NORTH CAROLINA REPORTS

Vol. 256

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1961
SPRING TERM, 1962

JOHN M. STRONG

REPORTER

RALEIGH:
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1962

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JUSTICES
OF THE
SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1961.
SPRING TERM, 1962.

CHIEF JUSTICE:
EMERY B. DENNY.[1]

ASSOCIATE JUSTICES:

R. HUNT PARKER,
WILLIAM H. BOBBITT,
CARLISLE W. HIGGINS,
WILLIAM B. RODMAN, JR.,
CLIFTON L. MOORE,
SUSIE SHARP.[2]

EMERGENCY JUSTICES:
M. V. BARNHILL,
J. WALLACE WINBORNE.

ATTORNEY-GENERAL:
THOMAS WADE BRUTON.

ASSISTANT ATTORNEYS-GENERAL:

HARRY W. McGALLIARD,
PEYTON B. ABBOTT,
RALPH MOODY,
F. KENT BURNS,[3]
LUCIUS W. PULLEN,
H. HORTON ROUNTREE,[4]
HARRISON LEWIS
G. ANDREW JONES, JR.
CHARLES D. BARHAM, JR.

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] Appointed Chief Justice 14 March 1961 upon the resignation of Chief Justice Winborne.
[2] Appointed 14 March 1962 to fill vacancy upon the elevation of Justice Denny to Chief Justice.
[3] Resigned. Succeeded by Charles W. Barbee, Jr., 1 March 1962.
[4] Resigned. Succeeded by James F. Bullock, 1 March 1962.

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

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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.
Eugene G. Shaw	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.	J. WILLIAM COPELAND.....Murfreesboro.
SUSIE SHARP [1].....Reidsville.	JOHN D. MCCONNELL.....Southern Pines.
W. JACK HOOKS [2].....Kenly.	EDWARD B. CLARK.....Elizabethtown.
H. L. RIDDLE, JR.....Morganton.	HARRY C. MARTIN [3].....Asheville.
HAL HAMMER WALKER.Asheboro.	J. C. PITTMAN [4].....Sanford.

EMERGENCY JUDGES.

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

J. PAUL FRIZZELLE.....Snow Hill.

[1] Resigned 12 March 1962 to accept appointment to the Supreme Court.
[2] Died 27 February 1962.
[3] Appointed 16 March 1962.
[4] Appointed 30 March 1962.

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.
DAN K. EDWARDS	Tenth	Durham.
IKE F. ANDREWS	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.

FIRST DIVISION

First District—Judge Stevens

Camden—April 9.
Chowan—April 2; April 30†.
Currituck—Jan. 22†; March 5.
Dare—Jan. 15†; May 28.
Gates—March 26; May 21†.
Pasquotank—Jan. 8†; Feb. 19*(2); March 19†; May 7†(2); June 4*; June 11†.
Perquimans—Jan. 29†; March 12†; April 16.

Second District—Judge Mintz

Beaufort—Jan. 22*; Jan. 29; Feb. 19†(2); March 12*; May 7†(2); June 11†; June 25.
Hyde—May 21.
Martin—Jan. 8†; March 19; April 9†(2); May 28†(2); June 18.
Tyrrell—April 23.
Washington—Jan. 15*; Feb. 12†; April 2†; April 30*.

Third District—Judge Parker

Carteret—March 12†; March 19†(a); April 2; April 30†; May 7†(a); June 11(2).
Craven—Jan. 8(2); Feb. 5†(3); March 12(a); April 9; May 7†(2); May 28 (2).
Pamlico—Jan. 22(a)(2).
Pitt—Jan. 22†; Jan. 29; Feb. 26†(2); March 19(2); April 16†; April 23; May 21; May 28†(a); June 25.

Fourth District—Judge Bone

Duplin—Jan. 22*; Feb. 12†(2); March 12†(2); April 2*; April 23†.
Jones—March 5; May 14†.
Onslow—Jan. 8(2); Feb. 26; March 26†; May 21(2).
Sampson—Jan. 29(2); April 9†(2); April 30*; May 7†; June 4†(2).

Fifth District—Judge Cowper

New Hanover—Jan. 15*; Jan. 22†(2); Feb. 12†(2); Feb. 26*(2); March 12†(2); April 9*; April 16†(2); May 7†(2); May 21*; May 28†(2); June 11*; June 18†(2).
Pender—Jan. 8; Feb. 5†; March 26; April 30†.

Sixth District—Judge Morris

Bertie—Feb. 12(2); May 14(2).
Halifax—Jan. 29(2); March 5†(2); April 30; May 28†(2); June 11*.
Hertford—Feb. 26; April 16(2).
Northhampton—April 2(2).

Seventh District—Judge Paul

Edgecombe — Jan. 22*; Feb. 26*(2); March 26†(a)(2); April 23*; May 14†(a); June 4.
Nash—Jan. 8*(a); Jan. 29†; Feb. 5*; March 12†(2); April 9*(2); May 21†(2).
Wilson—Jan. 8†(2); Feb. 12*(2); March 12†(a)(2); March 26* (2); May 7*(2); *June 18*†(2).

Eighth District—Judge Bundy

Greene—Jan. 8†; Feb. 26; April 30.
Lenoir—Jan. 15*; Feb. 12†(2); March 19(2); April 16†(2); May 21†(2); June 18*(2).
Wayne—Jan. 22*; Jan. 29†(2); March 5†(2); April 2*(2); May 7†(2); June 4†(2).

SECOND DIVISION

Ninth District—Judge Clark

Franklin—Feb. 5*; Feb. 19†(2); April 23†(2); May 14*.
Granville—Jan. 22; Jan. 29†(a); April 9(2).
Person—Feb. 12; March 26†(2); May 21; May 28†.
Vance—Jan. 15*; March 5*; March 19†; June 18*; June 25†.
Warren—Jan. 8*; Jan. 29†; March 12†; May 7†; June 4*.

Tenth District—Judge Mallard

Wake—Jan. 8†(2); Jan. 8*(a); Jan. 15†(a)(2); Jan. 22*(2); Jan. 29†#(a); Feb. 5†(2); Feb. 5*(a); Feb. 12†(a)(2); Feb. 19*(2); Feb. 26†#(a); March 5†(2); March 19*(2); March 26†#(a); April 2†(2); April 2†(a); April 16*(a)(2); April 16†(2); April 30†#; May 7*(a)(2); May 7†(2); May 21†(2); May 28†#(a); June 4*(2); June 4†(a)(2); June 18†(2); June 25*(a).

Eleventh District—Judge Hall

Harnett—Jan. 8*; Jan. 15†(a)(2); Feb. 19†(2); March 19*; April 23†(2); May 21*; May 28†; June 11†(2).
Johnston—Jan. 15†(2); Jan. 29†(a)(2); Feb. 12; Feb. 19(a); March 5†(2); April 2†(2); April 16*; May 7†(2); June 4; June 25*.
Lee—Jan. 29*†; Feb. 5†; March 26*; May 7†(a)(2); May 28*(a).

Twelfth District—Judge Carr

Cumberland—Jan. 8*(2); Jan. 22†(2); Feb. 5†(a)(2); Feb. 5*(2); Feb. 19*(a); Feb. 19†(2); March 5†(a); March 12*; March 26*; April 2*(a); April 2†(2); April 16*(2); April 30†(a); May 7†(2); May 21*(2); June 4†(2); June 18*(2).
Hoke—Jan. 8(a); March 5†; April 30.

Thirteenth District—Judge McKinnon

Bladen—Feb. 19; March 19†; April 23; May 21†.
Brunswick—Jan. 22; Feb. 26†; April 30†; May 14.
Columbus — Jan. 8†(2); Jan. 29*(2); March 5†(2); May 7*; June 18.

Fourteenth District—Judge Hobgood

Durham—Jan. 8*; Jan. 15†(2); Jan. 29*; Feb. 5†(2); Feb. 19*(2); March 5†(2); March 19*; March 26*(2); April 9†(2); April 23*; April 30†(2); May 14*(2); May 28†(2); June 11*; June 18*(2).

Fifteenth District—Judge Bickett

Alamance—Jan. 8†(2); Jan. 29*(a); Feb. 5†(2); March 5*(2); April 2†; April 16†(2); May 7*; May 21†(2); June 11*(2).
Chatham—Jan. 29†; Feb. 26(a); March 19†; May 14; June 4†.
Orange—Jan. 22†; Feb. 26*; March 26†; April 30*; June 25†.

Sixteenth District—Judge Williams

Robeson—Jan. 8†(2); Jan. 22*(2); Feb. 26†(2); March 12*; March 26†(2); April 9*(2); April 23†; May 7*(2); May 21†(2); June 11*(2).
Scotland—Feb. 5†; March 19; April 30†; June 25.

THIRD DIVISION

Seventeenth District—Judge Armstrong

Caswell—Feb. 26†; March 26*(a).
Rockingham—Jan. 22*(2); March 5†(2); March 19*; April 16†(2); May 14†; June 11*(2).
Stokes—Feb. 5*; April 2*; April 9†; June 25.
Surry—Jan. 8*(2); Feb. 12†(2); March 26; April 30*(2); June 4.

Eighteenth District—

Schedule A—Judge Phillips

Guilford Gr.—Jan. 8†(2); Jan. 15†#(a); Jan. 22†(2); Feb. 5*(2); Feb. 19†#(a); Feb. 26†(2); March 26 †#(a); April 16†(2); April 30†#(a); May 14*(2); June 4†#; June 11†(2).
Guilford H.P. — Feb.12*(a); Feb. 19†; March 12*; March 19†(2); April 2*; April 30†; May 7*; May 28*.

Schedule B—Judge Johnston

Guilford Gr.—Jan. 8*(2); Feb. 5†(2); Feb. 19†; Feb. 26*(2); March 12†(2); March 26*; April 2†(2); April 16*(2); April 30†(2); May 28†(2); June 11*(2).
Guilford H.P.—Jan. 8†(a); Jan. 22*; Jan. 29†; May 21†; June 25†.

Nineteenth District—Judge Olive

Cabarrus—Jan. 8*; Jan. 15†; March 5†(2); April 23(2); June 11†(2).
Montgomery—Jan. 22*; May 21†(2).
Randolph—Jan. 29*; Feb. 5†(2); March 5†(a)(2); April 2*; April 9†(2); May 28†(a)(2); June 25*.
Rowan—Jan. 29†(a)(2); Feb. 19*(2); March 19†(2); May 7(2); May 21†(a); June 4*(a).

Twentieth District—Judge Gambill

Anson—Jan. 15*; March 5†; April 16(2); June 11*; June 18†.
Moore—Jan. 22†; Jan. 29*; March 12†; April 30*; May 21†.
Richmond—Jan. 8*; Feb. 12†; March 19†(2); April 9*; May 28†(2).
Stanly—Feb. 5†; April 2; May 14†.
Union—Feb. 19(2); May 7.

