on it to the left, and overturned. In the wreck plaintiff was injured.

Defendant's evidence is to this effect:

He was driving about 40 miles an hour. The road is crooked with a lot of sharp curves. He had gone around nine curves. The curve where he turned over is about 70 degrees, and is elevated. When he was going around this curve, he met an automobile with bright lights practically in the middle of the road. If he had tried to get off the road, he would have run into a big bank. He went to the right as far as he could. In passing, this automobile sideswiped him leaving a light blue streak from the front end of his automobile almost to the back door. His automobile was an old one with bad shock absorbers, and would turn over easily. As a result of being sideswiped his automobile turned over completely twice, and came to a stop on its wheels, facing in the opposite direction from which he had come. Plaintiff was thrown through the windshield out of the automobile. When defendant "woke up," he and Tommy were in the back seat. Plaintiff did not tell him to slow down. There were two streaks of paint on his automobile, a dark green one below the light blue one, because previously he had had a wreck with a green Cadillac. The driver of the automobile meeting him did not stop, and was not identified. Defendant knew well this road, driving it nearly every day.

Issues of negligence of defendant and damages were submitted to the jury, who answered the first issue No.

From a judgment that plaintiff recover nothing, he appeals.

John H. McMurray for plaintiff, appellant.
Patton & Ervin By Sam J. Ervin, III, for defendant, appellee.

PARKER, J. All of plaintiff's assignments of error, except formal ones, relate to the court's charge to the jury.

Plaintiff alleged in his complaint negligence on defendant's part in

the operation of his automobile, as follows: One. He drove his automobile in a careless and reckless manner in violation of G.S. 20-140. Two. When approaching and going around a curve, he failed to decrease his speed, but was operating and continued to operate his automobile at a speed greater than was reasonable and proper and prudent under the conditions then existing in violation of G.S. 20-141. Three. He failed to keep his automobile under control. Four. He operated his automobile at a reckless, negligent and dangerous speed when approaching and going around a curve. Five. He drove his automobile off of the hard-surfaced highway at a dangerous speed, which caused it to overturn. And that such negligence was the sole and proximate cause of his injuries.

The court in its charge, after stating that actionable negligence consists of the two elements of negligence and proximate cause, and scantily defining negligence but not proximate cause, said it is also negligence for one to violate a statute that has been enacted for the public safety, and plaintiff invokes the alleged violation by defendant of one or more of our statutes. Then the court went on to charge as follows — some we summarize and some we quote: The statutory maximum speed limit on our highways is 55 miles an hour, and plaintiff alleges a violation of that statute. "We have a statute that provides that, notwithstanding the speed limitations, that a person shall not operate a car upon the public highways at a speed that is greater than reasonable and prudent under the conditions existing; and the conditions, of course, include such things as nature and type of the highway, grades, curves, lightness, darkness, weather — things of that sort; and he alleges the violation of that statute by the defendant." And then the court quoted substantially the language in part of G.S. 20-140 defining reckless driving, but omitting the words "without due caution and circumspection" appearing in the statute. Then the court went on to charge that plaintiff in addition to proving negligence "must also prove the negligence complained of was the direct, immediate or proximate cause of the injuries to himself." That it doesn't matter how negligent a person is, if this negligence doesn't proximately, directly or immediately cause injury to another. This is all that the court charged in respect to the statutes of this State regulating the operation of automobiles, except in the part of the charge quoted in the next paragraph.

This is the court's application of the law to the evidence arising in the case in respect to the issue of defendant's negligence: "The plaintiff is required to tip the scales of your minds in his favor to the extent that he proves by the greater weight of the evidence that the defendant, in the operation of the car, was negligent, either in driving his car

at a speed which was greater than was reasonable and prudent under the conditions existing, or in operating it recklessly and heedlessly as I have defined that for you, or in failing to keep a proper lookout and see what was there to be seen — violating the rule of the reasonably prudent person in the operation of the car. If he has established by the greater weight of the evidence that the defendant was negligent in any one or more of those respects, and further has established by the greater weight of the evidence that without that negligence this accident would not have occurred — that it directly and immediately brought about and produced injury to the plaintiff, then, gentlemen of the jury, the plaintiff would be entitled to prevail in this issue and you would answer it 'Yes,' the issue being, 'Was the plaintiff injured by the negligence of the defendant, as alleged in the Complaint?' "

G.S. 20-141(a) provides, "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." The same statute, section (b), sets forth the speed limits. The same statute, section (c), provides in relevant part, "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed . . . , when approaching and going around a curve, . . . 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."

The statute prescribes the 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 violation of G.S. 20-141(c) is negligence *per se. Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205.

Plaintiff assigns as error that the court failed in its charge to explain the statute G.S. 20-141(c) in respect to speed when approaching and going around a curve, and to apply it to the evidence arising in the case.

Plaintiff's evidence tends to show that defendant drove his automobile in the nighttime, when approaching and going around a very sharp, nearly 90 degrees, flat curve, which had sand on it, at a speed of 50 to 60 miles an hour, and that such speed on this curve caused his automobile to overturn proximately resulting in plaintiff's injuries. One of plaintiff's principal contentions from his evidence, if not his principal one, is that defendant operated his automobile in violation of the provisions of G.S. 20-141(c), and such violation was a proximate cause of his injuries. This was a substantive feature of the case arising on the evidence, and no request for special instructions by plaintiff on

this point was necessary, because it was the positive duty of the judge, as required by G.S. 1-180, to declare and explain the law upon all the substantive features arising on the evidence given in the case. *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253; Strong's N. C. Index, Vol. 4, Trial, pp. 331-2, where many cases to the same effect are cited.

Our decisions are as one in holding that the positive duty of the judge, required by G.S. 1-180, to declare and explain the law arising upon the evidence in the case means that he shall declare and explain the statutory law as well as the common law arising thereon. *Barnes v. Teer,* 219 N.C. 823, 15 S.E. 2d 379; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Williams v. Coach Co.,* 197 N.C. 12, 147 S.E. 435; *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170.

In *Kolman v. Silbert, supra,* the Court said: "The duty imposed by statute (G.S. 1-180) is positive. The subsequent charge in which the court stated and applied the common law rule of the prudent man is not sufficient to remedy the failure to properly explain and apply the statutory provisions." The part enclosed in the parentheses is ours.

Speaking directly to the point in *Bowen v. Schnibben, supra,* it is said: " . . . but where a statute appertaining to the matters in controversy provides that certain acts of omission or commimssion shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by the common law."

This is said in *Batchelor v. Black,* 232 N.C. 314, 59 S.E. 2d 817: "This Court has repeatedly held that the court need not read a statute to the jury, and in fact the opinions tend to discourage the practice. While the court must apply the law to the evidence (G.S. 1-180) this is often better accomplished by a simple explanation without the involvement of the technical language of the statute."

The court in its charge quoted almost verbatim the provisions of G.S. 20-141(a), but neither charged nor explained in form or substance, nor made any reference to, the provisions of G.S. 20-141(c) in any part of the charge. This affected a substantive right of plaintiff, and is prejudicial error, even in the absence of a special request for instructions. *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523, and cases there cited.

Plaintiff also assigns as error the court's definition of proximate cause. The court's definition of proximate cause is inadequate, in that, *inter alia,* it made no reference to foreseeable injury, which is a requisite of proximate cause. *Aldridge v. Hasty, supra; Adams v. Board*

of Education, 248 N.C. 506, 103 S.E. 2d 854. However, this seems prejudicial to the defendant rather than the plaintiff.

There are other assignments of error appearing on the record and brought forward in plaintiff's brief which present difficult questions, but we deem it unnecessay to consider them *seriatim,* as they will probably not recur upon a new trial, and a new trial must be awarded for prejudicial error against plaintiff on the negligence issue, as set forth above.

For error in the charge plaintiff is entitled to a new trial, and it is so ordered.

New trial.

S. A. SCHLOSS, JR., MARY JANE SILVERMAN, AND FLORETTE SCHLOSS WILE, TRADING AS SCHLOSS POSTER ADVERTISING COMPANY, A PARTNERSHIP V. JAMES CLARENCE HALLMAN AND B. L. BECK.

(Filed 22 November, 1961.)

1. Appeal and Error § 49—

Ordinarily, when the court's conclusion of law is not supported by findings of fact the cause must be remanded on defendant's exceptions, but when the evidence is insufficient to make out a case, the judgment in favor of plaintiff will be reversed on defendant's exception to the refusal of the court to grant his motions for judgment as of nonsuit.

2. Automobiles § 14—

A motorist upon a four-lane street having two lanes for travel in each direction may overtake and pass another vehicle traveling in the same direction to the right of such other vehicle, G.S. 20-150.1(b) and, when such street is in the business or residential section of a municipality, he is not under duty to sound his horn before passing or attempting to pass, G.S. 20-149(b).

3. Same—

A motorist traveling along the right lane of a four-lane street is not under duty to anticipate that another motorist traveling in the same direction in the left lane for travel in such direction will suddenly turn directly in front of him into the right lane without giving timely signal, especially when the drivers are not approaching an intersection which might give the one notice that the other would turn from his lane of travel in order to enter the intersection.

4. Automobiles § 7—

A motorist is not bound to anticipate negligence on the part of another in the absence of anything to indicate otherwise.

5. Automobiles § 19; Negligence § 3—

A driver confronted with a sudden emergency will not be held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence would have made under similar circumstances.

6. Automobiles § 41d— Evidence held insufficient to establish negligence on part of motorist forced off the street by negligence of another.

Evidence tending to show that defendant driver was traveling in the right lane of a wet four lane street, that as he was attempting to pass another vehicle traveling in the same direction in the left lane for travel in such direction, such other vehicle turned into the right lane immediately in front of him, and that defendant thus confronted with the sudden emergency, applied his brakes and turned his wheels to the right in order to avoid collision with the other vehicle and a vehicle following immediately behind him, and that when his wheel hit the curb he lost control of his vehicle, which went across the curb and sidewalk and down an incline and hit plaintiff's billboard, *is held* insufficient to make out a case of actionable negligence on the part of defendant.

7. Trespass § 1—

A motorist without fault who is forced off the highway and onto plaintiff's property as a result of negligence of another motorist may not be held liable for the resulting damage to the realty.

APPEAL by defendant B. L. Beck from *Craven, Special Judge,* 6 February 1961 Special Civil Term of MECKLENBURG.

This is a civil action in which the plaintiff partnership seeks to recover for damages caused to its 4-panel poster advertising board on 28 April 1959, when the truck owned by defendant B. L. Beck ran off West Fifth Street in the City of Charlotte, North Carolina, and damaged said board. The truck was being operated in an easterly direction in the 1100 block of said street when the alleged damage occurred.

The plaintiffs allege in their complaint that the billboard was destroyed as a result of the negligence of James Clarence Hallman, employee of defendant B. L. Beck, while driving a 1950 Ford wrecker-truck owned by Beck, within the scope and course of his employment. Hallman was not served with process in this action.

By mutual consent the action against Beck was heard by the trial judge without a jury pursuant to the provisions of G.S. 1-539.3, *et seq.,* governing the adjudication of small claims.

The findings of fact pertinent to this appeal may be summarized as follows: West Fifth Street which runs in an easterly and westerly direction is 50 feet wide and has four traffic lanes, two for eastbound traffic and two for westbound traffic, all four lanes being properly marked; that plaintiff's billboard is located ten feet to the south of

West Fifth Street, just west of Irwin Creek; that Andrill Terrace is a street which intersects West Fifth Street at a right angle, approximately 300 feet west of Irwin Creek; that immediately prior to the accident, Hallman was driving the wrecker at a speed of approximately 30 miles per hour in an easterly direction in the outside or curb lane of West Fifth Street as it approached the Andrill Terrace intersection; that before the wrecker reached the intersection, a Pontiac automobile proceeding in a northerly direction on Andrill Terrace turned into the inside or left-hand eastbound lane on West Fifth Street; that the Pontiac was traveling at a slower rate of speed than the wrecker driven by Hallman; that while the Pontiac was proceeding eastwardly in the inside lane, the driver of the wrecker approached it from the rear in the outside lane and undertook to pass the Pontiac "without slowing down and without applying his brakes or sounding his horn." That when the driver of the wrecker was in the act of passing the Pontiac, the driver of the Pontiac, without giving a signal, turned into the outside lane; that Hallman turned the truck to the right into the curb on West Fifth Street to avoid a collision; that there was another vehicle traveling east just behind the wrecker in the inside lane when the Pontiac turned into the outside lane; that Hallman lost control of the wrecker due to the impact with the curb; that the point where the wrecker turned into the curb was less than 100 feet from plaintiffs' billboard; that the wrecker jumped over the curb and ran into the billboard, destroying it. The Pontiac did not stop.

From the foregoing findings of fact the court concluded as a matter of law that Hallman "failed to apply his brakes immediately after the Pontiac had come out in front of him, when in the exercise of due care he should have done so, but instead immediately attempted to pass the Pontiac when he knew or should have known that the Pontiac was in the act of making a sudden and hazardous turn and that a continuation of the turn would bring the Pontiac into the right or outside lane constituted, under these circumstances, failure to exercise due care, and that this failure to exercise due care on the part of defendant's driver was one of the proximate causes of the collision."

Based on said findings of fact and conclusion of law, the trial judge entered a judgment against the defendant B. L. Beck in the sum of $1,000, plus the costs of the action to be taxed by the Clerk.

The defendant Beck appeals, assigning error.

Dockery, Ruff, Perry, Bond & Cobb for appellees.
Carpenter, Webb & Golding; John A. Mraz for appellant.

DENNY, J. A careful examination of this record reveals that the

conclusion of law set out hereinabove is not supported by the findings of fact. Neither is there any evidence to support the finding that the driver of the Beck truck failed to blow his horn before attempting to pass the Pontiac automobile. There is no evidence whatever in the record as to whether Hallman did or did not blow his horn before attempting to pass said automobile.

The evidence, however, does reveal that before the driver of Beck's truck reached the intersection of Andrill Terrace and West Fifth Street, a Pontiac automobile operated by a lady with two small children as passengers, turned from Andrill Terrace into the inside or northernmost lane for eastbound traffic on West Fifth Steet. The Pontiac car proceeded east in the inside lane for a distance of approximately 200 feet. When Hallman, traveling in the curb or outside lane at a speed of approximately 30 miles per hour, undertook to pass the Pontiac, the driver of the Pontiac, without giving a signal, pulled into the outer or curb lane only twenty feet ahead of the Beck truck which was traveling faster than the Pontiac.

The evidence further tends to show that the driver of the Beck truck in his effort to avoid a collision with the Pontiac or with another vehicle traveling in the same direction in the left or inner eastbound lane just behind the Beck truck, hit the curb, applied his brakes, lost control of his vehicle which went across the curb, the sidewalk, and down an incline and hit the plaintiffs' billboard. The Pontiac never stopped and the driver thereof is not identified on this record.

The defendant is entitled to a new trial if the evidence is sufficient to carry the case to the jury. Hence, we shall consider the defendant's assignment of error based on his exceptions to the failure of the court below to grant his motion for judgment as of nonsuit interposed at the close of plaintiffs' evidence and renewed at the close of all the evidence.

G.S. 20-150.1 in pertinent part provides. "The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions: * * * (b) Upon a street or highway with unobstructed pavement of sufficient width which have been marked for two or more lanes of moving vehicles in each direction and are not occupied by parked vehicles."

It is clear that under the circumstances revealed by the record herein, the driver of the defendant's truck was under no duty to sound his horn before passing or attempting to pass a vehicle proceeding in the same direction in another lane, while traveling within a business or residential district. G.S. 20-149 (b). The accident complained of by the plaintiffs occurred in the 1100 block of West Fifth Street in the City of Charlotte. Moreover, there is no evidence of an intersection into which the driver of the Pontiac might have turned to put Beck's

driver on notice that the driver of the Pontiac might enter his lane of traffic in order to turn into such intersection. Therefore, the driver of defendant Beck's truck was under no duty to anticipate that the driver of the Pontiac would turn to the right directly in front of him without giving a timely signal and at a time when the Pontiac was only 20 feet ahead of the approaching truck which was traveling approximately 30 miles per hour, which was a greater rate of speed than the Pontiac was traveling.

The driver of a motor vehicle is not bound to anticipate negligence on the part of another driver, in the absence of anything to indicate otherwise. 5A Am. Jur., Automobiles and Highway Traffic, section 204, page 354; *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849; *Garner v. Pittman,* 237 N.C. 328, 75 S.E. 2d 111; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239.

Here, as in the case of *Simmons v. Rogers, supra,* Hallman was confronted with a sudden emergency. The street was wet, it was raining, and a car driven by a woman with two small children as passengers, suddenly and without warning turned into Hallman's lane of travel only 20 feet ahead of him. "One who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; *Ingram v. Smoky Mountain Stages,* 225 N.C. 444, 35 S.E. 2d 337; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Powell v. Lloyd,* 234 N.C. 481, 67 S.E. 2d 664; *Henderson v. Henderson,* 239 N.C. 487, 80 S.E. 2d 383; *Cockman v. Powers,* 248 N.C. 403, 103 S.E. 2d 710; 38 Am. Jur., Negligence, section 41, page 687; 65 C.J.S., Negligence, section 17, page 408.

There is no evidence on this record tending to show that the choice made by Hallman in his effort to avoid a collision with the Pontiac was not such choice as a person of ordinary care and prudence would have made under similar circumstances. Accordingly, if Hallman exercised "such care as an ordinarily prudent man would exercise when confronted by a like emergency, he is not liable for an injury which resulted from his conduct, even though another course of conduct would have been more judicious, or even though another course of conduct would have been safer, or might even have avoided the injury, as under such circumstances the injury is regarded as an inevitable accident." 65 C.J.S., Negligence, section 17, page 409.

Even so, the plaintiffs contend that irrespective of negligence, they are entitled to recover the relief they seek on their second cause of action as a result of the trespass of the defendant Beck's truck driver upon the land on which their advertising poster was located, which land

the plaintiffs are in legal possession by virtue of a lease between themselves and the Piedmont and Northern Railway Company.

In Restatement of the Law of Torts, section 166, page 394, it is said: "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest." See also *Smith v. Pate*, 246 N.C. 63, 97 S.E. 2d 457. This contention cannot be sustained on this record.

Moreover, a careful consideration of all the evidence adduced in the hearing below leads us to the conclusion that the evidence is insufficient to establish actionable negligence on the part of Hallman, and that the exception to the refusal of the court below to sustain the appellant's motion for judgment as of nonsuit is well taken and will be upheld.

The judgment below is

Reversed.

MARSHALL EUGENE BLACK, PLAINTIFF v. GUY MANNERING PENLAND AND BURKE FARMERS CO-OPERATIVE DAIRY, INC., ORIGINAL DEFENDANTS AND JOE THOMAS HURST ADDITIONAL DEFENDANT.

(Filed 22 November, 1961.)

1. Automobiles § 29—

Where the municipal ordinance introduced in evidence restricts speed in a business district to 20 miles per hour in accord with G.S. 20-14(b) (1) but does not define a business district, what is a business district must be determined in accordance with G.S. 20-38(a) with reference to the status of frontage along the street, excluding from consideration intersecting streets or highways, and a district is a business district only when 75 per cent of the frontage along a street or highway for a distance of 300 feet is occupied by buildings in use for business purposes.

2. Same; Automobiles § 46—

Where the evidence is insufficient to show that the place where the accident in suit occurred was a business district as defined by statute and there is evidence that the motorist in question was traveling in excess of 20 miles per hour, an instruction in regard to negligence in exceeding the speed limit within a "business district" must be held for prejudicial error.

3. Trial § 33—

An instruction upon a material matter not based on sufficient evidence is erroneous.

APPEAL by original defendants from *Pless, J.*, June Term, 1961, of BURKE.

Plaintiff instituted this action against Guy Mannering Penland (Penland) and Burke Farmers Co-operative Dairy, Inc. (corporate defendant), original defendants, to recover damages for personal injuries allegedly caused by their negligence.

Answering, said original defendants denied all allegations as to their negligence, alleging plaintiff's injuries were caused solely by the negligence of Joe Thomas Hurst (Hurst). They alleged further that, if negligence on their part was a proximate cause of plaintiff's injuries, which they denied, the negligence of Hurst was also a proximate cause thereof; and, upon their motion, Hurst was made an additional party defendant pursuant to G.S. 1-240. Although personally served, Hurst filed no pleading and did not appear at the trial.

On December 28, 1959, about 6:15 p.m., plaintiff, then engaged in a telephone conversation, was in a public telephone booth at the southeast corner of the intersection of Meeting and Sterling Streets in Morganton, North Carolina. A collision occurred within said intersection between a Dodge truck owned by the corporate defendant and operated by Penland and a Ford automobile operated by Hurst. As a result of said collision, the Dodge truck struck the telephone booth and thereby caused plaintiff's injuries.

It was stipulated that Penland, on the occasion of said collision, was the agent of the corporate defendant, then acting in the course and scope of his employment.

This is the factual background: Meeting Street, 40 feet wide, runs east-west. Sterling Street, 64½ feet wide, runs north-south. Prior to collision, the Dodge truck was proceeding east on Meeting Street and Hurst was proceeding south on Sterling Street. The collision occurred near the center of said intersection. The impact was between the right front of the Ford car and the left front of the Dodge truck. A traffic light, suspended over the center of said intersection, emitted light on four sides. When the lights for traffic on Meeting Street changed from green to caution to red, the lights for traffic on Sterling Street changed from red to green, and *vice versa.*

Plaintiff's allegations as to Penland's negligence included the following: Penland drove the Dodge truck "in excess of the maximum legal speed limit of twenty (20) miles per hour in the business district in the Town of Morganton, North Carolina," at and immediately prior

to said collision, and "entered into the said intersection when the traffic control light was not green and in fact was red." As to these matters, the original defendants alleged that Penland approached and entered said intersection at a slow rate of speed and when the traffic light facing him was green. The allegations of the original defendants as to Hurst's negligence included the following: Hurst approached and entered the intersection (1) when the traffic light facing him was red, (2) at excessive speed, and (3) after the Dodge truck was within said intersection.

Additional pertinent facts will be stated in the opinion.

The court submitted, and the jury answered, these issues: "1. Was the plaintiff, Marshall Eugene Black, injured by the negligence of the defendant, Guy Mannering Penland, as alleged in the Complaint? Answer: YES. 2. Was the plaintiff, Marshall Eugene Black, injured by the negligence of the defendant Thomas Hurst, as alleged in the Answer and cross action of the defendants Guy Mannering Penland and Burke Farmers Co-operative Dairy, Inc.? Answer: YES. 3. What amount, if any, is the plaintiff, Marshall Eugene Black, entitled to recover on account of his personal injuries? Answer: $10,000.00."

With reference to the second issue, the court instructed the jury, if it should answer the first issue, "Yes," then, "as a matter of law, and under the condition of the pleadings," it would answer the second issue, "Yes."

The court entered judgment (1) that plaintiff recover from said original defendants the sum of $10,000.00 and costs, and (2) that the original defendants "have judgment over and against" Hurst for $5,000.00 and one-half of the costs. The original defendants excepted and appealed, assigning errors.

Byrd & Byrd for plaintiff, appellee.
Patton & Ervin for original defendents, appellants.

BOBBITT, J. King Street runs north-south, parallel with Sterling Street and approximately "300 or 350 feet" west thereof. Penland, traveling east on Meeting Street, crossed its intersection with King and approached and entered its intersection with Sterling.

A witness for plaintiff testified he saw the Dodge truck traveling east on the portion of Meeting Street between King and Sterling, and in his opinion the speed of the Dodge truck was then "approximately 35." An investigating police officer, a witness for plaintiff, testified Penland said "he was doing approximately 22 miles an hour at the time he entered the intersection." Defendants' evidence tended to show the speed of the Dodge truck as it approached and entered the inter-

section of Meeting and Sterling Streets was 18-20 miles per hour. Suffice to say, the speed of the Dodge truck as it approached and entered said intersection was material in determining whether Penland was negligent.

Plaintiff pleaded and offered in evidence an ordinance of the Town of Morganton adopted December 6, 1954, and in force on December 28, 1959. Section 2 thereof provides: "It shall be unlawful for any person to operate a vehicle (defined in Section 1) in the Town of Morganton in excess of the following speeds: (a) 20 miles per hour in any business district. (b) 35 miles per hour in any place other than those named in Section 2(a)." The ordinance does not define the term "business district." With reference to speed "in any business district," the ordinance is in exact accord with G.S. 20-141(b) (1).

The court instructed the jury as follows: ". . . the court instructs you that if from the evidence you find, and find by its greater weight, that this was a business section, as the court has defined that for you, that the speed limit at that place would be 20 miles an hour; and if you find by the greater weight of the evidence that the truck was traveling at a speed greater than that, that that would constitute negligence in itself."

G.S. 20-38, in part, provides: "Definitions of words and phrases.—The following words and phrases when used in this article shall, for the purpose of this article, have the meanings respectively prescribed to them in this section, except in those instances where the context clearly indicates a different meaning:

"(a) Business District.—The territory contiguous to a highway where *seventy-five per cent or more of the frontage thereon* for a distance of three hundred (300) feet or more *is occupied by buildings* in use for business purposes." (Our italics)

A "business district" is determinable with reference to the status of the frontage on the street or highway on which the motorist is traveling. Conditions along intersecting streets or highways are excluded from consideration. *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406. Whether Meeting Street, between King and Sterling, was a business district, is determinable in accordance with the rules stated in *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585.

This is the evidence as to "(t)he territory contiguous to" Meeting Street, going west from Sterling to King. On the north side: A poolroom (facing Sterling) was at the Sterling corner. Behind the "pool place," there was "a little battery shop in a small filling station." Next, there was "a large vacant area where there (were) no structures." The only other buildings in the block were "at the upper-end—the First Baptist Church facing on King Street and the educational building facing on

Meeting." On the south side: The Medlock house, a rooming house, was at the Sterling Corner. Next, there was "the place" where a doctor lived and had his office. Next, there was a large vacant area with a "greenhouse" or "flower garden building" where plants and flowers were sold. Next, on the corner opposite the First Baptist Church, there was a rooming house. There was no evidence as to the frontage occupied by buildings in use for business purposes.

Under the rules stated in *Hinson v. Dawson, supra,* the evidence was insufficient to support a finding that Meeting Street, between King and Sterling, was a business district. "It is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous." *Childress v. Motor Lines,* 235 N.C. 522, 530, 70 S.E. 2d 558, and cases cited.

It is unnecessary to consider appellants' contention that the court's instructions as to what constitutes a "business district" were erroneous. A new trial must be awarded on the ground the evidence was insufficient to warrant any instruction in relation to Penland's negligence as to speed within a "business district."

While a new trial is awarded on the ground stated, it seems appropriate to direct attention to the fact that no ordinance of the Town of Morganton, providing for the regulation of traffic at the intersection of Meeting and Sterling Streets by means of an automatic signal control device, was pleaded or in evidence. In this connection, see *Smith v. Buie,* 243 N.C. 209, 213, 90 S.E. 2d 514, and cases cited, and *Wilson v. Kennedy,* 248 N.C. 74, 79, 102 S.E. 2d 459; also, G.S. 160-272 and G.S. 8-5.

New trial.

MARY ELSIE HODGE v. LEWIS PERRY, JR., ADMINISTRATOR OF THE ESTATE OF LEWIS PERRY, SR.

(Filed 22 November, 1961.)

1. Quasi-Contracts § 1—

In the absence of a special contract or prevalent custom that compensation for personal services should become due at a later date, the right to recover on an implied contract to pay for such services accrues as and when the services are rendered.

2. Executors and Administrators § 24b—

G.S. 1-52 bars the claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date

of decedent's death, G.S. 1-22, and the contention that the statute bars the claim for all services rendered more than three years prior to the institution of the action, is untenable.

3. Limitation of Actions § 9—

An action against the personal representative of a decedent on a claim which survives decedent's death may be maintained within one year after the issuance of letters of administration if the claim is not barred at the time of the decedent's death. G.S. 1-22.

APPEAL by defendant from *Carr, J.*, May Term, 1961, of WAKE.

Plaintiff instituted this action to recover for personal services rendered Lewis Perry, Sr., defendant's intestate, from early in 1952 until his death, in consideration of the decedent's promise to compensate plaintiff therefor. Defendant, by answer, denied plaintiff's material allegations; and, as to any alleged services rendered more than three years *before this action was instituted*, defendant pleaded the three-year statute of limitations (G.S. 1-52) in bar of plaintiff's right to recover.

The court submitted, and the jury answered, these issues: "1. Did the plaintiff render services to Lewis Perry, Senior, under an implied contract that she was to receive compensation for said services, as alleged in the Complaint? ANSWER: *Yes.* 2. What amount, if any, is the plaintiff entitled to recover of the defendant? ANSWER: *$4,290.00.*"

Judgment for plaintiff, in accordance with the verdict, was entered. Defendant excepted and appealed, assigning errors.

Bunn, Hatch, Little & Bunn for plaintiff, appellee.
J. B. Bilisoly for defendant, appellant.

BOBBITT, J. Careful consideration of each of defendant's twenty-one assignments of error fails to disclose error deemed sufficiently prejudicial to justify the award of a new trial.

However, assignments Nos. 12, 13, 14 and 16, based on exceptions to portions of the charge, merit discussion. All present the same question of law.

Decedent died May 19, 1959. Defendant qualified as administrator May 25, 1959. This action was instituted April 11, 1960.

The court instructed the jury that, if plaintiff was entitled to recover, she was entitled to recover the reasonable value of the services she rendered the decedent during *the three years immediately preceding his death.* Defendant contends this was error, asserting plaintiff's action was barred as to all services rendered more than *three years prior to the institution of this action.* Thus, under defendant's con-

tention, plaintiff's recovery would be limited to the period of two years, one month and eight days immediately preceding decedent's death.

We are not presently concerned with decisions such as *Stewart v. Wyrick*, 228 N.C. 429, 45 S.E. 2d 764, and cases cited therein, holding that, with reference to personal services rendered by A to B under an agreement that A is to be compensated therefor at the death of B, the statute of limitations does not begin to run during B's lifetime. Here, the court, in accordance with *defendant's* contention, held plaintiff's evidence insufficient to invoke this rule.

Disapproving a contrary suggestion in *Hauser v. Sain*, 74 N.C. 552, this Court, in *Miller v. Lash*, 85 N.C. 51, in opinion by *Smith, C.J.*, said: ". . . the unexplained fact of labor performed and extending over a series of years raises no implication that payment is to be made at any fixed period, unless perhaps annually, as controlled by a prevalent custom appropriate to the kind of service and entering into the contract, when it so appears in evidence. The implied promise is to pay for services as they are rendered, and payment may be required whenever *any are rendered;* and thus the statute is silently and steadily excluding so much as is beyond the prescribed limitation." This rule is restated and approved by *Stacy, J.* (later *C.J.*), in *Wood v. Wood*, 186 N.C. 559, 120 S.E. 194. Absent a special contract or prevalent custom that compensation was to become due at a later date, the implied promise was to pay for plaintiff's services as and when rendered.

In *Wood v. Wood, supra,* the trial judge instructed the jury that plaintiff's action was barred by the statute of limitations "for all time except the three years next preceding the death of defendant's intestate." Defendant calls attention to this excerpt from the opinion: "But as a general rule, when the statute of limitations is pleaded, plaintiff may not recover on a *quantum meruit* for services rendered more than three years next immediately preceding the commencement of her action." *Miller v. Lash, supra,* and *McCurry v. Purgason*, 170 N.C. 463, 87 S.E. 244, are cited in support of this statement. While a new trial was awarded on a different ground, the opinion suggests that the court's instructions may have caused the jury to award a larger amount than plaintiff was entitled to recover. There, as here, an appreciable time elapsed between the death of the decedent and the institution of the action against the administrator.

In *McCurry v. Purgason, supra,* the question presented was whether the plaintiff's cause of action accrued at decedent's death, as contended by plaintiff, or as and when the services were rendered, as contended by defendant. The plaintiff performed no services after December 12, 1910. The decedent died in January, 1915. In awarding a

new trial, this Court held, *inter alia,* if the plaintiff and the decedent on December 12, 1910, mutually abandoned their agreement, plaintiff's cause of action for services previously rendered then accrued; and that, since more than three years elapsed from December 12, 1910, until the institution of the action, plaintiff's right to recover, if the agreement was abandoned by mutual consent, was barred by the statute of limitations. However, in *McCurry,* if the three-year statute of limitations applied, plaintiff's right to recover was barred prior to the death of the decedent.

In *Edwards v. Matthews,* 196 N.C. 39, 144 S.E. 300, where a judgment for plaintiff was upheld, the *per curiam* opinion states: "Recovery was limited, under instructions of the court, to services rendered during three years immediately preceding the death of defendant's testator." Later, in *Brown v. Williams,* 196 N.C. 247, 251, 145 S.E. 233, *Clarkson, J.,* states: "We think the evidence should be submitted to the jury on the question of *quantum meruit* for the three years prior to the death of defendant's testator. *Edwards v. Matthews, ante,* 39."

In *Bank v. McCullers,* 201 N.C. 412, 414, 160 S.E. 497, the opinion begins with this statement: "Defendants were not permitted to show, as consideration for the deed in question, services rendered prior to 1 January 1925, upon the theory, we presume, that recovery for such services was thought to be limited to three years next immediately preceding the commencement of the action, or the death of Nellie Horne McCullers. *Wood v. Wood,* 186 N.C. 559, 120 S.E. 194; *Edwards v. Matthews,* 196 N.C. 39, 144 S.E. 300; *Miller v. Lash,* 85 N.C. 51. In this we think there is error. The action is not to recover for such services and there is no plea of the statute of limitations." Despite the holding that the statute of limitations was not involved, the quoted statement suggests a conflict in our decisions as to whether recovery for services is limited to the three years next preceding the commencement of the action or to the three years next preceding the decedent's death.

Here, if plaintiff had instituted an action against decedent immediately prior to his death, the statute of limitations would not have barred recovery for services rendered during the three years immediately preceding the institution thereof. Plaintiff's cause of action survived.

G.S. 1-22, in pertinent part, provides: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters

testamentary or of administration, provided the letters are issued within ten years of the death of such person."

It is noted that the statute now codified as G.S. 1-22 is not referred to in any of the above-cited cases.

"The general rule is unquestionably that when the 'statute of limitations once begins to run nothing stops it.' But the statute (Revisal, sec. 367) has made an exception where a party dies. It provides that if the debt is not barred at the time of the debtor's death, action can be brought against his personal representative (if the cause of action survive), though the period of limitation has then elapsed, if within one year after issuing of letters of administration." *Matthews v. Peterson,* 150 N.C. 134, 63 S.E. 721; *Irvin v. Harris,* 182 N.C. 656, 109 S.E. 871; s. c., 184 N.C. 547, 114 S.E. 818; *Humphrey v. Stephens,* 191 N.C. 101, 131 S.E. 383, and cases cited; *Winslow v. Benton,* 130 N.C. 58, 40 S.E. 840; *Benson v. Bennett,* 112 N.C. 505, 17 S.E. 432.

Having instituted this action against the administrator within one year after his qualification, plaintiff's right to recover is the same as if he had instituted the action against the decedent immediately preceding his death. The respective rights of the parties are fixed as of the date of decedent's death; and, in respect of the statute of limitations, the interval between decedent's death and the institution of the action has no legal significance.

The court below correctly ruled that plaintiff, if entitled to recover, was entitled to recover for the services rendered by her during the three years immediately preceding the decedent's death.

No error.

SIMEON AUGUSTUS WOOTEN, SR. v. JOSEPH L. RUSSELL

AND

SIMEON AUGUSTUS WOOTEN, JR., BY HIS NEXT FRIEND, JENNIE LANE WOOTEN v. JOSEPH L. RUSSELL.

(Filed 22 November, 1961.)

1. Automobiles § 17—

The failure of a motorist along a servient highway to yield the right of way to through traffic on a dominant highway is not negligence *per se* but is evidence of negligence and, when the proximate cause of a collision with a motorist entering the intersection along the dominant highway, is sufficient to support a verdict in favor of the motorist traveling along the dominant highway. G.S. 20-158.

2. Same—

The driver along the servient highway is required not only to stop before entering an intersection with a dominant highway but also to exercise due care to see that he may enter or cross the dominant highway in safety before entering thereon, and a motorist along a dominant highway is not under duty to anticipate that the motorist along the servient highway will fail to stop, but in the absence of anything which gives or should give notice to the contrary, may assume and act upon the assumption, even to the last minute, that the motorist along the servient highway will stop.

3. Negligence § 26—

Nonsuit may not be entered on the ground of contributory negligence unless plaintiff's evidence establishes contributory negligence as the sole reasonable inference, and nonsuit may not be entered upon this ground if differing and conflicting inferences can be drawn from the evidence.

4. Automobiles § 42g— Evidence held insufficient to establish contributory negligence as a matter of law on the part of motorist entering intersection from a dominant highway.

Where plaintiff's evidence tends to show that he was traveling at a lawful speed along a dominant highway, that he was a half block from an intersection with a servient highway when he saw defendant's vehicle approaching along the servient highway while it was some quarter of a block away from the intersection, that defendant's vehicle appeared to be stopping, that plaintiff decreased his speed, that the vehicles reached the intersection at approximately the same instant, and that plaintiff drove into the intersection in reliance on his assumption that defendant would stop, and upon first apprehending that a collision was imminent, turned to his right but did not have time to apply brakes or avoid the collision, *is held* not to establish contributory negligence as a matter of law on the part of plaintiff, defendant's evidence in conflict therewith, which was sufficient to take the case to the jury on defendant's cross-action, not being considered upon the motion to nonsuit plaintiff's case.

APPEAL by plaintiffs from *Phillips, J.*, March Civil Term 1961 of WILSON.

This litigation grows out of a collision of automobiles at the intersection of Vance and Bynum Streets in Wilson about 11:45 p.m. on 1 July 1960. Plaintiff Wooten, Sr., is the owner of a Mercury automobile kept as a family purpose car. At the time of the collision it was being operated by his son, plaintiff Wooten, Jr.

The Mercury car was traveling west on Vance Street. Defendant, owner and operator of a Chrysler automobile, was traveling north on Bynum Street. Vance is the dominant, Bynum the servient, street. This fact is indicated to operators of motor vehicles by stop signs on Bynum Street. In addition to the stop signs there is an overhead light in the center of the intersection. It flashes a red light to travelers on Bynum and a yellow light to those on Vance.

The father, alleging negligent operation of defendant's motor vehicle, brought his action for damages to the Mercury. The son sued for personal injuries sustained in the collision.

Defendant denied he was negligent. As an additional defense and for affirmative relief he pleaded the negligence of Wooten, Jr.