Twenty-First District—Judge Gwyn

Forsyth—Jan. 8†#(a); Jan. 8(2); Jan. 22†(3); Feb. 5(a)(2); Feb. 12†#; Feb. 19†(2); March 5†#(a); March 5(2); March 12†(a); March 19†(3); April 9(2); April 9†(a); April 16†#(a); April 23†(3); May 14(2); May 14†(a)(2); May 28†(2); June 11(2); June 18†(a)(2).

Twenty-Second District—Judge Shaw

Alexander—March 12; April 16.
Davidson—Jan. 22†(a); Jan. 29; Feb. 19†(2); March 19(a); April 2†(2); April 30; June 4†(2); June 25.
Davie—Jan. 22*; March 5†; April 23.
Iredell—Feb. 5(2); March 19†; May 21(2).

Twenty-Third District—Judge Crissman

Alleghany—Jan. 29; April 23.
Ashe—April 2*; May 28†.
Wilkes—Jan. 15†(2); Jan. 29(a); Feb. 19†(2); March 12*(2); April 30†(2); June 4(2); June 18†(2).
Yadkin—Jan. 8; Feb. 5(2); May 14.

FOURTH DIVISION

Twenty-Fourth District—Judge Clarkson

Avery—April 30(2).
Madison — Feb. 5†; Feb. 26; March 26†(2); May 28*(2); June 25†.
Mitchell—April 9(2).
Watauga—Jan. 22*; April 23*; June 11†(2).
Yancey—March 5(2).

Twenty-Fifth District—Judge Froneberger

Burke—Feb. 19; March 12(2); June 4(2).
Caldwell — Jan. 22†(2); Feb. 26(2); March 26†(2); May 21(2).
Catawba—Jan. 8†(2); Feb. 5(2); April 9(2); April 23†(2); June 18†(2).

Twenty-Sixth District—

Schedule A—Judge McLean

Mecklenburg—Jan. 8*(2); Jan. 22†(2); Feb. 5†(3); Feb. 26†(2); March 12*(2); March 26†(2); April 9*(2); April 23†(2); May 7†(2); May 21†(2); June 4†(2); June 18*(2).

Schedule B—Judge Pless

Mecklenburg—Jan. 8†(2); Jan. 22†(2); Feb. 5†; Feb. 12*(2); Feb. 26†(2); March 12†(2); March 26†(2); April 9†(2); April 23†(2); May 7*(2); May 21†(2); June 4†(2); June 18†(2).

Twenty-Seventh District—Judge Patton

Cleveland—Jan. 29; March 26†(2); April 30(2).
Gaston—Jan. 8*; Jan. 15†(a)(2); Jan. 29*(a); Feb. 5†(3); Feb. 26*(2); March 12†(2); March 26†(a)(2); April 16*(2); April 30†(a)(3); May 28*(3); June 18†(2).
Lincoln—Jan. 15(2); May 14(2).

Twenty-Eighth District—Judge Huskins

Buncombe—Jan. 8*(2); Jan. 22†(3); Feb. 12*(2); Feb. 26†(3); March 19*(a)(2); March 19†(a); March 26†(3); April 16*(2); April 30†(3); May 14*(a)(2); May 21†(2); June 4†(3); June 11*(a).

Twenty-Ninth District—Judge Farthing

Henderson—Feb. 12(2); March 19†(2); May 7*; May 28†(2).
McDowell—Jan. 8*; Feb. 26†(2); April 16*; June 11(2).
Polk—Jan. 29; Feb. 5†(a)(2); June 25.
Rutherford—Jan. 15†*(2); March 12*†; April 23†*(2); May 14*†(2).
Transylvania—Jan. 29†(a); Feb. 5*; April 2(2).

Thirtieth District—Judge Campbell

Cherokee—April 2(2); June 25†.
Clay—April 30.
Graham—March 19; June 4†(2).
Haywood—Jan. 8†(2); Feb. 5(2); May 7†(2).
Jackson—Feb. 19(2); May 21.
Macon—April 16(2).
Swain—March 5(2).

* Indicates criminal term.
† Indicates civil term.
# Indicates non jury term.
No designation indicates mixed term.

(a) Indicates judge to be assigned.
Number in parenthesis indicates number of weeks of term; no number indicates one week term.

UNITED STATES COURTS FOR NORTH CAROLINA

EASTERN DISTRICT

Judges

ALGERNON L. BUTLER, *Chief Judge*, CLINTON, N. C.
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.
WILLIAM L. HILL, II, 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.
MISS JULIA FAYE PORTER, RALEIGH, N. C.

MIDDLE DISTRICT

Judges

EDWIN M. STANLEY, *Chief Judge*, 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. Attorneys

R. ROY MITCHELL, JR., GREENSBORO, N. C.
ROY G. HALL, 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.
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MRS. RUTH R. MITCHELL, GREENSBORO, N. C.
MRS. RUTH W. STARR, GREENSBORO, N. C.
MRS. RUTH M. TRUITT, GREENSBORO, N. C.

WESTERN DISTRICT

Judges

WILSON WARLICK, *Chief Judge*, NEWTON, N. C.
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.

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VERNE E. BARTLETT, ASHEVILLE, N. C.
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MISS ELVA MCKNIGHT, CHARLOTTE, N. C.
MRS. GLENIS S. GAMM, CHARLOTTE, N. C.
MISS ANNIE ADERHOLDT, STATESVILLE, N. C.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1961

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION,
v. WILLIAM C. REAGAN.

(Filed 13 December, 1961.)

1. Insurance §§ 1, 49, 52—

The rule that the insured must have an insurable interest in the subject matter of the policy and that the want of such insurable interest renders the policy void as being against public policy, applies to a fire and hail policy on an automobile to the same extent as to any other type of insurance.

2. Same—

An insurable interest in the subject matter of a policy of insurance is some interest such as the law will recognize and protect, and where the insured has no insurable interest the fact that a person who does have an insurable interest lends his consent to the transaction does not impart validity to the policy contract.

3. Insurance § 53; Money Received—

An insurer who has been induced by a mistake of fact to pay a claim under a policy of insurance under the mistaken belief that the terms of the policy required such payment, is entitled to recover such payment from the payee as money had and received, provided the payment has not caused such a change in the position of the payee that it would be unjust to require restitution.

4. Same—

The fact that the person to whom payment is made under a mistake of fact has paid over to another or spent the money so paid does not constitute such a change in condition of the payee as to preclude the recovery of the payment as money had and received.

5. Same; Insurance §§ 49, 52— Insurer paying claim under the mistaken belief that insured had insurable interest may recover payment as money had and received.

Plaintiff's evidence tended to show that defendant procured the issuance of a certificate of title from the Department of Motor Vehicles and the execution of a policy of fire and hail insurance on the automobile in question by falsely representing that he owned the vehicle, when in fact the automobile was owned exclusively by defendant's brother and defendant had no interest therein of any kind, that insurer under this mistake of fact paid the claim for damage and procured a subrogation receipt from defendant, that insurer instituted action against the tort-feasor whose alleged negligence caused the fire, and did not discover the true facts until it was forced to take a voluntary nonsuit in that action because of defendant's testimony that he had no interest in the vehicle. *Held:* The evidence was sufficient to be submitted to the jury in insurer's action against defendant for money had and received, notwithstanding that defendant had permitted the proceeds of the policy to be used in repair of the automobile.

APPEAL by plaintiff from *Johnston, J.*, March 1961 Civil Term of ROCKINGHAM.

This action was instituted in the Reidsville Recorder's Court. A summary of the allegations of the complaint is as follows:

On 27 December 1958 plaintiff issued to the defendant William C. Reagan, its policy of insurance insuring a 1958 Convertible Chevrolet automobile, which was registered with the North Carolina Department of Motor Vehicles in the name of defendant, William C. Reagan, *inter alia*, against losses caused by fire or hail. Defendant accepted the policy as owner of the automobile. Plaintiff acted in reliance upon the provisions of its policy in accepting the premium, and in delivering its policy to defendant.

On 23 April 1959 the automobile was damaged by fire, and while being repaired was damaged by hail. Plaintiff paid defendant, pursuant to the provisions of its policy, for the fire and hail damage.

The conditions of the policy required the defendant to co-operate with the plaintiff in recovering or attempting to recover for damage to the automobile caused or reasonably thought to have been caused by the negligence of a third party, and to permit plaintiff to institute suit in defendant's name for such purpose.

Defendant willfully refused plaintiff's request to permit it to institute suit in his name against one Clarence Eastridge for fire damage

to the automobile caused by the negligence of Clarence Eastridge. As a result, plaintiff instituted action against Clarence Eastridge in the Reidsville Recorder's Court to assert its subrogated rights against him for his negligence in causing fire damage to the automobile. When defendant was subpoenaed as a witness for plaintiff in the suit, he, for the first time told plaintiff he did not own or possess the automobile at the time it was damaged or at any time prior thereto. The automobile was registered in the defendant's name as a courtesy to his brother, Luther T. Reagan, Jr., who was the true owner and possessor of the automobile at all times complained of. Defendant sustained no pecuniary loss or other loss or inconvenience by reason of the fire and hail damage to the automobile.

At the trial of plaintiff's suit against Clarence Eastridge in the Reidsville Recorder's Court defendant William C. Reagan testified under oath that he had no interest in the automobile, had sustained no pecuniary loss or any other loss by reason of its damage by fire, that the automobile was owned by his brother, Luther T. Reagan, Jr., free and clear of any interest whatever by him, including the right of beneficial use. The uncontradicted testimony of defendant and his brother, Luther T. Reagan, Jr., caused the trial judge to intimate that he would dismiss the suit because it appeared from the uncontradicted evidence that William C. Reagan had no interest in the automobile which would entitle him to recover against Eastridge, and that plaintiff could have by subrogation no greater right than William C. Reagan had. Whereupon plaintiff took a voluntary nonsuit.

Defendant obtained the issuance of the insurance policy to him by the representation that he was the owner of the automobile, which was a false representation of a material fact intentionally made to deceive plaintiff and to induce it to issue to him its policy, and which it reasonably relied upon in issuing its policy. The defendant had no insurable interest in the automobile, and plaintiff would not have issued him its policy, if it had known the true facts as to the ownership of the automobile. Consequently, such misrepresentations caused plaintiff to pay money to defendant, and for his benefit, which he was not legally and equitably entitled to receive, and as a result defendant has been unjustly enriched, and plaintiff is entitled to recover damages from defendant in the amount of $1,012.60, less the amount of the insurance premium it received.

Wherefore, plaintiff prays that the policy of insurance be rescinded and restitution granted it, and that it recover from defendant damages in the amount of $1,012.60, less the amount of the insurance premium it received.

Defendant in his answer denied practically all of the allegations

of the complaint, except that he admits the issuance to him by plaintiff of the policy of insurance, that plaintiff made certain payments to him as a result of damage to the automobile, and that plaintiff instituted suit against Clarence Eastridge to assert its subrogated rights against him. And for a further answer defendant alleges in substance: On 27 December 1958, and prior to and subsequent to said date, the title to the automobile was registered in his name with the Motor Vehicles Department, and he was the legal owner of it in contemplation of the policy of insurance plaintiff issued to him. On 27 December 1958 he borrowed money from the Bank of Reidsville, and pledged as security for the loan the automobile, which loan he paid. The money paid him by plaintiff for damage to the automobile was used exclusively for the repair of the automobile.

Plaintiff filed a reply in which he alleged in substance: As a result of defendant's fraud the Commissioner of Motor Vehicles was misled and caused to register the automobile in defendant's name and to certify mistakenly to the public that defendant was the lawful owner of the automobile. After the automobile was damaged by fire, defendant filed a claim for loss under his policy, accepted from plaintiff payment for the fire loss, and assigned his interest in the claim to plaintiff in accordance with the subrogation provisions of the policy, so that plaintiff could recover from the wrongdoer. Plaintiff instituted suit against Clarence Eastridge for negligence in causing fire damage to the automobile, and defendant testifying in said suit said he had no ownership of, control over, or interest in the automobile, thereby forcing plaintiff to withdraw its suit, pay the costs, and to be deprived of its right of subrogation. No insurable interest in the automobile was acquired as a consequence of his obtaining a title certificate for it from the Motor Vehicles Department. By virtue of defendant's denial in its suit against Eastridge of his having any insurable interest in the automobile and the resulting injury to plaintiff, defendant is now estopped to claim an insurable interest in the automobile which would entitle him to compensation under the policy for fire loss, and the policy should be declared void as against public policy.

The case was tried in the Reidsville Recorder's Court. The following issues were submitted to the jury and answered as follows:

> "1. Was the defendant unjustly enriched at the expense of the plaintiff, as alleged in the Complaint?
>
> ANSWER: Yes.
>
> "2. What amount, if any, is the plaintiff entitled to recover of the defendant?
>
> ANSWER: $926.68."

Judgment was entered upon the verdict, and defendant appealed to the superior court, where the case was heard *de novo.*

This is a summary of plaintiff's evidence in the superior court:

On 12 November 1958 defendant, William C. Reagan, filed a sworn, written application in the usual form with the North Carolina Motor Vehicles Department for a certificate of title for the Chevrolet automobile here, in which he stated he was the owner of the Chevrolet automobile, and had purchased it secondhand on 16 October 1958 from his brother, Luther T. Reagan, Jr., Maxwell, A. F. B., Alabama. Pursuant to his application, the Commissioner of Motor Vehicles issued to defendant a certificate of title for the Chevrolet. Defendant applied for, and plaintiff on 27 December 1958 issued to him, a policy of insurance insuring the Chevrolet, *inter alia,* against losses caused by fire and hail. Item 4 in the declarations of the policy shows that any loss under Part III, which covers physical damage to the Chevrolet, such as fire and hail, is payable as interest may appear to the named insured, William C. Reagan, and the time payment department, Bank of Reidsville: the policy does not reflect the interests of any other person.

On 23 April 1959 the Chevrolet was in Eastridge's Garage when and where it was damaged by fire. An investigation by an adjuster of plaintiff revealed that when it caught fire there was definite evidence of negligence on the part of the garage. After the fire the Chevrolet was carried to Chambers and Poindexter Body Shop for repairs, and while there five days later it was damaged by hail. Chambers and Poindexter Body Shop repaired the fire and hail damage. William C. Reagan made claim under the policy with plaintiff for payment of the fire and hail damage. An adjuster of plaintiff discussed with defendant his claim, and defendant did not say, or do, anything to indicate that he was not the owner of the Chevrolet. Plaintiff issued its draft on 17 June 1959 payable to William C. Reagan and Chambers and Poindexter Body Shop for $806.24 covering the fire damage, and another draft on the same day payable to the same payees for $171.44 covering the hail damage. The payees therein named endorsed both drafts, and both drafts were paid upon presentation.

On 2 July 1959 William C. Reagan delivered to plaintiff his signed subrogation receipt, in which he states in reference to his claim for damage to the Chevrolet under his policy of insurance with plaintiff he had received from plaintiff the sum of $806.24 in full settlement for loss occurring on 23 April 1959, and in which he further states as follows: "In consideration of and to the extent of the above payment, the undersigned subrogates, assigns and transfers to the above company, any and all claims or causes of action which the undersigned

may have against any person, firm, or corporation liable for the loss mentioned above, and authorizes the company to sue, compromise, or settle in the undersigned's name, or otherwise, all such claims, and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned." At the same time and as part of the subrogation receipt William C. Reagan signed a certificate of satisfaction that damage to the Chevrolet insured under the policy had been satisfactorily repaired, and that the payment of the cost of the repairs by plaintiff constitutes a release in full for all claims for damage to the insured Chevrolet under the policy.

Plaintiff instituted suit under its subrogation receipt from plaintiff against Clarence Eastridge in Reidsville Recorder's Court to recover damages for injury by fire to the insured Chevrolet caused by the negligence of Eastridge. Eastridge filed an answer in the suit about 27 October 1959. On 5 January 1960, which was 21 days before the trial of the case, William C. Reagan told an adjuster of plaintiff he did not own the Chevrolet and had no interest in it. That was the first time plaintiff had any knowledge or notice William C. Reagan did not own the Chevrolet.

The case of plaintiff against Eastridge was tried in Reidsville Recorder's Court in January 1960. The judge of that court testified in substance: In the trial William C. Reagan testified under oath that he had no interest in the insured Chevrolet, and had never had any interest in it. He may have paid for the title certificate, but that if he did, his brother, Luther T. Reagan, Jr., paid him back. He paid for the insurance but his brother paid him back. His brother Luther owned the Chevrolet, and he had never loaned Luther any money on the Chevrolet, and had never exercised any control over it. He had never driven the Chevrolet, though he had ridden in it. He gave no one any instructions to repair it. He sustained no loss by virtue of the fire or otherwise.

The case on appeal was agreed upon by counsel. The statement of case on appeal says in part: "This civil action was instituted to recover money paid to the defendant under the terms of a certain automobile, casualty insurance policy. . . . The defendant claimed and received insurance payments as a consequence of fire and hail damage sustained to the automobile. Upon trial of the plaintiff's subrogated right to recover against a third party tort-feasor for the fire damage, this defendant, testifying as a sworn witness for the plaintiff, denied having any interest in the subject automobile except such as may have arisen by virtue of the registration of the vehicle with the Department of Motor Vehicles. Upon intimation from the court that the plain-

tiff's claim of subrogation would be nonsuited and dismissed for failure to show an insurable interest to which plaintiff might be subrogated, plaintiff was allowed to submit to a voluntary nonsuit."

At the close of plaintiff's evidence the court, upon defendant's motion, allowed his motion for judgment of involuntary nonsuit.

From a judgment of involuntary nonsuit, plaintiff appeals.

Gwyn & Gwyn By Julius J. Gwyn for plaintiff, appellant.

Brown, Scurry, McMichael & Griffin By Claude S. Scurry and Jule McMichael for defendant, appellee.

PARKER, J. It is a fixed rule of insurance law that an insurable interest on the part of the person taking out the policy is essential to the validity and enforceability of the insurance contract, whatever the subject matter of the policy, and that if no insurable interest exists, the contract is void. *Trinity College v. Ins. Co.*, 113 N.C. 244, 18 S.E. 175; *Wharton v. Ins. Co.*, 206 N.C. 254; 173 S.E. 338; 29 Am. Jur., Insurance, § 433, where cases are cited to this effect from many jurisdictions. 44 C.J.S., Insurance, § 175.

The fact that another person who has an insurable interest lends his consent to the transaction does not impart validity to a policy of insurance. 44 C.J.S., Insurance, p. 869. See *Trinity College v. Ins. Co., supra.*

It is a prerequisite to the validity of a policy insuring against loss or injury to an automobile by fire, theft, collision, or other causes, no less than in the case of any other type of insurance, that the person to whom it is issued have some interest in the automobile, inasmuch as some interest is essential to the validity of a policy of insurance, whatever its subject matter. *Mowles v. Ins. Co.*, 226 Mass. 426, 115 N.E. 666; *Hirsch v. Ins. Co.*, 218 Mo. App. 673, 267 S.W. 51; *Hessen v. Ins. Co.*, 195 Iowa 141, 190 N.W. 150, 30 A.L.R. 657; 6 Blashfield, Cyclopedia of Automobile Law and Practice, § 3501; 5A Am. Jur., Automobile Insurance, § 10.

Now there is little discussion in the cases as to the necessity of the existence of an insurable interest in the insured, but the question as to the nature and extent of the interest required in order to qualify as an insurable interest is still a matter of lively debate. This debate is conducted largely from the point of view of determining whether or not the interest of particular persons such as mortgagors, receivers, spouses, or landlords constitutes an insurable interest. Anno. 9 A.L.R. 2d p. 183.

It is said in *Warnock v. Davis*, 104 U.S. 775, 26 L. Ed. 924, "It is not easy to define with precision what will in all cases constitute an insur-

able interest, so as to take the contract out of the class of wager policies."

"As a general rule, anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction." 5A Am. Jur., Automobile Insurance, § 11.

This is said in 44 C.J.S., Insurance, p. 870: "In general a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against. Great liberality is indulged in determining whether a person has anything at hazard in the subject matter of the insurance, and any interest which would be recognized by a court of law or equity is an insurable interest. Thus, the interest of insured may be personal or as a representative of the rights of others; and while neither legal nor equitable title is necessary, a person must have such a right or interest as the law will recognize and protect."

Fray v. National Fire Ins. Co., 341 Ill. 431, 173 N.E. 479, relied upon by defendant is clearly not in point. In that case a trustee acquired title to the insured property under a quit claim deed conveying the property for the benefit of creditors under a trust agreement. Transfers were absolute on their face, and there was no defeasance clause in either deed or bill of sale or instrument of trust which gave trustee absolute power, directed him to sell property and to apply same for benefit of grantor's creditors. In no event was grantor entitled to recover property. The trustee was held to have an insurable interest in the property.