Plaintiffs replied to the counterclaim, denying negligence in the operation of the Mercury, and as an additional defense pleaded negligence of defendant as alleged in the complaints.

The cases were consolidated for trial. At the conclusion of plaintiffs' evidence, defendant's motion for nonsuit was allowed. Issues arising on defendant's counterclaim and the replies were submitted to the jury. The jury returned a verdict in conformity with defendant's contention. Judgment was entered on the verdict. Plaintiffs appealed.

Ruark, Young, Moore & Henderson and Moore & Moore for plaintiff appellants.

Lucas, Rand & Rose and Critcher & Gurganus for defendant appellee.

RODMAN, J. The first question for determination is: Should defendant's motion for nonsuit have been allowed? Young Wooten testified that defendant did not stop at the intersection as commanded by the stop signs. While a failure to stop and yield the right of way to traffic on the dominant highway is not negligence *per se*, G.S. 20-158, it is evidence of negligence, *S. v. Sealy*, 253 N.C. 802, 117 S.E. 2d 793; *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E. 2d 429; *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658; and, when the proximate cause of injury, is sufficient to support a verdict for plaintiff.

Defendant in his brief does not contend there was no evidence of his negligence. He insists the nonsuit was properly allowed because plaintiffs' evidence establishes his negligence contributing to the collision and the resulting damages. If so, it must be established by evidence from which only that inference can be drawn. If differing and conflicting inferences can be drawn, the jury must do so.

The law applicable to motorists on dominant and servient highways when approaching an intersection has been stated in numerous cases. It is said in *Peeden v. Tait*, 254 N.C. 489, 119 S.E. 2d 450: "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 an 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 of 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."

It is said in *Jordan v. Blackwelder, supra:* "This latter statute (G.S. 20-158) not only requires the driver on the servient highway or street to stop, but such driver is further required, after stopping, to exercise due care to see that he may enter or cross the dominant highway or street in safety before entering thereon." *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381; *Jackson v. McCoury,* 247 N.C. 502, 101 S.E. 2d 377; *Caughron v. Walker,* 243 N.C. 153, 90 S.E. 2d 305; *Smith v. Buie,* 243 N.C. 209, 90 S.E. 2d 514; *Loving v. Whitton,* 241 N.C. 273, 84 S.E. 2d 919; *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683.

Plaintiff's evidence fixes his speed at "about 35" m.p.h. It is not suggested that such a speed is unreasonable or prohibited. Plaintiff testified: "When I got about a half a block from the intersection of Vance Street and Bynum Street I saw the lights of the vehicle approaching so I took my foot off of the gas, instinctively, kind of, and as I approached the intersection he appeared to be stopping. He appeared to be stopping but he didn't stop and came on up there and I didn't have time to hit the brakes at all so I turned to the right to try to avoid the collision but as I turned, I turned kind of into the other street and as I turned in there I was struck on the left fender by Mr. Russell's car." Plaintiff and defendant each knew of the stop signs on Bynum Street.

Defendant testified that he was traveling about 10 m.p.h. If that be true and plaintiff's estimate of his speed and the approximate distance of the two automobiles from the intersection when first visible to each other is accurate, it is apparent that they would reach the intersection at approximately the same instant.

Plaintiff also said: "I saw the lights of the Russell car when I was about a half a block away from the intersection. I don't know how far I was when I saw the car. The Russell car was approaching the intersection but I couldn't see too far back up in the intersection. The Russell car was about a fourth of a block away from the intersection. I guess I was about a half a block away, yes sir. The Russell car appeared to be about a fourth of a block away from the intersection of Bynum Street when I first saw it. There is a house that is located in that intersection corner on the southeast that is very near the street line. I never did put on brakes. . . . I saw it coming out into the street and I knew I didn't have time to hit the brakes then. I saw it come out into the street. I didn't really have time to think exactly what I was going to do so I just turned right the first chance, the first time I saw there was going to be a collision."

True, defendant's version differs from that of plaintiff. He testified that he stopped at the intersection, looked down Vance Street, and seeing no traffic approaching, proceeded into the intersection, and when half or more than half way across the intersection, was struck by plaintiff, who was traveling at a speed estimated to be 55 m.p.h. But this differing picture painted by defendant requires a factual determination by a jury.

The court erred in allowing defendant's motion for nonsuit. It ruled correctly in refusing to nonsuit defendant's counterclaim.

Plaintiffs assign as error portions of the charge, but as they are entitled to a new trial on the issues raised by the pleadings, it is not necessary to discuss the asserted errors not apt to occur in another trial.

New trial.

EDGAR DENSON v. EDNA DENSON.

(Filed 22 November, 1961.)

1. Divorce and Alimony §§ 1, 26; Judgments § 24—

G.S. 50-3 providing that in an action for divorce the summons shall be returnable to the court of the county in which either the plaintiff or the defendant resides is *not* jurisdictional but relates to venue, and the jurisdictional requirement of G.S. 50-6 is met if the plaintiff has resided in this State for a period of six months preceding the institution of the action, and therefore a decree of divorce entered in an action in which defendant was personally served with summons may not be set aside on the ground of fraud upon the jurisdiction of the court merely because the action was instituted in a county other than plaintiff's residence.

2. Divorce and Alimony § 1; Pleadings § 29—

Where the complaint in an action for divorce alleges that plaintiff has been a resident of the State for more than six months prior to the institution of the action, the pleading does not raise a question of whether the plaintiff had been a resident of the county in which the action was instituted for the six-month period, and an issue as to the county of plaintiff's residence is inappropriate.

APPEAL by respondent Ola Kiser Denson from *Armstrong, J.*, June Term 1961 of DAVIDSON.

The plaintiff instituted an action for absolute divorce from the defendant in the Superior Court of Davidson County on 25 November 1959, on the ground that they had lived separate and apart for more

than two years next preceding the commencement of the action. Personal service was obtained on the defendant on 28 November 1959.

The cause came on for trial in the Superior Court of Davidson County on 25 January 1960 and the issue submitted as to residence reads as follows: "Has the plaintiff resided continuously in Davidson County, State of North Carolina, for more than six months next preceding the institution of this action?" This issue as well as the additional issues with respect to the marriage and as to whether plaintiff and the defendant had lived separate and apart for more than two years next preceding the commencement of the action, were all answered in the affirmative.

Judgment was entered on 25 January 1960, granting the plaintiff an absolute divorce from the defendant.

The plaintiff thereafter married Ola Kiser on 31 January 1960. Edgar Denson, plaintiff, died on 21 November 1960.

The defendant, Edna Denson, filed a motion on 20 January 1961 to set aside the judgment of divorce obtained by the plaintiff on 25 January 1960, on the ground, as the movant "is informed and believes, and upon such information alleges, that at the trial of this cause the plaintiff and another witness falsely swore under oath that the plaintiff had resided continuously in Davidson County for more than six months next preceding the institution of this action."

The motion was served on counsel of record for plaintiff who also appeared as counsel for Ola Kiser Denson, who, subsequent to the entry of the aforesaid judgment, married the plaintiff. The movant and her counsel and Ola Kiser Denson and her counsel appeared and offered evidence in the hearing below.

The court found certain facts, among them: (1) That the plaintiff had not resided in the County of Davidson at any time within twenty years prior to the institution of this action; (2) that the plaintiff and Ola Kiser Denson had been living as man and wife and in the same home in Forsyth County, North Carolina, continually since September 1958, until they married in 1960; (3) that on 10 May 1956, Ola Kiser and plaintiff caused to be executed to them a deed of conveyance in which the grantees were named as Edgar K. Denson and wife, Ola Denson; (4) that the plaintiff concealed from the court and the jury the fact that he actually was a legal resident of Forsyth County and that this act was deliberate and intentional due to his personal and real estate involvement with Ola Kiser, posing as his wife, Ola Denson.

Whereupon the court held as a matter of law that when the plaintiff caused the jury in Davidson County to answer affirmatively whether he was a resident of Davidson County, North Carolina, he perpetrated

a fraud upon the court which related to jurisdiction, making the judgment voidable.

Based on the findings of fact and conclusion of law, the court entered an order declaring the judgment theretofore entered in this cause a nullity.

Ola Kiser Denson, as respondent, moved to set aside the aforesaid order. The motion was denied. She excepted and appeals to the Supreme Court, assigning error.

Hayes & Hayes for appellee.
Phillips, Bower & Klass for appellant.

DENNY, J. An examination of the complaint filed in this action reveals that it was not alleged therein that plaintiff was a resident of Davidson County, but instead, "That the plaintiff is now and has been for more than six months a resident of the State of North Carolina * * *."

Therefore, the appropriate issue in light of the pleadings should have read: Has the plaintiff been a resident of the State of North Carolina for more than six months next preceding the commencement of this action? No issue as to whether the plaintiff was or was not a resident of Davidson County was raised by the pleadings.

It clearly appears from the evidence adduced in the hearing below that the plaintiff, Edgar Denson, at the time he instituted this action in Davidson County, North Carolina, was a resident of Forsyth County, North Carolina, and had been a resident thereof for several years immediately prior thereto.

Furthermore, no evidence was introduced in the hearing below tending to show that the plaintiff or any other witness on his behalf, testified at the trial in January 1960 that the plaintiff was a resident of Davidson County.

G.S. 50-6, in pertinent part, provides: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided *in the State* for a period of six months." (Emphasis added.)

In *Henderson v. Henderson,* 232 N.C. 1, 59 S.E. 2d 227, this Court said: "Under this statute (G.S. 50-6), in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years; and (2) the plaintiff, husband or wife, shall have resided in the State of North Carolina for a period of one year (now six months)."

The jurisdictional requirement as to residence under G.S. 50-6 is met by allegation and proof of residence within the State of North Carolina for a period of six months next preceding the commencement of the action.

In 27A C.J.S., Divorce, section 83, page 284, it is said: "With respect to the place within the state for bringing action, an action for divorce is a transitory, and not a local, action and, therefore, in some jurisdictions it may be instituted in any county of the state, subject to the right of defendant to require the prosecution of the action in a county prescribed by statute," citing *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391.

"As a general rule, statutory provisions with respect to the place for commencing divorce proceedings relate to venue only, * * *." 27A C.J.S., Divorce, section 83, page 298.

In the case of *Smith v. Smith, supra,* the plaintiff, a resident of Hertford County, instituted a divorce action in Martin County. Summons was served on the defendant, a nonresident of North Carolina, by publication. In affirming the lower court's denial of the motion to set aside the judgment of divorce, this Court, speaking through *Winborne, J.,* now *C.J.,* said: "The provision of the statute, G.S. 50-3, that in all proceedings for divorce the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, is not jurisdictional, but relates to venue, and may be waived. If an action for divorce be instituted in any other county in the State, the action may be tried therein, unless the defendant before the time of answering expires demands in writing that the trial be had in the proper county. See *Davis v. Davis,* 179 N.C. 185, 102 S.E. 270."

In *Davis v. Davis,* 179 N.C. 185, 102 S.E. 270, the plaintiff brought an action for divorce in Beaufort County, although he resided elsewhere in North Carolina. The defendant was served with process by publication. This Court held: "The first objection of the defendant to the validity and regularity of the decree of divorce is based on section 1559 of Revisal (now G.S. 50-3), which provides that 'In all proceedings for divorce the summons shall be returnable to the court of the county in which the applicant resides,' the defendant contending that this is jurisdictional.

"It is evident that the General Assembly did not so intend because it placed the section under the title of venue and not of jurisdiction, and nothing appears to show the purpose to take an action for divorce out of the general principle, which prevails, that any action brought in the wrong county may be removed instead of dismissing it, and that a failure to make the motion for removal is a waiver of the objection to the county in which it is brought."

Likewise, in *McLean v. McLean,* 233 N.C. 139, 63 S.E. 2d 138, we held: "The mere fact of instituting suit for divorce in a county other than that of plaintiff's residence would not be regarded as affecting the jurisdiction of the court over the action on proper service, but rather as affecting only the question of venue."

Defendant Edna Denson, movant here, was personally served with process in the divorce proceeding, and it does not appear from the record before us that she filed an answer to the complaint therein. Neither is it contended that any motion was made for change of venue before the time for answering expired.

The evidence offered in the hearing below in support of the movant's motion establishes unequivocally that the plaintiff had been a resident of North Carolina for more than six months next preceding the institution of his action. Therefore, conceding, as we must in light of the evidence, that the plaintiff had been a resident of North Carolina for the time required by statute prior to the institution of his action for divorce, it is immaterial whether he was a resident of Davidson, Forsyth, or some other county.

We hold that the evidence introduced in the hearing below and the facts found based thereon are insufficient to support a conclusion that the plaintiff perpetrated a fraud on the court with respect to his residence.

The court below committed error in entering the order setting aside the judgment in this action, and the same is

Reversed.

WILL L. POWELL, PLAINTIFF v. ERNEST OLIVER CLARK AND WIFE, MARY POWELL CLARK, DEFENDANTS.

(Filed 22 November, 1961.)

1. Appeal and Error § 1—

When plaintiff's evidence is sufficient to make out a case but a new trial must be awarded upon other exceptions, the Supreme Court may refrain from a discussion of the evidence in overruling defendant's exceptions to the denial of his motion for judgment as of nonsuit.

2. Automobiles § 38—

Testimony of a witness that the vehicle in question was traveling 55 to 60 miles per hour cannot be taken as evidence that the vehicle was traveling in excess of 55 miles per hour.

3. Automobiles § 46—

Where there is no evidence in the case upon which the jury can base

a finding that defendant's vehicle was being operated at a speed in excess of 55 miles per hour in violation of G.S. 20-141(b) (4), it is error for the court to charge the jury upon the law of this statute.

4. Automobiles § 15—

G.S. 20-146 is for the protection of occupants of other vehicles, pedestrians, and property on the highway, and is inapplicable in an action by a guest passenger to recover for injuries received when the driver lost control of the vehicle and as result thereof drove off the road, there being no evidence that any other vehicle or person or property upon the highway was in any way involved, and it being immaterial upon the question of proximate cause that after the driver lost control of the car it ran off the left rather than the right side of the road.

5. Automobiles § 46—

An instruction to the jury in regard to a safety statute must be held for error when such statute is inapplicable to the factual situation disclosed by the evidence or there is no evidence tending to show that a violation of such statute was a proximate cause of plaintiff's injuries.

6. Trial § 33—

An instruction in regard to an abstract proposition of law not presented by the evidence in the case must be held for prejudicial error.

APPEAL by defendants from *Pless, J.*, June Term, 1961, of BURKE.

On June 6, 1960, plaintiff suffered serious personal injuries when the 1960 Pontiac in which he was a passenger went off the highway to its left and down an embankment, thereafter traveling 400-500 feet and stopping 50-75 feet after striking a large rock.

Defendant Mary Powell Clark, plaintiff's daughter, was operating the 1960 Pontiac. She and her father were traveling in an easterly direction on the portion of the highway designated No. 64 and No. 70 between the Drexel intersection and Valdese. They had left Drexel about 10:00 a.m. for Winston-Salem where plaintiff's nephew (Mary Powell Clark's first cousin) was to graduate "as a doctor from Wake Forest College."

Plaintiff alleged that Mary Powell Clark "was driving said 1960 Pontiac automobile at a high and excessive rate of speed for the road conditions of US Highway 64 & 70, and was talking to plaintiff in a loud voice and negligently looked at him while so talking, and in so doing took her eyes off the road, and she negligently and carelessly lost control of the car and drove said car off the paved portion of the road on her right-hand side, and then the car was driven or it swerved out of control across said highway to Mary Powell Clark's left-hand side at an excessive rate of speed and left the highway . . ."

Plaintiff alleged Mary Powell Clark was negligent in that: (a) She failed to keep a proper lookout. (b) She drove carelessly and reckless-

ly in violation of G.S. 20-140. (c) She drove at a speed greater than was reasonable and prudent in violation of G.S. 20-141. (d) She failed to apply the brakes to bring the car to a stop or reduce its speed. (e) She failed to operate the car "on her right-hand one-half of the highway" in violation of G.S. 20-146. (f) She "took her eyes off the road while talking with plaintiff and failed to steer said car in such a manner so as to keep same on the traveled portion of the highway, and drove said car off the paved portion of the road, first on the right-hand side in the direction in which she was traveling, and then off the left-hand side and into the rock wall."

Plaintiff alleged the "said 1960 Pontiac automobile was owned by defendant, Ernest Oliver Clark, as a family purpose car and was frequently driven and used by defendant, Mary Powell Clark, for family purposes, said defendants being husband and wife and living in the same home, and on the occasion of this wreck and collision . . ., she was driving said car with the knowledge, authority and consent of her said husband, and as his agent, within the family purpose doctrine as the same pertains in North Carolina."

Defendants, by joint answer, denied all of plaintiff's said allegations; and, as further defenses, pleaded (1) the contributory negligence of plaintiff, (2) joint enterprise or adventure, and (3) unavoidable accident.

The only evidence was that offered by plaintiff.

The court submitted, and the jury answered, these issues: "1. Was the plaintiff injured by the negligence of the defendant, Mary Powell Clark, as alleged in the Complaint? Answer: YES. 2. Was the defendant, Mary Powell Clark, the agent of Ernest Oliver Clark at the time in question? Answer: YES. 3. What amount, if any, is plaintiff entitled to recover of the defendant(s)? Answer: $10,000.00."

Judgment for plaintiff, in accordance with the verdict, was entered. Defendants excepted and appealed, assigning errors.

John H. McMurray for plaintiff, appellee.
Patton & Ervin for defendants, appellants

BOBBITT, J. This Court is of opinion that the evidence, when considered in the light most favorable to plaintiff, was sufficient to require submission of the case to the jury. Hence, the assignment of error directed to denial of defendants' motion for judgment of nonsuit is overruled. Since a new trial is awarded for reasons stated below, we refrain from a discussion of the evidence presently before us. *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637.

The court instructed the jury, *inter alia,* that the law "requires that

an automobile shall be operated upon the right half of the highway" and "provides that an automobile shall not be operated on the open highway at a speed in excess of 55 miles per hour."

In final instructions on the first issue, the court said: "The plaintiff has the affirmative and positive burden of tipping the scales of your minds in his favor; that is, showing by the greater weight of the evidence that in the operation of the car, *either in exceeding the 55 miles per hour speed limit,* or in driving at a speed which was greater than was reasonable and prudent under the conditions then existing, or that in operating it, she did so in a reckless and heedless manner, at a speed and in a manner so as to endanger, or be likely to endanger, human life and property, *or that she drove the car on the wrong side of the road, that is, did not drive it on the right of the paved portion of the highway,* or that she failed to keep a lookout — her eyes in front and watching the road —, and in doing so, violated the rule of the reasonably prudent person, the court instructing you if he has proven *any one of those things* and proven it by the greater weight of the evidence and has further proven that that was the reason — the direct and immediate cause of injury to the plaintiff, then he would be entitled to prevail in this issue and you would answer that question we are discussing 'Yes.' " (Our italics)

Lowman testified that, in his opinion, the 1960 Pontiac "was running around 55 to 60 an hour" when it left the road. He testified further that, when it left the road, "it was going a little faster" than when he first observed it "because it's a downhill grade and naturally it would be picking up a little speed." There was no other evidence as to speed.

Lowman's testimony, taken in the light most favorable to plaintiff, amounts to no more than in his opinion the speed was 55 miles per hour. *Mitchell v. Melts,* 220 N.C. 793, 801, 18 S.E. 2d 406; *Hinson v. Dawson,* 241 N.C. 714, 721, 86 S.E. 2d 585. Hence, there was no evidence upon which the jury could base a finding that the 1960 Pontiac was being operated at a speed in excess of 55 miles per hour in violation of G.S. 20-141(b) (4).

As indicated above, the court instructed the jury that, if they found from the evidence and by its greater weight that the feme defendant "drove the car on the wrong side of the road, that is, did not drive it on the right of the paved portion of the highway," such conduct would constitute negligence.

G.S. 20-146, referred to in the complaint, is inapplicable to the factual situation under consideration. Its purpose is the protection of occupants of other vehicles then using the public highway and pedestrians and property thereon. Here, there is no evidence that any other

vehicle or person or property upon the public highway was in any way involved.

Unquestionably, the 1960 Pontiac proceeded some distance on the driver's left half of the highway. While they did not offer evidence, defendants alleged that, when the feme defendant was operating the 1960 Pontiac at a speed of approximately 40 to 45 miles per hour, the car suddenly became difficult to steer, began to pull sharply to the left, would not respond to the steering wheel, continued to pull to the left and left the road.

The gist of plaintiff's case is that the driver of the 1960 Pontiac, by reason of her negligence, lost control of the car and *thereafter* the car crossed her left half of the highway and went off the highway and down the embankment. If she lost control of the 1960 Pontiac, by reason of her own negligence or otherwise, the fact that the car went off the left rather than the right side of the road was not a proximate cause of plaintiff's injuries. Under the circumstances, the court's said instruction, apparently based on G.S. 20-146, was erroneous. A safety statute, such as G.S. 20-146, is pertinent when, and only when, there is evidence tending to show a violation thereof proximately caused the alleged injuries. *Farfour v. Fahad,* 214 N.C. 281, 199 S.E. 521.

"It is established by our decisions that an instruction about a material matter not based on sufficient evidence is erroneous. (Citations) And it is an established rule of trial procedure with us that an abstract proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury. (Citations)" *Childress v. Motor Lines,* 235 N.C. 522, 530, 70 S.E. 2d 558; *McGinnis v. Robinson,* 252 N.C. 574, 578, 114 S.E. 2d 365. We are constrained to hold that the instructions discussed above, in relation to the present factual situation, were erroneous and prejudicial. See *Lookabill v. Regan,* 245 N.C. 500, 96 S.E. 2d 421, and *McGinnis v. Robinson, supra.*

The questions raised by defendants' other assignments of error may not recur upon a new trial. Hence, particular consideration thereof upon the present record is deemed inappropriate.

New trial.

FRANCES BADHAM HOWARD; FANNIE BADHAM; BESSIE B. SMALL; SIDNEY BADHAM; MILES BADHAM; PENELOPE OVERTON; ALEXANDER BADHAM; CHARITY BADHAM; CHARLES BADHAM; SADIE B. HAWKINS; PAULINE B. TURNER; FRANK BADHAM; JAMES (JANIE) BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DECEASED. v. LONNIE BOYCE.

(Filed 22 November, 1961.)

1. Judgments §§ 25, 29—

Upon motion of only two of a number of plaintiffs to set aside a consent judgment or a judgment in retraxit on the ground that they had not authorized anyone to bring the suit for them, only movants and respondant-defendant are before the court seeking adjudication of their rights *inter se*, and upon evidence supporting movants' averments the court may adjudicate only that movants are not bound by the judgment and it is error for the court to adjudicate further with regard to rights of parties not before it on the motion and not seeking its aid.

APPEAL by Frances Badham Howard (Mrs. Martin L. Howard) from *Parker, J.*, May 1961 Term of CHOWAN.

This is the third appeal from judgments relating to the validity and effect of the judgment rendered in 1945 by the Superior Court of Chowan County in an action entitled as above. See *Overton v. Boyce*, 252 N.C. 63, 112 S.E. 2d 727, and *Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897. Following the remand directed in the opinion of *Moore, J.*, in *Howard v. Boyce, supra*, the motions of Penelope Overton and Alexander Badham were heard by Judge Parker.

Movants Overton and Badham offered evidence to support their allegations that they had not authorized anyone to bring suit for them against defendant Boyce for the purpose of determining ownership of the land described in the complaint. Frances Badham Howard, appellant, testified as a witness for movants. She testified: She employed Mr. Jennette; she verified the complaint which was filed; none of the heirs of Hannibal Badham, Sr. authorized her to employ counsel; Mr. Jennette sent her the amount paid by Boyce, less his fee; she did not distribute any portion of these funds to any of the other heirs.

Based on the evidence, Judge Parker found:

"FIFTH: That no person, other than Frances Badham Howard, named as plaintiffs, authorized Mr. J. W. Jennette, Attorney, to represent him, her or them, in the action commenced on October 26, 1944, and purportedly concluded by judgment before the Clerk of the Superior Court of Chowan County, dated July 13, 1945.

"SIXTH: That Frances Badham Howard authorized and understood the prosecution of the action purportedly determined by judgment before said Clerk of the Superior Court of Chowan County,

dated July 13, 1945, to have proceeded upon the theory of sole ownership and right to possession in her under a paper writing, allegedly a deed to her father, Hannibal Badham, Jr., and under a paper writing, allegedly a testamentary devise from Hannibal Badham, Jr., her father, to her, the said Frances Badham Howard, and that she had no authority to authorize, nor did she authorize said action on behalf of any other heir or heirs of Hannibal Badham, Sr., her grandfather.

"SEVENTH: That no additional evidence on the question of laches has been offered by respondents.

"EIGHTH: That no other related question has been raised requiring findings of fact and conclusions of law."

Based on these findings, he concluded as a matter of law that appellant "is legally bound by the judgment in said action commenced October 26, 1944, and concluded, insofar as her right, title and interest in and to the lands described in the complaint are concerned, by judgment entered before the Clerk of the Superior Court of Chowan County on July 13, 1945." Thereupon he adjudged "that movants' motion be and it is HEREBY ALLOWED and that said judgment in this cause entered before the Clerk of the Superior Court of Chowan County on July 13, 1945, in respect to all parties plaintiffs, other than Frances Badham Howard or Mrs. Martin L. Howard, be and the same is HEREBY SET ASIDE." Frances Badham Howard excepted to this judgment and appealed.

Samuel S. Mitchell, R. Conrad Boddie, Chance, Mitchell & Wells for plaintiff appellant.

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

RODMAN, J. Appellant has made no motion to vacate the judgment rendered in 1945, nor have any parties named as plaintiffs made such a motion except movants Penelope Overton and Alexander Badham. The only parties before the court seeking an adjudication of their rights at the May 1961 Term were movants Overton, Badham, and respondent Boyce. Their appearance, voluntary or by process duly issued and served, authorized the court to determine their rights *inter se*. The court had no power to declare or deny a right to one not seeking a determination of his rights. *Howard v. Boyce, supra; Peel v. Moore,* 244 N.C. 512, 94 S.E. 2d 491; *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26; *Johnson v. Whilden,* 171 N.C. 153, 88 S.E. 223; *Allred v. Smith,* 135 N.C. 443; *Loven v. Parson,* 127 N.C. 301; *Falls v. Gamble,* 66 N.C. 455.

The court, on the findings made, correctly adjudged that the judg-

ment rendered in 1945 was not binding on movants Overton and Badham. That was the only question it was called upon to decide. It exceeded its jurisdiction by adjudging rights of parties not before it and not seeking its aid.

The cause is remanded to the Superior Court of Chowan County with instructions to modify and correct Judge Parker's judgment to conform to this opinion.

Remanded for modification.

W. S. BOYD SALES COMPANY, INC. v. MARVIN WILSON SEYMOUR.

(Filed 22 November, 1961.)

Abatement and Revival § 3—

Where it appears that the action instituted by plaintiff in the Superior Court of one county is based upon the same cause of action as that of a prior action instituted in the Superior Court of another county of the State by the defendant in the second action against the plaintiff in the second action, the second action is properly dismissed upon plea in abatement, since the parties and the cause of action in both cases are the same. G.S. 1-127.

APPEAL by plaintiff from *Mintz, J.*, at July Assigned Civil Term 1961, of WAKE.

Civil action to recover for alleged breach of contract in respect to purchase by defendant Seymour from plaintiff Sales Company a certain Autocar Diesel Sleeper.

The record shows that the judgment from which this appeal is taken recites that "it appearing that this action was filed in the Superior Court of Wake County on May 4, 1961; that prior thereto an action entitled 'Marvin Wilson Seymour, plaintiff v. W. S. Boyd Sales Company, Incorporated, defendant' was on the first day of April, 1961, filed in the Superior Court of Currituck County; that the action filed in Currituck County is an action between the same parties for the same cause of action and in a court of like jurisdiction as the action filed in the court as above entitled; that this action is abated by the action which was prior brought and pending in Currituck County."

And thereupon it was ordered by the court that this action be and the same is hereby dismissed and stricken from the docket, — taxing the Boyd Sales Company with the costs.

The Sales Company excepts to the conclusions of the court and the judgment rendered, and appeals to the Supreme Court.

Bailey & Dixon for plaintiff appellant.
J. W. Jennette for defendant appellee.

WINBORNE, C.J. It will be noted that the complaint in the action in the Currituck County case is set out in the record on this appeal. Comparing it with the complaint in the action brought in the Superior Court of Wake County, it is seen that the two actions pertain to the same subject matter, as found by Judge Mintz. The parties named in the action in Wake County and those named in Currituck County are identical, and constitute actions between the same parties for the same cause. Both are in courts of like jurisdiction. Hence, this action in Wake County, having been brought subsequent to the action in Currituck County, abates. G.S. 1-127. See also *McDowell v. Blythe Bros.*, 236 N.C. 396, 72 S.E. 2d 860.

Decisions of this Court uniformly hold that the pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having jurisdiction. Therefore, the action of the Superior Court of Wake County in dismissing this action is

Affirmed.

N. E. BREWER COMPANY v. JOHN D. YARBROUGH AND YARBROUGH TRANSFER AND STORAGE COMPANY.

(Filed 22 November, 1961.)

Negligence §§ 24a, 25—

The pleadings and evidence in this case held to raise issues of negligence and contributory negligence with regard to whether the damage to plaintiff's backhoe when it ran off the side of defendants' trailer in loading operations resulted from negligence of defendants in providing a trailer with unsecured four by four timbers on its bed and whether plaintiff was contributorily negligent in providing an operator who was unfamiliar with the controls of that particular backhoe, causing him to lose control of the equipment as he was driving it upon the trailer.

APPEAL by plaintiff from *Crissman, J.*, May 29, 1961 Term of FORSYTH.

Plaintiff is a corporation engaged in construction work. It owns much heavy equipment, including a Lima backhoe. The backhoe is a steam shovel or ditching machine which is propelled on tracks similar

to those on a crawler tractor; it consists of tracks, a cab and a boom, and weighs 54,000 pounds. Corporate defendant is a motor carrier. Plaintiff contracted with the corporate defendant to move the backhoe from a point on Pennsylvania Avenue to Castle Heights in Winston-Salem, compensation for the service to be on a per-hour basis. Corporate defendant's equipment for this transportation consisted of a tractor and lowboy trailer. The lowboy trailer had a large flat bed which was about 2½ to 3 feet from the ground, and it had two sets of double wheels on each side. There were openings in the bed of the trailer above the wheels, and at times the tires extended through and above the bed up to five inches, depending on the weight of the load and the irregularity of the surface over which the trailer moved.

Plaintiff prepared a dirt ramp for use in loading the backhoe. On 3 January 1959 the corporate defendant sent its tractor and lowboy trailer to the loading site. The individual defendant, president of defendant corporation, accompanied the driver of the tractor-trailer to the loading site. They backed the lowboy up to the dirt ramp, and placed six timbers on the bed of the lowboy. The timbers were 4 by 4s, three feet long. They were not secured or fastened to the bed, but were laid loose and crosswise on the bed. The purpose of the timbers was to protect the trailer tires. An employee of plaintiff drove the backhoe up the dirt ramp and onto the bed of the lowboy a distance of about 12 feet, at which point the backhoe went off the right side of the trailer, turned over and was damaged. At the time the backhoe started off the trailer the tracks were entirely on the trailer bed. If the backhoe had proceeded on the trailer for 6 more feet it would have been in proper position for the moving operation.

This action is for recovery of damages for injury to the backhoe. Plaintiff alleges that the loading was under the supervision of defendants, that defendants were negligent in that they furnished a trailer with loose timbers placed thereon, that it was unsafe to load the backhoe on the trailer in this condition, that defendants insisted that the machine be loaded thereon notwithstanding and assured plaintiff it was safe to do so, that the loose timbers caused the backhoe to run off the trailer and the damage resulted. Defendants denied all of plaintiff's allegations of negligence, denied that they supervised the loading or had any responsibility with respect to the loading, alleged that plaintiff's employee, driver of the backhoe, was unfamiliar with its operating mechanism, and said employee's negligence in operating it was the cause of the damage, and pleaded contributory negligence.

There was evidence which tended to show: The driver of the backhoe noticed the loose timbers and asked the individual defendant if it was safe to "load on or to cross those timbers," and was told that de-

fendants had been using them all the time. The driver had had a great deal of experience in loading backhoes but had never loaded "on . . . timbers before." Others experienced in such operations had not seen loose timbers used. The tracks of the backhoe were wet and muddy. When the tracks reached the timbers, the timbers slipped, the machine turned to the right and fell off the trailer.

There was also evidence which tended to show: The driver of the machine was an experienced backhoe operator, but had operated this particular machine very little. The controls on this machine are different from those on the machine he customarily operated. The controls were at "neutral" which permitted the machine to go straight ahead. He did not touch the controls at any time after he started up the ramp. When the backhoe veered to the right he jumped off.

The jury for its verdict found defendants negligent and plaintiff contributorily negligent.

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

Deal, Hutchins and Minor, and Edwin T. Pullen for plaintiff, appellant.

Hudson, Ferrell, Petree, Stockton & Stockton and Norwood Robinson for defendants, appellees.

PER CURIAM. Upon the pleadings and evidence, issues arose for jury determination. The jury has decided these issues. The case was presented by the court to the jury upon proper issues and upon a charge free of error prejudicial to plaintiff. Plaintiff has failed to show any error sufficiently harmful to justify a new trial.

In the trial of the case, we find

No error.

STATE v. WILLIAM LARRY DANIEL, AND JERRY MITCHUM GULLEDGE.

(Filed 22 November, 1961.)

1. Automobiles § 84—

A warrant charging that defendant did, on a specified date, unlawfully and willfully engage in a speed competition on a public highway with another motor vehicle is sufficient to inform defendant of the offense with which he is charged and is adequate to protect him against further prosecution for the same offense.

2. Indictment and Warrant § 9—

A warrant which is sufficient to inform a person of the offense with which he is charged and which is adequate to protect him against further prosecution for that offense is sufficient. G.S. 15-153.

3. Automobiles § 84—

Evidence tending to show a prearrangement between defendants to race on the highway and that in engaging in such speed competition they operated their respective vehicles at an unlawful rate of speed is sufficient to support a verdict of guilty of violating G.S. 20-141(b).

APPEALS by defendants from *Hooks, S.J.*, April 1961 Term of CABARRUS.

Defendants were tried and convicted in the Recorder's Court of Cabarrus County on warrants which charged the named defendant, on or about 18 March 1961, "unlawfully, wilfully and feloniously did operate a motor vehicle upon the public highways of North Carolina and did willfully engage in speed competition with another motor vehicle in Vio. G.S. 20-141.3 against the form of the Statute in such cases made and provided . . ." They appealed to the Superior Court. There the cases were consolidated for trial. The jury found defendants guilty. After the verdict defendants moved in arrest of judgment, contending the warrants failed to charge a criminal offense, merely charging two unrelated noncriminal acts. The motion was overruled. Judgment was entered on the verdict. Defendants appealed.

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

B. W. Blackwelder for defendant appellants.

PER CURIAM. The record does not disclose any challenge to the warrant in the Recorder's Court nor in the Superior Court until after the verdict. G.S. 20-141.3(b) makes it "unlawful for any person to operate a motor vehicle on a street or highway wilfully in speed competition with another motor vehicle." We think there can be no doubt that defendants understood the warrants to charge a violation of this statute. A warrant sufficient to inform a person of the offense with which he is charged and adequate to protect him against further prosecution for that offense is sufficient. G.S. 15-153; *S. v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133.

Defendants' motion for nonsuit was properly overruled. The evidence was adequate to support the verdict because sufficient to show a prearrangement between defendants to race on the highway, reaching a speed of 55 m.p.h. in a 35 m.p.h. speed zone. The case was submitted to the jury on a charge to which no exception was taken.

No error.

WILLIAM W. JOHNSON AND LOIS F. JOHNSON, TRUSTEE v. A. GLENDON JOHNSON.

(Filed 22 November, 1961.)

1. Appeal and Error § 21—

In the absence of exceptions to the court's findings of fact an appeal from the judgment entered by the court upon such findings presents only whether the findings support the order and whether error of law appears upon the face of the record.

2. Appeal and Error § 35—

The court will not take notice of matters appearing in another pending action between the parties when no part of the record in the other action is included in the record on appeal.

APPEAL by defendant from *Mintz, J.*, July 1, 1961, Civil Term, WAKE Superior Court.

This civil action was instituted by the plaintiffs on May 12, 1961, for the alleged purpose of dissolving Standard Homes Company, a partnership in which the parties hereto owned the following interests: William W. Johnson, 55 per cent; Lois F. Johnson, Trustee, 20 per cent; and A. Glendon Johnson, 25 per cent. The dissolution was prayed for upon the alleged ground that A. Glendon Johnson had violated the terms of the partnership agreement by attempting to assert control, direction, and management of the business and by refusing to perform the personal services which the partnership agreement required; and that the defendant's interference seriously embarrassed the management and jeopardized the success of the business. The plaintiffs prayed for an order of dissolution of the partnership and appointment of a receiver to dispose of it as a going concern and to account to the partners according to their respective interests.

The defendant filed a long, detailed answer, admitting in part and denying in part the allegations of the complaint. After hearing on June 16, 1961, Judge Carr made detailed findings of fact, entered an order dissolving the partnership, and appointed a temporary receiver. The defendant excepted and gave notice of appeal. He was allowed 60 days to serve his case. Thereafter, on July 28, 1961, after further hearing, Judge Mintz entered an order making the receivership permanent and enjoining the parties from interfering with the receiver's management of the business. The order provided: ". . . (this) order is entered without prejudice to the rights of the parties in another action pending in this court entitled *'A. Glendon Johnson v. William W. Johnson, et al.'*, it being S. D. No. 14614."

The defendant excepted and appealed.

Robert A. Cotten, Dupree, Weaver, Horton & Cockman, By: F. T. Dupree, Jr., for plaintiffs, appellees.

A. Glendon Johnson, Pro Se, defendant, appellant.

PER CURIAM. The defendant does not challenge by exception any finding of fact made either by Judge Carr or Judge Mintz. The appeal, therefore, presents the question whether the findings support the orders and whether error of law appears upon the face of the record. The findings and the pleadings support the orders. No error of law appears.

The defendant, by brief and oral argument, insists this Court take notice of the issues raised in another civil action referred to in the order of Judge Mintz as S. D. 14614. No part of the record in that case is included in the record now before us. Reference to it is meaningless. The order entered by Judge Mintz provides it is without prejudice to the defendant's rights in the other case.

Affirmed.

MARY P. FOWLE v. DR. WILLIS H. FOWLE, III, DR. E. D. SHACKLEFORD AND DR. THORNTON H. CLEEK.

(Filed 22 November, 1961.)