Considering plaintiff's evidence in the light most favorable to it, as we are required to do on a motion for judgment of involuntary nonsuit, *Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492, it tends to show that defendant was not the owner of the Chevrolet automobile, and obtained a certificate of title to it from the Commissioner of Motor Vehicles by false representations to the Motor Vehicles Department in his sworn, written application to it for a certificate of title that he was, when in fact his brother owned the Chevrolet. Certainly, this evidence, considered in the light most favorable to plaintiff, gave defendant no insurable interest in the Chevrolet automobile, which any court of law or equity would recognize as an insurable interest and that the policy of insurance issued to defendant by the plaintiff is void. This is said in *Hirsch v. Ins. Co., supra:* "This case is no different in principle than if a stranger had procured a certificate of title to this automobile when the automobile in fact belonged to plaintiff. Under such

circumstances, of course, no reasonable person would say that the real ownership was in the stranger, although the issuance of such a certificate is no doubt some evidence of title."

It is a firmly established general rule that an insurer who has made a payment under an erroneous belief induced by a mistake of fact that the terms of the insurance contract required such payment is entitled to restitution from the payee, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund. The rule is bottomed on the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to pay. *Pilot Life Ins. Co. v. Cudd,* 208 S.C. 6, 36 S.E. 2d 860, 167 A.L.R. 463; *St. Paul F. & M. Ins. Co. v. Pure Oil Co.,* 63 F. 2d 771; *Roney v. Commercial Union Fire Ins. Co.,* 225 Ala. 367, 143 So. 571; *Franklin Life Ins. Co. v. Ward,* 237 Ala. 474, 187 So. 462; *Ponder v. Jefferson Standard Life Ins. Co.,* 201 Ark. 179, 143 S.W. 2d 1115; *Couper v. Metropolitan Ins. Co.,* 250 Mich 540, 230 N.W. 929; *Riegel v. American Iife Ins. Co.,* 153 Pa. 134, 25 A. 1070, 19 L.R.A. 166; *Prudential Ins. Co. v. Somers,* Court of Common Pleas of Conn., 135 A. 2d 365; *Great American Ins. Co. v. Yellen,* 58 N.J. Super. 240, 156 A. 2d 36; *North River Ins. Co. v. Aetna Finance Co.,* 186 Kan. 758, 352 P. 2d 1060; *Kentucky Farm Bureau Mutual Ins. Co. v. Cobb, Court of Appeals of Kentucky,* 290 S.W. 2d 606; *Scottish Metropolitan Assurance Co., Ltd. v. P. Samuel and Co., Ltd.,* (1923) 1K.B. 348; Annotation 167 A.L.R. 472-476

It is a thoroughly well established general rule that money paid to another under the influence of a mistake of fact, that is, on the mistaken belief of the existence of a specific fact material to the transaction, which would entitle the other to the money, which would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund. 40 Am. Jur., Payments, § 187 and § 192; 70 C.J.S., Payment, § 157. Such is the law in this jurisdiction. *Adams v. Reeves,* 68 N.C. 134, 12 Am. Rep. 627; *Simms v. Vick,* 151 N.C. 78, 65 S.E. 621, 24 L.R.A. (N.S.) 517, 18 Ann. Cas. 669; *Sparrow v. John Morrell & Co.,* 215 N.C. 452, 2 S.E. 2d 365; *National Bank of Sanford v. Marshburn,* 229 N.C. 104, 47 S.E. 2d 793; *Tarlton v. Keith,* 250 N.C. 298, 108 S.E. 2d 621.

"An action to recover money paid under a mistake of fact is an action in assumpsit and is permitted on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment and is liable for money had and received."

Morgan v. Spruill, 214 N.C. 255, 199 S.E. 17. In accord, see 4 Am. Jur., Assumpsit, § 24.

In *North River Insurance Company v. Aetna Finance Co., supra,* the Court said: "As early as the times of Oliver Cromwell, courts of law in England held that the action of general or indebitatus assumpsit would well lie on the common count of money had and received, where the plaintiff showed that he had under mistake of fact paid money to defendant under a supposed duty. Attention is directed to the decision in the year 1657, in the case of *Bonnel v. Fouke,* 2 Siderfin 4; translated from the Norman French and reprinted in Scott & Simpson, Civil Procedure 104."

"While the ownership of, and title to, property is ordinarily a mixed question of law and fact, a payment made under mistake with respect thereto is usually treated as made under a mistake of fact rather than a mistake of law." 70 C.J.S., Payment, p. 370. To the same effect: *Kentucky Farm Bureau Mutual Ins. Co. v. Cobb, supra; Roney v. Commercial Union Fire Ins. Co., supra.*

"As a general rule, it is no defense to an action for the recovery of a payment made under mistake of fact that the money or property has been paid over to another or spent by the payee." 70 C.J.S., Payment, p. 372. To the same effect: *Moors v. Bird,* 190 Mass. 400, 77 N.E. 643; *Picotte v. Mills,* 200 Mo. App. 127, 203 S.W. 825; *Scottish Metropolitan Assurance Co., Ltd. v. P. Samuel and Co., Ltd., supra.*

In *St. Paul F. & M. Ins. Co. v. Pure Oil Co., supra,* which was an action by marine insurers for money paid through mistake in settlement of cargo loss, it was held that deduction of premiums was essential, but tender before suit unnecessary. *L. Hand, C.J.,* speaking for the Court said: "The premium must of course be deducted, but as this is an action for money paid, no tender before suit was necessary."

Plaintiff's evidence, considered in the light most favorable to it, and giving it the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom according to the rule in passing on a motion for judgment of involuntary nonsuit, tends to show:

Defendant obtained from the Commissioner of Motor Vehicles a certificate of title on the Chevrolet here by a false representation in his sworn, written application for a certificate of title on the Chevrolet that he had bought the Chevrolet from his brother, and that he was the owner of the Chevrolet, whereas in truth and in fact he had not bought the Chevrolet from his brother, and his brother was the owner of the Chevrolet. That by the same false representation and fraud he obtained from plaintiff the policy of insurance here. That when the Chevrolet was damaged by fire and hail he made a claim with plain-

tiff for the payment of such damage to the Chevrolet under the policy of insurance. That plaintiff made the two payments under the policy of insurance for the fire and hail damage to the Chevrolet above set forth, under an erroneous belief induced by a mistake of fact caused by the false representations of defendant that he was the owner of the Chevrolet, which was material to the transaction, and that the terms of the policy of insurance required such payments. That plaintiff would not have made such payments, if it had known the fact was otherwise. That plaintiff did not know that defendant was not the owner of the Chevrolet, until after it had brought suit to recover fire damage to the Chevrolet caused by the alleged negligence of Clarence Eastridge by virtue of the subrogation receipt given by defendant to it, when it was told of such fact by defendant.

Plaintiff's adjuster testified in substance: We put the garage on the drafts as a payee to protect it: we know from experience an owner often can get a garage to endorse a draft, and retain the full amount. Defendant's subrogation receipt given to plaintiff states defendant has received from plaintiff the sum of $806.24 in full settlement for loss occurring on 23 April 1959. This was the fire damage. In the statement of the agreed case on appeal it is stated: "The defendant claimed and received insurance payments as a consequence of fire and hail damage sustained to the automobile."

Defendant voluntarily endorsed the drafts and received the proceeds, or voluntarily permitted the proceeds of the drafts to be received by Chambers and Poindexter Body Shop in payment of repairs to his brother's Chevrolet. Whether he received the proceeds of the drafts and expended them, or permitted the proceeds to be paid to another, is no defense to the present action for the recovery of payments made by plaintiff for fire and hail damage to the Chevrolet under a mistake of fact induced by his false representations and fraud, provided the jury finds such facts exist. Money paid under a mistake of fact is not the money of the payee.

Plaintiff's evidence, considered in the light most favorable to it, does not tend to show that the payments for fire and hail damage by plaintiff to defendant have caused such a change in the position of the defendant payee that it would be inequitable or unjust to require him to make full restitution to plaintiff less the amount of premium paid for the insurance, but it does tend to show that such payments belong in equity and good conscience to plaintiff who paid them, and that plaintiff is entitled to full restitution, minus the amount of premium received by it for the policy of insurance.

The judgment of involuntary nonsuit was improperly entered.

Reversed.

JANE MOORE KEESLER AND HERMAN A. MOORE, JR. v. NORTH CAROLINA NATIONAL BANK, A CORPORATION; EMMIE McCONNELL MOORE HOWERTON, D. LACY KEESLER, BETTY C. MOORE, ERIC M. MOORE, A MINOR; HERMAN A. MOORE, III, A MINOR; LESLIE H. MOORE, A MINOR; PHILIP CRAIG MOORE, A MINOR; DREW L. KEESLER, JR., A MINOR; JAMES Z. KEESLER, A MINOR; THE UNBORN ISSUE OF JANE MOORE KEESLER, THE UNBORN ISSUE OF HERMAN A. MOORE, JR., AND ALL OTHER PERSONS WHOSE NAMES ARE UNKNOWN, IN BEING OR NOT IN BEING, AND WHO HAVE OR MAY HAVE ANY INTEREST, PRESENT OR FUTURE, IN THE ASSETS OF THE TRUST NOW BEING ADMINISTERED UNDER THE WILL OF HERMAN A. MOORE.

(Filed 13 December, 1961.)

1. Appeal and Error § 60—

Where there is no exception by any of the parties to the adjudication of a particular matter presented for decision, the appeal being directed solely to other provisions of the judgment, that part of the judgment to which there are no exceptions becomes the law of the case and is binding upon the parties.

2. Wills § 59—

Ordinarily, where the particular estate is terminated for any reason not contemplated in the will the enjoyment of the remainder is accelerated provided the remainder is vested and provided there is no express or implied provision in the will to the contrary.

3. Same—

A legatee or devisee may disclaim or renounce his right under a will irrespective of statutory authority, in which event the devise or bequest never takes effect, but ordinarily such renunciation must be made before the legatee or devisee has accepted any benefits under the devise or bequest and such renunciation may not be partial unless the gift is separate and independent from the benefits not renounced.

4. Same— Renunciation by life beneficiary of income from specified part of trust held not to accelerate remainder.

Testator set up a trust with provision that his wife be paid a stipulated sum per year, with discretionary authority in the trustee to augment the payments by an additional amount if deemed necessary for her comfortable support, with provision that any surplus should accumulate and be added to the principal of the trust, with further provision that upon the death of his wife a trust should be set up for each of his children, with the income therefrom to be paid to each until the *corpus* of the trust should be distributed in accordance with the terms of the instrument. The widow executed a renunciation of her right to receive income from specified stock of the *corpus* of the estate, but did not renounce her right to receive income in the specified amount from the trust as a whole, augmented by such additional amounts as the trustee might allow in its discretion. *Held:* The renunciation does not effect an acceleration of the remainder to the children, and they are not entitled to receive prior to the death of the widow income from the shares of stock which were the subject of the renunciation, since any effect of the re-

nunciation would be to create a surplus and the will expressly directed the trustee to accumulate and hold any surplus subject to the terms of the instrument.

5. Trusts § 5—

Equity will modify a trust only when necessary to preserve the trust property and effectuate the primary purpose of the trust, and will not modify a trust merely to suit the convenience or wishes of the interested parties.

APPEAL by plaintiffs from *Sharp, S.J.,* June 19, 1961 Special Term of MECKLENBURG.

Herman A. Moore, a resident of Mecklenburg County, died testate on 12 January 1948. He was survived by his wife, Emmie McConnell Moore, a son, Herman A. Moore, Jr., and a daughter, Jane Moore. Their approximate ages at the time of the death of Herman A. Moore were 41, 18 and 12 years respectively.

The portions of the last will and testament of Herman A. Moore which are of material concern on this appeal are as follows:

"*ITEM IV.* I give, devise and bequeath all the rest, residue and remainder of my property . . . unto the AMERICAN TRUST COMPANY. . . . IN TRUST, however, for the uses and purposes as follows:

— A —

"If my wife, EMMIE McCONNELL MOORE, shall survive me, my Trustee is directed to pay to her in equal monthly installments the sum of Twelve Thousand Dollars ($12,000.00) per year for and during the period of her natural life. Such payments shall be made out of income therefor, and any deficiency shall be paid out of the principal of my trust estate.

"The Trustee in its discretion may add to and augment the payments of One Thousand Dollars ($1,000.00) per month, provided for above, as in its discretion it shall deem such action necessary to provide for the comfortable support and maintenance of my wife. . . .

"If . . . there shall remain any surplus net income from my trust estate, such surplus net income shall accumulate in the hands of my Trustee and shall be invested and reinvested and added to the principal of my trust estate and shall thenceforth be subject to the terms and provisions hereinafter contained controlling the distribution of the principal of this trust.

— B —

"On the death of my wife, EMMIE McCONNELL MOORE, I di-

rect my Trustee to set aside a special trust of One Hundred Thousand Dollars ($100,000.00) each for each child then living or if any child shall have died leaving issue, a trust in the same amount shall be set up for the issue of such child as a group.

"(1) Any trust so set up for a son shall be distributed as follows: Said Trustee shall pay the entire net income of such trust to such son commencing at age 21 and until he has arrived at the age of 35 years.

. . . .

"(2) If such son shall be 35 years of age at the time of the death of my wife, said Trustee shall make immediate distribution to such son of the amount which would otherwise have been set up in trust for him, or if such son shall arrive at the age of 35 years after the death of my wife, the corpus of said trust shall be paid over to him in full at age 35.

— C —

"Any trust so set up for a daughter shall be distributed as follows:

"Said Trustee shall administer the same similarly in all respects as provided in the trust for each son in the paragraph next preceding, except as follows:

"From age 21 through 35 each such daughter shall receive all the net income and thereafter for life all net income or Three Hundred ($300.00) Dollars per month, whichever is the greater, and to accomplish this purpose, the principal may be invaded to the extent necessary.

"*ITEM V.* The residuary of said corpus of the trust after the creation of the trusts, provided for above, shall be equally divided between the trust for the children thus set up, and added thereto, . . .

"*ITEM VII.* The trust established, if any, for the issue of any deceased child shall be distributed as follows: During minority of said issue the Trustee is directed to use the income and so much of the principal as in its discretion it may deem necessary to provide for the support, maintenance and education of such issue without allocation or division of the corpus. When the youngest living issue shall arrive at age twenty-one (21), the Trustee shall make division, share and share alike, and pay and deliver same to each issue and said trust for said issue shall thereupon cease and determine. Issue arriving at age twenty-one shall thereafter receive an aliquot share of the net income of said trust until the youngest living issue shall arrive at age twenty-one. The surviving issue shall receive the share of any deceased issue.

"*ITEM VIII.* I hereby vest in each of my children who shall survive me a power of appointment covering the interest of such child

under this trust, said power of appointment to be limited as follows: Such child may bequeath or devise said interest to members of the following class: the spouse of such child or the issue of such child or the spouse of said issue."

"*ITEM X.* Unless sooner terminated in accordance with the foregoing provisions, each of the trusts created by this Will shall in any event terminate and be distributed, discharged of all trust restrictions, upon the expiration of a period of twenty-one years from and after the death of the last survivor of me, my said wife, my children and such of the issue of my children, if any, as shall be living at the time of my death, . . ."

The American Trust Company is now the North Carolina National Bank. The widow has remarried and is now Emmie McConnell Moore Howerton; Herman A. Moore, Jr. is married; and the daughter is married, is now Jane Moore Keesler. Their ages in February 1960 were 53, 30 and 24 years respectively. Herman, Jr., and Jane are the plaintiffs in this action.

At the time of the death of Herman A. Moore he had no grandchildren. Herman, Jr., presently has four children and Jane has two. Their children are parties defendant herein and are represented by *guardian ad litem*. A *guardian ad litem* has been appointed for unborn children and unknown persons who may have or claim an interest in the subject of this action. The widow and the Trustee are parties defendant.

At testator's death the approximate value of his estate was $200,000.00. The present value of the principal of the trust is approximately $3,500,000.00. From the establishment of the trust until April 30, 1959, the average net annual income from the trust and the average annual distribution from income has been as follows: Net income, $97,499.90; to widow, $32,538.72; taxes, $38,987.23; to trust principal, $25,973.95. The figures for the fiscal year April 1960 to April 1961 are: Net income, $138,579.53; to widow, $37,468.99; taxes, $57,093.44; to trust principal, $45,111.74.

On 9 February 1960 the widow, Emmie McConnell Moore Howerton, executed and delivered to the Trustee a written instrument which is, in part, as follows:

". . . I hereby renounce, abandon, release, waive and quitclaim unto American Commercial Bank as Trustee under said (Herman A. Moore's) Will all right, title and interest, whether in income, principal or otherwise, which I may now have or might have hereafter under said Will in 16,660 shares of common stock of Auto Finance Company held by said Trustee as part of the principal of the trust created by Item IV of said Will, upon the condition that such renunciation, aban-

donment, release, waiver and quitclaim shall operate, and shall be construed, solely as a renunciation, abandonment, release, waiver and quitclaim of my interest in the aforesaid 16,660 shares . . . including all future income therefrom, and shall be without prejudice to, but expressly reserving, all of my other rights under said trust and in all other properties included therein and in the income and principal thereof, particularly my right to receive from said trust a minimum of $12,000 per year, augmented by such additional amount as the Trustee in its discretion shall deem necessary for my comfortable support and maintenance . . . payable first from the income of said trust and thereafter, to the extent, if any, that the income in any year shall not be sufficient for said purpose, then out of the principal thereof."

The stock referred to in the instrument has a value of approximately $22.00 per share. The widow had not renounced or attempted to renounce any benefits under the will prior to 9 February 1960, but had accepted all benefits provided her thereunder.

Plaintiffs, son and daughter of testator, instituted this action and alleged that the foregoing release and renunciation by the widow of her beneficial interest in the shares of stock accelerated their beneficial remainder interests in such shares. They pray that the Trustee be ordered and directed to divide the shares equally between the separate trusts for the respective benefit of each of the plaintiffs and hold the shares and administer the trusts "as if defendant Howerton were deceased," pursuant to the terms of the will.

The parties waived jury trial. The court found facts, made conclusions of law and entered judgment decreeing that the document signed by the widow on 9 February 1960 "did not operate to accelerate the remainder interests of the plaintiffs . . . in and to the shares of stock . . . nor to terminate the contingent remainder interests of the grandchildren," that the Trustee hold the shares, subject to its right to sell the shares and reinvest the proceeds, and that the income be accumulated "to await the death of the widow," at which time such principal and accumulated income shall be distributed as directed by the will, and that none of the income or principal of such shares be paid to Emmie McConnell Moore Howerton during her life.

Plaintiffs appealed.

Lassiter, Moore and Van Allen, and Robert Lassiter, Jr. for plaintiffs, appellants.

Pierce, Wardlow, Knox and Caudle, and Lloyd C. Caudle for defendant North Carolina National Bank, appellee.

Cansler & Lockhart and B. Irvin Boyle for defendant Mrs. Emmie McConnell Moore Howerton, appellee.

Robert L. Hines, Guardian Ad Litem, appellee.

MOORE, J. The trial court adjudged that no portion, principal or income, of the 16,660 shares of stock of Auto Finance Company, referred to in the instrument executed by Emmie McConnell Moore Howerton on 9 February 1960, shall be paid to her by the trustee during her life time. Thus it is adjudged that the instrument is binding upon Mrs. Howerton. G.S. 36-41. No exception was taken to this ruling by any of the parties to the action. Therefore, this is the settled law of the case as to her.

On this appeal the question for determination is: What effect, if any, does the instrument have upon the rights and duties of the other parties to the action with respect to the trust estate? Plaintiffs maintain that, with respect to the portion of the trust estate represented by the 16,660 shares of stock of Auto Finance Company, the activation of the trusts provided in the will of Herman A. Moore for the benefit of plaintiffs is accelerated by reason of the document executed by the widow, and that these trusts should be set up forthwith and payment of income to plaintiffs from the shares of stock should proceed.

"The problem of acceleration of remainder interests arises when for some reason the precedent estate given by will . . . terminates prematurely or in a manner not contemplated by the will in providing for the remainder over. The person to whom the life estate is provided may die before the testator, or the gift of the life estate may be void, or the life tenant may refuse or renounce the gift of the life estate, whereas the will provides only that the remaindermen are to take upon, or at, or after, the death of the life tenant. Under the doctrine of acceleration, the general rule is that vested remainders take effect immediately upon the death of the testator where the life estate has failed prior to testator's death, or immediately after the determination of the life estate subsequent to the death of the testator, whether the failure or determination of the life estate is due to death, revocation, incapacity of the devisee to take, or any other circumstance. This rule applies, of course, in the absence of a controlling equity or an express or implied provision in the will to the contrary. . . . By renunciation or repudiation of a life estate is meant such an unequivocal act by the life tenant as would destroy his claim as a life tenant so that he could not thereafter assert it, and would accelerate and mature the remainder. . . . The doctrine of acceleration applies to personal property as well as to real property." 33 Am. Jur., Life Estates, Remainders, etc., s. 154, pp. 620-622.