Physicians and Surgeons; Libel and Slander § 9; Insane Persons § 1—

Allegations that defendant physicians did not examine plaintiff but nevertheless filed affidavits pursuant to G.S. 122-42 stating that they had carefully examined plaintiff and believed her to be a fit subject for admission in a hospital for the mentally disordered *is held* not to state a cause of action for wilful negligence but for libel, and the cause of action for libel is properly dismissed, the statements being absolutely privileged.

APPEAL by plaintiff from *Gwyn, J.*, 10 April 1961 Civil Term of RANDOLPH.

Civil action to recover damages for the detention of plaintiff for 24 days in a state hospital for mentally disordered persons arising out of a judicial proceeding under Article 3, Chapter 122, General Statutes of North Carolina, heard on a joint written demurrer filed by defendants Dr. E. D. Shackleford and Dr. Thornton H. Cleek.

This demurrer was sustained, and plaintiff appeals.

Ottway Burton and Linwood T. Peoples for plaintiff, appellant.

Jordan, Wright, Henson & Nichols By: Charles E. Nichols for Dr. E. D. Shackleford and Dr. Thornton H. Cleek, defendants, appellees.

PER CURIAM. These are the essential allegations of plaintiff's complaint, so far as this appeal is concerned:

On 28 January 1960 the defendant Dr. Willis H. Fowle, III maliciously and wrongfully instituted proceedings before the clerk of the superior court of Randolph County under the provisions of G.S. Ch. 122, Art. 3, to have plaintiff, his wife, committed to a state hospital for the mentally disordered. The clerk acting under the provisions of G.S. Ch. 122, Art. 3, directed Dr. E. D. Shackleford and Dr. Thornton H. Cleek, who are practicing medical doctors in Asheboro, Randolph County, to examine plaintiff to see if a state of mental disorder exists. Dr. Shackleford and Dr. Cleek did not examine plaintiff, but signed false affidavits to the effect that they had carefully examined plaintiff, and believed her to be suffering from a mental disease and to be a fit subject for admission in a hospital for the mentally disordered. As a result of the wilful, wrongful and concurrent acts of all the defendants the clerk of the superior court of Randolph County on 28 January 1960 committed plaintiff to Umstead State Hospital for the Insane. Plaintiff was not mentally disordered, nor in need of medical treatment. After her confinement in Umstead State Hospital for the Insane for 24 days, she was released therefrom in a habeas corpus proceeding by Judge Hamilton H. Hobgood, who found as a fact that she was being improperly restrained of her liberty. As a result of her unlawful restraint she is entitled to recover from all the defendants actual and punitive damages.

The joint written demurrer of Dr. E. D. Shackleford and Dr. Thornton H. Cleek alleges that the complaint does not state facts sufficient to constitute a cause of action against them, and specifies their ground of objection.

Plaintiff contends in her brief that she has alleged a case of wilful negligence against Drs. Shackleford and Cleek. With that contention we do not agree. The nature of plaintiff's allegations and charges against Dr. Shackleford and Dr. Cleek is that of libel consisting of false statements in their affidavits. Such statements by these two physicians in the due course of a judicial proceeding, which were material to the inquiry, are absolutely privileged, and cannot be made the basis of an action for libel, even though given with express malice and knowledge of their falsity. The judgment below sustaining the demurrer filed by Dr. E. D. Shackleford and Dr. Thornton H. Cleek is affirmed upon the authority of *Bailey v. McGill*, 247 N.C. 286, 100 S.E. 2d 860, and *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248, which are directly in point and controlling.

Affirmed.

GLADYS V. NEWMAN v. HOME LIFE INSURANCE COMPANY.

(Filed 22 November, 1961.)

Insurance § 16—

Insurer is entitled to cancel a policy of group insurance for failure of the employer to pay the premium, and an employee may not thereafter recover on his certificate notwithstanding that the employer has deducted from his salary his pro rata part of the premium.

APPEAL by plaintiff from *Gwyn, J.*, February 6, 1961, Civil Term, RANDOLPH Superior Court.

The plaintiff instituted this action before a justice of the peace to recover her hospital expenses beginning April 2, and ending April 8, 1960. The plaintiff claimed the liability arose by reason of the defendant's Group Hospital Expense Policy No. GH-1900, issued to Smart Style, Inc., the plaintiff's employer. The plaintiff incurred hospital expenses of $183.35 for treatment beginning April 2, 1960. The justice of the peace rendered judgment for the plaintiff for the amount of her claim. The defendant appealed to the superior court.

In the superior court the parties waived jury trial. Judge Gwyn found these facts: The policy was issued on December 15, 1959. It required Smart Style, Inc., to make monthly premium payments in advance. These payments were made on December 15, 1959, and January 15, 1960. Smart Style, Inc., failed to make any payments thereafter. The policy terminated at the end of a 30-day grace period, or on March 17, 1960.

The plaintiff had elected to participate in the group plan and her employer, Smart Style, Inc., deducted from her salary her proportionate part of the premium due on the policy and continued to make the deductions through April 1, 1960. The plaintiff had no notice of her employer's failure to pay the premiums as the policy required. Judge Gwyn entered judgment for the defendant, from which the plaintiff appealed.

Ottway Burton, Linwood T. Peoples, for plaintiff, appellant.

Bryant, Lipton, Strayhorn & Bryant, By: F. Gordon Battle, for defendant, appellee.

PER CURIAM. The group policy was a contract between the insurance company and the employer. The plaintiff was a third party beneficiary. Her right against the insurance company terminated at the end of the grace period by reason of the failure on the part of her

employer to keep the contract alive by paying the required premium. Although the plaintiff paid her employer, who defaulted, her recourse is not against the insurance company.

The judgment of the superior court is

Affirmed.

DAVID LLOYD WICKER v. NELLIE GRACE YOW WICKER.

(Filed 22 November, 1961.)

Divorce and Alimony § 14; Judgments § 30—

In a proceeding in *habeas corpus* to determine the right of custody of the children of the marriage as between husband and wife, a finding by the court that the wife had not committed adultery with any person is not *res judicata* on the question in a subsequent action by the husband for divorce on the ground of adultery, it being required that in an action for divorce the ground for relief must be found by a jury. G.S. 50-10.

APPEAL by defendant from *Carr, J.*, (on motion) at August 1961 Criminal Term, of LEE.

Civil action for absolute divorce on ground of adultery.

Plaintiff alleged, among other things, that on or about the 15th day of February, and on various other dates, the defendant committed adultery with a specified party, and that because of these adulterous acts, he is entitled to an absolute divorce.

Defendant denied the material allegations of the complaint, and alleged, as a further answer and defense, that the issues raised in this action— specifically defendant's alleged acts of adultery— were raised, tried, and determined in defendant's favor in a previous case, which case was appealed to Supreme Court and reported in *In Re Wicker*, 253 N.C. 431, 117 S.E. 2d 13.

Whereupon, the defendant moved for a hearing on the plea in bar of *res judicata*.

Upon consideration of the stipulations of the parties and of the evidence offered, the court below was of the opinion that the order entered in the previous action is not *res judicata* to this action and therefore ordered that this action be tried upon its merits.

Defendant objects thereto and appeals to Supreme Court, and assigns error.

Hoyle & Hoyle, Pittman, Staton & Betts for plaintiff appellee.

Gavin, Jackson & Williams for defendant appellant.

PER CURIAM. The previous action, a *habeas corpus* proceeding to determine the custody of the children of the marriage involved in the instant case, was heard by the trial judge who, sitting without a jury, found as a fact, among other things, that Nellie Grace Yow Wicker had not committed adultery with any person, and entered judgment in accordance therewith.

G.S. 50-10 requires that, in a divorce action, the material facts as to the grounds for divorce must be found by a jury. *Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617.

Thus, it is patent that the order entered in the *habeas corpus* proceeding based on facts found by the trial judge is not *res judicata* to this action for divorce upon the ground of adultery.

Hence, the order from which appeal is taken is

Affirmed.

ROSA ELLA D. WHITTINGTON, EMPLOYEE, PLAINTIFF, v. A. J. SCHNIERSON & SONS, INC., EMPLOYER, AND EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, CARRIER, DEFENDANTS.

(Filed 22 November, 1961.)

Master and Servant § 60—

An injury sustained by an employee while going to or from work does not arise in the course of his employment and is not compensable when the employer is not under contractual duty to transport employee to or from work or furnish the means of transportation as an incident of the contract of employment.

APPEAL by plaintiff from *Bone, J.*, May 29, 1961, Term of RANDOLPH.

Plaintiff filed claim with the Industrial Commission for an award of compensation for injury by accident, which she alleges arose out of and in the course of her employment by A. J. Schnierson & Sons, Inc.

Plaintiff was an employee of Schnierson. She worked from 7:00 A.M. to 3:35 P.M. On 11 December 1958 it began to snow and the "floor boss" came around and told plaintiff and other employees to go home before the weather got so bad they would be unable to get home. Plaintiff left the plant about 12:00 noon. At this hour she had no means of conveyance to her home — she customarily rode with others who worked elsewhere in town. Her employer (Schnierson) provided no transportation for its employees either to or from work and had not contracted to provide transportation for them; each employee pro-

vided his or her own transportation. On the day in question plaintiff arranged to ride home in the car of a fellow employee. Because of the condition of the road to plaintiff's home they took another route. Plaintiff got out of the car about 1/2 mile from her home with the intention of walking the remaining distance. As she got out of the car her feet slipped and she fell. As a result of the fall her hip was broken. She was hospitalized and has not been able to work since the accident.

The Hearing Commissioner concluded that the injury did not arise in the course of plaintiff's employment and denied compensation. Upon appeal to the Full Commission the opinion and award of the Hearing Commissioner was affirmed. Plaintiff appealed to Superior Court and that court affirmed the opinion and award of the Full Commission.

Plaintiff appealed to Supreme Court and assigned errors.

Ottway Burton and Linwood T. Peoples for plaintiff.
Walser & Brinkley and Charles H. McGirt for defendants.

PER CURIAM. It has been repeatedly declared by this Court that an injury sustained by an employee while going to or from work does not arise in the course of his employment and is not compensable unless the employer is under a contractual duty to transport employee or furnishes the means of transportation as an incident of the contract of employment. *Smith v. Gastonia,* 216 N.C. 517, 5 S.E. 2d 540; *Lassiter v. Telephone Co.,* 215 N.C. 227, 1 S.E. 2d 542; *Dependents of Phifer v. Dairy,* 200 N.C. 65, 156 S.E. 147.

The judgment of the court below is

Affirmed.

STATE v. CARL WESTMORELAND.

(Filed 22 November, 1961.)

Husband and Wife § 22; Parent and Child § 8—

In a prosecution for wilful abandonment of his wife by defendant without providing her adequate support and his wilful failure to provide adequate support for his children, an instruction which does not require a finding that defendant's acts were wilful in order to sustain the conviction, must be held for prejudicial error.

APPEAL by defendant from *Sink, E.J.,* June 1961 Term of RANDOLPH.

Defendant was tried and convicted in the Recorder's Court of Ran-

dolph County on a warrant which charged (1) wilful abandonment of his wife without providing her with adequate support and (2) wilful failure to provide adequate support for his children. He appealed to the Superior Court where he was tried on the original warrant. From a verdict of guilty and judgment imposing prison sentence defendant appealed.

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

L. T. Hammond and J. Harvey Luck for defendant appellant.

PER CURIAM. The criminal offenses charged are defined by statute, G.S. 14-322. By express language the abandonment and failure to support must be wilful to create criminal offenses. *S. v. Hall,* 251 N.C. 211, 110 S.E. 2d 868; *S. v. Gibson,* 245 N.C. 71, 95 S.E. 2d 125; *S. v. Lucas,* 242 N.C. 84, 86 S.E. 2d 770. The court, in charging the jury, made defendant's guilt turn on the adequacy of the support provided without requiring a finding that defendant acted wilfully. This omission of an essential ingredient of the crime entitles defendant to a New trial.

SADIE MAE WILLIAMS, PLAINTIFF, AND ROY LEE WILLIAMS, ADDITIONAL PLAINTIFF, V. DON BRYCE MILLER AND BENNIE DENNIS MILLER, DEFENDANTS.

(Filed 22 November, 1961.)

APPEAL by defendants from *Gwyn, J.,* May Term, 1961, of ROWAN.

Civil action growing out of a collision between a 1957 Mercury, owned by plaintiffs and operated by plaintiff Sadie Mae Williams, and a 1955 Mercury, owned by defendant Bennie Dennis Miller and operated by defendant Don Bryce Miller. It was admitted that Bennie Dennis Miller was liable, under the family purpose doctrine, for the actionable negligence, if any, of his minor son, Don Bryce Miller, then sixteen years of age.

The collision occurred on the Greensboro Road (Old Highway #29), approximately one and one-half miles north of Lexington, about 4:00 p.m. on March 18, 1960. Prior to collision, both cars had proceeded north on said highway, the Williams car ahead of the Miller car. The highway was approximately eighteen feet wide. It had no marked center line. The collision occurred in a 35-mile speed zone.

Plaintiffs' evidence, in substance, tended to show: Upon reaching the crest of a hill, Mrs. Williams put on her signal for a left turn and proceeded slowly a distance of one hundred feet or more until she reached the point where she was to turn left into a private driveway. While doing so, she looked in her rear vision mirror but saw no car approaching from the rear. In attempting to make the left turn, she had barely crossed the center of the highway when the left front fender and bumper of the Williams car was struck by the right rear fender of the Miller car. Skid marks made by the Miller car started on the right side of the highway and extended to the point of collision. At the scene of collision, the driver of the Miller car stated, *inter alia*, that he did not see the Williams car; that he was traveling approximately fifty miles an hour; and that "he was going that fast because he was in a hurry to get home."

Defendants' evidence as to what occurred on the occasion of the collision consisted of the testimony of Don Bryce Miller, the driver of the Miller car. His testimony, in substance, tended to show: The Williams car, when he first saw it, was parked on the side of the road, "half on the road and half off." Mrs. Williams gave no signal for a left turn. He was proceeding on his right side of the highway. As he started to pull around the Williams car, Mrs. Williams "started to turn in this driveway on the left." He put on brakes and skidded. His speed was "around 35 or 40." He denied the statements attributed to him by witnesses for plaintiffs.

Issues of negligence and contributory negligence, raised by the pleadings, were answered in favor of plaintiffs; and the jury awarded damages for personal injuries sustained by Mrs. Williams and for damage to the Williams car.

Judgment for plaintiffs, in accordance with the verdict, was entered. Defendants excepted and appealed, assigning errors.

George R. Uzzell and Robert M. Davis for plaintiffs, appellees.
Linn & Linn for defendants, appellants.

PER CURIAM. Defendants strongly and ably contend that the court erred in overruling their motion for judgment of nonsuit in that (1) plaintiffs' evidence establishes that Mrs. Williams was contributorily negligent as a matter of law, and (2) there was a fatal variance between plaintiffs' allegations and proof. However, after careful consideration of the pleadings and evidence, the conclusion reached is that defendants' said motion was properly overruled.

Careful consideration of each of the assignments of error brought forward and discussed in defendants' brief fails to disclose any error

of law deemed of sufficient prejudicial 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 decisions of this Court. No new question of law is involved. Hence, it would serve no useful purpose to discuss each of defendants' assignments of error in detail.

No error.

LILLIAN RUTH McCLAIN v. ALEXANDER HALEY.

(Filed 22 November, 1961.)

APPEAL by plaintiff from *Fountain, Special Judge,* February Special Civil Term 1961 of CABARRUS.

This is a civil action instituted by the plaintiff against the defendant, in Iredell County, North Carolina, to recover for personal injuries and property damages allegedly sustained in a collision between an automobile owned and operated by the plaintiff and an automobile owned and operated by the defendant, in the City of Kannapolis, North Carolina, on 19 December 1958. Summons was issued and served on the defendant on 13 October 1959. Thereafter, counsel for defendant and his insurance carrier moved for a change of venue. Plaintiff's counsel consented to the change and on 19 December 1959 an order was entered transferring the case to Cabarrus County.

On 27 January 1961 a judgment by default and inquiry was entered by the Clerk of the Superior Court of Cabarrus County and the case was transferred to the Civil Issue Docket and calendared for trial the week of 8 February 1961.

The attorney for defendant, upon receiving a copy of the calendar of the Superior Court of Cabarrus County for the week of 8 February 1961, prepared an answer which was duly verified and filed on 4 February 1961. Defendant's counsel was notified from the office of plaintiff's attorney on 6 February 1961 that a default judgment had been taken on 27 January 1961.

Motion was made to set aside said judgment on the ground of inadvertence, oversight, and excusable neglect on the part of the defendant's counsel. The court heard the motion and found facts to the effect that neither the defendant nor his insurance carrier had been guilty of negligence; that the negligence of the defendant's attorney

was excusable; and that the defendant has a meritorius defense to the action. The court set aside the default judgment.

Plaintiff appeals, assigning error.

Ann Llewellyn McKenzie for plaintiff.
John H. Small for defendant.

PER CURIAM. The negligence of an attorney, although inexcusable, if not imputable to the litigant may still be cause for relief. *Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902.

In the hearing below, the court found that neither the defendant nor his insurance carrier had been guilty of negligence; that the negligence of defendant's counsel was excusable; and that the defendant has a meritorious defense to the action.

The judgment of the court below is

Affirmed.

MARVIN HUSSEY v. BENSON CRAIG YORK AND ATTRESS JANET KIDD
AND
ARLENE HUSSEY v. BENSON CRAIG YORK AND ATTRESS JANET KIDD.

(Filed 22 November, 1961.)

APPEAL by each plaintiff from *Gwyn, J.,* at April Civil Term, 1961, of RANDOLPH.

Two civil actions instituted in Superior Court of Randolph (1) by plaintiff in No. 529 for recovery for personal injuries growing out of automobile collision allegedly caused by the negligence of defendants, and (2) by plaintiff in No. 530 for recovery of property damage.

Defendants, answering, deny negligence and plead contributory negligence of plaintiffs.

The two cases were consolidated for trial.

Upon the trial in Superior Court, the plaintiff in each case and the several defendants in each case offered evidence, and the cases were submitted to the jury upon identical issues (except as to names) under the charge of the court.

The jury in each case answered the issue as to negligence of defendants, and as to contributory negligence of plaintiff, in the affirmative, and awarded no damages.

From judgment in accordance therewith the respective plaintiffs

except and appeal to Supreme Court, filing separate appeals, and assign error.

Ottway Burton, Linwood T. Peoples for each plaintiff appellant.
Coltrane & Gavin for defendants appellees.

PER CURIAM. In Supreme Court the two appeals were heard as one,— plaintiffs assigning many errors based upon exceptions taken in the course of the trial.

However, careful consideration of the evidence offered fails to reveal error of a prejudicial nature sufficient to require disturbing the verdict of the jury as rendered.

As to No. 529— No error.

As to No. 530— No error.

STATE v. JOHN MARTIN HOSKINS.

(Filed 22 November, 1961.)

APPEAL by defendant from *Preyer, J.*, at May Term, 1961, of MOORE.

Criminal prosecution upon a bill of indictment charging John Martin Hoskins with the crime of involuntary manslaughter on the 12th day of January, in the year of our Lord 1961, and with force and arms at and in the county aforesaid, did "unlawfully, willfully, and feloniously kill and slay one Melaine Jean Cook, contrary to statute in such case made" etc.

Plea: Not guilty.

This case arose out of a collision between an automobile operated by defendant traveling upon a highway and an automobile operated by the deceased, Melaine Jean Cook, which entered the highway from a side road.

Upon the trial in Superior Court both State and defendant offered evidence.

The case was submitted to the jury under the charge of the court.

Verdict: Guilty.

Judgment: That defendant be confined in the Central Prison for a period of not less than three nor more than four years.

Defendant excepted thereto and appeals therefrom to Supreme Court, and assigns error.

Attorney General Bruton, Assistant Attorney General Ralph Moody for the State.

H. F. Seawell, Jr. for defendant appellant.

PER CURIAM. For conviction the State invokes and relies upon the principle of culpable negligence proximately resulting in the death of the decedent. However, the evidence, considered in the light most favorable to the State, fails to make out a case.

Culpable negligence has been the subject of uniform decisions of this Court. It suffices here to cite *S. v. Cope,* 204 N.C. 28, 167 S.E. 456, where in opinion by *Stacy, C.J.* (1933), the decisions of this Court were assembled and the principles defined and distinguished from actionable negligence in the law of torts.

Moreover, further collaboration to like effect is to be found in opinion of *Parker, J.,* in *S. v. Roop, ante,* 607, (1961). On the authority of principles enunciated in these cases and many more of like tenor, the defendant is entitled to an acquittal. Hence, the motion of defendant for judgment as of nonsuit should have been allowed.

Reversed.

F. G. WHITENER v. NAN G. WHITENER.

(Filed 22 November, 1961.)

APPEAL by defendant from *Fountain, S.J.,* February 1961 Term of CABARRUS.

Plaintiff instituted this action for an absolute divorce on the ground of two years separation. G.S. 50-6. Defendant answered and counterclaimed for alimony without divorce (G.S. 50-16), alleging that plaintiff wrongfully and wilfully abandoned her.

At the trial the evidence was conflicting as to whether or not plaintiff had wilfully abandoned defendant. Plaintiff testified that the separation was by mutual consent. There was also a conflict of evidence as to whether or not plaintiff had contributed to defendant's support after the separation.

Appropriate issues were submitted to the jury and were answered in favor of plaintiff. Judgment was entered granting plaintiff an absolute divorce.

Defendant appealed.

Williams, Willeford & Boger for plaintiff.
Robert C. Llewellyn for defendant.

PER CURIAM. There are nine assignments of error. We have carefully examined and considered each of them. We find no error sufficiently prejudicial to justify this Court in disturbing the judgment entered. The questions raised on appeal involve no novel or unusual legal matters.

In the trial of the cause we perceive
No error.

STATE v. GLENN JERNIGAN.

(Filed 29 November, 1961.)

1. Crime Against Nature—

The crime against nature is a felony in this jurisdiction. G.S. 14-177.

2. Criminal Law § 13—

The Superior Court is a court of general State-wide jurisdiction, and has final jurisdiction of all felonies committed within this State. G.S. 7-63.

3. Same—

A valid warrant or indictment is an essential of jurisdiction.

4. Crime Against Nature—

An assault is not an essential element of the crime of sodomy when the indictment does not allege that the offense was committed on an unwilling human being, nor is it a less degree of that crime, and therefore a defendant charged with committing the crime against nature with a woman cannot be convicted upon such warrant of an assault upon the woman.

5. Criminal Law § 154—

An appeal itself will be taken as an exception to the judgment and raises the question whether error of law appears upon the face of the record.

6. Criminal Law § 16—

Where a defendant is brought before a municipal-county court upon a warrant charging a felony, such court having the power in such instance only to bind defendant over for trial in Superior Court, the municipal-county court has no jurisdiction to convict defendant on such warrant of a misdemeanor which is not a less degree of the crime charged, and its imposition of a suspended sentence for such misdemeanor and its order thereafter activating the suspended sentence for condition broken, are nullities.

7. Criminal Law §§ 18, 136—

The jurisdiction of the Superior Court on appeal from a municipal-county court is derivative, and therefore when a municipal-county court has no jurisdiction to enter an order activating a suspended sentence for condition broken, the Superior Court acquires no jurisdiction by an appeal.

8. Criminal Law § 139—

When lack of jurisdiction appears upon the face of the record, the Supreme Court will *ex mero motu* vacate and set aside the proceeding.

9. Criminal Law § 26—

A conviction of defendant of an offense without a valid warrant or indictment charging such offense does not preclude the State from thereafter proceeding against defendant upon a valid warrant or indictment.

10. Criminal Law § 137—

Where the record of a municipal-county court shows that "defendant entered a plea of probable cause hearing" to a warrant charging a felony, the cause must be remanded to that court for a correction of its record to show whether defendant waived a preliminary hearing, or, if defendant did not waive such hearing, for the court to hold such preliminary hearing.

APPEAL by defendent from *Gambill, J.*, February 1961 Term of GUILFORD, Greensboro Division.

Appeal from a judgment putting into effect a suspended sentence.

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

Lawrence Egerton, Jr., for defendant, appellant.

PARKER, J. Defendant on 18 March 1960 was brought before the municipal-county court, criminal division, of Guilford County, for trial on a warrant charging him on 12 February 1960 at and in Guilford County, near the South Drive-In Theatre in Greensboro, with having committed the abominable and detestable crime against nature with a woman, specified by name in the warrant, in violation of G.S. 14-177. The record proper in that court signed by Z. H. Howerton, Jr., the presiding judge, shows the following occurred: "The defendant entered a plea of Probable Cause Hearing to the above offense, and, upon hearing the evidence, the court rendered a verdict of Guilty (Assault on Female)." Whereupon, the judge imposed a sentence of two years imprisonment, and suspended the imprisonment for five years upon certain specified conditions, one of which was that "defendant shall not communicate with the prosecuting witness by

telephone or mail, or by any other means, and shall not molest the prosecuting witness in any way."

On 20 January 1961 the court issued a capias to bring the defendant before it for determination of whether he had willfully violated the condition of the suspended sentence above set forth. Upon such hearing the court found as a fact that he had, and activated the sentence of imprisonment. Defendant appealed to the superior court.

Judge Gambill heard *de novo* the question whether defendant had willfully violated the condition of the suspended sentence above set forth, made detailed findings of fact, found that he had, and activated the sentence of imprisonment. Whereupon, defendant appealed to the Supreme Court.

Defendant in his brief makes the following contentions: He was brought before the municipal-county court, criminal division, of Guilford County, charged in a warrant with having committed the crime against nature, a violation of G.S. 14-177, a felony. He entered a plea of probable cause hearing to the offense charged, and when he did, the court should have bound him over to the superior court of Guilford County for trial on that offense. But instead of doing this, the court heard evidence, "rendered a verdict of guilty" of an assault on a female, which it had no jurisdiction to do because he was charged with no such offense. That such action by the court was void for lack of jurisdiction, and as the court had no jurisdiction "to render a verdict" that he was guilty of assault on a female and to sentence him for such an offense, the superior court, whose jurisdiction was derivative on his appeal, had no jurisdiction. He contends the case should be remanded to the municipal-county court.

The municipal-county court, criminal division, of Guilford County, is a court of limited jurisdiction, and has no final jurisdiction over felonies committed within its territorial jurisdiction. 1955 Session Laws, Chapter 971, Section 3(a), (b), (1). Section 3, (b), (3), of this statute gives this court authority to hear and bind over to the superior court persons charged with having committed a felony within its territorial limits upon a finding by it of probable cause of guilt. Section 4, Rule 15, of the above statute, provides: "In all cases heard by the judges of the court as committing magistrates in any case where the court does not have final jurisdiction, and in which probable cause of guilt is found," the defendant shall be bound over to the next succeeding criminal term of the superior court of Guilford County, Greensboro Division.

The crime against nature in this jurisdiction is a felony. G.S. 14-177.

The superior court is a court of general, state-wide jurisdiction,

and has final jurisdiction of all felonies committed within the territorial limits of the State. G.S. 7-63.

A valid warrant or indictment is an essential of jurisdiction. *S. v. Thornton*, 251 N. C. 658, 111 S.E. 2d 901; *S. v. Wallace*, 251 N.C. 378, 111 S.E. 2d 714; *S. v. Strickland*, 243 N.C. 100, 89 S.E. 2d 781; *S. v. Thorne*, 238 N.C. 392, 78 S.E. 2d 140; *S. v. Morgan*, 226 N.C. 414, 38 S.E. 2d 166; *S. v. Beasley*, 208 N.C. 318, 180 S.E. 598.

The warrant here specifies in detail the facts of the crime charged, which is sodomy. "Assault is an element of the offense of sodomy only when perpetrated on an unwilling human being, and is not an element if the other person consents or when the offense is committed with a beast. Likewise, the offense of sodomy may be committed without compulsion or force." 81 C.J.S., Sodomy, Section 1, (2). The warrant here does not aver that the woman therein named was unwilling, or that compulsion or force was used, or that an assault was committed upon her.

An assault upon a woman is not a less degree of the crime of sodomy charged in the warrant here. See G.S. 15-170; *S. v. Savage*, 161 N.C. 245, 76 S.E. 238.

The municipal-county court "rendered a verdict" the defendant is guilty of an assault upon a female, and imposed sentence upon him without a warrant, or a waiver thereof, and without a plea by defendant to such an offense, or the intervention of a jury. Speaking directly to such a point, this Court said in *S. v. Alston*, 236 N.C. 299, 72 S.E. 2d 686: "The record indicates that the judgment was pronounced and entered without warrant or indictment, or waiver thereof (G.S. 15-140), and without arraignment, plea, or the intervention of a jury. It necessarily follows, then, that the judgment is void. This is conceded by the State. The judgment will be vacated and set aside. Of course, the Solicitor may send a bill, if so advised."

"An appeal will be taken as an exception to the judgment and raises the question as to whether error in law appears upon the face of the record." *S. v. Corl*, 250 N.C. 252, 108 S.E. 2d 608.

It appears here upon the face of the record proper that the municipal-county court had no jurisdiction "to render a verdict" the defendant is guilty of an assault on a woman, to impose a sentence of imprisonment upon him suspended on certain conditions, and to activate the sentence of imprisonment upon a finding that he had willfully violated a condition of the suspended sentence, and that such action by that court was void. The jurisdiction of the superior court on the appeal here is derivative, and since the municipal-county court had no jurisdiction in respect to the offense of an assault on a woman in this

case, as above set forth, and all its proceedings in that respect are void, the superior court had no jurisdiction to activate the suspended sentence, and such action on its part is void. *S. v. White,* 246 N.C. 587, 99 S.E. 2d 772; *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267.

Where a lack of jurisdiction appears upon the face of the record, as it does here, this Court, even in the absence of a motion, will *ex mero motu* vacate and set aside the proceedings done when there is no jurisdiction. *S. v. Wallace, supra; S. v. Ivey,* 230 N.C. 172, 52 S.E. 2d 346; *S. v. Morgan, supra.*

The judgment of the superior court activating the suspended sentence is vacated and set aside, and the superior court will remand the case to the municipal-county court with directions that it shall vacate and set aside its "rendering of a verdict" that the defendant is guilty of an assault upon a woman, its imposition of a sentence of imprisonment upon him for such an offense suspended upon certain conditions, and its activation of such sentence of imprisonment upon a finding that he had willfully violated a condition of its suspension.

However, the State, if it so desires, may proceed against the defendant in the municipal-county court for an assault upon the woman named in the warrant here upon a valid warrant. *S. v. Wallace, supra; S. v. Strickland, supra.* Jeopardy attaches only when, *inter alia,* a defendant is tried upon a valid warrant or indictment. *S. v. Beasley, supra; S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537.

The record proper in the municipal-county court states that the judge "rendered a verdict of guilty" of an assault on a female. This is an infelicitous and inaccurate choice of words, for the word "verdict" means the answer of the jury concerning any matter of fact submitted to them for trial. *S. v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564; *Bartlett v. Hopkins,* 235 N.C. 165, 69 S.E. 2d 236; 89 C.J.S., Trial, Section 485 (a).

When the case is remanded to the municipal-county court, and, pursuant to the law set forth in this decision, it vacates and sets aside all its proceedings done in respect to assault on a woman, the defendant will be confronted with the warrant charging him with having committed a crime against nature, in violation of G.S. 14-177. The record proper from the municipal-county court shows that on 18 March 1960 "the defendant entered a plea of Probable Cause Hearing" to the above warrant. We are not certain what these quoted words mean. If in fact the defendant waived a preliminary hearing on this warrant, the municipal-county court will correct its records to show such waiver, and bind the defendant over to appear at the next succeeding criminal

term of the superior court of Guilford County, Greensboro Division, on the warrant charging him with having committed the crime against nature. It is universally recognized that a court of record has the power and duty to supply defects in its records, and to make its records speak the truth. *S. v. Cannon*, 244 N.C. 399, 94 S.E. 2d 339. If the defendant did not waive a preliminary hearing on such charge, then the municipal-county court will have a preliminary hearing on the warrant charging defendant with having committed the crime against nature in accordance with law.

Reversed and remanded with directions.

JANE VIRGINIA ANDREWS PHILBRICK, INDIVIDUALLY AND AS ADMINISTRATRIX, C. T. A. OF THE ESTATE OF WILLIAM J. ANDREWS, DECEASED, AND MARTHA ANDREWS WING v. AUGUSTA ANDREWS YOUNG.

(Filed 29 November, 1961.)

1. Judgments § 6—

A court has the power upon a proper showing to correct its record and supply an inadvertent omission. G.S. 2-16(9).

2. Wills § 8; Public Officers § 8—

It is the duty of the clerk of the Superior Court in discharge of the statutory requirements to keep books in which wills and the proof thereof are recorded, G.S. 2-24(11), to record the dissent of the widow when filed, and when he records such dissent with the will there is a presumption that the instrument was the act of the widow, and done within the time and in the manner required by law.

3. Wills § 60; Evidence § 11—

Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court is established by evidence, an interested party may testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. G.S. 8-51.

APPEAL by respondent Augusta Andrews Young from *Sharp, S.J.*, February 1961 Special Civil Term of WAKE.

Petitioners Philbrick and Wing, in August 1960, filed a petition with the clerk of the Superior Court alleging: Petitioners and respondent were the heirs at law of William J. Andrews, who died in 1943. He devised all of his property to his widow Augusta, who was also named

as executrix. She refused to qualify. The will was probated on motion of petitioner Philbrick, who qualified as administratrix c.t.a. The widow, now dead, filed her dissent when the will was probated or shortly thereafter. The records of the court do not show that the written dissent was the act of the widow or the date when it was filed. Petitioners pray that the court records be amended and corrected to declare the genuineness of the paper and the date of filing.

Respondent denied the paper appearing of record and in the files of the court was the act of the widow or, if her act, that the dissent was filed within six months from probate of the will.

The clerk, upon the evidence offered, found Mrs. Andrews, the devisee, "appeared in person before the Clerk of the Superior Court of Wake County on April 20, 1943, entered her written Dissent to the Will of William J. Andrews, and the Dissent was duly filed in said office on April 20, 1943." He further found: "The then Clerk . . . inadvertently failed to enter upon the original Dissent the date of filing and to show by whom it was filed." Based on these findings he ordered that the records be amended *nunc pro tunc* to speak the truth. Respondent excepted and appealed to the Superior Court. Judge Sharp reviewed the evidence. She affirmed the clerk's findings and the judgment based thereon. Respondent excepted and appealed.

Mordecai, Mills & Parker for petitioner appellees.
Armistead J. Maupin for respondent appellant.

RODMAN, J. The power of a court upon a proper showing to correct its records and supply an inadvertent omission cannot be doubted. G.S. 2-16(9); *Trust Co. v. Toms,* 244 N.C. 645, 94 S.E. 2d 806; *S. v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339; *Foster v. Woodfin,* 65 N.C. 29.

Appellant recognizes the power of the court to correct its records. Her challenge to the judgment is based on the assertion that there is no competent evidence to support the court's findings.

Our statute law as it existed in 1943 (G.S. 30-1) provided: "Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court."

To support their allegations petitioners offered in evidence the court jacket containing the original will to which was attached the proof and order of the clerk dated 20 April 1943 establishing the paper writing as the will of William J. Andrews. In the jacket with the will and

probate was a paper writing purportedly signed by the widow. This paper is sufficient in form to comply with the statute permitting a widow to dissent. Petitioners offered will book P, p. 121. There the will, the evidence taken by the clerk to establish it as such, and the order of probate are recorded. Below these the paper purporting to be Mrs. Andrews' dissent is recorded. Page 121 of the will book is devoted exclusively to matters relating to the will of Mr. Andrews.

Clerks of the Superior Court are required by statute to keep books in which wills and the proof thereof must be recorded, G.S. 2-42(11). Subsection 19 requires the clerk to keep a cross-index showing the parties interested in the estate of the testator.

While the statute merely requires the filing of the dissent, it is, we think, the duty of the clerk to record the dissent when filed. Here the clerk did so. This recording created the presumption that the instrument was the act of the widow done in the time and manner required by law. *Jones v. Saunders,* 254 N.C. 644, 119 S.E. 2d 789; *Freeman v. Morrison,* 214 N.C. 240, 199 S.E. 12; *Poplin v. Hatley,* 170 N.C. 163, 86 S.E. 1028. But petitioners were not content to rely upon the presumption which arose by the recordation of the dissent. They offered the testimony of a court employee. She testified: "I have an independent recollection of a dissent being filed in this estate. . . . I remember that Mrs. Andrews came into the office and I not being able to sign it I took it up to Mr. Mordecai's office and it was completed there. . . . I do not know when it was. It wasn't too long after the Will was put on record, though. . . . Mrs. Andrews signed the dissent. I did not have to sign it. . . . I had to take it up to Mr. Mordecai for his advice as to just what to do with it." Mr. Mordecai, referred to by the witness, was the clerk in 1943.

Mr. Smith, attorney for Mrs. Andrews, testified that Mrs. Andrews acted on his advice in dissenting from the will. She was a creditor of her husband's estate. The debt owing her was secured by mortgages or deeds of trust on certain of his real estate. Other creditors had taken judgments against him and these had been docketed, but they were subsequent to the registration of the mortgage. Mr. Smith testified that he feared a failure to dissent might constitute an election by the widow to take under the will and a waiver of her right as a mortgage creditor, thereby subordinating her rights to the rights of the judgment creditors. This witness was unable to fix the date when the dissent was filed, but he identified a mortgage or deed of trust securing Mrs. Andrews which might be subordinated to the claims of judgment creditors if she did not dissent. This deed of trust, by marginal entry, showed foreclosure and a conveyance of the property there described to the widow on 16 July 1943. The foregoing evidence was sufficient to

support the finding that the dissent was genuine and the factual inference that the dissent was filed within six months from the probate of the will.

Petitioner Philbrick testified specifically to the date when the dissent was filed. She said that she went to the office of the clerk to qualify as administratrix c.t.a. and to offer the will for probate. The record shows this was 20 April 1943. Her mother went with her to the office of the clerk. The witness then, over the objection of respondent, testified that she saw her mother on that date file the dissent in the clerk's office. Respondent insists the evidence was incompetent because prohibited by G.S. 8-51. This witness was not offered for the purpose of proving Mrs. Andrews' execution of the dissent. That fact and the fact of delivery by Mrs. Andrews to the court had been established by other evidence. Mrs. Philbrick's testimony was offered to fix the time when the act was done. It was competent for that purpose. *Abernathy v. Skidmore,* 190 N.C. 66, 128 S.E. 475; *Collins v. Lamb,* 215 N.C. 719, 2 S.E. 2d 863; *Wilder v. Medlin,* 215 N.C. 542, 2 S.E. 2d 549; *In re Mann,* 192 N.C. 248, 134 S.E. 649; *Johnson v. Cameron,* 136 N.C. 243.