In this jurisdiction the doctrine of acceleration of estates in remainder has been applied in instances where a widow, who has been given a life estate by the will of her husband, dissents from the will and elects to take her dower or statutory share instead. *Trust Co. v.*

McEwen, 241 N.C. 166, 84 S.E. 2d 642; *Blackwood v. Blackwood,* 237 N.C. 726, 76 S.E. 2d 122; *Trust Co. v. Johnson,* 236 N.C. 594, 73 S.E. 2d 468; *Bank v. Easterby,* 236 N.C. 599, 73 S.E. 2d 541; *Neill v. Bach,* 231 N.C. 391, 57 S.E. 2d 385; *Cheshire v. Drewry,* 213 N.C. 450, 197 S.E. 1; *Young v. Harris,* 176 N.C. 631, 97 S.E. 609; *Baptist University v. Borden,* 132 N.C. 476, 44 S.E. 47; *Wilson v. Stafford,* 60 N.C. 646. In final analysis, the question as to whether or not remainders will accelerate, when the life estate devised to the widow falls in by reason of her dissent from the will of her husband, is to be determined from the intent of the testator gathered from the will as a whole. "The doctrine of acceleration, by which the 'enjoyment of an expectant interest is hastened,' rests upon the theory that such enjoyment having been postponed for the benefit of a preceding vested estate or interest, on the . . . determination of such preceding estate before it would regularly expire, the ultimate takers should come into the present enjoyment of their property. Unless a contrary intent is disclosed by the will, the position is fully recognized, where a widow has dissented. . . ." *Young v. Harris, supra.* In such case the dissent of the widow, so far as the remaindermen are concerned, is equivalent to her death. *Trust Co. v. McEwen, supra.* In making a will a husband is presumed to have knowledge of and to have taken into consideration the statutory right of his widow to dissent from the will. G.S. 30-1. A remainder will not be accelerated if it is impossible to identify the remaindermen or if there is an intention on the part of the testator to postpone the taking effect of the remainder. *Trust Co. v. Johnson, supra.* If it appears in the will that the maker of the testament intended that the life of the person who was intended to receive the particular estate should terminate before the remainder interest should become possessory, the court will not accelerate the nonpossessory interest.

In *Trust Co. v. McEwen, supra,* testator devised and bequeathed property to a trustee for the benefit of his wife for life, with provision that upon her death the estate should be equally divided among his children, and with further provision that, if any child should be then deceased, his or her share should go to his or her children. The widow dissented from the will. It was held that the interests of testator's children accelerated and they were entitled to immediate possession. It was there stated, "A vested remainder may be accelerated, although future contingent interests will thereby be cut off" (quoting from 31 C.J.S., Estates, s. 82, p. 96).

In the instant case, however, the widow did not dissent from the will of Herman A. Moore. She elected to take under the will. It is suggested that the instrument she executed and delivered to the trustee in 1960 amounts to a partial renunciation of the testamentary

gift. Under a different factual situation this Court indicated that a partial renunciation is not recognized in this State. *Bailey v. McLain*, 215 N.C. 150, 155, 1 S.E. 2d 372. This rule probably would not be applied in all situations. "Where two or more separate and independent gifts are made by a will to a beneficiary, he is, as a general rule, entitled to accept one or more and disclaim others, unless a contrary intention on the part of the testator appears from other provisions of the will." 91 A.L.R., Anno. — Rejecting part of testamentary gift, s. II, p. 608. However, the gift to Mrs. Howerton with respect to the indicated shares of stock was not separate from nor independent of the remainder of the trust corpus.

Furthermore, the act of defendant Howerton in releasing her interest in the shares of stock does not constitute a renunciation as that term is defined and limited in relation to estates created by will. A legatee under a will is not bound to accept a legacy or devise therein provided, but may disclaim or renounce his right under the will, even where the legacy or devise is beneficial to him, provided he has not already accepted it. The right to renounce a legacy is a natural one and needs no statutory authorization. A title by devise requires the assent of the devisee before it can take effect. When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation the devise never takes effect and title never vests in the devisee. *Perkins v. Isley*, 224 N.C. 793, 32 S.E. 2d 588. Mrs. Howerton accepted the legacy provided for her in the will of Herman A. Moore and received the benefits for 12 years before executing the instrument dated 9 February 1960.

Mrs. Howerton's estate is not terminated. For all practical purposes she has retained all the benefits conferred upon her by the will. In the instrument executed by her she specifically reserves "all . . . other rights under the trust and in all other properties included therein and in the income and principal thereof, particularly . . . right to receive from said trust a minimum of $12,000 per year, augmented by such additional amount as the trustee in its discretion shall deem necessary for (her) comfortable support . . ." These benefits are all that the will provides for her. She has merely released the trustee from the duty of paying any of these benefits from the principal and income of the specified shares of stock, and relinquished whatever rights she had to require that the payment of benefits be made from this stock.

It is our opinion, from a careful consideration of the terms of the will, that the testator did not intend a piecemeal acceleration of the trusts provided for his son and daughter, but made provisions to the contrary. He anticipated that, after payment of the benefits to his wife, there might be surplus net income from the trust estate. He pro-

vided, in such event, that "such surplus net income shall accumulate in the hands of . . . trustee and shall be . . . added to the principal of . . . trust estate and shall thenceforth be subject to the terms and provisions hereinafter contained controlling the distribution of the principal of this trust." If the release by the widow has any effect, it is to create a surplus. She merely recognizes the existence of a surplus. The trustee is under the duty to accumulate and hold the surplus subject to the terms of the will. Furthermore, the testator was fully aware of the ages of his wife and children and that his wife might live for many years. He had in mind that his wife might be living when his son and daughter attained age 35. He provided: "If such son shall be 35 years of age at the time of the death of my wife, said Trustee shall make immediate distribution to such son . . ." There is a somewhat similar provision referring to the arrival of the daughter at age 35.

To allow the contention of plaintiffs would be to rewrite, in part, the will of the testator. In altering a trust, the court exercises its equity jurisdiction when, and only when, it is necessary to preserve the trust and effectuate its primary purpose. *Carter v. Kempton*, 233 N.C. 1, 9, 62 S.E. 2d 713. It is contrary to the holdings and inclination of this Court to make a will for a decedent so as to meet the convenience and wishes of interested parties. *In re Westfeldt*, 188 N.C. 702, 125 S.E. 531; *McDaniel v. King*, 90 N.C. 597.

The judgment below is

Affirmed.

GERALDINE M. CARNEY v. FRANCIS CARLYLE EDWARDS AND JOYCE LLOYD EDWARDS.

(Filed 13 December, 1961.)

1. Boundaries § 1—

The fundamental rule in the ascertainment of the boundaries of the land described in a deed is the intent of the parties, and a general description may not enlarge the specific description when the specific description is sufficient to identify the land which the deed purports to convey.

2. Boundaries § 8—

What are the boundaries called for in the description of a deed is a question of law to be declared by the court, where they are located is a question of fact.

3. Boundaries § 2—

A call to a natural object will prevail over courses and distances, and a call to a line of an adjacent tract is a call to a natural object within the purport of the rule when such line is known and established.

4. Boundaries § 5—

A junior conveyance cannot be used in locating the lines called for in a prior conveyance.

5. Boundaries § 9—

Where the iron stake marking a corner has been removed subsequent to the execution of the deed, and such corner, if located in accordance with courses and distances, would patently include land not owned by grantor, the missing corner may be established *aliunde* the description by parol testimony of disinterested witnesses as to the location of the line and corner at the time the deed was executed, including testimony as to the location of the corner in a contemporaneous survey even though the survey is not referred to in the deed, and when the description in the deed can thus be made certain, it is controlling.

6. Boundaries § 7—

Where the location of the corner of an adjacent tract is necessary in order to establish the boundaries of the deed involved in the action, the owner of the adjacent tract should be made a party.

APPEAL by defendants from *Clark, J.*, June 1960 assigned Civil Term of WAKE.

Plaintiff instituted this action to remove cloud from her title to a tract of land conveyed to her and Bernard B. Blanchard by Kate Rogers on 13 August 1959. Defendants answered, admitting their claim of title to a described area within the area claimed by plaintiff. They asked that they be adjudged the owners of the land so described.

The parties waived jury trial. From the admissions in the pleadings and the findings by the court these facts appear:

(1) In 1947 Max Collins and wife acquired title to a specifically described area containing 87.5 acres, being "tracts Nos. 4 and 5 of the C. L. Duke Farm according to survey and map of M. E. Chappel, dated October 8, 1913 . . ." This land is bounded on the south by Crabtree Creek, on the west by Haley Branch, on the north by the lands of Henry Bryant (lot 3 of the C. L. Duke farm), and on the east by a line from the Bryant lands to Crabtree Creek. A road known as Reedy Creek Road crosses Crabtree Creek. It extends northwardly through lots 4 and 5. That part of lots 4 and 5 lying west of Reedy Creek Road contains 58.13 acres.

(2) On 31 December 1947 Collins and wife conveyed to their daughter Ednabel C. Holder and her husband, Ruffin Holder, as tenants by entirety, a tract described as "BEGINNING at an iron pipe in the

ground on the West side of Reedy Creek Road approximately one-half mile North of the Crabtree Creek Bridge and runs thence North 83 degrees 30 minutes West 1070 feet to an iron pipe in the center of Haley Branch; thence in a Northerly direction as said Haley Branch meanders approximately 210 feet to an iron pipe in the center of said Haley Branch; thence South 83 degrees 30 minutes East 1100 feet to an iron pipe sunk in the ground on the West side of said Reedy Creek Road; thence in a Southerly direction along the edge on said Reedy Creek Road approximately 230 feet to the place and point of the BEGINNING, containing 5 acres, more or less, and being a part of the property conveyed to Max Collins, Sr., and wife, Gladys Collins, by O. A. Palmer and wife, Lillie W. Palmer."

(3) On 30 March 1949 Collins and wife conveyed to W. F. Rogers the following described property: "Bounded on the North by lands of Ednabel C. Holder, on the East by the Reedy Creek Road as the same is now located, on the South by Crabtree Creek and on the West by Haley Branch and BEGINNING at a point, the intersection of the center line of Crabtree Creek with the center line of the Reedy Creek Road, as now situate, said point being the approximate center of the Reedy Creek Road Bridge over Crabtree Creek as said bridge is now situate, runs thence in a Northerly direction along the center line of the present Reedy Creek Road 1970 feet, more or less, to a point in the center of said road marked by an iron stake on the West side of said road, Ednabel C. Holder's southeast corner, said point being situate about 230 feet in a southerly direction from the intersection of the center line of said road with the South Line of Tract 3 on the map hereinafter referred to: runs thence N 83 degrees, 30 minutes West to and with Ednabel C. Holder's South line 1080 feet more or less, to a point in the center of Haley Branch (the description then follows Haley Branch and Crabtree Creek to the beginning) containing 50 acres, more or less, and being parts of Tracts Nos. 4 and 5 . . . and being all those portions of tracts Nos. 4 and 5 lying west of the Reedy Creek Road as the same is now situate, excepting only that 5 acre tract conveyed to Ednabel C. Holder by Max Collins and wife by deed recorded in Book 991, page 482 . . ."