Affirmed.

JAMES LESTER WOODRUFF v. SONNY TABOR HOLBROOK, THOMAS JEFFERSON BILLINGS, CARL DEAN COTHREN AND WINFORD STANLEY SPICER.

(Filed 29 November, 1961.)

Automobiles § 54f—

Evidence that the injury was caused by the negligent operation of a vehicle, carrying a specified North Carolina license plate, but further that such license plate was issued for a car of a different color and different motor number, is insufficient to raise the presumption of agency as against the person to whom such license plate was issued and those alleged to have been engaged in a joint enterprise with him.

APPEAL by plaintiff from *Crissman, J.,* February 20, 1961, Civil Term, FORSYTH Superior Court.

Civil action to recover damages for the plaintiff's injuries resulting from an automobile collision at the intersection of 25th and North Liberty Streets in Winston-Salem. According to plaintiff's allegations, he entered the intersection in obedience to a green traffic light, operating a 1951 Oldsmobile carefully and at a lawful rate of speed, when

the defendant, Sonny Tabor Holbrook, negligently, carelessly, and at an excessive and dangerous rate of speed, and in violation of the traffic light, drove a 1950 Oldsmobile "owned by the defendant or under the control of the defendant," into the intersection, colliding with the plaintiff's vehicle, lawfully in the intersection, causing damage and injury, etc. Plaintiff alleged that at the time of the accident, July 10, 1959, the 1950 Oldsmobile driven by the defendant Holbrook was registered in the name of the codefendant Carl Dean Cothren; that "a short time prior to the collision the codefendant Winford Stanley Spicer made a purported transfer of title to the 1950 Oldsmobile to one of his codefendants; that each of the codefendants was full owner—or owned said vehicle jointly with one or more of his codefendants."

The plaintiff further alleged that at the time of the accident, ". . . defendant Holbrook was agent and employee of each of his codefendants, . . . in the furtherance of the business of each of his codefendants in the illegal transportation of nontaxpaid whiskey." In effect, the plaintiff alleged the defendants acted in concert before and after the wreck, juggling the title to the vehicle involved therein in order to prevent the identity of the vehicle they were using in the illegal liquor business.

The defendant Holbrook did not answer. Judgment by default and inquiry was entered against him and later the inquiry was executed in favor of the plaintiff. The codefendants filed separate answers denying all material allegations of the complaint. Billings and Spicer alleged that prior to April 22, 1959, Billings transferred a 1950 two-door grey Oldsmobile, motor No. 8A331861H to Spicer in exchange for a 1953 Chevrolet. They denied that the Oldsmobile was involved in the wreck or that either of the codefendants ever had any interest in the vehicle driven by Holbrook.

The plaintiff's evidence disclosed the 1950 grey Oldsmobile involved in the wreck bore motor No. V-722034 and North Carolina license No. NX 713. The plaintiff offered and the court excluded records of the Department of Motor Vehicles that a 1950 green Oldsmobile, motor No. 8A331861H was registered in the name of the codefendant Billings and that license plate No. NX 713 was issued to the defendant Billings for that vehicle.

At the close of all the evidence the court entered Judgments of nonsuit against the defendants Billings, Cothren and Spicer. The plaintiff appealed.

Elledge & Mast, By: Archie Elledge, Clyde C. Randolph, Jr., for plaintiff, appellant.

Womble, Carlyle, Sandridge & Rice, By: I. E. Carlyle and H. G. Barnhill, Jr., for Thomas Jefferson Billings, defendant, appellee.

Deal, Hutchins and Minor, By: Fred S. Hutchins, for Winford Stanley Spicer, defendant, appellee.

W. G. Mitchell, Kurt R. Conner, for Carl Dean Cothren, defendant, appellee.

HIGGINS, J. The plaintiff sought to make out a case against the appellees by showing the *grey* 1950 Oldsmobile, motor No. V722034, involved in the accident was the property, as he alleges, "of one or all the defendants who were jointly engaged in the illicit liquor traffic." To establish ownership the plaintiff sought to introduce in evidence the Department of Motor Vehicles records showing license plate No. NX 713 for 1959 was issued to Billings and the vehicle was subsequently transferred to Spicer, then to Cothren. The plaintiff argues that under G.S. 8-37 the license plate on a motor vehicle tends to show the ownership of the vehicle. In this case, however, the document which identifies license plate NX 713 as having been issued to Billings also shows it was issued for a *green* Oldsmobile, motor No. 8A33816H, a vehicle different from the *grey* Oldsmobile operated by Holbrook at the time of the wreck.

The evidence tends to show that Holbrook was operating his vehicle upon the highway with a license plate issued "for a motor vehicle other than the one on which used." G.S. 20-63(f). If his operation was "wilful" he would be guilty of a misdemeanor. Guilt would also attach to anyone who knowingly aided and abetted the unlawful use of the plate. The tendered records identify Billings, Spicer and Cothren in succession with the ownership of the green automobile, motor No. 8A33816H. Although the license plate at all times remains the property of the State, it should have been transferred to each new owner. G.S. 20-63. The physical attachment of the license plate to Holbrook's grey Oldsmobile is not, of itself, sufficient to charge either Billings, Spicer or Cothren when the record shows that plate should have been on a different vehicle.

The plaintiff, aside from the records tendered and excluded, did not make out a case. The records, if admitted, would have shown the plate had been attached to the wrong vehicle, by whom we may only guess. The nonsuit as to each appellee is

Affirmed.

AVERY BODENHEIMER, v. NATIONAL FOOD STORES, INC., AND GREENSBORO COCA-COLA BOTTLING COMPANY.

(Filed 29 November, 1961.)

Negligence § 37f—

Plaintiff's evidence tended to show that she stood upon the apron of a display rack and removed a carton of soft drinks from the top of the rack, that she did not see any loose bottles about the rack, and that when she stepped back a bottle struck the floor near her feet, breaking and causing injury. *Held:* The evidence is insufficient to overrule defendants' motions to nonsuit.

APPEAL by plaintiff from *Olive, J.*, February 20, 1961, Civil Term, GUILFORD Superior Court — High Point Division.

This civil action was instituted in the Small Claims Division of the High Point Municipal Court upon the following allegations: "Plaintiff on August 5, 1960, while invitee of defendant, sustained injury, loss of earnings, and medical expenses by reason of defendant's improper and negligent stacking of soft drink bottles, one of which fell to the floor and shattered, resulting in broken glass imbedding itself in plaintiff's ankle."

The National Food Stores, Inc., the original defendant, entered a general denial, pleaded contributory negligence of the plaintiff, and upon its motion had the Greensboro Coca-Cola Company made codefendant upon the allegation that the codefendant owned the display case upon which the cartons of coca cola were stacked by it in the original defendant's self-service grocery store.

The plaintiff testified she stood upon the apron of the display rack, removed a carton containing six bottles of Coca Cola from the top, and about the time she stepped down on the floor a bottle struck the floor near her feet, shattered, and imbedded particles of glass in her ankle. She did not observe loose bottles on the rack or in any of the cases and did not know where the bottle came from. The time was 7:00 p.m., August 5. The store was well lighted.

The defendant introduced evidence that the display rack was 4 feet, 4 inches high and that cartons when placed thereon tilted against the back in a secure position, from which customers served themselves. Employees were on duty and it was their custom to make inspections throughout the store to guard against hazards. The evidence disclosed the display rack was safe for the purpose and was in approved and in general use.

The judge of the municipal court found the issues of negligence in favor of the bottling company but against the store. It found, however, the issue of contributory negligence against the plaintiff. From the judgment dismissing her action, she appealed to the superior court.

In the superior court judgment of nonsuit was allowed at the conclusion of the plaintiff's evidence. She appealed.

Schoch and Schoch, By: Arch K. Schoch, for plaintiff, appellant.

James B. Lovelace, for defendant Greensboro Coca Cola Bottling Co., appellee.

Charles W. McAnally, for defendant National Food Stores, Inc., appellee.

PER CURIAM. The plaintiff failed to present any evidence from which actionable negligence against either defendant may be inferred. She and no one else was at the display rack at the time the bottle fell. Where it came from she does not know. She did not see any loose bottles about the rack. If she could not see it, there is nothing to indicate the management was negligent in failing to discover it. The judgment of nonsuit is

Affirmed.

GLORIA GRAVER, PLAINTIFF v. ROY CHARLES RUNDLE, ROBERT LEE WYRICK, AND ROSE M. BREWER, DEFENDANTS

AND

DANIEL S. MILLER, PLAINTIFF v. ROY CHARLES RUNDLE, ROBERT LEE WYRICK, AND ROSE M. BREWER, DEFENDANTS

AND

ERVIN T. MILLER, PLAINTIFF v. ROY CHARLES RUNDLE, ROBERT LEE WYRICK, AND ROSE M. BREWER, DEFENDANTS

AND

WILSON D. MILLER, PLAINTIFF v. ROY CHARLES RUNDLE, ROBERT LEE WYRICK, AND ROSE M. BREWER, DEFENDANTS.

(Filed 29 November, 1961.)

APPEALS by plaintiffs from *Olive, J.*, April 17, 1961, Civil Term, of GUILFORD.

Four personal injury actions, consolidated for trial, growing out of collisions that occurred July 31, 1959, about 8:00 p.m., on U. S. Highway No. 29, a short distance north of Greensboro, N. C.

The paved portion of this two-lane north-south highway was 24 feet wide, with a broken white line separating the east (northbound) and west (southbound) traffic lanes, with shoulders approximately 12 feet wide. The area was undeveloped except for "Cobb's Store," a general store and filling station on the west side of the highway.

A Plymouth station wagon had stopped in the northbound lane. The operator was waiting until the southbound lane was clear of traffic before making a left turn into an entrance to Cobb's Store.

Three vehicles were directly involved in the collisions. (1) A 1956 Dodge, owned and operated by defendant Rundle, in which the plaintiffs were passengers. (2) A 1958 Chevrolet owned by defendant Brewer and operated by defendant Wyrick. (3) A tractor-trailer of Grubb Motor Lines. As they approached Cobb's Store and the stopped station wagon, the Rundle Dodge and the Brewer Chevrolet were proceeding north, in the east or northbound lane, the Rundle Dodge ahead of the Brewer Chevrolet; and the Grubb tractor-trailer was proceeding south, in the west or southbound lane.

There were two collisions. One occurred in the northbound lane, when the front of the Brewer Chevrolet collided with the right rear of the Rundle Dodge. The other occurred in the southbound lane, when the right front of the Rundle Dodge was struck by the Grubb tractor-trailer.

It is noted: (1) Defendant Brewer was riding in the front seat of the 1958 Chevrolet and admitted Wyrick was operating it as her agent. (2) Neither Grubb Motor Lines nor the operator of the tractor-trailer is a party to this action.

Plaintiffs alleged defendant Rundle was negligent in specific respects and that his negligence was one of the proximate causes of plaintiffs' injuries. They alleged defendants Wyrick and Brewer were negligent in specific respects and that their negligence was one of the proximate causes of plaintiffs' injuries.

Evidence offered by the respective parties was in sharp conflict.

Defendants Wyrick and Brewer contended the collision between the Rundle Dodge and the Grubb tractor-trailer was the first collision. They contended Rundle had turned left into the southbound lane and was there struck by the tractor-trailer and knocked back into their Chevrolet.

Defendant Rundle contended he was and had been stopped, entirely in the northbound lane, on account of the stopped car(s) ahead of him, an appreciable length of time when the right rear of the Rundle Dodge was struck by the front portion of the Brewer Chevrolet, thereby knocking the Rundle Dodge into the southbound lane and into collision with the tractor-trailer.

Plaintiffs contended they were injured as a result of the joint and concurrent negligence of all defendants. They contended as stated in their brief, "that the defendant Rundle and the defendant Wyrick were not keeping a proper lookout, came unexpectedly upon the vehicles stopped in the northbound lane and were unable to make a

safe stop; that the defendant Rundle failed to give an adequate signal of his intention to stop or turn and had turned across the center line into the path of the tractor-trailer truck at which time he was struck by the Wyrick-Brewer automobile and almost simultaneous by the tractor-trailer truck."

The court submitted and the jury answered the following issues: "1. Were the plaintiffs injured by the negligence of the defendant, Roy Charles Rundle, as alleged in the complaints? ANSWER: No. 2. Were the plaintiffs injured by the negligence of the defendants, Robert Lee Wyrick and Rose M. Brewer as alleged in the complaints? ANSWER: Yes. 3. What amount, if any, is the plaintiff Gloria Graver entitled to recover? ANSWER: $10,000.00. 4. What amount, if any, is the plaintiff Daniel S. Miller entitled to recover? ANSWER: $4,000.00. 5. What amount, if any, is the plaintiff Ervin T. Miller entitled to recover? ANSWER: $50,000.00. 6. What amount, if any, is the plaintiff Wilson D. Miller entitled to recover? ANSWER: $8,000.00."

Judgments in favor of plaintiffs and against defendants Wyrick and Brewer, in accordance with the verdict, were entered. These defendants gave notice of appeal but did not perfect their appeal.

The judgments also provided that plaintiffs have and recover nothing from defendant Rundle. To this portion of the judgments, plaintiffs excepted and appealed.

Hubert E. Seymour, Jr., and Irving W. Coleman for plaintiffs, appellants.

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

PER CURIAM. The two assignments of error brought forward in plaintiffs' brief are based on exceptions to the charge. Plaintiffs contend the court failed to explain and apply the law of joint and concurrent negligence to the first issue. The contention is without merit and the assignments are overruled.

Careful consideration of the charge discloses the court made it quite clear that the jury should answer the first issue, "Yes," if they found by the greater weight of the evidence that negligence on the part of defendant Rundle was *one of the proximate causes* of plaintiffs' injuries. Indeed, the instructions bearing directly upon the first issue constitute a discriminating and correct application of the law to the facts as contemplated by G.S. 1-180, drawing into sharp focus the questions of fact for jury determination.

No error.

APPENDIX.

ADVISORY OPINION IN RE GENERAL ELECTIONS.

Elections § 1—

An election in which absentee ballots are excluded is not a general election within the purview of an Act providing that proposed constitutional amendments should be submitted at the next general election after the adjournment of the General Assembly.

21 July 1961

Hon. J. Wallace Winborne
Chief Justice
Hon. Emery B. Denny
Hon. R. Hunt Parker
Hon. William H. Bobbitt
Hon. Carlisle W. Higgins
Hon. William B. Rodman, Jr.
Hon. Clifton L. Moore
Associate Justices
Of the Supreme Court of North Carolina
Raleigh, North Carolina

My dear Sirs:

The 1961 General Assembly at its Regular Session ratified Senate Bill No. 5 and House Bill No. 13, Chapter 1037 of the 1961 Session Laws, entitled "Capital Improvement Bond Election Bill." Section 26 of this Act provides in part as follows:

> "The question of the issuance of the bonds of each of said issues shall be submitted to the qualified voters of the State of North Carolina at an election to be held on a date during 1961 to be fixed by the Governor by a proclamation issued by him; provided, that if an election upon the question of the issuance of other State bonds is authorized to be held during the same period, the election herein provided for may be held upon the same day as such other State bond election. Notice of said election shall be given by publication at least twice in a newspaper published in each county of the State or having a general circulation therein, and said election shall be held under and in accordance with the general laws of the State of North Carolina, except that no absentee ballots shall be allowed in said election."

The 1961 General Assembly also ratified six separate acts proposing

six different constitutional amendments to be submitted to the qualified voters "at the next general election". These Constitutional amendments are proposed by Chapters 313, 459, 466, 591, 840 and 1169 of the 1961 Session Laws.

The Attorney General has advised the Secretary of the State Board of Elections that the proposed constitutional amendments may not be submitted to the electors of the State at the election to be held on a date to be fixed by the Governor pursuant to Chapter 1037 of the 1961 Session Laws, for the reason that such an election would not be a general election within the meaning of Section 1 of Article XIII of the Constitution. However, the Attorney General has advised me that the question is not altogether free from doubt.

The 1949 General Assembly proposed five constitutional amendments, three of which provided that the question be submitted to the qualified voters "at the next general election to be held November 7, 1950," and two of which provided that the question be submitted "at the next general election". On June 4, 1949, a bond election was called by Governor Kerr Scott, but no constitutional amendments were submitted at this election. Likewise, in the 1953 General Assembly, there were proposed five constitutional amendments, and at the bond election held on October 3, 1953, these amendments were not submitted to the qualified voters.

The question is, however, of such great importance that I feel justified in seeking an opinion of the Supreme Court. Hence, I respectfully request, if in keeping with the proprieties and functions of the Court, an advisory opinion on the following question:

> Would a bond election called pursuant to Chapter 1037 of the 1961 Session Laws meet the constitutional requirements of a general election, so as to require the constitutional amendments proposed by Chapter 313, 459, 466, 591, 840 and 1169 of the 1961 Session Laws be submitted to the qualified voters of the State?

Your opinion on the question presented will be appreciated and will guide me in the fixing of a date to submit these important issues to the people.

Sincerely,

Terry Sanford

TS:fg

ADVISORY OPINION IN RE GENERAL ELECTIONS.

July 25, 1961

To His Excellency Terry Sanford
Governor of North Carolina

Your communication of the 21st instant presents this question: Should the Constitutional Amendments referred to below, which the General Assembly of 1961 proposed, be submitted at a called bond election in 1961 or at the general election in 1962?

1. Chapter 313 of the 1961 Session Laws, entitled "An Act to Amend the Constitution of North Carolina by Rewriting Article IV Thereof and Making Appropriate Amendments of Other Articles so as to Improve the Administration of Justice in North Carolina."

2. Chapter 459 of the 1961 Session Laws, entitled "An Act to Amend Section 5 of Article II of the Constitution of North Carolina for the Purpose of Providing an Automatic Reapportionment of the Members of the House of Representatives of the General Assembly of North Carolina."

3. Chapter 466 of the 1961 Session Laws, entitled "An Act to Amend Articles II, III and XIV of the Constitution of North Carolina With Respect to Succession to Elective State Executive Offices, the Appointment of Acting Officers in Certain Instances, the Determination of the Incapacity of Elected State Executive Officers to Perform the Duties of Their Offices, and Fixing a Permanent Seat of Government."

4. Chapter 591 of the 1961 Session Laws, entitled "An Act to Amend Article VI, Section 2, of the Constitution of North Carolina so as to Permit New Residents Not Qualified to Vote Only Because of Insufficient Residence Time, to Vote for Presidential and Vice-Presidential Electors."

5. Chapter 840 of the 1961 Session Laws, entitled "An Act to Amend the Constitution of North Carolina so as to Provide For Greater Legislative Authority Over the Salaries of the State Executive Officers."

6. Chapter 1169 of the 1961 Session Laws, entitled "An Act to Amend Section 3, Article V, and Section 5, Article V, of the Constitution of North Carolina Relative to the Power of the General Assembly to Exempt and to Classify Property for Ad Valorem Tax Purposes."

ADVISORY OPINION IN RE GENERAL ELECTIONS.

Chapter 1037 of the 1961 Session Laws provides for submitting the question of the issuance of Capital Improvement Bonds to the qualified voters of the State at an election to be held on a date in 1961 to be fixed by the Governor, but the Act excludes the use of the absentee ballot in such election.

On the other hand, the Constitutional Amendments are to be submitted "at the next general election to the qualified voters of the State in the same way and manner and under the same rules and regulations governing general elections in this State."

Therefore, the undersigned, each for himself, states that the proposed Constitutional Amendments should be submitted to the qualified voters of the State at the general election in November 1962, and may not be submitted at the bond election to be called pursuant to the provisions of Chapter 1037, Session Laws of 1961.

J. Wallace Winborne
Chief Justice

Emery B. Denny
Associate Justice

R. Hunt Parker
Associate Justice

Wm. H. Bobbitt
Associate Justice

Carlisle W. Higgins
Associate Justice

William B. Rodman, Jr.
Associate Justice

Clifton L. Moore
Associate Justice

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Prior Action Pending.

Where it appears that the action instituted by plaintiff in the Superior Court of one county is based upon the same cause of action as that of a prior action instituted in the Superior Court of another county of the State by the defendant in the second action against the plaintiff in the second action, the second action is properly dismissed upon plea in abatement, since the parties and the cause of action in both cases are the same. *Sales Co. v. Seymour*, 714.

ADMINISTRATIVE LAW

§ 4. Appeal, Certiorari, and Review.

Where a party cited to appear before an administrative board or officer fails to appear, and the board hears evidence and finds facts supporting its order revocating the beer license of such party, the order of such administrative board will not be disturbed upon review, there being no exception to the evidence adduced at the hearing before the board or to its findings of fact based on such evidence. *Chilton v. Hunt*, 618.

ADOPTION

§ 6. Operation and Effect of Decrees.

A decree of adoption gives the child the same rights as a natural child and prevents a legacy to the adoptive mother from lapsing for the death of the mother prior to the death of the testator. *Headen v. Jackson*, 157.

ADVERSE POSSESSION

§ 4. Adverse Possession of Lappage.

Where there is lappage in the descriptions in deeds to contiguous tracts of land and the grantee in the senior deed is not in actual possession of the lappage and the grantee in the junior deed is in actual possession thereof, such possession will ripen title in the grantee in the junior deed after seven years. *Lane v. Lane*, 444.

§ 7. Adverse Possession among or by Tenants in Common.

Where parties claim the *locus in quo* as heirs of their ancestor, and introduced evidence of continuous possession by one or the other of them of the entire tract as tenants in common for more than 20 years, the evidence is sufficient to be submitted to the jury on their claim of title by adverse possession as against a stranger, since the possession of any one of them inures to the benefit of all, and it is not required that each cotenant be on the property during the entire time. *Taylor v. Scott*, 484.

§ 15. Color of Title.

Where the description in a deed in proper form embraces not only the land owned by grantor but also a contiguous additional strip of land, such deed conveys the land owned by the grantor and constitutes color of title as to the strip of land embraced in the description but not owned by the grantor. *Lane v. Lane*, 444.

ADVERSE POSSESSION—*Continued.*

§ 23. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where defendants' evidence upon their claim of title by adverse possession is limited to evidence that their predcessors in title had planted grass seed on the land during one year and had planted and harvested oats in another year, and had listed and paid taxes on the lands for over 20 years, the evidence is insufficient to be submitted to the jury upon the question of adverse possession for 20 years or for 7 years under color, since while the payment of taxes is evidence of the character of their claim, it is not evidence of actual possession, and the evidence of the other two incidents is insufficient, as a matter of law, to show continuous possession by defendants for the statutory periods. *Chisholm v. Hall*, 374.

Evidence of a defendant in an action in ejectment that he had been in actual possession of a specific portion of the *locus in quo*, and had occupied and cultivated the tract under known and visible lines and boundaries in the character of sole owner, is sufficient to require the submission of the issue of his acquisition of title to such portion by adverse possession. *Taylor v. Scott*, 484.

AGRICULTURE

§ 16. Right, Powers and Liabilities in Regard to Marketing Associations.

The fact that a milk processor, pursuant to directions of its producer and the terms of a certified copy of the membership agreement between the producer and his marketing association, deducts membership dues from payment for milk purchased directly from the producer and remits such dues to the association, does not make the processor a party to the contract between the producer and his association, and the deduction of such dues, in the absence of legal obligation, remains a matter of courtesy on the part of the processor. *Milk Producers Co-op. v. Dairy*, 1.

Evidence held insufficient to show that processor induced producers to breach their contract with marketing association. *Ibid.*

Where a milk processor, purchasing directly from producers, deducts dues from its payments for milk so purchased and remits such dues to the producers' marketing association, but discontinues making such deductions pursuant to written instructions of the producers, and thereafter pays the producers in full for the milk purchased, the processor may not be held liable by the association for the dues of such producers, the processor not being a party to the contract between the association and its members and not being liable for the dues after it had paid the producers in full for the milk purchased from them. *Ibid.*

APPEAL AND ERROR

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Where a new trial is awarded on defendant's appeal, the Supreme Court will refrain from discussing the evidence. *Baker v. Construction Co.*, 302; *Powell v. Clark*, 707.

Where a new trial is awarded on one ground, the Supreme Court need not decide whether a new trial should also be awarded on another ground. *Hunnicutt v. Ins. Co.*, 515.

An appeal will be determined in accordance with the theory of trial in the lower court. *Chisholm v. Hall*, 374.

APPEAL AND ERROR—*Continued.*

§ 4. Parties who May Appeal — "Party Aggrieved."

Only the "party aggrieved," who is one whose rights have been directly and injuriously affected by the action of the court, may appeal from the Superior Court to the Supreme Court. *Gold v. Ins. Co.*, 145.

Persons not parties and whose rights could not be precluded by judgment, may not appeal. *Ibid.*

§ 13. Supersedeas and Stay Bonds.

A supersedeas is a writ issuing solely from an appellate court to preserve the *status quo* pending the exercise of the appellate court's jurisdiction, and upon certification of opinion of the Supreme Court affirming the judgment of the lower court, the effect of the writ terminates. *New Bern v. Walker*, 355.

§ 19. Form and Necessity for Objections, Exceptions and Assignments of Error.

An assignment of error not supported by exception duly noted in the record will not be considered on appeal. *Webb v. Gaskins*, 281; *Moore v. Owens*, 336; *Stancil v. Stancil*, 507; *In re Will of Summerlin*, 523.

§ 20. Parties Entitled to Object and Take Exception.

Appellant may not complain of alleged error in the charge in respect to an issue answered in appellant's favor. *Gathings v. Sehorn*, 503.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents the sole questions of whether the facts found and admitted are sufficient to support the judgment and whether there is error of law on the face of the record. *Janicki v. Lorek*, 53; *Webb v. Gaskins*, 281; *Bridges v. Jackson*, 333; *Moore v. Owens*, 336; *Lanier v. Dawes*, 458.

Where the verdict is certain and imports a definite meaning free from ambiguity and is sufficient in form and substance to support the judgment, which is definite in terms and regular in form, a sole exception to the signing of the judgment cannot be sustained. *Moore v. Owens*, 336.

A sole exception to the order denying a motion to set aside a judgment presents only whether error of law appears on the face of the record proper, which includes whether the judgment sought to be set aside is regular in form and supported by the verdict. *In re Will of Summerlin*, 523.

An appeal from an order for the examination of the adverse party presents for review the legal sufficiency of the application for examination. *Griners' & Shaw, Inc. v. Casualty Co.*, 380.

In the absence of exceptions to the court's findings of fact an appeal from the judgment entered by the court upon such findings presents only whether the findings support the order and whether error of law appears upon the face of the record. *Johnson v. Johnson*, 719.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

Where, in a trial by the court under agreement of the parties, appellant has no exception to the admission or rejection of evidence or to the findings of fact, his motion for nonsuit at the close of all of the evidence does not present the sufficiency of the evidence to warrant recovery. *Bridges v. Jackson*, 333.

Where none of the assignments of error is supported by exceptions duly

APPEAL AND ERROR—*Continued.*

noted review is limited to whether error of law appears on the face of the record, the appeal itself being taken as an exception to the judgment, but the appeal does not present the findings of fact or the sufficiency of the evidence to support them. *Stancil v. Stancil*, 507.

§ 24. Exceptions and Assignments of Error to Charge.

An assignment of error to peremptory instructions given by the court in favor of defendant and an assignment of error to the refusal of the court to give peremptory instructions in favor of plaintiff will not be considered when there is no exception supporting the assignments of error and no prayer for special instructions. *Moore v. Owens*, 336.

§ 33. Necessary Parts of Record Proper.

The application for examination of the adverse party is a necessary part of the record proper on an appeal from an order allowing the application. *Griners' & Shaw, Inc. v. Casualty Co.*, 380.

§ 35. Conclusiveness and Effect of Record and Presumptions in Regard to Matters Omitted.

The rule that when the charge is not in the record it will be presumed that the jury was instructed correctly on every principle of law applicable to the facts, presupposes a trial on proper issues and the failure of the court to submit proper issues cannot be cured by the charge. *Baker v. Construction Corp.*, 302.

The court will not take notice of matters appearing in another pending action between the parties when no part of the record in the other action is included in the record on appeal. *Johnson v. Johnson*, 719.

§ 36. Correction of Record.

While motion for diminution of the record will lie to correct the record and make it conform to what transpired in the lower court, such motion will not lie when it is sought to correct stipulations, not on the ground that the stipulations were not as filed in the lower court, but on the ground that they did not state what movant intended. *Starbuck v. Havelock*, 198.

§ 37. Time of Filing Briefs and Effect of Failure to File.

Upon a proper showing of diligence by counsel and circumstances mitigating the failure of appellants represented by him to authorize and direct him to prosecute the appeal in time, such counsel may be permitted to adopt in behalf of his clients the brief duly filed by other appellants. *Morehead v. Harris*, 130.

§ 38. Form and Contents of Brief.

Assignments of error not set out in appellants' brief and in respect to which no reason or argument is stated or authority cited will be deemed abandoned. *Gillikin v. R. R.*, 228; *Little v. Brake Co.*, 451.

§ 40. Harmless and Prejudicial Error in General.

A new trial will not be awarded for mere technical error but only for error which is material and prejudicial so that, except for such error, a different result would likely have ensued. *Parks v. Washington*, 478; *Davis v. Ludlum*, 663.

APPEAL AND ERROR—*Continued.*

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Whether evidence was prejudicial in affecting amount of recovery was determined by court on motion to set aside verdict. *Parks v. Washington*, 478.

The admission of evidence over objection cannot be held prejudicial when it appears that evidence of like import had been given by the same witness on cross-examination immediately theretofore without objection. *Hall v. Atkinson*, 579.

Where an expert has testified that the cracks in the wall of plaintiff's building resulted from settling and had existed for many years prior to the negligent act of defendants which further damaged the wall, further testimony by the expert as to the cause of the settling, if incompetent, could not be prejudicial, since the cause of the settling could in no manner relate to the liability of defendants. *Davis v. Ludlum*, 663.

§ 42. Harmless and Prejudicial Error in Instructions.

The court submitted the issues of bailment, negligence, contributory negligence, and damages to the jury. The issue of bailment was inapposite but the allegations and evidence made out a case of negligence. Instructions that if the jury answered the first issue "No" it need not consider any of the other issues must be held for prejudicial error upon a negative finding by the jury to the first issue and the failure to answer the other issues, even though correct instructions were given in other parts of the charge. *Electric Co. v. Dennis*, 64.

When the first issue upon which plaintiffs have the burden of proof, is merely formal and the rights of the parties, under the stipulations and admissions, depend solely upon the answers to the second and third issues relating to the affirmative defenses, and there is insufficient evidence to be submitted to the jury upon the defenses, a directed verdict in favor of plaintiffs on all three issues cannot be prejudicial, since upon the theory of trial plaintiffs are entitled to recover as a matter of law. *Chisholm v. Hall*, 374.

An exception to the charge will not be sustained when it clearly appears that the charge, construed contextually, presented the law of the case to the jury in such manner as to leave no reason to believe the jury could have been misled. *Gathings v. Sehorn*, 503.

§ 45. Error Covered by Verdict.

Where the jury's answer to the first issue determines the rights of the parties, error relating to a subsequent issue is not prejudicial. *Tripp v. Keais*, 404.

§ 49. Review of Findings or of Judgments on Findings.

While the findings of fact of the trial court are conclusive on appeal when supported by any substantial evidence, the trial court's inferences of fact which are not based upon direct evidence but upon other inferences, are not conclusive, and its conclusions which involve legal questions are subject to review. *Milk Producers Co-op. v. Dairy*, 1.

Upon waver of jury trial, the court's findings of fact, if supported by competent evidence, are as conclusive as the verdict of a jury. *Trust Co. v. Bank*, 205.

A finding of fact to which no exception is taken is presumed to be supported by competent evidence. ***Ibid.***

APPEAL AND ERROR—*Continued.*

Where the facts agreed in the submission of the controversy to the court are insufficient to support judgment, the cause must be remanded. *Reidsville v. Development Co.*, 274.

Where the court fails to find an ultimate material fact, the cause must be remanded for definite findings sufficient to support a judgment. *Helms v. Charlotte*, 647.

Findings held findings of fact and not conclusions of law. *Webb v. Gaskins*, 281.

In the absence of an exception, the findings of fact are presumed to be supported by evidence and are binding on appeal. *Ibid.*

Ordinarily, when the court's conclusion of law is not supported by findings of fact the cause must be remanded on defendant's exceptions, but when the evidence is insufficient to make out a case, the judgment in favor of plaintiff will be reversed on defendant's exception to the refusal of the court to grant his motions for judgment as of nonsuit. *Schloss v. Hallman*, 686.

§ 55. Remand.

Where the findings of fact are incomplete and insufficient to support the conclusions of law and judgment, and there is conflict between the findings and the stipulations, particularly with reference to whether some of the parties had been properly served and were before the court, the cause will be remanded to the end that the facts may be sufficiently and definitely found so that the appellate court may more accurately and safely pass upon the conclusions of law and the judgment. *Morehead v. Harris*, 130.

ARMY AND NAVY

Domicile at time of induction into Army remains the domicile of a serviceman until and unless he establishes another domicile. *Israel v. Israel*, 391.

ASSAULT AND BATTERY

§ 7. Assault on Female by Man or Boy over Eighteen years of Age.

An indictment charging assault with intent to commit rape includes the lesser offense of assault on a female, and it is not required that the indictment allege that defendant, at the time of the assault, was over the age of 18 years, there being a presumption that a male person charged with an assault with intent to commit rape is over 18 years of age. *S. v. Beam*, 347.

That defendant is over 18 years of age does not create a separate and distinct offense in a prosecution of such defendant for assault upon a female, but the age of defendant relates only to the punishment, and the burden is upon defendant to prove that he is under 18 years of age if such is the fact. *Ibid.*

In a prosecution for assault to commit rape a verdict of "guilty of simple assault on a female" will support sentence for an assault on a female by a man or boy over 18 years of age when defendant's own evidence discloses that he was over 18 years of age at the time he committed the assault and no question of defendant's age was raised during the trial, it further appearing that the word "simple" was used in the verdict in response to the charge of the court in distinguishing the assault from an assault with intent to commit rape. *Ibid.*

AUTOMOBILES

§ 2. Grounds and Procedure for Suspension or Revocation of Drivers' Licenses.

Suspension of driver's license is effective from date of order and not date of receipt of notice of conviction warranting revocation. *S. v. Ball*, 351.

§ 6. Safety Statutes and Ordinances in General.

Findings to the effect that defendant was operating his automobile at a speed greater than was reasonable and prudent under the circumstances and that he approached a sharp curve with which he was unfamiliar at a speed of from 45 to 50 miles per hour, are sufficient predicate for the conclusion of negligence, since such findings amount to findings of violations of G.S. 20-141(a) and G.S. 20-141(c), and the violation of a safety statute is negligence *per se*, unless otherwise provided in the statute. *Bridges v. Jackson*, 333.

A violation of G.S. 20-140(b) is negligence *per se*. *Robbins v. Harrington*, 416.

A violation of G.S. 20-141(c) is negligence *per se*. *Pittman v. Swanson*, 681.

The standard of care fixed by the Legislature in the operation of motor vehicles is absolute. *Ibid.*

§ 7. Attention to Road, Look-out and Due Care in General.

A nocturnal motorist, like every other, is charged with the duty of exercising ordinary care for his own safety and will be held to the duty of seeing that which he ought to see in maintaining a proper lookout in his direction of travel, but he will not be held to the duty of being able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not have reasonably anticipated. *Privette v. Lewis*, 612.

A motorist is not bound to anticipate negligence on the part of another in the absence of anything to indicate otherwise. *Schloss v. Hallman*, 686.

§ 8. Turning and Turning Signals.

In making a left turn, a motorist is required to give either the hand signal or a mechanical or electrical signal, but is not required to give both, G.S. 20-154(b). *Rudd v. Stewart*, 90.

The statutory requirement that a motorist shall not turn left across a traffic lane of a highway without first seeing that such movement can be made in safety imposes the legal duty on him to exercise reasonable care under the circumstances in ascertaining that such movement can be made in safety, acting up the assumption that the drivers of other vehicles will observe the safety statutes, and the law does not require him to refrain from making such movement unless the circumstances render it absolutely free from danger. *Lemons v. Vaughn*, 186.

The giving of a signal for a left turn does not give the signaler an absolute right to make the turn immediately, regardless of circumstances, but the signaler must first ascertain that the movement may be made safely, and when the circumstances do not allow the signaler a reasonable margin of safety, other motorists affected have the right to assume that he will delay his movement until it may be made in safety. G.S. 20-154(a). *Eason v. Grimsley*, 494.

§ 9. Stopping, Parking, Signals and Lights.

The stopping of an automobile upon the highway without giving any signal either by hand or device approved by the Department of Motor Vehicles, when the operation of any other vehicle may be affected by such movement, is negligence. *Hall v. Carroll*, 326.

AUTOMOBILES—*Continued.*

Where the evidence discloses that a vehicle stopped on a highway some distance before reaching an intersection at which a blinker light was maintained, it is for the jury to say whether the blinker light was close enough to relieve the driver of the car of the duty to give proper signal of his intention to stop on the highway. *Ibid.*

§ 10. Negligence and Contributory Negligence in Halting Vehicle Stopped or Parked on Highway.

The fact that a motorist is not required to anticipate that an automobile will be stopped on the highway ahead of him at night without lights or warning signal required by statute, does not relieve him of the duty of exercising reasonable care for his own safety, of keeping a proper lookout, and of proceeding as a reasonably prudent person would under the circumstances to avoid collision with the rear of a vehicle stopped or standing on the road. *Privette v. Lewis*, 612.

§ 13. Skidding.

Skidding some thirty feet in a straight line and then some fifteen steps sidewise is sufficient to permit an inference of negligence. *Wilson v. Bright*, 329.

§ 14. Following Vehicles and Passing Vehicles Traveling in Same Direction.

G.S. 20-149(a) does not require that a vehicle must pass at least two feet to the left of the center line of the highway in passing another vehicle travelling in the same direction, but only that it pass at least two feet to the left of the other vehicle. *Eason v. Grimsley*, 494.

A motorist upon a four-lane street having two lanes for travel in each direction may overtake and pass another vehicle traveling in the same direction to the right of such other vehicle, G.S. 20-150.1(b) and, when such street is in the business or residential section of a municipality, he is not under duty to sound his horn before passing or attempting to pass, G.S. 20-149(b). *Schloss v. Hallman*, 686.

A motorist traveling along the right lane of a four-lane street is not under duty to anticipate that another motorist traveling in the same direction in the left lane for travel in such direction will suddenly turn directly in front of him into the right lane without giving timely signal, especially when the drivers are not approaching an intersection which might give the one notice that the other would turn from his lane of travel in order to enter the intersection. *Ibid.*

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

G.S. 20-146 is for the protection of occupants of other vehicles, pedestrians, and property on the highway, and is inapplicable in an action by a guest passenger to recover for injuries received when the driver lost control of the vehicle and as result thereof drove off the road, there being no evidence that any other vehicle or person or property upon the highway was in any way involved, and it being immaterial upon the question of proximate cause that after the driver lost control of the car it ran off the left rather than the right side of the road. *Powell v. Clark*, 707.

AUTOMOBILES—*Continued.*

§ 17. Right of Way at Intersections.

The fact that a motorist is faced by a green traffic control signal at an intersection does not warrant him in going forward blindly in reliance on the signal, but he remains under duty to maintain a lookout and to exercise reasonable care under the circumstances. *Bass v. Lee*, 73.

The failure of a motorist along a servient highway to yield the right of way to through traffic on a dominant highway is not negligence *per se* but is evidence of negligence and, when the proximate cause of a collision with a motorist entering the intersection along the dominant highway, is sufficient to support a verdict in favor of the motorist traveling along the dominant highway. *Wooten v. Russell*, 699.

The driver along the servient highway is required not only to stop before entering an intersection with a dominant highway but also to exercise due care to see that he may enter across the dominant highway in safety before entering thereon, and a motorist along a dominant highway is not under duty to anticipate that the motorist along the servient highway will fail to stop, but in the absence of anything which gives or should give notice to the contrary, may assume and act upon the assumption, even to the last minute, that the motorist along the servient highway will stop. *Ibid.*

§ 19. Sudden Emergency.

Motorist confronted with sudden emergency when child on bicycle rides toward him in his lane of travel, without looking, is not held to the wisest choice of conduct in taking steps to avoid collision. *Sparks v. Phipps*, 657.

A driver confronted with a sudden emergency will not be held to the wisest choice of conduct but only to such choice as a person of ordinary care and prudence would have made under similar circumstances. *Schloss v. Hallman*, 686.

§ 25. Speed in General.

The operation of a motor vehicle in excess of the speed limits prescribed by G.S. 20-141(b) is negligence *per se*, and G.S. 20-141(e), prescribing that the inability of a motorist, travelling at a lawful speed, to stop within the radius of his lights should not constitute negligence *per se*, is not applicable when there is evidence that the motorist was exceeding the statutory speed limit and the question of ability to stop before hitting a vehicle on the highway is not involved in the action. *Rudd v. Stewart*, 90.

A violation of G.S. 20-141(c) is negligence *per se*. *Pittman v. Swanson*, 681.

§ 27. Speed at Intersections.

The fact that a motorist is travelling within the speed limit fixed by law does not relieve him of the duty of reducing his speed when approaching an intersection or when special hazards exist with respect to pedestrians or other traffic. *Bass v. Lee*, 73.

§ 29. Speed in Business Districts.

Where the municipal ordinance introduced in evidence restricts speed in a business district to 10 miles per hour in accord with G.S. 20-14(b) (1) but does not define a business district, what is a business district must be determined in accordance with G.S. 20-38(a) with reference to the status of frontage along the street, excluding from consideration intersecting streets or highways, and a district is a business district only when 75 per cent of the

frontage along a street or highway for a distance of 300 feet is occupied by buildings in use for business purposes. *Black v. Penland*, 691.

§ 32. Injury to Persons on Bicycles.

Motorist is required to exercise due care to avoid striking child on bicycle whom he sees or should see, in the exercise of due care, in time to take steps to avoid injury. *Sparks v. Phipps*, 657.

§ 33. Pedestrians.

A pedestrian crossing a highway at a place other than a marked crosswalk is required to yield the right-of-way to vehicular traffic. G.S. 20-174a. *Holland v. Malpass*, 395.

§ 38. Opinion Evidence as to Speed.

Testimony that a vehicle was traveling at a speed of about 25 or 30 miles an hour may not be considered as tending to show a speed in excess of 25 miles an hour. *Holland v. Malpass*, 395.

Testimony of a witness that the vehicle in question was traveling 55 to 60 miles per hour cannot be taken as evidence that the vehicle was traveling in excess of 55 miles per hour. *Powell v. Clark*, 707.

§ 41a. Sufficiency of Evidence of Negligence in General.

Findings to the effect that defendant violated certain safety statutes and failed to keep a proper lookout in the direction of travel, and also failed to keep his vehicle under proper control, with further findings to the effect that plaintiff-passenger's injuries, received when the vehicle ran off the road, were proximately caused by such negligence, are sufficient to support judgment in plaintiff's favor. *Bridges v. Jackson*, 333.

Inferences of negligence which arise on the evidence but which are not supported by allegation, cannot be considered in passing upon the sufficiency of the evidence. *Eason v. Grimsley*, 494.

§ 41b. Negligence in Failing to Use Due Care in General.

Evidence tending to show that defendant driver had drunk some whiskey and beer and was driving in excess of the legal speed limit on the wrong side of the road, when he lost control of the car on a curve so that the car ran off the road and overturned to the injury of plaintiff passenger, *is held* sufficient to be submitted to the jury on the issue of defendant driver's negligence. *Westmoreland v. Gregory*, 172.

§ 41d. Negligence in Following or Passing Cars Traveling in Same Direction.

Evidence tending to show that defendant driver was traveling in the right lane of a wet four lane street, that as he was attempting to pass another vehicle traveling in the same direction in the left lane for travel in such direction, such other vehicle turned into the right lane immediately in front of him, and that defendant thus confronted with the sudden emergency, applied his brakes and turned his wheels to the right in order to avoid collision with the other vehicle and a vehicle following immediately behind him, and that when his wheel hit the curb he lost control of his vehicle, which went across the curb and sidewalk and down an incline and hit plaintiff's billboard, *is held* insufficient to make out a case of actionable negligence on the part of defendant. *Schloss v. Hallman*, 686.

AUTOMOBILES—*Continued.*

§ 41g. Sufficiency of Evidence of Negligence in Entering Intersection.

In passenger's action, evidence of negligence of each defendant in entering intersection held sufficient to be submitted to jury. *Bass v. Lee*, 73.

§ 41h. Sufficiency of Evidence of Negligence in Turning and in Hitting Turning Vehicle.

Evidence favorable to defendant tending to show that defendant, traveling north along a highway, attempted to make a left turn to enter the driveway on the west side of the highway, that he saw plaintiff's vehicle approaching from the north some 250 feet away, that he thought he had sufficient time to make the movement in safety, together with evidence permitting the inference that plaintiff was traveling at an unlawful rate of speed, *is held* sufficient upon defendant's counterclaim to be submitted to the jury on the issue of plaintiff's negligence, and nonsuit on the counterclaim is error. *Lemons v. Vaughn*, 186.

Evidence that defendant driver attempted to turn left into a dirt road without giving a plain and visible signal of his intention to do so, did not keep a proper lookout, and did not heed plaintiff's warning horn, resulting in a collision with plaintiff's vehicle as plaintiff, traveling in the same direction, was attempting to pass, is sufficient to be submitted to the jury on the issue of negligence. *Eason v. Grimsley*, 494.

§ 41i. Sufficiency of Evidence of Negligence in Entering Highway from Driveway or Filling Station.

Evidence that the driver of the car in which plaintiff was riding as a passenger was traveling at a speed within the statutory maximum and struck a car entering the highway from a filling station, that he applied brakes 65 to 70 feet prior to the collision, without evidence that the car had entered the highway prior to the time the brakes were applied or that a prudent driver should have anticipated that it would be driven into the highway in violation of G.S. 20-156, is insufficient to be submitted to the jury. *Nantz v. Nantz*, 357.

Evidence held insufficient to show negligence in hitting a car which entered the highway from a filling station in front of approaching traffic. *Fishel v. Carpenter*, 576.

§ 41j. Sufficiency of Evidence of Negligence in Skidding.

Evidence tending to show that defendant's car skidded for some 30 feet in a straight line on a dirt road and then skidded sidewise some 15 steps is sufficient to permit an inference of negligence in operating the vehicle in such manner as to cause the sidewise skid. *Wilson v. Bright*, 329.

§ 41l. Sufficiency of Evidence of Negligence in Striking Pedestrian.

Evidence of negligence in striking pedestrian *held* insufficient to be submitted to the jury. *Holland v. Malpass*, 395.

Evidence to the effect that defendant-motorist was blinded by the lights of on-coming cars and drove off the highway on his right side, hitting plaintiff-pedestrian who was walking some two feet off the hard surface on his left side of the highway, *is held* sufficient to be submitted to the jury on the issue of actionable negligence, since the evidence permits the legitimate inference that defendant was driving his automobile without due caution and circumspection and in a manner so as to endanger or be likely to endanger another,

AUTOMOBILES—*Continued.*

and did not keep his vehicle under proper control on the hard surface of the highway in violation of G.S. 20-140(b). *Robbins v. Harrington*, 416.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

Evidence that the driver of the car traveling along a dirt road some 18 feet wide, skidded in a straight line some 30 feet and then sidewise some 15 steps, hitting a child on his bicycle just after the child had entered the road from an intersecting 10-foot lane, with physical facts permitting the inference that the car struck the boy in its skid sidewise, *is held* sufficient to take the case to the jury on the issue of the driver's negligence. *Wilson v. Bright*, 329.

§ 42a. Nonsuit on Ground of Contributory Negligence in General.

Nonsuit may not be allowed on the ground that plaintiff's own evidence established plaintiff's violation of a safety statute when such violation is not pleaded by defendant. *Eason v. Grimsley*, 494.

§ 42d. Contributory Negligence in Following and Passing Vehicle Traveling in Same Direction.

Where the evidence supports contrary conclusions as to whether plaintiff, in attempting to pass another vehicle traveling in the same direction, did or did not drive at least two feet to the left of such other vehicle, nonsuit may not be properly entered on the ground of plaintiff's violation of G.S. 120-149(a) in this respect. *Eason v. Grimsley*, 494.

Evidence held not to show contributory negligence as matter of law on part of plaintiff in attempting to pass defendant's vehicle. *Ibid.*

§ 42f. Contributory Negligence in Hitting Vehicle Stopped or Parked on Highway.

Whether a motorist is guilty of contributory negligence in hitting the rear of another vehicle stopped on the highway in his lane of travel at nighttime without lights must be determined with regard to the facts of each particular case, taking into consideration any evidence of concurrent circumstances, such as fog, rain, glaring headlights, color of vehicles, traffic, etc. *Privette v. Lewis*, 612.

Evidence tending to show that plaintiff was traveling at nighttime in heavy traffic so that he had his headlights on dim that he had passed a truck, then entered a curve, passing two or three automobiles, and then saw defendant's car standing in his lane of travel some 25 or 30 feet away, that defendant's car had no rear lights burning and no glass reflectors on its rear and no flares set out, and that plaintiff applied his brakes immediately upon seeing defendant's car but could not stop in time to avoid collision, *is held* not to establish contributory negligence on plaintiff's part as a matter of law. *Ibid.*

§ 42g. Contributory Negligence in Failing to Yield Right of Way at Intersection.

Evidence held insufficient to establish contributory negligence as a matter of law on the part of motorist entering intersection from a dominant highway. *Wooten v. Russell*, 699.

§ 42k. Nonsuit for Contributory Negligence of Pedestrians.

Evidence *held* to disclose contributory negligence as a matter of law on part of pedestrian. *Holland v. Malpass*, 395.

AUTOMOBILES—*Continued.*

§ 42m. Contributory Negligence of Children.

A nine year old boy is rebuttably presumed incapable of contributory negligence, and therefore nonsuit may not be entered on the ground of his contributory negligence. *Wilson v. Bright*, 329.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence of concurring negligence of drivers resulting in collision at intersection held for jury. *Bass v. Lee*, 73.

The evidence disclosed that the car in which plaintiffs' intestate was a passenger followed the car operated by the appealing defendant for a distance of some two miles upon a wet and slippery highway, that the appealing defendant suddenly stopped his car without giving any signal of his intention to do so, that the driver of the car in which intestate was riding applied his brakes, skidded to the left across the other lane of the highway, and crashed head-on into a vehicle which approached from the opposite direction. *Held:* The evidence is sufficient to be submitted to the jury on the question of the appealing defendant's negligence as a proximate cause of the injury notwithstanding that his car did not come in contact with either of the colliding vehicles and not withstanding any negligence on the part of the drivers of the colliding vehicles. *Hall v. Carroll*, 326.

§ 44. Sufficiency of Evidence to Require Submission of Contributory Negligence to Jury.

Conflicting evidence as to whether a construction worker had flagged plaintiff to a virtual stop and was hit when he turned his back to look for traffic from the opposite direction, or whether the workman had no flag in his hand, was standing with his back to plaintiff's car, and stepped backward, into plaintiff's car without looking as plaintiff was driving his car slowly around a truck standing on the highway, *is held* to take the issue of plaintiff's contributory negligence to the jury. *Gathings v. Sehorn*, 503.

Evidence tending to show that defendant attempted to enter heavy traffic on a street from a filling station and collided with plaintiff's vehicle, which was traveling in its proper lane, *is held* insufficient to warrant the submission of an issue of plaintiff's negligence, either on the question of contributory negligence or on the question of negligence upon defendant's counterclaim. *Fishel v. Carpenter*, 576.

§ 46. Instruction in Auto Accident Cases.

Where excessive speed and failure to maintain a proper lookout are permissible inferences from the evidence, exceptions to the charge on the ground that the court should not have charged the law in regard thereto cannot be sustained. *Rudd v. Stewart*, 90.

Where defendant introduces evidence tending to support his plea of contributory negligence on the part of plaintiff, a passenger in defendant's car, the failure of the court to charge the jury as to the duty imposed by law upon a guest passenger must be held for prejudicial error. *Westmoreland v. Gregory*, 172.

In this action to recover for injuries to a thirteen year old boy resulting from a collision between the bicycle he was riding and defendants' automobile, the charge of the court *is held* to have correctly instructed the jury as to the legal duties defendants owed plaintiff to keep the vehicle under control, keep

a proper lookout, to sound the horn, or reduce speed or stop the car, or turn it in a manner to avoid the collision, arising on the evidence tending to show that defendant driver saw or should have seen the child riding his bicycle on the street. *Sparks v. Phipps*, 658.

In this action to recover for injuries to a thirteen year old bicyclist who was riding his bicycle down a slight grade without observing oncoming traffic and collided with defendants' car, traveling in the proper lane in the opposite direction, it *is held* that all of the evidence does not show that the emergency was brought about by defendants' negligence, and therefore the court properly instructed the jury on the aspect of sudden emergency upon the question of the negligence of defendant driver in turning his car to the right rather than to the left, which would have avoided the accident. *Ibid.*

Charge held for error in failing to instruct jury on duty to reduce speed when approaching a curve. *Pittman v. Swanson*, 681.

Where there is no sufficient evidence that scene of accident was within business district, instruction as to speed in business district is prejudicial. *Black v. Penland*, 691.

An instruction to the jury in regard to a safety statute must be held for error when such statute is inapplicable to the factual situation disclosed by the evidence or there is no evidence tending to show that a violation of such satute was a proximate cause of plaintiff's injuries. *Powell v. Clark*, 707.

§ 46½. Issues in Auto Accident Cases.

The refusal of the court to submit the issue of contributory negligence in submitting the issues upon defendant's counterclaim will not be held for error, the matter being determinable upon the issue of negligence submitted in the issues upon plaintiff's cause of action. *Rudd v. Stewart*, 90.

§ 48. Right of Guest or Passenger to Sue Drivers, Jointly or Severally and Rights of Drivers Inter Se.

If the negligence of the driver of one car is a proximate cause of a collision between two other vehicles, a passenger in one of the colliding vehicles may hold such driver liable even though negligence on the part of either or both of the drivers of the colliding vehicles join and concur in producing the injury. *Hall v. Carroll*, 326.

One driver sued by passenger is not entitled to file cross-action against other driver in absence of allegations of concurrent negligence, or against owner of that car. *Manning v. Hart*, 368.

§ 49. Contributory Negligence of Guest or Passenger.

A passenger is required to exercise the care of an ordinarily prudent man for his own safety and he may be held contributorily negligent in voluntarily riding with a driver whom he knows to be reckless, or in failing to abandon the trip after he ascertains that the driver is intoxicated or driving in a reckless manner when an ordinarily prudent person, under similar circumstances, would not have voluntarily undertaken the trip or would have abandoned the trip after the discovery of the recklessness of the driver. *Dinkins v. Carlton*, 137.

Whether a passenger is guilty of contributory negligence in failing to remonstrate with the driver in regard to the driver's excessive speed or reckless driving must be determined upon the facts of each particular case, with consideration as to whether under the attendant circumstances remon-

AUTOMOBILES—*Continued.*

strance would seem to be futile and also with consideration of the fact within common knowledge that "back seat driving" often confuses the driver and that physical interference with the driver would increase the hazard. *Ibid.*

Whether a passenger is guilty of contributory negligence in voluntarily embarking on a trip with a driver whom he knows to be reckless, or in failing to abandon the trip after discovery that the driver was operating the vehicle in a reckless manner or while intoxicated, or in failing to remonstrate with the driver, is usually a question for the jury under the rule of the ordinary prudent man, and the conduct of the passenger in these respects will not ordinarily be held for contributory negligence as a matter of law. *Ibid.*

Evidence held not to disclose contributory negligence as matter of law on part of passenger in failing to abandon trip. *Ibid.*

Conflicting evidence as to whether plaintiff passenger was guilty of contributory negligence in failing to warn defendant driver of apparent danger and in failing to remonstrate with him in regard to his excessive speed, and in distracting his attention by kissing him while he was attempting to negotiate a curve, *is held* to raise the issue of plaintiff's contributory negligence for the determination of the jury. *Westmoreland v. Gregory*, 172.

§ 50. Negligence of Driver Imputed to Passenger.

The negligence of the driver of a car is ordinarily imputed to the owner riding therein as a passenger, nothing else appearing. *Eason v. Grimsley*, 494.

§ 54f. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Irrespective of statute, proof that a commercial vehicle involved in a collision bore the name or insignia of defendant makes out a *prima facie* case that at the time the vehicle was being operated by an agent of the owner with authority, consent, and knowledge of the owner, but such *prima facie* case does not amount to a presumption of agency, and an instruction submitting to the jury the presumptive rather than the *prima facie* rule is prejudicial. *Carter v. Motor Lines*, 227 N.C. 193, overruled to the extent of conflict. *Knight v. Associated Transport*, 462.

Evidence that the injury was caused by the negligent operation of a vehicle carrying a specified North Carolina license plate, but further that such license plate was issued for a car of a different color and different motor number, is insufficient to raise the presumption of agency as against the person to whom such license plate was issued and those alleged to have been engaged in a joint enterprise with him. *Woodruff v. Holbrook*, 740.

§ 55. Family Purpose Doctrine.

Conflicting evidence relating to defendant owner's liability for the driving of his nephew under the family purpose doctrine held to raise the issue for the determination of the jury. *Westmoreland v. Gregory*, 172.

Allegations held insufficient to invoke family car doctrine as between plaintiff passenger and the owner of car in which she was riding so as to entitle defendant driver to joinder of the owner and the driver of the car in which plaintiff was riding. *Manning v. Hart*, 368.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

Evidence held insufficient to show culpable negligence on the part of defendant. *S. v. Roop*, 607.

AUTOMOBILES—*Continued.*

§ 84. Engaging in Speed Competition.

A warrant charging that defendant did, on a specified date, unlawfully and willfullly engage in a speed competition on a public highway with another motor vehicle is sufficient to inform defendant of the offense with which he is charged and is adequate to protect him against further prosecution for the same offense. *S. v. Daniel*, 717.

Evidence tending to show a prearrangement between defendants to race on the highway and that in engaging in such speed competition they operated their respective vehicles at an unlawful rate of speed is sufficient to support a verdict of guilty of violating G.S. 20-141(b). *Ibid.*

BAILMENT

§ 1. Nature and Requisites of the Relationship.

A contract under which defendant undertakes, with his own equipment, to hoist plaintiff's 3600 pound switchboard to the second floor of a building, does not create the relationship of bailee and bailor. *Electric Co. v. Dennis*, 64.

BANKS AND BANKING

§ 4. Joint Deposits.

Money deposited in a bank to the joint credit of a husband and wife, nothing else appearing, belongs one-half to the husband and one-half to the wife, but when it is made to appear that the funds deposited were the sole property of the husband, such deposit remains his property with mere agency to the wife to withdraw funds from the account. *Smith v. Smith*, 152.

§ 9. Collection of Checks and Drafts.

Until daft is accepted by payor, payee or holder may look only to drawer or prior endorser for payment. *Trust Co. v. Bank*, 205.

Bank acting as agent for collection may not hold drawee's bank liable for negligence in failing to collect or return draft within reasonable time. *Ibid.*

BASTARDS

§ 12. Legitimation.

A legitimated child has the same rights as a legitimate child and may inherit from or through their parent. *Greenlee v. Quinn*, 601.

BILL OF DISCOVERY

§ 2. To Obtain Information Necessary to Draft Pleading.

G.S. 1-568.1 *et seq.*, repealing the former statutes relating to discovery and enacting new provisions in regard thereto, requires that plaintiff's application for an examination of the adverse party to obtain evidence necessary to draw the complaint must contain factual averments disclosing that an action had been commenced, and that the information sought, designated with reasonable particularity, was not otherwise available to plaintiff and was necessary to enable plaintiff to draw the complaint. *Griners' & Shaw, Inc. v. Casualty Co.*, 380.

An application for the examination of the adverse party to obtain information necessary to enable plaintiff to draw the complaint will lie solely in respect to those matters which relate to the action instituted by plaintiff. *Ibid.*

BILL OF DISCOVERY—*Continued.*

Application held insufficient to support order for examination of adverse party. *Ibid.*

BILLS AND NOTES

§ 4. **Consideration.**

Where a purchaser executes a note payable to a bank merely as evidence of the balance due the seller on equipment, receiving nothing from the bank for the note, as between the purchaser, and the bank there is no consideration for the note, and the defense of want of consideration may be set up by the purchaser in an action on the note by the bank. *Distributors v. Mitchell*, 489.

§ 9. **Holders in Due Course.**

Where plaintiff acquires a note from the payee subsequent to the date plaintiff contends the note was due, plaintiff may not assert that he was a holder in due course before maturity, and is not protected by G.S. 25-63. *Distributors v. Mitchell*, 489.

§ 10. **Presentment and Acceptance.**

In regard to checks and in regard to drafts drawn on itself by the drawer, G.S. 25-143 and G.S. 25-144 apply, and the bank upon which the instrument is drawn has twenty-four hours after presentment in which to decide whether or not it will pay the instrument; but as to drafts drawn by a creditor against his debtor, these statutes do not apply, nor does G.S. 25-94 apply when the drawer does not have an account with the bank at which the instrument is payable. *Trust Co. v. Bank*, 209.

Drafts drawn by a creditor against his debtor were deposited in the drawer's bank for collection, and sent by it, marked "no protest," to a second bank for collection, which second bank in turn sent them to a third bank in which the payor had an account. The third bank presented same to the payor, who neither paid the drafts nor accepted them, and the third bank held the drafts for more than a week before turning them to the second bank. *Held:* The payor's bank may not be held liable on the drafts on the theory that its delay in returning the unpaid drafts constituted a constructive acceptance of the drafts by it. *Ibid.*

Where a creditor draws a draft on its debtor in another city, which draft is sent for collection through successive banks, it *is held* that prior to acceptance by the payor, the payee or holder of the bill must look to the drawer for his protection, since the liability of the payor or drawee to the payee or holder does not accrue until he makes a valid acceptance to one who is entitled to enforce the engagement contained in the acceptance, in which event the acceptor engages to pay the instrument according to the tenor of his acceptance. *Ibid.*

§ 11. **Notice and Protest.**

Where a draft has the words "NO PROTEST" stamped on it, the successive endorsers remain liable each to the prior endorser notwithstanding failure to make formal protest, presentment, or notice of dishonor. *Trust Co. v. Bank*, 205.

BOUNDARIES

§ 7. **Nature and Essentials of Processioning Proceedings.**

Ordinarily when each of the parties owning adjoining tracts of land admits

the title of the other, only the location of the true dividing line is involved and the question of title is not presented. G.S. 38-1 *et seq.*, but when one of the parties claims title to the lappage by adverse possession and asserts his ownership of all or a part of the lappage by reason of such adverse possession, the proceeding is assimilated into an action to quiet title, and the issue of title raised by the pleadings should be determined by a jury. *Lane v. Lane*, 444.

BUILDING AND LOAN ASSOCIATIONS.

§ 1. Operation — Joint Accounts.

While a husband by contract may vest in his wife ownership or a property right in all or any portion of a joint bank account, including the right of survivorship, provision of a joint deposit in a building and loan association stipulating that the deposit "shall be for the use and benefit of us both," is insufficient to create a trust in her favor or to constitute her the owner of any part of the funds belonging solely to him at the time the deposit was made. The right of survivorship is not involved and G.S. 41-2.1 is not applicable. *Smith v. Smith*, 152.

CARRIERS

§ 6½. Consolidation, Acquisition and Merger of Carriers.

Where the Interstate Commerce Commission imposes certain conditions solely upon the carrier acquiring control of another carrier through capital stock ownership, only the purchasing carrier is liable to the employees upon the stiuplated conditions, and nonsuit is properly allowed as to the other carrier in an employee's action against both carriers to recover compensation due him under the conditions. *Gillikin v. R.R.*, 228.

Where the Interstate Commerce Commission approves the acquisition of control of one carrier by another through capital stock ownership, it is required to impose a fair and equitable arrangement to protect the interests of the railroad employees affected. 49 U.S.C.A. 5(2). *Ibid.*

Where the Interstate Commerce Commission approves the acquisition of control by one carrier of another carrier through capital stock ownership, upon conditions that any employee of either carrier should be compensated for a stated period of time for loss of employment resulting from such employee being put in a worst position with respect to his employment by reason of the acquisition of the control, it *is held* that an employee is entitled to recover upon such conditions regardless of whether his loss of employment is due to the abolition or consolidation of jobs or to the use of modern and improved facilities, requiring fewer employees to do the work. *Ibid.*

COMMON LAW

The common law of England is in force in this State to the extent it is not destructive of, repugnant to, or inconsistent with our form of government and to the extent it has not been abrogated or repealed by statute or has become obsolete. G.S. 4-1. *S. v. Willis*, 473.

CONSPIRACY

§ 6. Sufficiency of Evidence and Nonsuit.

While conspiracy may be proved by circumstantial evidence, such evidence must establish facts from which an agreement to do a specific unlawful act

CONSPIRACY—*Continued.*

may be legally inferred, and a conviction cannot be upheld if the facts are as consistent with innocence as with guilt. *S. v. Williams*, 82.

Evidence tending to show that four persons conspired to assault and disable a particular person, and that two of them thereafter burned a building, is insufficient to support conviction of the second two of conspiracy to burn the building even though there is evidence that one of the second two defendants paid a sum of money to one of the arsonists after the building had been burned, there being no evidence that the payment was for the burning of the building. *Ibid.*

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

A constitutional question may not be raised by a person unless his rights are directly affected. *Watkins v. Wilson*, 510; *Wynn v. Trustees*, 594.

§ 10. Judicial Powers.

While the court has the power to declare an act of assembly unconstitutional, it will not consider such constitutional question except at the suit of a person whose constitutional rights are adversely affected or threatened. *Watkins v. Wilson*, 510.

§ 31. Right of Confrontation.

In this prosecution of defendant for rape of an eight-year old child, the court had the reporter take the examination of the child in the absence of the jury because of the difficulty in getting the child to answer questions and to talk loud enough for the jury to hear and comprehend her story, and then had the reporter read to the jury the examination which had been conducted in its absence. *Held:* The defendant is entitled to have the jury hear the testimony from the witness herself and to observe her demeanor at the time she testified, and a new trial must be awarded. *S. v. Payton*, 420.

Where defendant introduces evidence of an alibi relating to the date charged in the bill of indictment, and rested his case, submission of the question of defendant's guilt on the date specified or on another date shown by the evidence deprives defendant of her right of confrontation as to such other date. *S. v. Whittemore*, 583.

CONTRACTS

§ 2. Offer and Acceptance and Mutuality.

Where one of the parties to a written contract understands an ambiguous provision of the agreement to mean one thing and the other party to the contract understands that such provision means another, there is no meeting of the minds, and the writing does not constitute a binding agreement. *Distributors v. Mitchell*, 489.

In order to constitute a valid contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite. *Horton v. Refining Co.*, 675.

Negotiations contemplating the execution of a written contract embodying all the terms of the agreement does not constitute a contract, the written agreement never being executed. *Ibid.*

CONTRACTS—*Continued.*

Evidence that defendant represented that plaintiff could earn at least a specified sum in the operation of a filling station to be leased to him by defendant is insufficient to establish a binding contract in regard thereto, since such promissory representation amounts to nothing more than a statement of opinion upon which plaintiff had no right to rely. *Ibid.*

§ 7. Contracts in Restraint of Trade.

Covenant not to engage in competition with employer after termination of employment held reasonable both as to territory and time. *Welcome Wagon, Inc., v. Pender*, 244; *Asheville Associates v. Miller*, 400.

§ 12. Construction and Operation of Contracts in General.

The interpretation placed upon a contract by the parties themselves prior to controversy will be given consideration by the courts in construing the agreement. *Membership Corp. v. Light Co.*, 258; *Distributors v. Mitchell*, 489.

The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Thompson v. ALD, New York, Inc.*, 321.

The contract of the parties must be interpreted as written, and it is only in case of doubt and uncertainty as to the meaning of the language used that judicial construction is necessary. *Parks v. Oil Co.*, 498.

§ 13½. Parties to Contract within Purview of Contractual Obligations.

The fact that milk processor deducts dues to marketing association from payment to producers for milk bought directly from producers does not render processor a party to the marketing agreement, the deduction of dues being merely a matter of courtesy. *Milk Producers Co-op v. Dairy*, 1.

Where the contract between a city and a construction company provides that the engineer should inspect and certify the work but that this should not relieve the contractor of the duty to do sound and reliable work, the engineer is not a party to the contract so as to render him liable to the contractor's surety for defective work that had been approved by the engineer. *Durham v. Engineering Co.*, 98.

§ 24. Parties in Actions on Contract.

Where two persons enter into a contract for the benefit of a third party, such third party beneficiary may maintain an action for breach of the agreement. *Pickelsimer v. Pickelsimer*, 408.

§ 25. Pleadings in Actions on Contract.

Where the contract is made a part of the pleadings, the rights of the parties under the instrument, as presented by demurrer, will be determined in accordance with the terms of the agreement rather than the allegations or conclusions of the pleader. *Durham v. Engineering Co.*, 98.

§ 27. Sufficiency of Evidence and Nonsuit.

Evidence held to establish negotiations for agreement but not execution of definite contract. *Horton v. Refining Co.*, 675.

§ 28. Instructions in Actions on Contract.

The controversy between the parties was whether work done by the contractor after payment of the contract price was extra work for which he

CONTRACTS—*Continued.*

should be paid a stipulated sum per hour in accordance with the terms of the agreement, or whether it was work necessary to complete the project in accordance with the specifications, payment having been made prior to the completion of the project upon the contractor's promise to complete it. *Held:* An instruction that it was immaterial whether the original specifications were fulfilled and that the issue was whether the owner owed the contractor for any extra work done on the project, must be held for prejudicial error. *Golding v. Casstevens*, 200.

§ 31. Wrongful Interference with Contractual Rights by Third Persons.

Evidence held insufficient to show that processor induced producers to breach their contract with marketing association. *Milk Producers Co-op. v. Dairy*, 1.

CONTROVERSY WITHOUT ACTION.

§ 2. Statement of Facts, Hearing and Judgment.

Where the parties submit a controversy to the court upon an agreed statement of facts and admissions in the pleadings, the facts stipulated and admitted are in the nature of a special verdict, and the court may not infer or deduce other facts. *Reidsville v. Development Co.*, 274.

CORONERS

The report of the coroner as to the alcohol content of a blood specimen purportedly taken from the body of decedent is incompetent when the coroner testifies that he could not remember whether the specimen was taken from the body while he was present and there is no evidence as to the manner in which the specimen was handled after it was taken or as to who took the sample of blood. *Robinson v. Ins. Co.*, 669.

G.S. 8-35 has no application to an uncertified copy of a coroner's report but only to a duly certified copy. *Ibid.*

CORPORATIONS

§ 5. Right of Stockholders to Maintain Action.

An action against officers and directors of a corporation to recover salary or other compensation paid to the officer which was not honestly earned and fairly owed, may be maintained by a minority stockholder when the corporation is so dominated and controlled by the wrongdoer that it is powerless to act. *Fulton v. Talbot*, 183.

§ 13. Liability of Officers and Agents to Corporation.

G.S. 55-35, which is declaratory of the law prior to the effective date of the Business Corporation Act, constitutes the officers and directors of a corporation fiduciaries and liable to the corporation and its shareholders for the utilization of their authority for their own benefit to the dertiment of the corporation, but notwithstanding, contracts between them and the corporation fixing the amount and method of payment of compensation for services are not void or voidable *per se*. *Fulton v. Talbert*, 183.

An action against a corporate officer to recover salaries, bonuses, or other remuneration paid by the corporation to the officer, is based on fraud in the receipt of monies not honestly earned and fairly owed, and mere allegation

that such amounts were exorbitant, unreasonable and unjust is insufficient, it being required that plaintiff allege facts from which conclusions of fraud may be drawn. *Ibid.*

COURTS

§ 2. Jurisdiction of Courts in General.

Jurisdiction may not be conferred upon a court by waiver or consent of the parties, but where the court has jurisdiction of the subject of the action and the parties are before the court, objections as to the manner in which the court obtained jurisdiction of the person or to mere informalities in the procedure or judgment may be waived, and a party may be estopped to attack the judgment on such grounds by failure to object in apt time and by acquiescence in the judgment after rendition. *Pulley v. Pulley*, 423.

§ 3. Original Jurisdiction of Superior Courts in General.

The Superior Court is a court of statewide jurisdiction. *Cooperative Exchange v. Trull*, 202; *In re Will of Summerlin*, 523.

§ 17. Justices of the Peace.

Chapter 275 of the Public Local Laws of 1931 does not require justices of the peace in Asheville Township to pay fees or make any report of the fees paid for service of process to any official of Buncombe County, and therefore failure of the County to receive such fees cannot be charged to a justice of the peace of the Township. *Swain v. Creasman*, 546.

The failure of a justice of the peace to collect fees for the service of civil process upon the issuance of the process at the instance of certain business firms, and his action in waiting until the end of the month to collect such fees, is insufficient to support a finding of malfeasance or bad faith on the part of such justice of the peace which would justify his removal from office, any monetary loss from such practice being recoverable by action against such justice of the peace personally and on his official bond. *Ibid.*

Although Section 3, Chapter 275, Public Local Laws of 1931, requires all civil process issuing out of the office of a justice of the peace for Asheville Township to be delivered to and served by the constable for such township or his agent, where, during a period of years, the constable is not available for the service of such process, and a justice of the peace, by arrangement with the Sheriff and Commissioners of the County, delivers process to a deputy sheriff appointed for the purpose of serving such process, his act in so doing under such circumstances cannot be held malfeasance warranting his removal from office. *Ibid.*

§ 18. Conflict of Laws — Federal and State Courts.

Where a person claiming the proceeds of a policy of war risk insurance does not appeal from the adverse ruling of the Board of Veterans' Appeals, the failure to pursue the exclusive procedure provided in 38 U.S.C.A., § 784 precludes the matter, and such ruling is not open to challenge in a State court. *Williams v. Williams*, 315.

§ 19. Enforcement of Federal Statutes in State Courts.

The courts of this State have jurisdiction of an action by a railroad employee to recover upon conditions imposed by the Interstate Commerce Commission for the protection of employees from loss of employment resulting from the merger of carriers or the acquisition of one carrier by another, there being nothing in the record to show the matter is in the purview of an exclusive arbitration of agreement. *Gillikin v. R. R.*, 228.

COURTS—*Continued.*

§ 20. What Law Controls — Laws of This and Other States.

In an action in the courts of this State on a transitory cause of action in tort arising in another state, the law of such other state controls the substantive rights, but matters of procedure, including rules of evidence and the sufficiency of the evidence to make out *prima facie* case, are governed by the laws of this State. *Knight v. Associated Transport*, 462.

CRIME AGAINST NATURE

Some penetration of or by the sexual organ is an essential element of the crime against nature, G.S. 14-177, and this essential element of the offense was not affected by G.S. 14-202.1, which supplements the former statute. *S. v. Whittemore*, 583.

Evidence of defendant's guilt, together with testimony of a confession by defendant explaining the evidence of guilt in making it appear that that evidence imported the essential element of "penetration," held sufficient to sustain conviction; but the evidence against the other defendant held insufficient to be submitted to the jury since, standing alone, it did not establish the essential element of a "penetration." *Ibid.*

The crime against nature is a felony in this jurisdiction. *S. v. Jernigan*, 732.

An assault is not an essential element of the crime of sodomy nor is it a less degree of that crime, and therefore a defendant charged with committing the crime against nature with a woman cannot be convicted upon such warrant of an assault upon the woman. *Ibid.*

CRIMINAL LAW

§ 3. Attempts.

An attempt to do an act cannot be an offense unless the actual commission of the act would be an offense. *S. v. Willis*, 473.

An attempt to commit suicide is an indictable misdemeanor in this State. *Ibid.*

§ 5. Mental Capacity to Commit Crime in General.

Insanity is a defense to a charge of attempted suicide as it is to any other crime, but the test of mental responsibility is the capacity to distinguish between right and wrong at the time and in respect to the matter under investigation. *S. v. Willis*, 473.

§ 9. Aiders and Abettors.

An aider is a person who, being present at the time and place, does some act to render aid to the actual perpetrator without taking an actual share in the commission of the offense, and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit the offense. *S. v. Hargett*, 412.

Mere presence alone and failure to do anything to prevent the actual perpetrator from committing a felony cannot constitute a bystander an aider or abettor, even though he has the uncommunicated intention of assisting the perpetrator, unless he is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection. *Ibid.*

§ 10. Accessories before the Fact.

An accessory before the fact need not be the originator of the plan to com-

CRIMINAL LAW—*Continued.*

mit the offense, but a person is an accessory before the fact if, with knowledge of the intent of the principal to commit the offense, he gives advice or counsel to the principal with regard to a proposed line of conduct, or does some act in aid to the principal in committing the offense, and is not actually present when the offense is committed. *S. v. Bass*, 42.

§ 13. Jurisdiction in General.

The Superior Court is a court of general State-wide jurisdiction, and has final jurisdiction of all felonies committed within this State. *S. v. Jernigan*, 732.