(4) "(T)he intention of the parties to the conveyance was that W. F. Rogers would purchase all of tracts 4 and 5 located south of the Holder tract and west of the Reedy Creek Road; and W. F. Rogers and wife did not at any time claim any of the property north of the south line of the Holder tract." The distance from the center of Crabtree Creek Bridge to the south line of tract 3, measured along Reedy Creek Road, is 2541 feet. The south line of the Holder land as located

by defendants is more than 230 feet from the south line of tract 3 and less than 1970 feet from the center of Crabtree Creek Bridge.

(5) On 30 March 1957 Collins and wife conveyed to defendants a tract which begins at an iron stake at the edge of Reedy Creek Road and runs then by courses and distances back to the road, "containing 15 acres more or less and being a part of the Max Collins farm in Wake County, North Carolina." This land lies between the south line of tract 3 of the Duke farm and the Holder land as located by defendants.

(6) Plaintiff and her cotenant trace title to W. F. Rogers and have good title to such property as he acquired by his purchase from Collins.

Based on the admissions and findings the court concluded with respect to the W. F. Rogers deed: "The specific metes and bounds description was highly ambiguous and inaccurate and was inadequate to locate the land; hence the general description 'being all those portions of tracts Nos. 4 and 5 lying west of Reedy Creek Road as the same is now situated excepting only that 5 acre tract conveyed to Ednabel C. Holder' prevails over the conflicting metes and bounds description." Plaintiff and her cotenant purchased for value without knowledge of any intent of Rogers or Collins when the conveyance was made. "(T)he exact location of the five acre Ednabel C. Holder tract is immaterial to a decision of this controversy."

The court thereupon concluded that plaintiff and her cotenant (not a party to the action) were the owners of the land in controversy; and the claim of defendants constituted a cloud on the title of plaintiff and her cotenant. Defendant, having excepted to the findings of fact and conclusions, appealed from the judgment so entered.

William Joslin for plaintiff appellee.
Manning, Fulton & Skinner for defendant appellants.

RODMAN, J. Determinative of the appeal are the legal conclusions that "the exact location of the five acre Ednabel C. Holder tract is immaterial to a decision of this controversy" because "the general description 'being all those portions of tracts Nos. 4 and 5 lying west of Reedy Creek Road as the same is now situated excepting only that 5 acre tract conveyed to Ednabel C. Holder' prevails over the conflicting metes and bounds description' in the deed from Collins and wife to Rogers." If these conclusions are correct, the judgment must be affirmed. To determine that question we must ascertain what property was conveyed by Collins to Rogers.

The court found it was the intent of the parties that Rogers would have those parts of lots 4 and 5 south of the Holder lands, and con-

forming to that intent, Rogers never claimed to own any part of lot 4 lying north of the Holder lands. The first and fundamental rule to apply in construing deeds is to ascertain the intent of the parties. We said in *Franklin v. Faulkner,* 248 N.C. 656, 104 S.E. 2d 841: ". . . when ascertained, that intent becomes the deed, will, or contract." Following the statement that intent, when ascertained, controls, we said: "It is equally well settled that a general description will not enlarge a specific description when the latter is in fact sufficient to identify the land which it purports to convey. Only when the attempted specific description is ambiguous and uncertain will the general prevail." To support that statement we cited decisions going back nearly three quarters of a century. To those listed we now add *Midgett v. Twiford,* 120 N.C. 4; *Loan Assoc. v. Bethel,* 120 N.C. 344; *Ferguson v. Fibre Co.,* 182 N.C. 731, 110 S.E. 220, where *Walker, J.,* said: "If the first description by metes and bounds does not embrace the *locus in quo,* the second one should not be allowed to control it, and thereby enlarge its boundaries, unless it was the clear, if not manifest, intention of the grantor to do so and to convey lands not covered by the first description." The rule announced is not peculiar to North Carolina. It is of general application. 26 C.J.S. 876-877; 16 Am. Jur. 600-601.

The Holder land extends from Reedy Creek Road westwardly to Haley Creek. Plaintiff does not challenge the validity of the deed from Collins to Holders. She insists: When the Holder land is properly located it will be adjacent to lot 3, and the specific description and general description will be in agreement, conveying one tract; but if she is wrong in her location of the Holder land, the deed to Rogers conveyed two tracts, the large area south of the Holder lands and a much smaller area to the north of the Holder lands. The area south of the Holder lands as located by defendants contains 44.77 acres. The area north of the Holder lands as located by defendants contains approximately ten acres.

Since the court based its conclusion that the general description in the deed from Collins to Rogers prevailed over the specific description because "(t)he specific metes and bounds description was highly ambiguous and inaccurate and was inadequate to locate the land" we must look at that description in the light of the testimony, findings of fact, and well-settled principles of law.

What are boundaries is a question of law to be declared by the court. Where they are located is a question of fact. *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311.

Where a deed gives course and distance to a natural object, the call for the natural object is less apt to be incorrect and will for that

reason prevail over course and distance. *Batson v. Bell, supra; Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765; *Cherry v. Warehouse,* 237 N.C. 362, 75 S.E. 2d 124. This principle is applicable to descriptions calling for the line of another tract when that line is known and established.

A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance. The location of the lines called for in the prior conveyance is a question of fact to be ascertained from the description there given. *Harris v. Raleigh,* 251 N.C. 313, 111 S.E. 2d 329; *Coffey v. Greer,* 241 N.C. 744, 86 S.E. 2d 441; *Bostic v. Blanton,* 232 N.C. 441, 61 S.E. 2d 443; *Cornelison v. Hammond,* 224 N.C. 757, 32 S.E. 2d 326.

To determine, as required by the foregoing rules, the sufficiency of the specific description in the deed from Collins to Rogers, we find: (1) The beginning corner, the intersection of the center lines of Crabtree Creek and Reedy Creek Road, is known and established. (2) Since Reedy Creek Road is a known highway, there is no difficulty about the direction from the beginning corner to the second corner. (3) The termination of this line is "Ednabel C. Holder's southeast corner." Everyone agrees the point referred to is the southeast corner of the lands which Collins had conveyed to his daughter, Mrs. Holder. Where is that point? The Rogers deed says it is "1970 feet *more or less*" from Crabtree Creek and "*about* 230 feet" from the south line of tract 3 of the Duke farm. (Emphasis supplied.) Neither of these approximations can be used to fix the point called for. It is necessary to go to the proper source to determine the location of the southeast corner of Mrs. Holder's land. That source is Collins' deed to her.

The deed to Holder says the beginning corner is on the west side of Reedy Creek Road and is indicated by an iron pipe "approximately one-half mile North of the Crabtree Creek Bridge." That approximate distance would, if used as a definite and specific distance, locate the land north of grantor's northern boundary. The deed would be mere color of title because the description would not include lands owned or claimed by grantor. The iron pipe called for has been removed. Do these facts destroy the title which Mrs. Holder acquired, or is she at liberty to show where in fact the pipes were located? The answer would seem to be plain. It is permissible to show where the lines were located when the deed was made. As said by *Ashe, J.,* in *Thornburg v. Masten,* 88 N.C. 293: "Such particularity in the description of land conveyed or contracted to be conveyed, as will give the court certain and unmistakable information of the land that is meant, is not required, and could rarely even be attained. All that is required is that the land should be described with such certainty that by proof *aliunde*

the description may be fitted to the thing. In almost every case, extraneous proof is requisite and admissible to apply the description to the land meant to be conveyed."

Max Collins, Jr., son of the original grantor, testified that in October or November 1947 he made a survey of the land to be conveyed to Mrs. Holder. This survey was made at the request of his father and brother-in-law. When he made the survey, he chopped and marked certain trees indicating the corners. The south line as he surveyed it "is the line between the large grove of trees and the old field . . . The line out there today is the same line, beginning at the same tree I chopped in 1947." Mrs. Collins, one of the Holder grantors, testified: "I was there when the property sold to Holder was surveyed . . . We had it surveyed before we wrote the deed. That was the first thing we did." True, the deed from Collins to the Holders does not refer to this survey, but that fact does not prevent the parties from showing what they did to locate the land conveyed. John Rogers, son of plaintiff's immediate grantor, likewise testified to the location of the Holder line as pointed out to him by both Collins and his father, saying the southern boundary of this tract was south of a large grove of trees. There was other evidence sufficient to show where the lines were in fact located when the deed was made to the Holders. The evidence offered to locate the Holder land was competent and, if accepted as true, sufficient to establish its location. *Meekins v. Miller*, 245 N.C. 567, 96 S.E. 2d 715. In fact the court seems to have accepted this testimony as true. It found "that said 5 acres included some large shade trees, and the south line extended in an east-west direction along the north line of a field for some distance from the Reedy Creek Road . . ."

When the evidence and the findings of fact are examined, it is apparent, we think, that an erroneous conclusion was reached because the court undertook to locate the southeast corner of the Holder lands by the Rogers', a junior, deed. Had he applied the proper rule, he would have undertaken to locate the Holder lands by applying to its description the parol testimony. Then the approximate distances called for in the deeds would not create difficulty.

The pleadings contain no suggestion that any of the deeds need to be reformed. The only question raised by the pleadings is the ownership of a specific area to be determined by the deeds as presently written. Plaintiff, having the older deed from a common source, acquired title to such property as was conveyed by that deed, but she acquired title to no more than was conveyed by it. Her land, by the express language of her deed, is south of the Holder land. The deed does not purport to convey two tracts, one on the south and the other on the north of the Holder land. Her deed, by express language, excepts the

Holder land. The lines of the Holder land must be located before this controversy can be determined. The present owners of the Holder property, if not essential, are certainly proper parties and should be brought in to settle once for all the crucial question here presented. Similarly, plaintiff's cotenant should be made a party. She will not be bound by the ultimate decision unless a party.

New trial.

STATE v. MARIE HALES.

(Filed 13 December, 1961.)

1. Indictment and Warrant § 15—

A defendant charged with the violation of a criminal statute may challenge the constitutionality of the statute by demurrer or motion to quash.

2. Constitutional Law § 30—

The phrase "law of the land" as used in Article I, § 17, of the State Constitution and "due process of law" as used in the Federal Constitution are interchangeable terms.

3. Constitutional Law § 11; Criminal Law § 1—

The Legislature in the exercise of the inherent police power of the State may define and punish any act as a crime provided the statute has some substantial relation to the evil sought to be supressed, and the expediency of the enactment is within the province of the Legislature.

4. Statutes § 4—

There is a presumption in favor of the constitutionality of a statute, and a statute will be upheld unless it is in conflict with some constitutional provision.

5. Criminal Law §§ 1, 2—

The General Assembly may make the doing of a proscribed act a crime irrespective of intent, and whether intent is an element of a statutory offense must be determined from the language of the statute in view of its manifest purpose and design.