A valid warrant or indictment is an essential of jurisdiction. *Ibid.*

§ 16. Degree of Crime.

Where a defendant is brought before a municipal-county court upon a warrant charging a felony, such court having the power in such instance only to bind defendant over for trial in Superior Court, the municipal-county court has no jurisdiction to convict defendant on such warrant of a misdemeanor which is not a less degree of the crime charged, and its imposition of a suspended sentence for such misdemeanor and its order thereafter activating the suspended sentence for condition broken, are nullities. *S. v. Jernigan*, 732.

§ 18. Jurisdiction on Appeals to Superior Court.

The jurisdiction of the Superior Court on appeal from a municipal-county court is derivative, and therefore when the lower court had no jurisdiction to enter an order activating a suspended sentence the Superior Court acquires no jurisdiction by appeal. *S. v. Jernigan*, 732.

§ 26. Former Jeopardy.

A mistrial of a capital felony for incapacity of the judge from a heart attack will not support a plea of former jeopardy in the subsequent prosecution. *S. v. Boykin*, 432.

A conviction of defendant of an offense without a valid warrant or indictment charging such offense does not preclude the State from thereafter proceeding against defendant upon a valid warrant or indictment. *S. v. Jernigan*, 732.

§ 71. Confessions.

Where the evidence before the court upon the *voir dire* is not in the record it will be presumed that there was evidence sufficient to sustain the court's finding that the confession of the defendant was voluntary, and evidence elicited by counsel for defendant upon cross-examination that the interrogation of defendant took place in the sheriff's office in the presence of uniformed and armed officers is insufficient to impeach the voluntariness of the confession. *S. v. Boykin*, 432.

Where the confession of the defendant is challenged on the ground that it was not voluntary, the question of its volunutariness is a preliminary question to be determined by the court from evidence heard in the absence of the jury. *S. v. Outing*, 468.

Where, upon preliminary hearing, the court finds that defendant's confessions were voluntary, such finding is conclusive when supported by the evidence notwithstanding conflicts in the testimony of the officers and defendant. *Ibid.*

The fact that the evidence on the *voir dire* discloses that one of the officers, standing some distance from defendant, fired his pistol several times at used flashlight bulbs, does not preclude a finding that the confession of defendant was voluntary, notwithstanding the testimony of defendant that the officer shot toward him, the bullet striking a short distance from his feet, there being further evidence that the murder weapon had been discovered in consequence of the defendant's incriminating statements prior to the shooting incident. *Ibid.*

An extrajudicial confession is competent only when made understandingly and voluntarily, and a defendant who has sufficient mental capacity to testify has sufficient mental capacity to confess. *S. v. Whittemore*, 583.

It is error for the court upon the challenge of the competency of a confession to refuse to hear evidence on the *voir dire* that defendant was of low mentality, had great imagination, and would believe anything told him, it being the duty of the court to hear and weigh such evidence in determining whether the confession was in fact understandingly and voluntarily made. *Ibid.*

§ 79. Evidence Obtained by Unlawful Means.

Evidence obtained by search without warrant is competent when defendant consents to search. *S. v. Coffey*, 293.

§ 92. Introduction of Additional Evidence.

A motion to reopen the case for additional evidence is addressed to the sound discretion of the trial court, and where the record does not disclose any motion for continuance or for time to prepare for defense on the phase of the case to which the additional evidence relates, the contention that defendant was taken by surprise is untenable. *S. v. Coffey*, 293.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, the State is entitled to have the evidence considered in the light most favorable to it, and defendant's evidence must be disregarded unless it is favorable to the State or is not in conflict therewith and tends to explain and make clear the State's evidence. *S. v. Roop*, 607.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

When the substantive evidence offered by the State is conflicting, some tending to inculpate and some tending to exculpate defendant, it is sufficient to withstand motion for nonsuit. *S. v. Bass*, 42.

The uncorroborated confession of a defendant, standing alone, is insufficient to be submitted to the jury on the question of guilt, but a confession may be corroborated by circumstantial evidence, and it is not required that the evidence *aliunde* the confession be sufficient within itself to establish each element of the *corpus delicti*, but it is sufficient if evidence *aliunde* is explained and given criminal import by the confession as to each essential element. *S. v. Whittemore*, 583.

§ 107. Instructions — Statement of Evidence and Application of Law thereto.

An instruction that defendant might be found guilty if the jury found beyond a reasonable doubt that defendant committed the acts charged on the date specified in the indictment or on another date included in the evidence,

CRIMINAL LAW—*Continued.*

held error when defendant has introduced evidence of an alibi on the date charged, and vested his case. *S. v. Whittemore*, 583.

§ 121. Arrest of Judgment.

Supreme Court will arrest judgment *ex mero motu* when it appears on face of record that indictment was fatally defective. *S. v. Foster*, 353.

§ 122. Discretionary Power of Trial Court to Set Aside Verdict or Order a Mistrial.

The trial court has the discretionary power to withdraw a juror and order a mistrial when necessary to attain the ends of justice, but in a capital case the court is required to find the facts fully and place them in the record so that the court's action may be reviewed. *S. v. Boykin*, 432.

In this prosecution for capital offenses, the trial court ordered a mistrial in the exercise of its discretion as necessary to attain the ends of justice upon findings set out in the record that the judge has suffered an attack of angina pectoris and that in view of the judge's physical condition and the orders of his attending physician the judge could not return to the courtroom to resume trial. *Held:* The court had the discretionary power to order the mistrial and such order will not support a plea of former jeopardy upon the trial of the defendant at a subsequent term presided over by another judge. *Ibid.*

§ 127. Form and Requisites of Sentence in General.

Where consecutive sentences are imposed upon the defendant for separate offenses, the fact that the first sentence is in excess of that allowed by law does not render the sentences void for ambiguity or uncertainty and the defendant is not entitled to his discharge, but the cause will be remanded for imposition of proper sentence in lieu of the excessive sentence vacated, with credit for time served, and the imposition of sentences to begin at the expiration thereof for the other offenses. *S. v. Stewart*, 571.

§ 136. Revocation of Suspension of Sentence.

Whether defendant has violated the terms of a suspended sentence is for the determination of the court and not a jury, and it is not required that the alleged violation of the suspended sentence be proved beyond a reasonable doubt but only that the evidence be sufficient to satisfy the judge, in the exercise of his sound discretion, that the defendant had violated such terms. *S. v. Coffey*, 293.

On appeal from an order of an inferior court putting into effect a suspended sentence, on the ground that defendant had been convicted of illegal possession of intoxicating liquor, the hearing in the Superior Court is *de novo*, and the Superior Court may hear evidence of the violation of the terms of suspension irrespective of any conviction, and its order activating the sentence upon its findings of violation of the terms of suspension is an independent order which is not predicated upon any findings of the inferior court. *Ibid.*

Where a sentence is suspended upon condition that defendant not have intoxicating liquor in his possession for the period of suspension, the court may activate the sentence upon a finding that defendant had intoxicating liquor in his possession on a specified date, even though the criminal charge predicated upon such possession is still pending, since such possession would violate the terms of the suspension even though such possession was legal and did not violate any criminal law of the State. *Ibid.*

CRIMINAL LAW—*Continued.*

The jurisdiction of the Superior Court on appeal from a municipal-county court is derivative, and therefore when a municipal-county court has no jurisdiction to enter an order activating a suspended sentence for condition broken, the Superior Court acquires no jurisdiction by an appeal. *S. v. Jernigan*, 732.

§ 137. Modification and Corrections of Record in Trial Court.

Where the record of a municipal-county court shows that "defendant entered a plea of probable cause hearing" to a warrant charging a felony, the cause must be remanded to that court for a correction of its record to show whether defendant waived a preliminary hearing, or, if defendant did not waive such hearing, for the court to hold such preliminary hearing. *S. v. Jernigan*, 732.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court.

When lack of jurisdiction appears upon the face of the record, the Supreme Court will *ex mero motu* vacate and set aside the proceeding. *S. v. Jernigan*, 732.

§ 154. Necessity for and Form of Exceptions and Assignments of Error in General.

An appeal itself will be taken as an exception to the judgment and raises the question whether error of law appears upon the face of the record. *S. v. Jernigan*, 732.

§ 159. The Brief.

Exceptions and assignments of error not brought forward and argued in the brief will be deemed abandoned. *S. v. Williams*, 82; *S. v. Coffey*, 293.

§ 161. Harmless and Prejudicial Error in Instructions.

Instructions in this case held not prejudicial, it being apparent that court was not charging upon the burden of proof in the excerpts objected to, but was charging upon the principle that a single person could not be guilty of conspiracy and the rule that the punishment was for the court and not the jury, the correct rule as to the burden of proof having been given elsewhere in the charge. *S. v. Williams*, 82.

An assignment of error to the charge will not be sustained in the absence of prejudicial error. *S. v. Leggett*, 358.

§ 162. Harmless and Prejudicial Error in the Admission or Exclusion of Evidence.

Assignments of error to questions propounded by the solicitor to a witness during the trial cannot be sustained when defendant's objection to each of the questions is sustained, or when what the witness would have testified had he been permitted to answer does not appear in the record. *S. v. Williams*, 82.

A defendant cannot complain of testimony elicited by his own counsel on cross-examination of a witness. *Ibid.*

§ 168. Review of Judgments on Motions to Nonsuit.

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal. *S. v. Leggett*, 358.

CRIMINAL LAW—*Continued.*

§ 173. Post Conviction Hearing Act.

Where it appears on appeal from judgment in a post conviction hearing that the indictment was fatally defective as to one of the offenses of which defendant was convicted, but that the petition under the Post Conviction Hearing Act was filed more than five years after the conviction, the Supreme Court may arrest the judgment on the defective count *ex mero motu*, the defendant and the State being before the Court. *S. v. Foster*, 353.

DAMAGES

§ 4. Damages for Injury to Property.

In action for damages for injury to building resulting from negligent manner in which adjacent building was demolished or torn down, finding of difference in value of plaintiff's building before and after the demolition in one amount and damages in a different amount *held* not inconsistant, since part of difference in value of property could be due to disclosure of defects in plaintiff's building and change in use of adjacent property. *Davis v. Ludlum*, 663.

§ 12. Competency and Relevancy of Evidence on Issue of Damages.

Where the quantum of damages resulting to plaintiff's building from the negligent manner in which the building on the adjacent lot was demolished is in issue, with evidence as to the value of plaintiff's property before and after the incident complained of and testimony as to the condition of plaintiff's building when purchased and the repairs and improvements subsequently made, it is competent to ask plaintiff on cross-examination as to the price paid for the property by her some eighteen years prior to the institution of the action for the purpose of impeaching plaintiff's testimony as to values. *Davis v. Ludlum*, 663.

§ 15. Instructions on Issue of Damages.

Where the court gives correct instructions as to the measure of damages upon conflicting evidence as to whether plaintiff's injuries were serious and permanent or negligible and temporary, a new trial will not be awarded on exceptions to the charge, it being incumbent upon defendants, if they desired amplification, to have tendered proper request for special instructions. *Parks v. Washington*, 478.

DECLARATORY JUDGMENT ACT

§ 2. Proceedings.

In proceedings under the Declaratory Judgment Act the court is not required to give effect to incompetent evidence even though such evidence is embodied in the stipulations of counsel, there being sufficient competent evidence to support a judgment. *Trust Co. v. Wilder*, 114.

DEDICATION

§ 1. Acts Constituting Dedication.

Where land is sold with reference to subdivisional maps and not with reference to map of entire tract, dedication of street relates to each subdivision separately. *Janicki v. Lorek*, 53.

The intent to dedicate is an essential element of dedication. *Ibid.*

DEDICATION—*Continued.*

§ 3. Withdrawal and Revocation of Dedication.

Admitted facts held to show withdrawal of dedication of street not used for more than fifteen years after dedication. *Janicki v. Lorek*, 53.

§ 4. Title and Rights Acquired by Dedication.

A person who purchases a lot or parcel of land situated outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally, and when the rights of the public are withdrawn and barred, the rights of the owner of land outside the subdivision are also barred notwithstanding that his lands may be located at the dead-end of such street. *Janicki v. Lorek*, 53.

DEEDS

§ 19. Restrictive Covenants.

Fact that part of land shown on map of subdivision is marked "reserved unrestricted" and is later used for commercial purposes, does not affect residential restrictions to other lands shown on map. *Tull v. Doctors Bldg.*, 23.

Where the owner of a large tract of land subdivides it into numerous tracts and files a separate map as to each tract, which map shows a general plan of development for that tract, each tract is a separate subdivision for the purpose of construing the restrictive covenants. *Ibid.*

Restrictive covenants constitute negative easements running with the land, enforceable *inter se* by the grantees in the deeds containing such restrictions and also by all purchasers by *mesne* conveyances from such grantees, even though their immediate deeds contain no restrictions. *Ibid.*

Changes in character of the use of land adjacent to but outside the area of a subdivision restricted to residential purposes does not affect the validity and enforceability of the residential restrictions, there being no change in use within the covenanted area. *Ibid.*

The violation of covenants restricting the use of lots within a development to residential purposes, even though acquiesced in by the owners of other lots within the development, will not estop such other owners from enforcing the restrictions unless the violations of the restrictions amount to such a radical or fundamental change as to destroy for practical purposes the essential objects and purposes of the residential restrictions, and each case must be determined upon its particular facts. *Ibid.*

The fact that several lots in a residential development are paved and used for parking in connection with an office building lying outside the area of the development, and that owners of other lots within the development have acquiesced in such use, will not estop such other owners from enforcing the restrictive covenants when they have objected to and refused to permit the erection of any commercial structure on any of the lots within the residential area. *Ibid.*

The fact that a municipality opens up a street on a part of a lot in a subdivision in which all the lots are restricted to residential purposes does not violate or negate the residential restrictions. *Ibid.*

DESCENT AND DISTRIBUTION

§ 8. Right of Illegitimate Child to Inherit.

G.S. 49-12 is retroactive as well as prospective in effect, and where the parents of an illegitimate child marry, such child is legitimated even though

DESCENT AND DISTRIBUTION—*Continued.*

born before the enactment of the statute, and the legitimate children of such child inherit from their grandfather through their mother even though their mother dies prior to the death of their grandfather. G.S. 29-1(3). *Greenlee v. Quinn*, 601.

The legitimate children of a legitimated child inherit from a legitimate paternal half-sister of their deceased mother when such half-sister dies intestate without lineal descendants, since a legitimated child has the same right to inherit from collateral relations as if born in wedlock, and the children of such legitimated child take her interests. *Ibid.*

DIVORCE AND ALIMONY

§ 1. Jurisdiction and Pleadings in General.

Evidence tending to show that plaintiff in a divorce action was born and raised in a municipality of this State and lived here until inducted into the army, that he continued to regard this State as his domicile while stationed in many states and in a foreign country under military orders, that while on leave he made his "headquarters" at his mother's home in this State, *is held* to support an instruction that plaintiff's home remained in this State unless he had intended to make some other state his home permanently or for an indefinite period, and supports the jurisdiction of the court over the action, notwithstanding the marriage was contracted in another state. *Israel v. Israel*, 391.

G.S. 50-3 providing that in an action for divorce the summons shall be returnable to the court of the county in which either the plaintiff or the defendant resides is not jurisdictional but relates to venue. *Denson v. Denson*, 703.

§ 14. Divorce on Ground of Adultery.

In a proceeding in *habeas corpus* to determine the right of custody of the children of the marriage as between husband and wife, a finding by the court that the wife had not committed adultery with any person is not *res judicata* on the question in a subsequent action by the husband for divorce on the ground of adultery, it being required that in an action for divorce the ground for relief must be found by a jury. *Wicker v. Wicker*, 723.

§ 16. Alimony without Divorce.

The Superior Court of the county in which the parties reside has jurisdiction to order the payment of alimony by the husband to the wife. G.S. 50-1. *Pulley v. Pulley*, 423.

§ 18. Alimony and Subsistance Pendente Lite.

Provisions of an antenuptial agreement that neither party would make any demands upon the other with respect to alimony or support of any kind are void and cannot preclude the court from ordering subsistence and counsel fees *pendente lite* upon supporting findings of fact. *Motley v. Motley*, 190.

Findings supported by evidence warranting the conclusion that the husband had offered such indignities to the wife as to render her condition intolerable and her life burdensome, and that as a result thereof she had moved out of the home, with further findings that she was without means to defray the expenses of the action, *are held* sufficient to support the court's order allowing subsistence and counsel fees *pendente lite* in the wife's action for alimony

DIVORCE AND ALIMONY—*Continued.*

without divorce, the complaint alleging sufficient facts to constitute a cause of action therefor. *Ibid.*

§ 21. Enforcing Payment of Alimony.

Husband may not attack decree of alimony by confession for want of verification or informalities, and such decree will support contempt proceedings for willful refusal to pay alimony therein provided, even though the judgment stipulates that the wife recover of the husband the sums stipulated rather than that the husband should pay the amounts. *Pulley v. Pulley*, 423.

Where, in an action for divorce, an order for alimony *pendente lite* is entered which recites that the parties had agreed upon the amount of alimony and specifically decrees that the husband should pay the amount agreed upon, such judgment will support contempt proceedings for the willful refusal of the husband to pay the amount stipulated. *Stancil v. Stancil*, 507.

§ 26. Validity and Attack of Domestic Decrees of Divorce.

Mere fact that action was instituted in county other than plaintiff's residence, defendant having been personally served, does not warrant attack of decree for fraud on jurisdiction of the court. ***Denson v. Denson*, 703.**

DOMICILE

§ 1. Definitions and Distinctions.

The domicile at the time of induction into the Army remains the domicile of a serviceman until and unless he establishes another domicile. *Israel v. Israel*, 391.

DRAINAGE

§ 3. Nature and Establishment of Drainage Districts.

Drainage districts are quasi-municipal corporations, and the boundaries of a district can be altered only as permitted by statute. *In re Drainage District*, 338.

§ 6. Assessments, Liens and Enforcement.

Under G.S. 156-62(4) and G.S. 156-65 all lands which may be benefited must be included within the boundaries of the drainage district, and therefore lands lying outside of the boundaries may not be assessed with any portion of the cost of repairing and maintaining improvements originally authorized, G.S. 156-118 *et seq.*, notwithstanding that the board of viewers had recommended that the boundaries of the district be enlarged so as to include the lands in question, there being no statutory authority for enlarging the boundaries of the district prior to the effective date of Ch. 614, Session Laws 1961. *In re Drainage District*, 338.

EJECTMENT

§ 7. Presumptions and Burden of Proof.

In an action to recover possession of land and damages for trespass thereon, defendants' denial of plaintiffs' title places the burden on plaintiffs of proving title in themselves. *Taylor v. Scott*, 484.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where the parties stipulate that they claim under a common source, and

EJECTMENT—*Continued.*

defendant's admit the death of the common source and claim solely by adverse possession, the admission of the death of the common source raises a presumption that he died intestate, and, upon failure of evidence of adverse possession by defendants, a directed verdict in favor of plaintiff heirs is not prejudicial. *Chisholm v. Hall*, 374.

Where, in an action to quiet title, defendants rely upon a tax foreclosure deed but fail to put in evidence any judgment or record showing sale of the property for non-payment of taxes, there is a hiatus in the chain of title, and such evidence is insufficient to establish record title in defendants. *Ibid.*

Where plaintiffs claim record title from a common source, but the only evidence identifying the land claimed with the descriptions in their deeds is the testimony of a surveyor that the map prepared by him was based upon his assumption, without personal knowledge, that a certain branch referred to by witnesses by a particular name was in fact the same as a branch called by another name on his map, and that he disregarded the call in the deed designating the prong of the branch, *is held* insufficient to carry plaintiffs' burden of identifying the lands claimed, and nonsuit against them should have been entered. *Taylor v. Scott*, 484.

§ 11. Verdict and Judgment.

In an action involving title to land, judgment of nonsuit for the insufficiency of plaintiffs' evidence identifying the land claimed with the descriptions in their deeds does not have the effect of adjudicating title in the defendants. *Taylor v. Scott*, 484.

ELECTIONS

§ 4. Ballots and Voting.

Constitutionality of statute proscribing "single shot" voting *held* not presented for decision. *Watkins v. Wilson*, 510.

§ 10. Contested Elections — Sufficiency of Evidence and Nonsuit.

An election will not be disturbed for irregularities which are insufficient to alter the result, and the stipulations of the parties in this case, together with the lack of evidence of any irregularities sufficient to disturb the result, warrant nonsuit, other questions have been rendered moot by an act of the General Assembly. *Starbuck v. Havelock*, 198.

The constitutionality of a statute requiring a vote for as many candidates as there are vacancies to be filled for the office of city commissioner may not be challenged by a candidate when he fails to show that the votes for him on ballots accepted plus the number of ballots rejected for failure of the elector to vote for the required number, could alter the result as to him. *Watkins v. Wilson*, 510.

ELECTRICITY

§ 2. Service to Customers.

A power company and an electric membership corporation are free to compete in rural areas unless restricted by some valid stipulation in a contract between them. *Membership Corp. v. Light Co.*, 258.

Contract held not to preclude power company from constructing line across line of membership corporation to serve customers more than 300 feet from line of membership corporation. *Ibid.*

ELECTRICITY—*Continued.*

An electric membership corporation is not required to obtain a certificate of convenience and necessity from the Utilities Commission before construction facilities for serving its members, G.S. 2-101, and may compete with a power company for customers in rural areas subject only to the contractural restrictions between them, and therefore, in the absence of any order of the Utilities Commission, whether it is against public policy to permit a power company to construct a line across that of a membership corporation is a question for legislative action, and cases decided upon controversy between power companies subject to regulations by a public service commission are inapposite. *Ibid.*

EQUITY

§ 1. Nature of Equity and Maxims of Equity.

Equity will not override the law or invalidate contracts or destroy property rights. *Tull v. Doctors Bldg., Inc.*, 23.

ESTATES

§ 9. Joint Estates and Servivorship in Personalty.

The federal regulations in regard to the title and ownership of United States savings bonds have the force and effect of federal law and become a part of the bond contract between the purchaser and the Federal Government, and are determinative of the property rights of the parties to the bonds. *Trust Co. v. Wilder*, 114.

Where United States savings bonds are registered in the names of two individual co-owners in the alternative, and one of the co-owners dies, the surviving co-owner takes title by right of survivorship under the terms of the bonds, regardless of any provisions in the will of the deceased co-owner. *Ibid.*

A statement in the handwriting of the deceased co-owner that he had paid the other co-owner for the bonds and that the bonds belonged to his estate, cannot affect the title of the surviving co-owner. *Ibid.*

ESTOPPEL

§ 3. Estoppel by Record.

Estoppel to object to a prior order entered in the cause may arise from expressed consent to the order. *Webb v. Gaskins*, 281.

Findings of fact to the effect the parties moving to set aside a prior order entered in the cause, confirming the sale of assets by the receiver and directing the receiver to pay a specified claim, had consented to the order directing payment and had not objected to the order of confirmation, and that at that time the parties knew or should have known the facts, *is held* sufficient to support the conclusion of law that movants are estopped to attack the order, the claim having been paid by the receiver pursuant to the order of the court and the rights of third parties having intervened. *Ibid.*

§ 5. Parties who May Be Estopped.

The fact that a municipal official issues a permit for a non-conforming use after the enactment of a zoning ordinance does not estop the municipality from enforcing the ordinance. *Helms v. Charlotte*, 647.

EVIDENCE

§ 11. Transactions or Communications with Decedent or Lunatic.

Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court is established by evidence, an interested party may testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. *Philbrick v. Young*, 737.

§ 24. Proof of Public Records or Documents.

The record or certificate of a public officer as to transactions occurring out of his presence are generally inadmissible. *Robinson v. Ins. Co.*, 669.

G.S. 8-35 has no application to an uncertified copy of a coroner's report. *Ibid.*

§ 28. Hearsay Evidence in General.

A statement in the handwriting of testator, found attached to U. S. savings bonds registered in his and his daughter's names stating that he and his wife had given his daugher the face amount of the bonds and that the bonds belonged to himself and his wife, is incompetent as hearsay, and since such evidence is hearsay and does not come within any exceptions to the hearsay rule, it is incompetent irrespective of the fact that it is a self-serving declaration. *Trust Co. v. Wilder*, 114.

§ 30. Declarations — Res Gestae.

In order for a declaration to be competent as a part of the *res gestae* it must be shown that the declaration was spontaneous, made contemporaneously with the transaction or so closely connected with it as to be a part thereof, and that it be relevant to the fact sought to be proved. *Little v. Brake Co.*, 451.

A statement by an employee some time before starting a trip that he was going to call on some customers is incompetent to prove that the trip in question was made in the course of his employment. *Ibid.*

§ 31. Admissions or Declarations of Agents or Representatives.

A statement of an agent constituting an admission against the interest of the principal is not competent against the principal until the authority of the agent to bind the principal in regard to the matter is shown. *Thompson v. ALD*, 321.

§ 45. Blood Tests.

While the amount of alcohol in the bloodstream as shown by proper chemical tests is competent in evidence on the question of intoxication, proper foundation of such evidence must be laid by showing that the blood was taken from the person in question within a reasonable time of the incident under investigation, by identifying the blood specimen from the time it was taken to the time of the analysis, and by establishing the qualifications of the person making the analysis as an expert in the field, and further, if the specimen was taken from the body of a decedent, that it was taken before any extraneous substance had been injected into the body. *Robinson v. Ins. Co.*, 669.

Testimony of a witness that he obtained a sample of the blood of the decedent and that an analysis of the blood was made under his supervision and that the result of the tests were in his report, is properly striken and the

EVIDENCE—*Continued.*

report properly excluded from evidence when there is no evidence as to how long after the death of the decedent the blood was taken from his body, or who took the specimen of blood and, if actually taken from the body of decedent, whether it was taken before or after any extraneous substance had been injected into the body. *Ibid.*

Nor is a coroner's report competent in evidence when it does not appear that the blood was taken by the coroner or in his presence. *Ibid.*

EXECUTORS AND ADMINISTRATORS

§ 6. Title to and Control of Assets.

Testator purchased savings bonds and had them registered in the alternative in his own name and the name of his daughter. Testator retained control of the bonds and after his death they were found with a letter in his handwriting attached thereto, which letter stated that the bonds belonged to him and his second wife, as they had paid his daughter the face amount of the bonds. *Held:* Upon the father's death, title to the bonds vested in the daughter, and the contention that the daughter should hold the proceeds in trust is untenable, since the self-serving declaration in testator's handwriting is incompetent in evidence and cannot have the effect of impressing the proceeds of the bonds with a trust in favor of testator's widow. *Trust Co. v. Wilder*, 114.

§ 24b. Limitation of Actions for Personal Services Rendered Decedent.

G.S. 1-52 bars the claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, G.S. 1-22, and the contention that the statute bars the claim for all services rendered more than three years prior to the institution of the action, is untenable. *Hodge v. Perry*, 695.

FRAUD

§ 9. Burden of Proof and Presumptions.

When the facts admitted or proved are consistent with good faith and honest intent, they should be so construed, since fraud is not presumed. *Milk Producers Co-op. v. Dairy*, 1.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for Debt or Default of Another.

Where diverse inferences may be drawn from the evidence as to whether the promise to answer for the debt of another was an original or a collateral promise, nonsuit on the defense of the statute is properly denied and the evidence must be submitted to the jury on appropriate issues. *Baker v. Construction Co.*, 302.

GIFTS

§ 1. Gifts Inter Vivos.

Funds belonging to husband deposited by him in bank in joint account with wife remain his separate property with agency to her to draw thereon, nothing else appearing. *Smith v. Smith*, 152.

HOMICIDE

§ 2. Parties and Offenses.

Mere presence alone and failure to do anything to prevent the actual perpetrator from committing a homicide does not constitute the bystander an aider or abettor. *S. v. Hargett*, 412.

§ 10. Right to Kill in Defense of Others.

The right to kill in defense of members of the family extends not only to the right of a mother to kill in defense of her daughter, but also to the right of a brother-in-law to kill in defense of his sister-in-law who was a member of his household. *S. v. Hodges*, 566.

§ 14. Competency and Relevancy of Evidence.

Solicitor's order for post-mortem examination is competent and fact that order recited opinion of solicitor that "foul play" had been committed does not render its admission prejudicial. *S. v. Boykin*, 432.

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence for the State raising the permissible inference that defendant intentionally shoved deceased face down into the water in a ditch while the deceased was so drunk that he was helpless, and left the deceased there, with expert testimony that deceased died as a result of drowning and not as a result of alcoholism, is sufficient to be submitted to the jury in a prosecution for murder. *S. v. Hargett*, 412.

Evidence that a bystander stood by while the perpetrator pushed the deceased in the water face down *held* insufficient to be submitted to the jury on the question of the bystander's guilt as an aider and abettor. *Ibid.*

§ 27. Instructions on Defenses.

Evidence held to raise questions of one defendant's right to kill in defense of her daughter and other defendant's right to kill in defense of sister-in-law who was a member of his household. *S. v. Hodges*, 566.

HUSBAND AND WIFE

§ 1. Antenuptial Agreements.

A provision in an antenuptial agreement relieving the husband of the duty of supporting his wife is void as against public policy. *Motley v. Motley*, 190.

§ 2. Marital Rights, Privileges and Liabilities.

It is the duty of the husband to support his wife, and public policy will not permit him to contract away this obligation, and therefore a provision in an antenuptial contract relieving the husband of this duty is void as against public policy. G.S. 52-13 relates to the release of interests in property by antenuptial contract and has no bearing whatever on the right of a wife to support. *Motley v. Motley*, 190.

§ 11. Construction and Operation of Separation Agreements.

The provision of a separation agreement that the husband should keep in force his policies of life insurance issued by the Federal Government in which his wife was named beneficiary, and should not change the beneficiary, does not entitle the wife to impress a trust on the proceeds of the policies in the hands of the second wife when the husband, subsequent to his divorce

HUSBAND AND WIFE—*Continued.*

from his first wife and marriage to the second, changes the beneficiary in the policies to his second wife in accordance with the Federal regulations. *Williams v. Williams*, 315.

§ 15. Nature and Incidents of Estates by Entiretics.

There is no community property law in North Carolina, and income and profit from a farm owned by the husband, or even a farm owned by husband and wife by the entireties, are his separate and sole property. *Smith v. Smith*, 152.

§ 17. Termination, Cotenancy and Survivorship.

Where husband and wife owning an estate for life by the entireties are divorced, their estate is converted into a tenancy in common for life, and not a joint estate for life, and the survivor does not take an estate for life in the entire tract but only an estate for life in an undivided one-half interest in the lands. *Lanier v. Dawes*, 458.

§ 22. Instructions in Prosecutions for Abandonment and Non-Support.

In prosecution for abandonment and nonsupport, court must charge that jury must find that defendant's acts were willful in order to sustain conviction. *S. v. Westmoreland*, 725.

INDICTMENT AND WARRANT

§ 1. Preliminary Proceedings.

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State, and a person arrested without warrant and charged with murder by indictment returned by the grand jury at a term of court during the same month of the arrest may not attack the validity of the trial on the ground that no warrant was issued and no preliminary hearing held. *S. v. Hargett*, 412.

§ 9. Charge of Crime.

A warrant which is sufficient to inform a person of the offense with which he is charged and which is adequate to protect him against further prosecution for that offense is sufficient. *S. v. Daniel*, 717.

§ 17. Variance between Averment and Proof.

While time is not ordinarily of the essence of an offense, when the State specifies the date in the indictment and defendant offers evidence of an alibi, relating to such date, the State may not, after the defendant has rested his case, introduce evidence tending to show defendant's commission of the proscribed act on a later date. *S. v. Whittemore*, 583.

INJUNCTIONS

§ 4. Enjoining Violation of Statute or Ordinance.

A municipality may restrain the violation of its zoning ordinance. *New Bern v. Walker*, 355.

§ 7. Injunction to Restrain Occupancy or use of Land.

Purchaser may enjoin seller from using adjacent property for particular use in violation of representations inducing the purchase. *Stowe v. Burke*, 527.

INJUNCTIONS—*Continued.*

§ 13. Continuance and Dissolution of Temporary Orders.

Where a temporary order restraining defendant from violating a zoning ordinance has been properly continued to the hearing on the merits, defendant is not entitled to stay the restraining order until the hearing on the merits even though he files bond. *New Bern v. Walker*, 355.

INSANE PERSONS

§ 1. Commitment to Hospital.

Allegations that defendant physicians did not examine plaintiff but nevertheless filed affidavits pursuant to G.S. 122-42 stating that they had carefully examined plaintiff and believed her to be a fit subject for admission in a hospital for the mentally disordered *is held* not to state a cause of action for wilful negligence but for libel, and the cause of action for libel is properly dismissed, the statements being absolutely privileged. *Fowle v. Fowle*, 720.

INSURANCE

§ 3. Construction and Operations of Policies in General.

Relevant statutory provisions in force at the time of the execution of a contract of insurance become a part of the policy to the same extent as if they were actually written therein. *Nixon v. Ins. Co.*, 106.

§ 11e. Life Insurance — Exclusion of Coverage of Death by Suicide.

That death of insured resulted from suicide is an affirmative defense upon which insurer has burden of proof. *Smith v. Ins. Co.*, 569.

§ 16. Avoidance of Certificates under Group Policy for Nonpayment of Premiums.

Insurer is entitled to cancel a policy of group insurance for failure of the employer to pay the premium, and an employee may not thereafter recover on his certificate notwithstanding that the employer has deducted from his salary his pro rata part of the premium. *Newman v. Ins. Co.*, 722.

§ 26. Actions on Life Policies.

Where the admissions in the pleadings and the stipulations of the parties make out a *prima facie* case of liability on a policy of life insurance, the fact that the proof of death introduced by plaintiff has the word "suicide" printed in ink under the heading "cause of death" does not entitle insurer to nonsuit or a peremptory instruction on the affirmative defense of suicide when plaintiff testifies that he signed the paper in a hurry at the instance of insurer's agent and that at that time the word "suicide" did not appear thereon. *Smith v. Ins. Co.*, 569.

§ 48b. Risks Covered by Collision and Upset Policies.

A collision clause in an automobile insurance policy generally will be held to cover collision of the vehicle with any physical object, moving or stationary, in the absence of imitation in the policy contract. *Morton v. Ins. Co.*, 360.

Where a car is backed down a launching ramp to launch a boat from a trailer attached to the rear of the automobile, and while the drivers and others were in the rear to lower the boat into the water, the automobile rolls backward into the water and into a canal, there is a collision of the car with the water and in the canal and with the bottom of the canal within the meaning

INSURANCE—*Continued.*

of a policy insuring against damages to the car resulting from a collision of the automobile with another object. *Ibid.*

Allegations to the effect that after an automobile had been backed down a launching ramp, and while the car was stationary and unattended, the car suddenly started rolling backwards and rolled into the water and into a canal, clearly implies that the event was neither intended nor foreseen and therefore was an "accident" within the meaning of a clause insuring against damage from an accidental collision. *Ibid.*

§ 54. Vehicle Insured under Liability Policy.

Where a policy covers not only the vehicle owned by insured but also vehicles not owned by insured but used by him temporarily as a substitute for the described vehicle when the described vehicle was withdrawn from use because of breakdown, recovery may not be had even though the vehicle driven by insured and causing the accident was not owned by him if insured was driving the vehicle merely for his convenience and not because of breakdown of the insured vehicle. *Hunnicutt v. Ins. Co.*, 515. And where the evidence is conflicting as to insured's reason for using the vehicle causing the accident a peremptory instruction that insurer would be liable if insured did not own the vehicle is error. *Ibid.*

§ 62. Cooperation of Insured in Defense of Action brought by Injured Party and Forfeiture of Policy for admission of Liability by Insured.

Under G.S. 20, Article 9A, violation of policy provisions by insured in an assigned risk liability policy, when such violations occur subsequent to an accident resulting in injury or damage to third persons, cannot defeat the right of such third persons as against insurer, it being the purpose of the statute to provide protection to innocent parties injured by the acts of financially irresponsible motorists. *Nixon v. Ins. Co.*, 106.

By refusing to defend an action against insured on the ground that the policy was not in effect at the time of the accident, insurer waives provisions of the policy prohibiting settlement of claim by insured without insurer's consent, and the provisions making the liability of insurer dependant upon a judgment against insured; nevertheless insurer may be held liable in case of a settlement only for such amount as is reasonably necessary to effect the settlement. *Ibid.*

In an action by the injured person against insurer to recover the amount of a judgment by default and inquiry or a consent judgment against insured, obtained after insurer had refused to defend the suit, insurer is not entitled to allege the defense of the policy provision that insurer should not be liable upon a consent judgment to which it did not consent, but is entitled to allege that it is liable only for the amount reasonably necessary to effect the settlement, leaving for determination only the questions of whether the policy was in force at the time of the accident and whether the consent judgment was reasonable and made in good faith, and if not, the amount of the plaintiff's damages. *Ibid.*

§ 65. Rights of Injured Party against Insurer after Judgment against Insured.

Where the injured party obtains judgment against insured on the ground of insured's negligent operation of the automobile in question, without ad-

INSURANCE—*Continued.*

judication of insured's ownership of the vehicle, insurer is not estopped by such judgment in a subsequent action against it by the injured party from setting up the defense that insured was the owner of the vehicle and that such vehicle was not the one described in the policy, and therefore was not covered thereby. *Hunnicutt v. Ins. Co.*, 515.

§ 92. Actions on Hail and Windstorm Insurance.

The evidence, considered in the light most favorable to plaintiff, *is held* sufficient to support the jury's findings that plaintiff's tobacco was damaged to the extent of five per cent or more by hail alone within the provisions of the policy of hail insurance sued on. *Bowen v. Assurance Co.*, 577.

INTOXICATING LIQUOR

§ 13c. Sufficiency of Evidence on Charge of Illegal Possession and Possession for Sale.

Evidence tending to show that the husband of the owner of an automobile, with the registration card in his possession, was sitting therein on the front seat with intoxicating liquor between his knees as the car was being driven by another in a direction away from the town in which the whiskey had been purchased that day, and that he directed the disposition of the car after the whiskey was found, *is held* sufficient to support an inference that he had custody of the car and was in at least joint control thereof, and therefore that he was in possession of the whiskey. *S. v. Coffey*, 293.

JUDGMENTS

§ 2. Time and Place of Rendition.

Where the judge does not enter an order in the cause during the trial term but merely indicates upon the hearing that he would do so, and after adjournment of the term and outside the county and district enters the order without notice to or consent of a party, such order may not stand notwithstanding it states that it is entered *nunc pro tunc*. *Thompson v. Gennett*, 574.

§ 3. Conformity to Verdict and Pleadings.

The court properly refuses to grant relief prayed for by a plaintiff in an unverified motion, when such relief is not supported by plaintiff's complaint. *Tull v. Doctors Bldg., Inc.*, 23.

§ 6. Modification and Correction of Judgment and Record in Trial Court.

A court has the power upon a proper showing to correct its record and supply an inadvertent omission. *Philbrick v. Young*, 737.

§ 11. Nature and Essentials of Judgments by Confession.

Husband may not attack decree of alimony by confession for want of verification or informalities. *Pulley v. Pulley*, 423.

§ 15. Effect and Form of Default Judgment.

A judgment by default and inquiry establishes the right of action pleaded in the complaint, but the nature and extent of the default judgment is limited to the cause of action properly pleaded, and the default does not preclude defendant from showing that the averments of the complaint are insufficient to warrant any recovery. *Morton v. Ins. Co.*, 360.

JUDGMENTS—*Continued.*

§ 21. Attack of Judgments as Irregular.

Upon motion to vacate a default judgment upon the ground that the complaint fails to allege facts sufficient to constitute a cause of action, the test of the sufficiency of the complaint is the same as upon a demurrer, and the motion is properly denied if the facts alleged in the complaint are sufficient to make out a cause of action and support the judgment. *Morton v. Ins. Co.*, 360.

§ 22. Attack of Judgments for Surprise and Excusable Neglect.

A judgment may not be set aside under G.S. 1-220 on the ground that the judgment was taken against movant through his mistake, surprise, or excusable neglect when the motion to set aside the judgment is not made until more than one year after its rendition. *In re Will of Summerlin*, 523.

§ 24. Attack of Judgments for Fraud.

A decree of divorce entered in an action in which defendant was personally served with summons may not be set aside on the ground of fraud upon the jurisdiction of the court merely because the action was instituted in a county other than plaintiff's residence. *Denson v. Denson*, 703.

§ 25. Attack of Consent Judgments or Judgments in Retraxit.

Upon motion of some of the parties plaintiff to set aside a consent judgment or judgment in retraxit on the ground that they had not authorized anyone to bring the suit for them, the court may set aside the judgment as to movants but should not make any adjudication of the rights of other parties not before it on the hearing of the motion. *Howard v. Boyce*, 712.

§ 27. Hearings and Determination of Proceedings attacking Judgments.

Upon the hearing of a motion to set aside an order confirming sale of assets by a receiver and to vacate an order directing the payment of a claim by the receiver, the judge hearing the motion is required to find and state the ultimate facts but not the evidentiary facts. *Webb v. Gaskins*, 281.

Upon the hearing of a motion to vacate the order of confirmation of the sale of assets by a receiver and to set aside an order directing the receiver to pay a specified claim, findings by the court that the matters set forth as the basis for the motion had theretofore been heard and adjudicated, all parties being present, that the order directing the payment of the claim was consented to by all parties, and that the motion to vacate and set aside was without merit and made solely for the purpose of delay, are findings of fact and are not reviewable conclusions or inferences of law. *Ibid.*

Where the record discloses that a court having jurisdiction entered judgment for propounder upon the verdict of the jury establishing that the paper writing was executed according to the formalities required by law, that testatrix had sufficient mental capacity to execute same, and that it was not procured by undue influence, the denial of a motion to set aside the judgment on the ground that it was in fact a consent judgment will not be disturbed upon a sole exception to the order denying the motion, there being nothing in the record to suggest that movant asked the court to hear any evidence, offered to present any, or asked the court to find any facts, and there being no error of law appearing upon the face of the record proper in the caveat proceeding. *In re Will of Summerlin*, 523.

JUDGMENTS—*Continued.*

§ 29. Parties Concluded.

Where, in an action by a passenger in one car against the driver of the other car involved in the collision, such defendant has the other driver joined for contribution pursuant to G.S. 1-240, and plaintiff recovers judgment against the original defendant and the original defendant obtains judgment for one-half of the recovery against the additional defendant, *held* the rights and liabilities of the drivers *inter se* are put in issue by their pleadings and the judgment in such action will bar a subsequent action instituted by the driver of one car against the driver of the other. *Hill v. Edwards*, 615.

Upon motion of only two of a number of plaintiffs to set aside a consent judgment or a judgment in retraxit on the ground that they had not authorized anyone to bring the suit for them, only movants and respondant-defendant are before the court seeking adjudication of their rights *inter se*, and upon evidence supporting movants' averments the court may adjudicate only that movants are not bound by the judgment and it is error for the court to adjudicate further with regard to rights of parties not before it on the motion and not seeking its aid. *Howard v. Boyce*, 712.

§ 30. Matters Concluded in General.

A judgment against insured on the ground of insured's negligence in the operation of a vehicle, without adjudication of insured's ownership of the vehicle, does not estop insurer from setting up the defense in a subsequent action that insured was the owner of the vehicle and that such vehicle was not the one covered by the policy. *Hunnicutt v. Ins. Co.*, 515.

In a proceeding in *habeas corpus* to determine the right of custody of the children of the marriage as between husband and wife, a finding by the court that the wife had not committed adultery with any person is not *res judicata* on the question in a subsequent action by the husband for divorce on the ground of adultery, it being required that in an action for divorce the ground for relief must be found by a jury. *Wicker v. Wicker*, 723.

§ 33. Conclusiveness of Adjudication — Judgments of Nonsuit.

In an action involving title to land, judgment of nonsuit for the insufficiency of plaintiffs' evidence identifying the land claimed with the descriptions in their deeds does not have the effect of adjudicating title in the defendants. *Taylor v. Scott*, 484.

JUDICIAL SALES

§ 5. Validity and Attacks of Sale.

Upon the hearing of a motion to set aside an order confirming sale of assets by a receiver and to vacate an order directing the payment of a claim by the receiver, the judge hearing the motion is required to find and state the ultimate facts but not the evidentiary facts. *Webb v. Gaskins*, 281.

Upon the hearing of a motion to vacate the order of confirmation of the sale of assets by a receiver and to set aside an order directing the receiver to pay a specified claim findings by the court that the matters set forth as the basis for the motion had theretofore been heard and adjudicated, all parties being present, that the order directing the payment of the claim was consented to by all parties, and that the motion to vacate and set aside was without merit and made solely for the purpose of delay, are findings of fact and are not reviewable conclusions or inferences of law. *Ibid.*

JURY

§ 5. Right to Trial by Jury.

Unless a trial by jury is waived or a reference is ordered, issues of fact arising on the pleadings must be submitted to a jury. *Baker v. Construction Co.*, 302.

LIBEL AND SLANDER

§ 9. Absolute Privilege.

Allegations that defendant physicians signed affidavits upon which plaintiff was committed to hospital for insane and that the affidavits were false, *held* to state cause of action for libel which was absolutely privileged. *Fowle v. Fowle*, 720.

LIMITATION OF ACTIONS

§ 9. Death and Administration.

An action against the personal representative of a decedent on a claim which survives decedent's death may be maintained within one year after the issuance of letters of administration if the claim is not barred at the time of the decedent's death. *Hodge v. Perry*, 695.

§ 16. Pleading of Statutes of Limitation.

The pleading of the predicate facts upon which the bar of the applicable statute of limitations rests is a sufficient pleading of the statute, and a mere statement that the party pleads a specified statue is insufficient. *Janicki v. Lorek*, 53.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Where the evidence raises conflicting inferences for the determination of the jury as to the date the amount sued for was due, the bar of the statute of limitations pleaded being dependent upon which of the possible dates the amount due was payable, the court may not assume that in no aspect could the jury find facts which would bar plaintiffs' right of action, and a peremptory instruction in plaintiffs' favor is error. *Distributors v. Mitchell*, 489.

MARRIAGE

§ 1. Nature and Requisites of the Relationship.

Marriage is not only contractual between the parties thereto but is a status in which the State has an interest and to which the law has attached certain incidents which may not be abrogated without the consent of the State. *Motley v. Motley*, 190.

MASTER AND SERVANT

§ 9. Actions to Recover Compensation.

Where a sales agent, employed on salary and commissions to sell equipment for a particular business, decides to go into the business himself, ceases his activities pursuant to the employment and engages solely in activities to set up his personal business, and thereafter purchases the equipment for the business from the employer, the employee is not entitled to commission on the equipment sold to himself, since commissions on such sale is not contemplated in the contract of employment and the employee had terminated and aban-

MASTER AND SERVANT—*Continued.*

doned the employment prior to the purchase of the equipment. *Thompson v. ALD*, 321.

§ 10. Duration of Employment and Wrongful Discharge.

Where an employee without prior notice to the employer decides to go into business for himself, ceases to engage in the activities of the employment and engages in activities relating solely to his personal business venture, the acts of the employee constitute an abandonment of his employment contract, and the employer, upon being advised of the facts, is entitled to treat the contract of employment as having been terminated by the employee. *Thompson v. ALD*, 321.

§ 32. Liability of Employer for Injuries to Third Persons in General.

Plaintiff's evidence was to the effect that he was assisting in loading cotton on a truck with a hydraulic lift owned by defendant and operated by defendant's employee, that hooks were placed on each side of the bale of cotton and embedded in the bale by its weight when the bale was lifted, and that as a bale was being loaded it fell from the hooks, resulting in plaintiff's injury. *Held:* In the absence of evidence of any defect in the loading mechanism or that it was negligently operated by defendant's employee, nonsuit is proper. *Jackson v. Gin Co.*, 195.

§ 46. Employers Subject to Compensation Act.

The fact that an employer who fails to purchase compensation insurance procures and pays the premiums on accident policies taken out on each of his employees does not exempt the employer from liability under the provisions of the Compensation Act, nor does the fact that an injured employee accepts the benefits under the accident policy amount to an election to exempt himself from the provisions of the Act or estop him from claiming compensation under the Act, there being nothing in the record to show that the employee knew, prior to time of his injury, that the employer was not carrying Workmen's Compensation insurance as required by law, or that either the employer or employee had exempted himself from the provisions of the Act in the manner required in G.S. 97-4. *Ashe v. Barnes*, 310.

§ 53. Injuries Compensable in General.

Declarations of agent some time before starting trip that he was going to call on some customers and declaration that he was going to a particular place on business *held* incompetent to prove that the trip was on business of the employer and therefore was in the course of his employment. *Little v. Brake Co.*, 451.

§ 60. Injuries while on Way to or From Work.

An injury sustained by an employee while going to or from work does not arise in the course of his employment and is not compensable when the employer is not under contractual duty to transport employee to or from work or furnish the means of transportation as an incident of the contract of employment. *Whittington v. Schnierson & Sons*, 724.

§ 67. Amount of Compensation for Injuries in General.

Disability benefits and hospital and medical payments received by the employee under an accident policy procured by the employer and upon which the

MASTER AND SERVANT—*Continued.*

employer alone paid the premiums, may not be deducted by the employer from the award of compensation to the employee for injuries causing the disability, even though the liability of the employer under the Act was not protected by compensation insurance. G.S. 97-6, G.S. 97-42. *Ashe v. Barnes*, 310.

§ 105. Right to Unemployment Compensation.

Benefits received by a laid-off employee from a trust fund set up pursuant to a collective bargaining agreement should not be deducted from unemployment insurance benefits due such employee under the Employment Security Act. *In re Shuler*, 559.

MAYHEM

§ 1. Nature and Elements of the Crime.

At common law, mayhem was a crime even though the injuries were self-inflicted or purposely inflicted by another upon a consenting victim, in which instance both parties were guilty, and malice aforethought was required under the common law only in cases involving the cutting out of the tongue or the putting out of an eye. *S. v. Bass*, 42.

Under G.S. 14-29 the elements of the offense of mayhem are the same as under the common law, and the consent of the victim does not constitute a defense in a prosecution under the statute, notwithstanding that the statute does not by express terms include such acts as are done with the consent of the victim. *Ibid.*

§ 2. Prosecutions for Mayhem.

Evidence tending to show that defendant, although he refused to cut off the fingers from the hand of another, deadened the fingers of such other with a hypodermic injection and furnished such other a tourniquet and instructed him in its use, all with knowledge that such other intended to have his fingers cut off to collect insurance money, which intent was actually carried out, is sufficient to make out a *prima facie* case against defendant as an accessory before the fact to mayhem. *S. v. Bass*, 42.

It is immaterial that the person who actually cut off the victim's fingers was not present when defendant deadened the victim's fingers with a hypodermic injection and instructed the victim how to use a tourniquet to stop the flow of blood after the commission of the act, since the counsel given the victim and communicated by the victim to the principal was in effect given by defendant to the principal through the agency of the victim. *Ibid.*

In this prosecution of defendant as an accessory before the fact to mayhem, the evidence tended to show that at the time defendant counselled and aided the victim, the victim desired to have his fingers cut off to collect insurance money, but the evidence was conflicting as to whether, at the time the actual perpetrator cut off the victim's fingers, he did so at the request of the victim or whether he did so over the objection of the victim, the victim having changed his mind. *Held:* Conflict in the evidence as to whether the offense as committed was the one which defendant aided and counselled, does not justify nonsuit. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 19. Right to Foreclose and Defenses.

Where the contract for sale of property provides that the seller should aid

MORTGAGES AND DEEDS OF TRUST—*Continued.*

the purchasers in the operation of the properties, the purchasers are entitled to have monies collected by the seller as agent of the purchasers in operating the property applied to the interest due upon the note secured by deed of trust on the property, and when there is evidence that the amount thus claimed to be due by the purchasers is more than sufficient to pay all interest and principal due on the note, order continuing the temporary order restraining foreclosures is properly entered. *Moore v. Parkerson*, 342.

The fact that the mortgagee is solvent does not affect the mortgagor's right to have sums due by the mortgagee under contract applied to the mortgage debt so as to prevent default and preclude the operation of the acceleration clause. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2. Annexation of Territory.

Annexation ordinance remanded for unconditional provision for maintenance of water, sewer and street services to area annexed. *In re Annexation Ordinance*, 633. Ordinance in this case remanded for findings supporting conclusion that area to be annexed meet the requirements of statute. *Huntley v. Potter*, 619.

§ 16. Appropriation of Private Water and Sewer Systems.

Where a municipality annexes territory served by private water or sewer lines, the owners of such lines may not recover the value thereof from the municipality in the absence of provisions for payment by contract or ordinance unless the municipality appropriates such private lines and controls them as proprietor, and the mere extension of the city limits to include such lines or the voluntary maintenance of such lines by the city does not amount to an appropriation of such lines by the municipality. *Huntley v. Potter*, 619.

§ 17. Purchase, Use and Sale of Municipal Property.

Findings held insufficient to support adjudication of whether city was authorized to sell lands as surplus property. *Reidsville v. Development Co.*, 274.

§ 25. Zoning Ordinances and Building Permits.

When the owner of property has begun construction of buildings for a then lawful use under authority of a building permit and has expended funds in good faith for such construction at the time of the enactment of an ordinance prohibiting such use, such owner ordinarily has the right to complete such structures for such nonconforming use. *Stowe v. Burke*, 527.

When at the time of commencing construction for a particular use the owner knows of the pendency of an ordinance proscribing such use and the hostility of owners of land in the neighborhood to such use, and commences such construction and hurries it along for the purpose of coming within the provisions of zoning regulations as to existing nonconforming uses, and there are findings supported by further evidence that the commencement of such construction was not done in good faith, such owner does not have a vested right to complete the structure for the nonconforming use. *Ibid.*

A municipal zoning ordinance is valid if it is enacted pursuant to statutory authority, has a reasonable tendency to promote the public safety, health, morals, comfort, welfare or prosperity and if its provisions are not arbitrary, unreasonable or confiscatory. *Helms v. Charlotte*, 647.

MUNICIPAL CORPORATIONS—*Continued.*

The mere fact that the value of property is depreciated by a zoning restriction does not, standing alone, establish the invalidity of the ordinance. *Ibid.*

Where change of a zoning regulation has been advertised for two successive weeks in a newspaper printed in the municipality, the statutory notice is sufficient, G.S. 160-176, and the contention that the statutory notice did not meet the requirements of due process because no notice was served on the property owners, that plaintiff had no actual knowledge of the hearing, and that the advertisement, although giving a boundary description of the area proposed for rezoning, did not refer to plaintiff's property by lot number or by reference to a recorded map, is untenable. *Ibid.*

It is not a prerequisite to the validity of a zoning ordinance that the zoning district lines should coincide with property lines. *Ibid.*

A municipal zoning ordinance is confiscatory and invalid in its application to a particular lot if it is practically impossible to use such lot for the purpose permitted by the ordinance so that the ordinance renders such property valueless for practical purposes. *Ibid.*

§ 26. Review of Orders of Municipal Zoning Boards.

A municipal zoning ordinance will be presumed valid, with the burden upon the complaining property owner to show invalidity or inapplicability. *Helms v. Charlotte*, 647.

Where divergent conclusions may be reasonably entertained as to whether a municipal ordinance is unreasonable, arbitrary, or discriminatory the question should be resolved in favor of the validity of the ordinance, since a court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. *Ibid.*

§ 34. Enforcement, Validity and Attack of Ordinances.

Fact that a municipal official issues a permit for a nonconforming use after the enactment of a zoning ordinance does not estop the municipality from enforcing the ordinance. *Helms v. Charlotte*, 647.

Plaintiff's property was rezoned from an industrial to a residential district. The court found upon supporting evidence that a residence could be built upon the property in conformity with the municipal regulations but did not find whether, if such house were constructed, the value of the house and lot would be more or less than the cost of constructing such a residence. *Held:* There being no finding or conclusion as to whether the land had any reasonable value for the permitted use and that such use was practical, judgment sustaining the validity of the ordinance is not supported by the findings. *Ibid.*

When temporary order restraining violation of zoning ordinance is properly continued to the hearing the defendant is not entitled to stay the order, even though he files bond. *New Bern v. Walker*, 355.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Negligence is the breach of duty to exercise that care which an ordinarily prudent person would exercise under similar circumstances when injury to person or property is reasonably foreseeable as a result of such breach of duty. *Electric Co. v. Dennis*, 64.

Negligence is the failure to exercise that degree of care which an ordinarily prudent man would exercise in like circumstances, the standard of care

being constant while the degree of care varies with the exigencies of the occasion, since an ordinarily prudent man increases his watchfulness in proportion to the apparent danger. *Sparks v. Phipps*, 657.

A wilful act cannot be made the basis of a cause of action for negligence. *Fowle v. Fowle*, 720.

§ 3. Sudden Peril and Emergencies.

A person confronted with a sudden emergency will not be held to the wisest choice of conduct, but only such choice as a person of ordinary care would have made. *Schloss v. Hallman*, 686.

§ 5. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* does not apply unless there is an injury which ordinarily does not occur in the absence of any negligence on someone's part, and unless the instrumentality which causes the injury is under the exclusive control and management of the defendant. *Jackson v. Gin Co.*, 194.

Plaintiff was injured while assisting with the loading of cotton on a truck with a hydraulic lift, hooks being placed over each side of a bale of cotton and being embedded in the bagging and cotton by the weight when the bale was raised by the hydraulic lift. Plaintiff was injured when a bale of cotton so lifted fell from the hooks. Plaintiff testified that he himself put the hooks in the bales and generally assisted in the loading operation. *Held:* On plaintiff's evidence, the instrumentality was not under the exclusive control of defendant and the doctrine of *res ipsa loquitur* is not applicable. *Ibid.*

§ 7. Proximate Cause.

There may be more than one proximate cause of an accident and injury. *Hall v. Carroll*, 326.

Foreseeability is an essential element of proximate cause. *Pittman v. Swanson*, 681.

§ 11. Contributory Negligence in General.

Contributory negligence bars recovery if it contributes to the injury as a proximate cause or one of them. *Holland v. Malpass*, 395.

A person *sui juris* is under duty to exercise ordinary care for his own safety, the degree of care being commensurate with the obvious danger. *Ibid.*

§ 16. Contributory Negligence of Minors.

A nine year old boy is rebuttably presumed incapable of contributory negligence. *Wilson v. Bright*, 329.

§ 20. Pleadings in Negligence Actions.

Where plaintiff sues two defendants to recover for negligent injury, a covenant not to sue executed by one of the defendants in favor of the other is not germane to plaintiff's action, and allegations in regard thereto are mere surplusage in relation to plaintiff's action, and the pleading of such covenant may not be read to the jury or evidence thereof introduced upon the trial. *Bass v. Lee*, 73.

§ 21. Presumptions and Burden of Proof.

In order to establish actionable negligence plaintiff must show a failure to exercise proper care in the performance of some legal duty which defendant

NEGLIGENCE—*Continued.*

owed plaintiff under the circumstances, that such negligence produced the injury in continuous sequence and without which it would not have occurred, and that a person of ordinary prudence could have foreseen that such result was probable under the existing facts. *Jackson v. Gin Co.*, 194.

Negligence is not presumed from the mere fact of injury, but plaintiff is required to offer legal evidence tending to establish each essential element of actionable negligence. *Ibid.*

§ 23. Questions of Law and of Fact.

Whether there is sufficient evidence of actionable negligence to be submitted to the jury is a question of law. *Jackson v. Gin Co.*, 194.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

The allegations and evidence favorable to plaintiff tended to show that defendant's agent, operating defendant's crane truck, was engaged in hoisting plaintiff's machinery to the second floor of a building pursuant to a contract between plaintiff and defendant, that the I beam on the building, to which the cables were attached by a beam clamp, began bending and twisting with the strain, that the operator lowered the machinery and substituted a sling cable for the beam clamp, and that when the machinery had again been hoisted to about the second floor the sling cable broke, with permissible inference that it was cut by a sharp edge on the I beam. The evidence further tended to show that defendant's operator was the sole agent of defendant upon the job and that he did not examine the I beam to see if it had any sharp edges, either initially or after it had been bent or twisted. *Held:* The evidence is sufficient to carry the case to the jury on the theory of defendant's negligence. *Electric Co. v. Dennis*, 64.

In order for circumstantial evidence to be sufficient to be submitted to the jury in an action for negligence, the facts proved must establish negligence and proximate cause as a reasonable inference and not raise a mere conjecture or surmise. *Jackson v. Gin Co.*, 194.

In passing upon motion to nonsuit at the close of all the evidence, defendant's evidence in conflict with that of plaintiff is not to be considered. *Eason v. Grimsley*, 494.

Negligence is not presumed from the mere fact of an accident, but if the evidence establishes actionable negligence as a more reasonable probability, the cause must be submitted to the jury in the absence of contributory negligence as a matter of law, even though the possibility of an accident may arise on the evidence. *Holland v. Malpass*, 395.

Negligence may be proved by circumstantial evidence, and when the facts and circumstances directly proven establish actionable negligence as a more reasonable probability, such evidence is properly submitted to the jury on the issue, notwithstanding the possibility of accident may also arise therefrom. *Robbins v. Harrington*, 416.

Question of defendant's negligence in loading plaintiff's "backhoe" on to trailer, resulting in injury to the machinery, *held* for jury. *Brewer Co. v. Yarborough*, 715.

§ 25. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

The pleadings and evidence in this case held to raise issues of negligence

and contributory negligence with regard to whether the damage to plaintiff's backhoe when it ran off the side of defendants' trailer in loading operations resulted from negligence of defendants in providing a trailer with unsecured four by four timbers on its bed and whether plaintiff was contributorily negligent in providing an operator who was unfamiliar with the controls of that particular backhoe, causing him to lose control of the equipment as he was driving it upon the trailer. *Brewer Co. v. Yarborough*, 715.

§ 26. Nonsuit for Contributory Negligence.

Nonsuit for contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to him, establishes contributory negligence as a proximate cause of the injury so clearly that no other reasonable conclusion can be drawn therefrom. *Dinkins v. Carlton*, 137; *Holland v. Malpass*, 395; *Wooten v. Russell*, 699.

Nonsuit may not be entered on the ground of contributory negligence of a nine year old boy, since he is presumed to be incapable of contributory negligence. *Wilson v. Bright*, 329.

Nonsuit on the ground of contributory negligence may not be entered when it is necessary to rely in whole or in part upon defendant's evidence, or when diverse inferences upon the question are reasonably deducible from plaintiffs evidence. *Eason v. Grimsley*, 494.

§ 28. Instructions in Negligence Actions.

A charge which reviews the respective contentions of the parties in regard to the evidence of contributory negligence, defines contributory negligence in general terms, but fails to instruct the jury as to what facts in evidence would constitute the basis for an affirmative finding upon the issue, must be held prejudicial in failing to apply the general law to the facts in evidence. *Westmoreland v. Gregory*, 172.

§ 31. Elements and Definitions of Culpable Negligence.

Culpable negligence as a predicate for a charge of manslaughter or, under some circumstances, of murder, implies something more than actionable negligence in the law of torts, and is such recklessness or carelessness as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, which recklessness or carelessness is a proximate cause of death. *S. v. Roop*, 607.

The wilful, wanton, or intentional violation of a safety statute, or the unintentional or inadvertent violation of such statute when accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting to a thoughtless disregard of consequences or heedless indifference to the safety of others, is culpable negligence. *Ibid.*

§ 35. Excavating and Duty to Shove Up.

The owner of one lot sued the owner of an adjacent lot for damages for failure of the defendant-owner to provide lateral support incident to excavation. Defendant-owner had his grading contractor joined as a defendant upon assertions of primary and secondary liability and the right to contribution. The cross action alleged that the contract required the contractor to use reasonable care in the protection of adjacent property, but alleged no facts in respect to the violation of, or deviation from, the plans and speci-

fications or from the terms of the grading contract. *Held:* The demurrer of the grading contractor was properly sustained, the allegation of primary and secondary liability and the right to contribution being merely conclusions not supported by allegations of fact. *Freel v. Center, Inc.*, 345.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence that defendant-proprietor mopped the floor of its restaurant with a damp mop, the moisture from which dried within three or four minutes, that plaintiff knew the mopping operation was going on, and that he fell when his crutch slipped on a damp spot on the floor, *is held* insufficient to warrant recovery. *Bowen v. Anchor Enterprises*, 359.

Plaintiff's evidence tended to show that she stood upon the apron of a display rack and removed a carton of soft drinks from the top of the rack, that she did not see any loose bottles about the rack, and that when she stepped back a bottle struck the floor near her feet, breaking and causing injury. *Held:* The evidence is insufficient to overrule defendants' motions to nonsuit. *Bodenheimer v. Food Stores*, 743.

PARENT AND CHILD

§ 8. Prosecutions for Abandonment and Nonsupport.

In a prosecution for wilful abandonment of his wife by defendant without providing her adequate support and his wilful failure to provide adequate support for his children, an instruction which does not require a finding that defendant's acts were wilful in order to sustain the conviction, must be held for prejudicial error. *S. v. Westmoreland*, 725.

PARTIES

§ 1. Necessary Parties in General.

In action by passenger against one driver, the dependant driver is not entitled to file a cross-action against the other driver and the owner of the other car in the absence of allegation of concurring negligence, since the other driver and the owner of that car are not necessary parties to plaintiff's action. *Manning v. Hart*, 368.

A necessary party is one whose rights must of necessity be affected by a judgment in the cause, and therefore one who must be brought in before the court can proceed to final judgment; a proper party is one having an interest in the subject matter of the action but whose rights need not necessarily be determined in adjudicating the rights of necessary parties to the action. *Pickelsimer v. Pickelsimer*, 408.

§ 3. Parties Defendant.

G.S. 1-69, prescribing who may be made parties defendant, is subject to the limitations of G.S. 1-123, and it is improper to join as a defendant to litigate a separate cause of action between the original defendant and the party joined. *Ins. Co. v. Waters*, 553.

§ 8. Joinder of Additional Parties.

G.S. 1-73, authorizing the court to bring in new parties under certain conditions, and G.S. 1-69, prescribing who may be defendants, are subject to the limitations of G.S. 1-123, prescribing what causes may be joined, and it is

PARTIES—*Continued.*

improper to join additional parties defendant to litigate a separate cause of action between the original defendant and such additional defendant when such cause may not be properly joined with the cause of action alleged by the original plaintiff against the original defendant. *Ins. Co. v. Waters*, 553.

PARTNERSHIP

§ 4. Rights and Liabilities of Partners as to Third Persons Ex Contractu.

Where a person denies liability on a partnership debt on the ground that he was a limited partner, but offers no evidence that he signed and swore to the certificate required by G.S. 59-2, or that the requisite certificate was filed for record in the office of the clerk of Superior Court, the court properly gives peremptory instructions on the issue of a general partnership, there being no evidence of an actual or substantial compliance with the statute. *Stove Works v. Keel*, 421.

PAYMENT

§ 3. Application of Payment.

The right of the debtor to direct the items of the indebtedness to which his payment should be credited cannot preclude the right of the creditor to apply the payment as an offset to a separate debt owed by the creditor to the debtor. *Moore v. Parkerson*, 342.

§ 5. Prepayment.

A debtor cannot compel his creditor to accept payment before maturity in the absence of agreement. *Barbour v. Carteret County*, 178.

PENALTIES

Statutes imposing a penalty are to be strictly construed and a party suing to recover a penalty under a statute must bring himself clearly within its purview. *Milk Producers Co-op. v. Dairy*, 1.

PHYSICIANS AND SURGEONS

§ 11. Nature and Extent of Liability for Malpractice.

Allegations that defendant physicians signed false affidavits upon which plaintiff was committed to hospital for insane, held to state a cause of action for libel and not for negligence, and affidavits were absolutely privileged. *Fowle v. Fowle*, 720.

PLEADINGS

§ 2. Statement of Cause of Action in General.

Where a complaint states a matter in the alternative, one version of which would support the cause of action and the other negate it, the conflicting allegations neutralize each other and result in a defective statement of the cause of action. *Hunnicutt v. Ins. Co.*, 515.

§ 3. Joinder of Causes of Action.

If an action involves title to several tracts of land and all of the parties are not interested in all of the tracts, there is a misjoinder of parties and causes. *Ins. Co. v. Waters*, 553.

PLEADINGS—*Continued.*

§ 7. Form and Contents of Answer.

A defendant may set up in his answer as many defenses as he has, and it is not required that the defenses be consistent. *Electric Co. v. Dennis*, 64.

§ 8. Counterclaims and Cross-Actions.

In a suit by the owner against the contractor and the surety on its maintenance bond for defects discovered after the acceptance of the work, the surety is not entitled to file a cross-action against the engineer who inspected the work and certified the work as it progressed, and the demurrer of the engineer to the cross-action for misjoinder of parties and causes of action should have been sustained. *Durham v. Engineering Co.*, 98.

The passenger in one car sued the driver of the other car involved in the collision. Defendant filed a cross-action against the driver and against the owner of the car in which plaintiff was riding, alleging negligence on the part of the driver and liability of the owner for the driver's negligence under the family car doctrine. *Held:* The driver and the owner of the car in which plaintiff was riding are not necessary parties to plaintiff's action against defendant, and defendant is not entitled to file the cross-action notwithstanding that it arose out of the same collision constituting the basis of plaintiff's action. *Manning v. Hart*, 368.

Demurrer to further answer and defense for misjoinder of parties and causes held properly sustained. *Ins. Co. v. Waters*, 553.

§ 12. Office and Effect of Demurrer.

The admission by demurrer of the facts alleged in the pleadings are in no way binding when the cause is heard on the merits. *Barbour v. Carteret County*, 178.

In passing upon a demurrer, the allegations of fact must be accepted as true. *Welcome Wagon v. Pender*, 244.

A demurrer for failure of the complaint to state a cause of action will be determined solely on the basis of whether the facts alleged in the complaint, liberally construed in favor of the pleader, are sufficient for this purpose. *Wynn v. Trustees*, 594.

§ 15. Defects Appearing on Face of Pleadings and "Speaking" Demurrers.

A demurrer will lie only for defect apparent on the face of the complaint without consideration of facts alleged in the answer. *Rhyne v. Clark*, 418.

§ 18. Demurrer for Misjoinder of Parties and Causes.

In a suit by the owner against the contractor and the surety on its maintenance bond for defects discovered after the acceptance of the work, the surety is not entitled to file a cross-action against the engineer who inspected the work and certified the work as it progressed, and the demurrer of the engineer to the cross-action for misjoinder of parties and causes of action should have been sustained. *Durham v. Engineering Co.*, 98.

A demurrer will lie only for defect apparent on the face of the complaint, without consideration of facts alleged in the answer, and when it is not apparent on the face of the complaint that there is a defect of parties plaintiff or defendant, or that a necessary party has not been joined, it is error for the court to sustain defendants' demurrer on the ground that a necessary party had not been joined. *Rhyne v. Clark*, 418.

PLEADINGS—*Continued.*

A further answer and defense, as well as a complaint, may be challenged on the ground of misjoinder of parties and causes of action by demurrer. *Ins. Co. v. Waters*, 553.

§ 19. Demurrer for Failure of Pleading to State Cause of Action.

In determining the sufficiency of a pleading upon demurrer, the facts alleged and not the conclusions of the pleader are determinative. *Freel v. Center, Inc.*, 345.

Where the complaint contains statements in the alternative, one of which would support the cause of action and the other negate it, the conflicting allegations neutralize each other, but such defect would constitute a defective statement of a good cause of action, and therefore if a demurrer *ore tenus* is sustained, plaintiffs would have legal right to move for leave to amend. *Hunnicutt v. Ins. Co.*, 515.

§ 25. Scope of Amendment to Pleadings.

The broad discretionary power of the trial court to allow amendments to pleadings extends before trial, and during trial when the circumstances afford the adverse litigant fair opportunity to investigate and rebut any new matter, to amendments in furtherance of justice upon such terms as the court deems proper; while after trial, or when the adverse party has no opportunity to investigate and rebut any new matter, the court's power to allow amendments is restricted to those which do not substantially change the claim or defense but merely amend the allegations to conform to the proof. *Electric Co. v. Dennis*, 64.

The allowance of an amendment to the answer to correct mistakes as to the facts alleged in the original answer and to set forth what defendant contends are the true facts, which amendment is allowed some two months prior to trial, rests in the discretion of the trial court even though the facts as alleged in the amendment are contradictory to those alleged in the original answer and vary the defense, and the denial of plaintiff's motion to strike such amendment will not be disturbed, the amended answer being relevant and germane to the subject of action set out in the complaint. *Ibid.*

§ 28. Variance between Allegation and Proof.

Proof without allegation is ineffectual. *Eason v. Grimsley*, 494.

§ 29. Issues Raised by Pleadings.

An issue of fact arises when the answer controverts a material allegation of the complaint. *Baker v. Construction Co.*, 302.

Where the complaint in a divorce action alleges that plaintiff had been a resident of the State for more than six months, the complaint does not raise the issue of the county of plaintiff's residence and the inclusion of the county in the issue is not an adjudication of the county of plaintiff's residence. *Denson v. Denson*, 703.

§ 30. Judgment on the Pleadings.

Where defendant admits plaintiff's allegations of indebtedness in a specified amount, the court is authorized to enter a judgment under G.S. 1-510, and such defendant is bound by the judgment. *Trust Co. v. Wilder*, 114.

§ 31. Motions to Require Pleadings to be Made More Definite.

A motion to require plaintiff to make the allegations of the complaint more

PLEADINGS—*Continued.*

definite and certain may not be made after judgment by default and inquiry. *Morton v. Ins. Co.*, 360.

PRINCIPAL AND SURETY

§ 8. Bonds for Public Construction.

Engineer inspecting and certifying work is not liable to contractor's surety for defects. *Durham v. Engineering Co.*, 98.

Public policy prohibits liens for labor or materials used or furnished on contracts for public construction, but such laborers and materialmen are given the substantial equivalent in the requirement of bonds from the contractors for such work, G.S. 44-14 and G.S. 136-28, and these statutes provide how the laborer or materialman may enforce his rights. *Steel Corp. v. Brinkley*, 162.

A laborer or materialman for public construction must file a statement of his claim with the contractor and the surety within six months from the completion of the project. G.S. 136-28, and, if a creditor institutes suit on the bond, he must notify all other claimants by publishing a notice accurately informing them how they may proceed, G.S. 44-14, and such other claimants may intervene in such action at any time within six months of the institution of the action. *Ibid.*

Where, in a creditor's action against the contractor and the surety on his bond to recover for labor and materials furnished and used in public construction, the notice of the pendency of the suit erroneously states the time limit for intervention by the other claimants, such notice does not meet the requirements of the statute, G.S. 44-14, and a claimant who has given notice of his claim to the contractor and the surety within six months of the completion of the contract may not be precluded from intervening and joining in the recovery against the bond because of his failure to intervene within six months from the institution of the suit, the notice being defective. *Ibid.*

PUBLIC OFFICERS

§ 8. Performance of Official Duties.

There is a presumption in favor of the validity and regularity of an act of a public official. *Philbrick v. Young*, 737.

The presumption of regularity of the official act of a public officer obtains as to transactions done by him or before him under his direction, but not as to transactions done out of his presence, and thus the record or certificate of a public officer as to transactions occurring out of his presence are generally inadmissible. *Robinson v. Ins. Co.*, 669.

§ 12. Removal from Office.

Evidence held insufficient to support finding of malfeasance or bad faith on part of justice of the peace which would justify his removal from office. *Swain v. Creasman*, 546.

QUASI-CONTRACTS

§ 1. Nature and Grounds of Remedy.

In the absence of a special contract or prevalent custom that compensation for personal services should become due at a later date, the right to recover on an implied contract to pay for such services accrues as and when the services are rendered. *Hodge v. Perry*, 695.

QUIETING TITLE

§ 2. Actions to Remove Cloud from Titles.

Upon theory of trial, defendants admitted plaintiffs' record title and relied solely upon affirmative defenses, and upon failure of evidence in support of the defenses, a directed verdict for plaintiffs was not prejudicial. *Chisholm v. Hall*, 374.

Where one of the parties to a processioning proceeding claims title to the lappage by adverse possession, the proceeding is assimulated into an action to quiet title, and the issue of title must be determined by a jury upon conflicting evidence. *Lane v. Lane*, 444.

RAILROADS

§ 3. Common Use of Facilities.

Where one railroad company is permitted to run its train over the tracks of another, both may be held liable for negligent injury to a motorist in a crossing accident, notwithstanding that only one of them is guilty of negligence causing the accident. *Johnson v. R. R.*, 386.

§ 5. Crossing Accidents — Injuries to Motorists.

A railroad company and a motorist are under mutual and reciprocal duty of exercising due care to avoid a crossing accident; the engineer of the train is under duty to give the customary warning of the train's approach to the crossing and to exercise reasonable vigilance, the motorist is under duty to look and listen in both directions for an approaching train if not prevented from doing so by the fault of the railroad company, and to do so at a point where lookout will be effective. *Johnson v. R. R.*, 386.

The failure of warning signals of the approach of a train to a railroad crossing does not justify a motorist in driving blindly onto the track in reliance on the absence of signals, but a motorist remains under duty to look and listen in both directions for an approaching train. *Ibid.*

Momentary failure of an automatic crossing signal is not evidence of any negligence of the railroad company, *res ipsa loquitur* having no application, but such failure may be properly considered in measuring the care exercised by the motorist, since a motorist has a right to place some reliance upon the signal, even though he may not rely blindly thereon, and therefore the absence of such signal is relevant on the question of contributory negligence. *Ibid.*

Evidence held not to show contributory negligence as a matter of law on part of motorist injured in crossing accident. *Ibid.*

RAPE

§ 4. Competency and Relevancy of Evidence.

In this prosecution for murder and rape, the fact that the solicitor's order for a post-mortem examination of the victim introduced in evidence, contained the statement that in the opinion of the solicitor "foul play" had been committed in connection with the death, *is held* not prejudicial, the order having been entered solely to ascertain the exact cause of the death of the victim, and there being plenary evidence complementing, supplementing and corroborating defendant's confession that he attacked the victim with a poker, raped, and then shot her. *S. v. Boykin*, 432.

RAPE—*Continued.*

§ 12. Elements of Offense of Carnal Knowledge of Female between Ages of 12 and 16.

Some penetration of the sexual organ of the female by the sexual organ of the male is an essential element of the offense of carnal knowledge by a male person of a female person between the ages of twelve and sixteen. *S. v. Whittemore*, 583.

§ 15. Sufficiency of Evidence and Nonsuit in Prosecutions for Carnal Knowledge of Female between Ages of 12 and 16.

Testimony that defendant put his private parts against the private parts of prosecutrix and had his private parts "at" the private parts of prosecutrix, and put his mouth on her private parts, is insufficient, standing alone, to establish the "penetration" constituting an essential element of the offense of carnal knowledge of a female between the ages of twelve and sixteen, or the offense of crime against nature, and in the absence of further evidence on this aspect, defendant's motions to nonsuit must be allowed. *S. v. Whittemore*, 583.

Evidence that defendant placed his private parts against the private parts of prosecutrix together with a confession by defendant that he rubbed his sexual organ through the lips of the sexual organ of the prosecutrix, is sufficient to be submitted to the jury on the question of penetration constituting an essential element of the offenses of crime against nature and the offense of carnal knowledge of a female person between the ages of 12 and 16, the evidence *aliunde* the confession being subject to explanation and interpretation by defendant himself upon the question of penetration. *Ibid.*

§ 18. Prosecutions for Assault with Intent to Commit Rape.

An indictment charging an assault with intent to commit rape includes the lesser offense of assault on a female. (Treated under the title *Assault and Battery.*) *S. v. Beam*, 347.

RECEIVERS

§ 13. Validity and Attack of Court Orders, Appeal and Review.

Motion to vacate order of confirmation of sale of assets by receiver held properly denied, the ground of attack having theretofore heard and determined adversely to movant, and the order directing payment of certain claims having been entered by consent. *Webb v. Gaskins*, 281.

ROBBERY

§ 6. Verdict and Sentence.

An indictment charging an assault with a deadly weapon and that defendant by means of such weapon and threats of violence took personal property from the person of his victim is sufficient to charge common law or highway robbery, but is insufficient to charge robbery with firearms or other deadly weapon, G.S. 14-87, there being no allegation that the life of a person was endangered or threatened by the use of a dangerous instrument or means, and therefore the maximum sentence upon conviction under such indictment, or upon defendant's plea of guilty of highway robbery, cannot exceed ten years. *S. v. Stewart*, 571.

SALES

§ 2½. Payment of Purchase Price.

Agreement for payment of balance of purchase price held ambiguous, and contractual date for payment was question for jury. *Distributors v. Mitchell*, 489.

SCHOOLS

§ 1. Establishment, Maintenance and Operation in General.

Trustees having statutory authority may not be restrained from establishing second unit of college on ground that single unit is more economical. *Wynn v. Trustees*, 594.

Taxpayers of a county may not enjoin the construction of a second unit of a community college in the county on the ground that the board of trustees of the college were establishing separate units for the unlawful purpose of segregating the students in the two units on the basis of race, there being no allegation that plaintiffs would be affected otherwise than being subject to the ad valorem tax levied to provide funds for the payment of the bonds or allegation that any qualified prospective students had been or will be excluded from attending either college solely on the basis of race. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Necessity of Search Warrant and Waiver.

Immunity to a search without a warrant is a personal right which may be waived, and where the husband of the owner of a car is an occupant therein and has the car's registration card in his possession, and the driver of the car consents to a search of the car by an officer, he may not object to the admission of evidence obtained by the search, since if he was a mere guest passenger he had no ground to object to the search, and if he had custody of the vehicle and joint control with the driver, his failure to assert his immunity to the search without a warrant amounts to a voluntary consent to the search. *S. v. Coffey*, 293.

SEDUCTION

§ 3. Sufficiency of Evidence and Nonsuit.

Testimony of prosecutrix as to each essential element of the crime of seduction with independent supporting evidence as to each essential element is held sufficient to be submitted to the jury. *S. v. Leggett*, 358.

SUICIDE

§ 1. Nature and Elements of the Offense and Attempts to Commit the Offense.

The common law offense of suicide obtains in this State notwithstanding that the common law punishment for the offense is precluded by our constitution, Article XI, § 1, and therefore an attempt to commit suicide is an indictable misdemeanor in this State. *S. v. Willis*, 473.

§ 2. Prosecutions for Attempts.

Insanity is a defense to a charge of attempted suicide as it is to any other crime, but the test of mental responsibility is the capacity to distinguish between right and wrong at the time and in respect to the matter under investigation. *S. v. Willis*, 473.

TAXATION

§ 6. Necessary Expenses and Necessity for Vote.

A county may issue its bonds or bond anticipation notes for the special purpose of constructing and operating a public hospital, there being legislative approval therefor, G.S. 153-77(d), but such bonds are not for a necessary expense and may be issued only after approval of a majority of those voting in an election held for that purpose. Constitution of North Carolina, Art. VII, § 7. *Barbour v. Carteret County*, 178.

§ 11. Bond Order, Issuance of Bonds and Rights of Holders.

The order of the county commissioners of a county for the issuance of county bonds, stipulating the purpose and amount of the bonds, and such other conditions as the county commissioners may annex, G.S. 153-78, constitutes the proposition submitted to the voters and such stipulations are controlling. *Barbour v. Carteret County*, 178.

Allegations to the effect that a bond order stipulated that the issuance of the proposed bonds should be conditioned upon the refinancing of other bonds of the county, and that no agreement had been made with the holders of such other bonds for repayment or acceptance of refunding bonds in discharge thereof, states a cause of action to enjoin the issuance of the proposed bond anticipation notes. *Ibid.*

§ 12. Application of Proceeds of Bonds or Tax.

The expenditure of the proceeds of bonds in accordance with the purpose for which the bonds were issued is a duty resting upon the county commissioners, G.S. 153-9(8) (9), and the courts will not substitute their judgment for that of the county officials honestly and fairly exercised, but allegations to the effect that the commissioners had agreed to pay a specified sum for designated property, that the property had not been appraised, and that the price agreed was double the value of the property, are sufficient upon demurrer to charge bad faith, justifying a court of equity in acting to prevent the alleged misuse of public funds. *Barbour v. Carteret County*, 178.

§ 34. Suit by Taxpayer to Restrain Issuance of Bonds or Levy of Tax.

A taxpayer may maintain an action to restrain the levy of a tax on the ground that the tax is in itself illegal or invalid or is for an illegal or unauthorized purpose. G.S. 105-406. *Wynn v. Trustees*, 594.

Taxpayers may not enjoin use of proceeds of bonds in authorized manner merely on the ground that another manner of expenditure would be more economical. *Ibid.*

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution.

Where plaintiff sues both defendants for negligent injury, the right of contribution is determined by the statute, and neither defendant may set up a plea for contribution against his co-defendant. *Bass v. Lee*, 73.

A demurrer to the cross-complaint of one defendant against another must be sustained if the cross-complaint fails to allege each material fact necessary to constitute a cause of action in favor of the first defendant against the second. *Freel v. Center, Inc.*, 345.

In absence of claim of joint-tort feasorship or liability under respondeat superior, driver sued by passenger may not file cross-action against other driver. *Manning v. Hart*, 368.

TORTS—*Continued.*

The common law rule that there is no right of contribution between joint tort-feasors has been modified in this State so as to provide for enforcement of contribution as between joint tort-feasors in the manner and to the extent provided by G.S. 1-240. *Herring v. Jackson*, 537.

An insurer paying the judgment obtained by the injured party against one tort-feasor has no right of action to enforce contribution against the other tort-feasor, and cannot acquire such right of action by the device of a "loan" to the injured party payable only in the event and to the extent of any recovery which the injured party may obtain against the other tort-feasor, and in an action for contribution in the name of the injured party, maintained solely in the interest of the insurer, the injured party is not a real party in interest. *Ibid.*

§ 7. Covenants Not to Sue.

Where plaintiff sues both tort-feasors, a covenant not to sue executed by one on favor of the other is not germane to plaintiff's action and may not be pleaded or shown in evidence. *Bass v. Lee*, 73.

TRESPASS

§ 1. Trespass to Realty in General.

A motorist without fault who is forced off the highway and onto plaintiff's property as a result of negligence of another motorist may not be held liable for the resulting damage to the realty. *Schloss v. Hallman*, 686.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof.

In an action in trespass to try title, plaintiff ordinarily has the burden of proving both title in himself and the trespass of defendant. *Tripp v. Keais*, 404.

In an action in trespass to try title plaintiff must rely on the strength of his own title and prove his title by some method recognized by law. *Ibid.*

While title is conclusively presumed to be out of the State in an action involving title to real property when the State is not a party. G.S. 1-36, there is no presumption of title in favor of either party. *Ibid.*

TRIAL

§ 6. Stipulations.

Stipulations duly made during the course of the trial constitute judicial admissions, binding on the parties and dispensing with the necessity of proof. *Chisholm v. Hall*, 374.

§ 10. Expression of Opinion by Court on Evidence During Trial.

Where a defendant relies upon accord and satisfaction and testifies that he mailed plaintiff a letter, enclosing a check, stating that defendant was sending the check in full satisfaction of his obligation, and plaintiff's witness has testified that he had searched for the asserted letter but could not find it, a statement by the court upon tender by plaintiff of another witness to testify to the same import, that the court was "of the opinion that it had been sufficiently gone into" must be held prejudicial as intimating an opinion by the court that the letter had not been mailed. *Petroleum Corp. v. Oil Co.*, 167.

TRIAL—*Continued.*

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

Whether evidence was prejudicial in affecting amount of recovery was determined by the court in passing on motion to set aside verdict in its discretion, and exception to the admission of the evidence is not sustained. *Parks v. Washington*, 478.

§ 18. Province of Court and Jury in General.

Upon motion to nonsuit, the function of the court is to determine only whether the facts and circumstances in evidence, considered in the light most favorable to the plaintiff, tend to make out and sustain the cause of action alleged in the complaint. *Hall v. Carroll*, 326.

It is the function of the court to declare the law and where, under the admissions of the parties, the evidence is insufficient as a matter of law to raise an issue of fact, it is the duty of the jury to return a verdict in accordance with the court's declaration of the law. *Chisholm v. Hall*, 374.

§ 20. Necessity for Motions to Nonsuit and Renewal.

By introducing evidence the defendant waives his motion for judgment as of nonsuit at the close of plaintiff's evidence. *Bridges v. Jackson*, 333.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Evidence of defendant in conflict with that of plaintiff may not be considered on the question of nonsuit. *Wilson v. Bright*, 329; *Eason v. Grimsley*, 494.

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Discrepancies and contradictions, even in plaintiff's evidence, do not justify nonsuit. *Dinkins v. Carlton*, 137; *Hall v. Carroll*, 326.

§ 26. Nonsuit for Variance.

The allegations were to the effect that infant-plaintiff was riding his bicycle on his right side of the road and the evidence was to the effect that the child was astride his bicycle reaching to pick up his shoe, and the evidence was confused as to whether the child was on the right or the extreme right of the road or whether he was near the center. *Held:* The variance relates to mere detail and is insufficient to warrant nonsuit. *Wilson v. Bright*, 329.

§ 31. Directed Verdict and Peremptory Instructions.

A directed verdict may not be given in favor of the party upon whom rests the burden of proof, or in favor of either party when the evidence in regard to the material facts is conflicting. *Chisholm v. Hall*, 374.

Where a material fact alleged in the complaint is denied in the answer, the pleadings raise an issue of fact for the determination of a jury, Constitution of North Carolina, Art. IV, sec. 1, and the court may not properly give a directed verdict on the issue in favor of plaintiffs even though defendants introduce no evidence, since, even so, the credibility of the evidence remains in the province of the jury. *Ibid.*

When all of the evidence offered upon an issue suffices, if true, to establish the controverted fact, the court may charge the jury to answer the issue accordingly if they find the facts to be as all of the evidence tends to show, since such peremptory instruction does not deprive the jury of the right to reject the evidence because of lack of faith in its credibility. *Ibid.*

But when, upon the theory of trial, plaintiffs are entitled to recover as a matter of law, a directed verdict for plaintiffs cannot be prejudicial. *Ibid.*

A peremptory instruction to the jury to answer the issues as indicated if they found the facts as all of the evidence tends to show, is incomplete, the proper form being for the court to add that if the jury did not so find the facts, to answer the issue in the negative, since the court must leave it to the jury to determine the credibility of the evidence. *Hunnicutt v. Ins. Co.*, 515.

§ 33. Instructions — Statement of Evidence and Application of Law thereto.

Where the crux of defendant's defense is that he mailed a letter, enclosing a check, stating that the check was in full satisfaction of defendant's obligations to plaintiff, and that plaintiff had cashed the check, an instruction to the effect that if plaintiff received and acted upon the letter it would release the defendant must be held for error as failing to charge on the *prima facie* presumption that if the letter were mailed it was received by the addressee, and in failing to explain that the cashing of the check tendered upon condition would constitute "acting" upon the letter. *Petroleum Corp. v. Oil Co.*, 167.

Charge stating contentions of parties and law in general terms, but failing to apply the law to the evidence, is insufficient. *Westmoreland v. Gregory*, 172.

It is the duty of the court, even in the absence of request for special instructions, to charge the jury upon all substantive features of the case arising on the evidence, and when both the common law and statutory law are applicable the court must charge upon the statutory as well as the common law, and an instruction applying only the common law to the evidence must be held insufficient. G.S. 1-180. *Pittman v. Swanson*, 681.

In charging the jury upon statutory law it is preferable for the court to give a simple explanation of the statute rather than read its technical language. *Ibid.*

An instruction upon a material matter not based on sufficient evidence is erroneous. *Black v. Penland*, 691; *Powell v. Clark*, 707.

§ 35. Expression of Opinion on Evidence in Instructions.

A charge correctly stating and pointing out the provisions and requirements of a pertinent statute cannot constitute an expression of opinion by the court upon the evidence. *Rudd v. Stewart*, 90.

§ 37. Instructions — Statement of Contentions.

An exception on the ground that the court misstated the contentions of appellant will not be sustained when the error is not called to the attention of the court in time to afford opportunity for correction. *Rudd v. Stewart*, 90.

§ 40. Form and Sufficiency of Issues.

It is the duty of the trial court to submit such issues as are necessary to settle the material controversies arising upon the pleadings, but within the limitations of this requirement the form and number of issues rests in the sound discretion of the trial court. *Rudd v. Stewart*, 90.

The form and number of issues rest in the discretion of the trial court subject to the limitation that the issues submitted must arise upon the pleadings, afford the parties opportunity to present fairly any view of the case arising

TRIAL—*Continued.*

on the evidence and that a verdict upon them must be such as to enable the court to render judgment. *Baker v. Construction Co.*, 302.

Where defendant denies that it had entered into the agreement alleged by plaintiff, the court must submit to the jury an issue upon this controverted issue of fact and the submission of the single issue as to the amount, if any, defendant is indebted to plaintiff is insufficient. *Ibid.*

Where a party tenders proper issues arising upon the pleadings and excepts to the refusal of the court to submit such issues, such party cannot be held to have waived the right to object that the issue submitted was insufficient. *Ibid.*

§ 45. Acceptance of Rejection of Verdict by the Court.

When the jury renders a verdict upon disputed issues of fact the court may not reject the verdict because it is contrary to the evidence, its power being solely to set aside the verdict to prevent an unjust result, but when the court properly directs a verdict upon the issues and the jury returns a verdict inconsistent with the charge and contrary to law, the court may refuse to accept the verdict and direct the jury to return a verdict which conforms to the law as declared by the court. *Chisholm v. Hall*, 374.

§ 48. Letting Aside Verdict in Courts Discretion.

Whether evidence was prejudicial in affecting amount of recovery was determined by the court in passing upon motion to set aside the verdict as a matter of discretion, and exception to the admission of the evidence is not sustained. *Parks v. Washington*, 478.

§ 49. New Trial for Newly Discovered Evidence.

A motion for a new trial on the grounds of newly discovered evidence is addressed to the discretion of the trial court, and while such discretion is not arbitrary and must be exercised with due regard for the rights of all parties involved, measured by legal and equitable standards, where the record discloses that the trial court duly heard the evidence, made thorough investigation and found facts supporting the denial of the motion, no abuse of discretion is made to appear. *Webb v. Gaskins*, 281.

Movant made it appear that a person who was an eyewitness to the collision in suit disclosed to movant that he was an eyewitness only after the witness had read in the newspaper of the verdict of the jury in the case, and that the witness would give material testimony as to how the collision in suit occurred. *Held:* There was sufficient showing to invoke the discretionary power of the court to order, during the trial term, a new trial for newly discovered evidence, and the court's action in granting the motion is affirmed. *Poole v. Motor Co.*, 563.

§ 52. Setting Aside Verdict for Excessive or Inadequate Award.

A motion to set aside the verdict and grant a new trial solely on the issue of damages on the ground that the damages assessed by the jury were inadequate, is addressed to the discretion of the trial court and, in the absence of a showing of abuse of discretion, the denial of the motion will not be disturbed. *Dixon v. Young*, 578.

§ 55. Waiver of Jury Trial and Agreement to Trial by the Court.

Where the record discloses that the court stated that the issues arising upon the pleadings and evidence were issues of law and would be answered

TRIAL—*Continued.*

by the court "there being no objection," the absence of objection may constitute a waiver of trial by jury of any question of fact embraced in the issues. *Janicki v. Lorek*, 53.

§ 57. Findings and Judgment of Court.

In a trial by the court under agreement of the parties, the court is required to find the facts on all issues of fact joined on the pleading, to declare separately the conclusions of law arising upon the facts found, and to enter judgment accordingly. *Morehead v. Harris*, 130.

The court is required to find and state the ultimate facts but not the evidentiary facts. *Webb v. Gaskins*, 281; *Bridges v. Jackson*, 333.

A judgment in a trial by the court under agreement of the parties, in the same manner as a judgment upon the verdict of a jury, cannot be based upon inconsistent and repugnant factual conclusions; nevertheless findings of the court will be reconciled if possible by interpretation in the light of the pleadings and evidence. *Davis v. Ludlum*, 663.

TRUSTS

§ 1. Creation of Written Trusts in General.

The essentials of a valid trust are the sufficiency of words to raise it, a definite subject, and an ascertained object. *Trust Co. v. Taylor*, 122.

§ 3. Merger of Legal and Equitable Titles.

In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. *Trust Co. v. Taylor*, 122.

VENDOR AND PURCHASER

§ 1. Validity and Construction of Contracts of Bargain and Sale and Opinions in General.

Provisions giving both lessor and lessee option held not contradictory, the right of the one being subordinate to that of the other. *Parks v. Oil Co.*, 498.

VENUE

§ 1. Definitions and Nature of Venue.

The Superior Court is a court of statewide jurisdiction, and a motion to remove from the Superior Court of one county to the Superior Court of another county does not present a question of jurisdiction. *Cooperative Exchange v. Trull*, 202.

§ 8. Removal for Convenience of Parties and Witnesses.

A motion for change of venue for the convenience of witnesses rests in the sound discretion of the trial court, and its ruling thereon is not subject to review except for manifest abuse for such discretion. G.S. 1-83(2). *Cooperative Exchange v. Trull*, 202.

When motion for change of venue is allowed but the clerk fails to transmit the record, a motion in that court at a later term to rescind the order of removal and to reactivate its jurisdiction is addressed to the sound discretion of the court, and the refusal of the motion and the entry of an order of removal in accordance with the prior order will not be disturbed in the absence of abuse of discretion. *Ibid.*

VETERANS

Failure to pursue exclusive procedure from determination of Board of Veterans' Appeals as to person entitled to proceeds of War Risk Insurance determines the matter. *Williams v. Williams*, 315.

Provision of separation agreement that husband should not change beneficiary in War Risk Insurance does not entitle wife to impress proceeds with trust when the husband has changed the beneficiary in accordance with Federal Regulations. *Ibid.*

WILLS

§ 2. Contracts to Devise or Bequeath.

Where a person agrees to live with and look after another and his household in consideration of the promise to such other to devise and bequeath a designated portion of his estate to the child of the promisee, the child, as a third party beneficiary, may maintain an action against the personal representatives of testator to recover for testator's breach of the agreement without the joinder of the child's mother, and the child's mother is not a necessary party to such action. *Pickelsimer v. Pickelsimer*, 408.

§ 8. Proof of Will and Probate in Common Form.

It is the duty of the clerk to keep books in which wills and the proof thereof are recorded, and to record the dissent of the widow when filed. *Philbrick v. Young*, 737.

§ 12. Nature and Jurisdiction of Coveat Proceedings.

The filing of a caveat to a paper writing propounded in common form confers jurisdiction on the Superior Court to try the issue of *devisavit vel non* raised by the caveat. *In re Will of Summerlin*, 523.

§ 27. General Rules of Construction.

The intent of testator as ascertained from an examination of the will from its four corners, giving every word and clause effect if possible, is the paramount aim of construction. *Trust Co. v. Taylor*, 122.

The primary objective in the construction of a will is to ascertain the intent of the testator as expressed in the language of the instrument construed in the light of the conditions and circumstances confronting testator at the time he executed the instrument. *Andrews v. Graham*, 268.

In reconciling apparently conflicting provisions of a will, greater regard will be given to the dominant purpose of testator rather than to the use of any particular words by him. *Ibid.*

The rule that a later provision of a will prevails over an earlier provision applies only where the provisions are wholly inconsistent and incapable of reconciliation. *Ibid.*

§ 29. Presumptions.

It will be presumed that testator did not intend to die intestate as to any portion of his estate. *Andrews v. Graham*, 267.

§ 33. Fees, Life Estates and Remainders.

A devise of realty "in trust" to testator's wife for her life, then "in trust" to testator's two daughters for life, and upon the death of the daughters their respective shares to be divided equally between their children, *is held* a devise of a life estate to the wife and daughters, successively, with re-

mainder to testator's grandchildren in accordance with the obvious intent of testator, since even if the wife and daughters are held to take the bare legal title in trust there are no duties imposed upon them as trustees and no beneficiaries of such trust, and therefore the trust would be passive and merge in the equitable titles of the beneficiaries. *Trust Co. v. Taylor*, 122.

Where a will devises lands for life to a named person with remainder in fee to another person, and the life tenant dies during the life of testator, the remainderman takes the fee upon the death of testator, nothing else appearing. *Andrews v. Graham*, 267.

One of testator's sisters and one of his nieces lived with him as members of his family. The will devised testator's entire farm to this sister for life with remainder in fee to the niece. By subsequent item the will bequeathed all farm implements and personal property used in connection with the operation of the farm to the sister for life and after her death to the niece, together with the income from a part of the farm. By a third item, the will devised all income from the remaining portion of the farm to other named nieces so long as they might live and remain unmarried, with further provision that upon the death of the named nieces and upon the death of the first named niece without issue of her body, the income from the farm should be equally divided between such of testator's nieces as should be living and unmarried. *Held:* The items of the will are not in irreconcilable conflict, and the will devised the fee in the entire lands, after the sister's life estate, to the niece first named, subject only to the lifetime interest in the income to the named nieces, no later item of the will purporting to dispose of the fee. *Ibid.*

§ 34. Time of Vesting of Estates and Whether Estate is Vested or Contingent.

A devise to testator's daughters for life and at their deaths their respective shares to be divided among their children each daughter having children living at the time of testator's death, vests the remainder in the children as a class, subject to be opened up to include children later born. *Trust Co. v. Taylor*, 122.

An estate is vested when there is either an immediate right of present enjoyment or a present fixed right of future enjoyment, and a remainder after a life estate is vested if the only obstacle to the right of immediate possession by the remaindermen is the existence of the preceding estate; but if there is uncertainty as to the person or persons who are to take, and the uncertainty is to be resolved in a particular way according to conditions existing at a time in the future, the remainder is contingent. *Ibid.*

§ 40. Rule against Perpetuities.

The will in this case devised land to testator's daughters for life with provision that upon their deaths their respective shares should be divided equally between their children when they reached the age of 25 years. *Held:* The devise to testator's grandchildren as members of a class vested upon testator's death, the *quantum* and not the quality of the estate being involved in the opening up of the class to admit later born children, and the provision that the land should be equally divided among the children when they reach the age of 25 years does not affect this result, the grandchildren of testator being entitled to possession immediately upon the deaths of testator's daughters, but the property should not be partitioned among them until the youngest reaches the age 25 years or until the deaths of their mothers, whichever is later. *Trust Co. v. Taylor*, 122.

WILLS—*Continued.*

§ 47. Adopted Children.

An adopted child prevents a legacy to the adoptive mother from lapsing for the death of the mother prior to the death of testator. *Headen v. Jackson*, 157.

§ 60. Dissent of Widow and Effect thereof.

It is the duty of the clerk of the Superior Court in discharge of the statutory requirements to keep books in which wills and the proof thereof are recorded, G.S. 2-24(11), to record the dissent of the widow when filed, and when he records such dissent with the will there is a presumption that the instrument was the act of the widow, and done within the time and in the manner required by law. *Philbrick v. Young*, 737.

Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court is established by evidence, an interested party may testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. *Ibid.*

§ 65. Lapsed Legacies.

An adopted child prevents a legacy to the adoptive mother from lapsing for the death of the mother prior to the death of testator. *Headen v. Jackson*, 157.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-22. If claim is not barred at time of decedent's death action may be maintained against personal representative within year after issuance of letters of administration. *Hodge v. Perry*, 685.

1-36. Presumption of title out of the State does not raise presumption in favor of either party. *Tripp v. Tripp*, 404.

1-38. Evidence held insufficient to show continuous possession for statutory period. *Chisholm v. Hall*, 374.

1-52. Bars claim for personal services only as to those rendered more than three years prior to date of recipient's death. ***Hodge v. Perry***, 696.

1-57. Where injured party has been completely compensated by insurance, he is not real party in interest in action against tort-feasor for contribution. *Herring v. Jackson*, 537.

1-73; 1-69. Are subject to limitations prescribed by G.S. 1-123. *Ins. Co. v. Waters*, 553.

1-83(2). Where clerk fails to transmit record after order of removal, court at later term may order clerk to comply with previous order. *Cooperative Exchange v. Trull*, 202.

1-127. Second action between same parties on same cause is properly abated. *Sales Co. v. Seymour*, 714.

1-131. Result of conflicting allegations is to render complaint defective statement of good cause of action, entitling pleader to amend. *Hunnicutt v. Ins. Co.*, 515.

1-138. Defendant may set up as many defenses as he has, and it is not required that defenses be consistant. *Electric Co. v. Dennis*, 64.

153-9(8) (9). Allegations held sufficient to charge bad faith in proposed expenditure of bond issue. *Barbour v. Carteret County*, 178.

1-163. Amendment to answer held within discretion of court to allow. *Electric Co. v. Dennis*, 64.

1-168. Variance held to relate to mere detail and was insufficient for nonsuit. *Wilson v. Bright*, 329.

1-172. Unless jury trial is waived or reference ordered, issues of fact must be tried by jury. *Baker v. Construction Co.*, 302.

1-180. Court may charge on all substantial features of case arising on evidence. *Westmoreland v. Gregory*, 172.
Court must explain applicable statutory law as well as common law. *Pittman v. Swanson*, 681.

1-183. Defendant waives motion to nonsuit at end of plaintiff's evidence by introducing evidence. *Bridges v. Jackson*, 333.

1-184(3). Record held to show waiver of jury trial and agreement to trial by the court. *Janicki v. Lorek*, 53.

GENERAL STATUTES CONSTRUED—*Continued.*

1-185. Cause remanded for definite and sufficient findings. *Morehead v. Harris*, 130.

1-196; 1-197. Issue arises when answer controverts a material allegation of the complaint. *Baker v. Construction Co.*, 302.

1-240. Where plaintiff sues both tort-feasors, neither may set up cross-action against the other. *Bass v. Lee*, 73. Insurer paying liability of one tort-feasor is not entitled to contribution from other tort-feasor. *Herring v. Jackson*, 537.

1-247. Husband may not attack decree of alimony by confession for want of verification or for informalities. *Pullley v. Pulley*, 423.

1-271. Persons not parties and whose rights could not be precluded by judgment may not appeal. *Gold v. Ins. Co.*, 145.

1-510. Where defendant admits allegations of indebtedness in specified amount, court is authorized to enter judgment. *Trust Co. v. Wilder*, 114.

1-568.1. Application held insufficient to support order for examination of adverse party. *Griners' & Shaw, Inc. v. Casualty Co.*, 380.

2-16(9). Court has power to correct its records to supply omission. *Philbrick v. Young*, 737.

2-24(11). Clerk has duty to record filing of widow's dissent. *Philbrick v. Young*, 737.

4-1 Attempt to commit suicide is misdemeanor. *S. v. Willis*, 473.

7-115. Action of justice of the peace in waiting to end of month to collect fees would render bond liable for any resulting loss. *Swain v. Creasman*, 546.

8-35. Has no application to uncertified copy of coroner's report. *Robinson v. Ins. Co.*, 669.

8-51. Witness may testify as to decedent's filing of dissent, not to prove its contents, but to establish time of filing. *Philbrick v. Young*, 737.

14-3. Even though common law punishment for suicide is precluded by constitution, attempt to commit suicide is misdemeanor. *S. v. Willis*, 473.

14-5. Definition of accessory before the fact. *S. v. Bass*, 42.

14-26. Some penetration is necessary element of the offense. *S. v. Whittemore*, 583.

14-29. Physician counseling method of cutting off fingers is guilty of accessory before fact to mayhem. *S. v. Bass*, 42.

14-87; 14-2. Indictment held insufficient to charge robbery with firearms, and sentence was excessive. *S. v. Stewart*, 571.

GENERAL STATUTES CONSTRUED—*Continued.*

14-177. Crime against nature is felony. *S. v. Jernigan*, 732.
Some penetration is essential element of the offense. *S. v. Whittemore*, 583.

15-27.1. Does not prohibit evidence obtained without warrant when search is made with consent. *S. v. Coffey*, 293.

15-45; 15-47; 15-85; 15-87. Validity of trial may not be affected by failure to issue warrant and have preliminary hearing. *S. v. Hargett*, 412.

15-153. Warrant which informs accused of offense charged and affords protection against further prosecution for same offense, is sufficient. *S. v. Daniel*, 717.

20-ART. 9A. Violation of provisions of policy by insured subsequent to accident cannot defeat right of injured party against insurer. *Nixon v. Ins. Co.*, 106.

20-14(b) (1). Where ordinance does not define business district, what is business district must be determined by G.S. 20-38(a).

20-19(f); 20-138. Suspension of driver's license is effective from date of order and not date of receipt of notice of conviction warranting revocation. *S. v. Ball*, 351.

20-140(b). Violation is negligence *per se*. *Robbins v. Harrington*, 416.

20-141(a) (c). Fact that motorist is traveling within statutory maximum does not relieve him of duty to decrease speed when special hazards exist. *Bass v. Lee*, 73. Findings that defendant was traveling at speed greater than reasonable under circumstances and approached sharp curve at 45 miles per hour are sufficient predicate for conclusion of negligence. *Bridges v. Jackson*, 333.

20-141(b). Operation of vehicle at speed in excess of statutory maximum is negligence *per se*. *Rudd v. Stewart*, 90.

20-141(b) (4). It is error for court to charge on violation of this statute when there is not evidence that defendant's vehicle was being driven at excessive speed. *Powell v. Clark*, 707.

20-141.3(b). Indictment and evidence held sufficient to sustain conviction of racing. *S. v. Daniel*, 717.

20-141(c). Violation of statute is negligence *per se*. *Pittman v. Swanson*, 681.

20-141(e). Is not applicable when question of ability to stop before hitting parked vehicle is not involved. *Rudd v. Stewart*, 90.

20-146. Is inapplicable in action by guest to recover for injuries when driver lost control, there being no other traffic involved. *Powell v. Clark*, 707.

20-148. Evidence held insufficient to show culpable negligence on part of defendant. *S. v. Roop*, 607.

GENERAL STATUTES CONSTRUED—*Continued.*

20-149(a). Motorist is not required to drive two feet to left of center of highway, but only two feet to left of car he is passing. *Eason v. Grimsley*, 494.

20-149(b). Motorist is not under duty to sound horn when passing on city street. *Schloss v. Hallman*, 686.

20-150.1(b). Motorist may pass on four lane highway to right of preceding vehicle. *Schloss v. Hallman*, 686.

20-154. Whether stopping without signal was proximate cause of collision between two other vehicles held for jury. *Hall v. Carroll*, 326. Evidence held for jury on question of negligence in turning left without giving signal. *Eason v. Grimsley*, 494. Giving of signal does not entitle motorist to turn left regardless of traffic. *Ibid.*

20-154(b). Motorist is not required to give both hand signal and mechanical signal for left turn. *Rudd v. Stewart*, 90.

20-156. Evidence held not to show negligence in hitting vehicle entering highway from filling station without warning. *Nantz v. Nantz*, 357.

20-158. Failure of motorist along servient highway to yield right of way is sufficient to take issue of negligence to jury. *Wooten v. Russell*, 699.

20-174a. Pedestrian crossing highway at place other than marked cross-walk is required to yield right-of-way to vehicular traffic. *Holland v. Malpass*, 395.

25-63. Person acquiring note subsequent to due date is not holder in due course. *Distributors v. Mitchell*, 489.

25-118; 25-116; 25-117. Where draft is marked "no protest", successive endorsers remain liable each to the prior endorser notwithstanding failure of formal protest. *Trust Co. v. Bank*, 205.

25-143; 25-144; 25-94. Where draft is drawn on itself by drawer G.S. 25-143 and G.S. 25-144 apply and G.S. 25-94 has no application. *Trust Co. v. Bank*, 205.

29-1(3). Legitimate children of legitimated child inherit even though their mother dies prior to death of intestate. *Greenlee v. Quinn*, 601.

31-42.1; 48-23. Survival of adopted child precludes ademption of legacy left to deceased mother. *Headen v. Jackson*, 157.

38-1; 1-399. Where issue of title is raised in processioning proceeding, the issue must be determined by a jury. *Lane v. Lane*, 444.

41-2.1. Where husband and wife separate, G.S. 41-2.1 has no application in determining right to funds deposited in joint account. *Smith v. Smith*, 152.

41-7. Legal and equitable titles merge in passive trust. *Trust Co. v. Taylor*, 122.

GENERAL STATUTES CONSTRUED—*Continued.*

44-14; 136-28. Notice held not to meet requirements of statute and therefore claimant was not barred from intervening in suit on bond although more than six months elapsed after institution of suit. *Steel Corp. v. Brinkley*, 162.

49-12. Is retroactive as well as prospective in effect, *Greenlee v. Quinn*, 601.

50-1. Superior Court of county of parties' residence has jurisdiction to order payment of alimony. *Pulley v. Pulley*, 423.

50-3; 50-6. Requirement that summons be returned to county of resident of one of parties is not jurisdictional but relates to venue. *Denson v. Denson*, 703.

50-10. Finding of adultery on hearing of motion for alimony is not *res judicata* in action for divorce. *Wicker v. Wicker*, 723.

52-13. Provision in antenuptial agreement relieving husband of duty to support wife is against public policy and void. *Motley v. Motley*, 190.

54-157. Evidence held insufficient to show that processor wrongfully induced breach of marketing agreement. *Milk Producers Co-op v. Dairy*, 1.

55-35. In action to recover compensation paid to officers, allegations that payments were excessive are insufficient, it being required that facts alleged support conclusion of fraud. *Fulton v. Talbert*, 183.

59-2. In order to take advantage of limited liability, party must prove compliance with statute. *Stove Works v. Keel*, 421.

63-53(d); 160-59. Findings held insufficient to support adjudication of whether city was authorized to sell lands as surplus property. *Reidsville v. Development Co.*, 274.

62-101. Public policy in regard to duplication of power lines is legislative and not judicial question. *Membership Corp. v. Light Co.*, 258.

96-8. Benefits received from trust fund set up by employer should not be deducted from unemployment benefits. *In re Shuler*, 559.

97-4; 97-93. Procurement of accident policy does not exempt employer from liability under Compensation Act. *Ashe v. Barnes*, 310.

97-6; 97-42. Benefits from accident policy procured by employer may not be deducted from compensation even though employer was not protected by compensation insurance. *Ashe v. Barnes*, 310.

105-406. Action to restrain levy of tax lies only if tax is illegal or is for illegal purpose. *Wynn v. Trustees*, 594.

122-42. False affidavits will not support action for negligence, and action for libel is privileged. *Fowle v. Fowle*, 720.

136-96. Admitted facts held to show withdrawal of dedication of street not used for more than fifteen years after dedication. *Janicki v. Lorek*, 53.

GENERAL STATUTES CONSTRUED—*Continued.*

156-62(4); 156-65; 156-118. Prior to effective date of Ch. 614, Session Laws 1961, lands lying outside of boundaries of district could not be assessed with costs of maintenance, notwithstanding board of viewers had recommended that boundaries be enlarged. *In re Drainage District*, 338.

153-77(d). County may issue bonds for public hospital with approval of voters. *Barbour v. Carteret County*, 178.

160-ART. 36. Annexation ordinance held not to meet requirements of statute. *Huntley v. Potter*, 619; *In re Annexation Ordinance*, 633.

160-176. Statutory notice is sufficient. *Helms v. Charlotte*, 647.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

ART.

I, §11. Where defendant relies on alibi variance between indictment and proof as to time offense was committed deprives defendant of right

IV, §1. Issue of fact is for jury, and court cannot give directed verdict in favor of party having burden of proof, unless matter is admitted. *Chisholm v. Hall*, 374.

VII, §7. Public hospital is not necessary expense and vote is necessary to issuance of bonds therefor. *Barbour v. Carteret County*, 178.

XI, §1. Even though common law punishment for suicide is precluded by the constitution, attempt to commit suicide is misdemeanor. *S. v. Willis*, 473.