6. Criminal Law §§ 2, 32—

The presumption of innocence does not preclude the General Assembly from providing by statute that the proof of certain facts should be *prima facie* evidence of an ultimate fact, provided there is a rational connection between the facts proven and the ultimate fact presumed.

7. Criminal Law §§ 1, 2; Shoplifting—

G.S. 14-72.1, making it a misdemeanor for a person, without authority, to wilfully conceal goods or merchandise of any store, not theretofore

purchased by such person, while still upon the premises of such store, and providing that the fact of concealment upon the person under such circumstances should be *prima facie* evidence that the concealment was wilful, is constitutional and valid, since the statute has a real and substantial relation to the evil of shoplifting which the statute seeks to suppress. Article I, § 17, Constitution of North Carolina; the Due Process Clause of the Federal Constitution.

8. Criminal Law § 1—

A criminal statute must be sufficiently definite in its terms to give notice of the proscribed conduct to a citizen of ordinary understanding and intelligence and enable the court to apply its provisions and a defendant to formulate his defense, but within this limitation only reasonable certainty is required, since a statute must be formulated to apply to variant factual situations to arise in the future.

9. Same; Shoplifting—

G.S. 14-72.1 defines the offense of shoplifting with sufficient clarity and definiteness to inform a person of ordinary intelligence and reasonable preception what act it intends to prohibit and omits no essential provisions which go to impress the inhibited acts as being wrongful and criminal, and therefore the statute cannot be declared void for vagueness or uncertainty.

10. Criminal Law § 2; Shoplifting—

The term "wilful concealment" as used in G.S. 14-72.1 means that the concealing of goods under the circumstances set out in the statute must be voluntary, intentional, purposeful, and deliberate, without authority and in violation of the law, and such wilfulness is an essential element of the statutory offense of shoplifting.

APPEAL by the State from *Stevens, J.*, March-April 1961 Criminal Term of WILSON.

The defendant was tried in the recorder's court of the city of Wilson on a warrant charging a violation of G.S. 14-72.1, enacted by the General Assembly, Session Laws 1957, Chapter 301. The warrant charges the offense in substantial accord with the words of the statute, and alleges in substance that the defendant on 3 September 1960, without authority, did unlawfully and wilfully conceal on or about her person the goods and merchandise of McLellan's Stores Company in the city of Wilson, to wit, 4 boys' T shirts (2 sizes 6 and 2 sizes 8) valued at $100 each, and one pair of girl's white shoes valued at $2.98, not theretofore purchased by her, while still upon the premises of the store. It seems patent that the charged value of the T shirts at $100 each is wrong, and that it should be $1.00 each.

In the recorder's court the defendant entered a plea of Not Guilty. She was found guilty, and fined $25.00 and the costs. From the judgment she appealed to the superior court.

When the case came on for trial in the superior court the defendant demurred to the warrant and moved that it be quashed on the following grounds: One, the offense alleged is not based on a violation of the common law. Two, G.S. 14-72.1 is unconstitutional, because it violates Article I, Section 17, of the North Carolina Constitution, for that G.S. 14-72.1, which attempts to prohibit shoplifting, which is common law larceny, does not require any felonious intent on the part of the person, who, without authority, wilfully conceals, the goods and merchandise of a store, not theretofore purchased by such person, while still upon the premises of such store, and that the provision of the statute which provides "such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment," does not require a felonious intent, and because the statute does not inform the defendant with reasonable precision of the act it prohibits; and further because the statute is so general and indefinite that it is void for uncertainty.

The court allowed the motion to quash, and the State, by virtue of G.S. 15-179, appealed to the Supreme Court.

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

Lucas, Rand and Rose By Z. Hardy Rose for defendant, appellee.

PARKER, J. The warrant charges a violation of G.S. 14-72.1. The defendant may challenge the constitutionality of this statute by a demurrer, or by a motion to quash the warrant. *S. v. Glidden Company,* 228 N.C. 664, 46 S.E. 2d 860; 16 C.J.S., Constitutional Law, pp. 343-4.

G.S. 14-72.1 reads: "Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment."

Article I, Section 17, of the North Carolina Constitution, states: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The phrase, "the law of the land," used in the above quoted part of

the State Constitution and "due process of law" are interchangeable terms. *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717.

The Legislature, unless it is limited by constitutional provisions imposed by the State and Federal Constitutions, has the inherent power to define and punish any act as a crime, because it is indisputedly a part of the police power of the State. The expediency of making any such enactment is a matter of which the Legislature is the proper judge. However, the act of the Legislature declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished. *S. v. Yarboro,* 194 N.C. 498, 140 S.E. 216; *People v. Belcastro,* 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223; 22 C.J.S., Criminal Law, Section 13; 14 Am. Jur., Criminal Law, Sections 16 and 22; Wharton's Criminal Law and Procedure, 1957, Vol. I, Section 16.

In passing upon the constitutionality of this statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision. *S. v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22.

It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. *S. v. Correll,* 232 N.C. 696, 62 S.E. 2d 82; *S. v. Lattimore,* 201 N.C. 32, 158 S.E. 741; *Hunter v. S.,* 158 Tenn. 63, 12 S.W. 2d 361, 61 A.L.R. 1148; Wharton's *ibid,* Section 17; 22 C.J.S., Criminal Law, Section 30; 14 Am. Jur., Criminal Law, 24.

Such legislation eliminating intent as an essential element of a statutory crime "is enacted and is sustained, for the most part, on grounds of necessity, and is not violative of federal or other constitutional prohibitions." 22 C.J.S., Criminal Law, p. 102.

This Court said in the *Lattimore* case: "It is true that an act may become criminal only by reason of the intent with which it is done, but the performance of an act which is expressly forbidden by statute may constitute an offense in itself without regard to the question of intent."

12 Am. Jur., Constitutional Law, Section 629, states: "The legislature has power to enact provisions, even in criminal actions, that where certain facts have been proved, they shall be prima facie evidence of the main fact in question if the fact proved has some fair relation to, or natural connection with, the main fact. There is no vested right to the rule of evidence that everyone shall be presumed innocent until proved guilty, which prevents the legislature from mak-

ing the doing of certain acts prima facie proof of guilt or of some element of guilt." To the same effect: *S. v. Barrett,* 138 N.C. 630, 50 S.E. 506; *S. v. Dowdy,* 145 N.C. 432, 58 S.E. 1002; *S. v. Hammond,* 188 N.C. 602, 125 S.E. 402; *S. v. Fowler and Brincefield,* 205 N.C. 608, 172 S.E. 191; *Casey v. U. S.,* 276 U.S. 413, 72 L. Ed. 632; 16 C.J.S., Constitutional Law, Section 128(d).

Speaking directly to the point in the *Fowler and Brincefield* case this Court says: "The defendants assail the constitutionality of chapter 434, Public Laws 1933, amending C.S., 4428, which makes the possession of tickets, certificates or orders used in the operation of a lottery prima facie evidence of a violation of said section, but the connection between the fact proved and the ultimate fact presumed seems to be a rational one, hence the objection must fail."

The sly, stealthy, crafty nature of the crime of shoplifting and the small individual thefts make detection, prosecution and conviction of the shoplifter for larceny a most difficult and perilous matter. When a merchant accosts a shoplifter, and takes out a warrant against him for larceny, and the shoplifter is acquitted when tried, the merchant risks a lawsuit for large damages for malicious prosecution, false imprisonment, false arrest, or similar tort. Faced with such a formidable array of deterrents, many a merchant stands by and watches his property disappear without a fair, legally protected, opportunity to protect it, if his sole remedy is a successful prosecution for larceny, in which offense superadded to the wrongful taking there must be a felonious intent. *S. v. Griffin,* 239 N.C. 41, 79 S.E. 2d 230. This is said in Tenn. Law Review, Vol. 24, 1955-1957, page 1177, which volume is in our library: "Under modern self-service methods and the exciting tempo of present day life, shoplifting seems to be the order of the day. It is estimated that shoplifting on the West Coast is equivalent to 1% of gross sales and a total of approximately $250 million annually in the United States. The great majority of the shoplifters fall within the group of 'casual pilferers.' One estimate is that 70% of the people caught in the act are first-time offenders. These are mostly women and juveniles. 'Bulky pockets, voluminous coats, and false-bottomed cartons' take their toll. Then there are the 'bloomer and trouser artists' who wear billowing bloomers beneath a flowing skirt or stuffed trousers under a topcoat; the 'crotch artists' who straddle the pilfered garment, cram its edges up beneath a girdle and waddle off. Professionals account for most of the large items."

According to an exhaustive investigation by us in the Supreme Court Library it appears that 44 states have enacted statutes in respect to shoplifting. In 1961 Colorado, Iowa, Maryland, Missouri, and Wyoming enacted such statutes. According to our investigation the follow-

ing States apparently have no statutes dealing with the specific offense of shoplifting, Alaska, California, Delaware, Hawaii, New Jersey and Vermont, and also the District of Columbia. These many statutes in respect to shoplifting vary in many ways. The Idaho, Maine, New Hampshire and Virginia statutes are very similar to ours.

It is manifest that our shoplifting statute has a rational, real and substantial relation to the end sought to be accomplished, which is the protection of our merchants from shoplifting, and that such was the manifest purpose and design of the legislation. It is also manifest from the language of our shoplifting statute, in view of its manifest purpose and design, that the Legislature intended that a felonious intent or a criminal intent should not be a necessary element of the statutory crime of shoplifting, and so enacted the statute, for the Legislature must have realized that the remedies heretofore provided by law for the protection of the goods and wares displayed for sale by merchants have not provided them adequate protection from sustaining very substantial losses from shoplifters. The statute states: "Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment." Undoubtedly, there is a rational connection between the fact proved and the ultimate fact presumed.

Our shoplifting statute, G.S. 14-72.1, violates no provision of Article I, Section 17, of the North Carolina Constitution, nor the due process clause of the Federal Constitution, because it does not require any felonious intent or any criminal intent on the part of the person who, without authority, willfully conceals the goods and merchandise of a store, not theretofore purchased by such person, while still on the premises of such store, and because the fact that "such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment."

"A criminal statute must be definite as to the persons within the scope of the statute and the acts which are penalized. If it is not definate, the due process clause of State Constitutions and of the Fifth and Fourteenth Amendments of the Federal Constitution, whichever is applicable, is violated. If the statute is so vague and uncertain that a reasonable man would be compelled to speculate at his peril whether the statute permits or prohibits the act he contemplates committing, the statute is unconstitutional. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct. If on its face a criminal statute is repugnant to the due process

clause, specifications of details of the offense intended to be charged will not serve to validate it, it being the statute and not the accusation under it that prescribes the rule to govern conduct and warns against transgression. . . . In determining whether a statute is sufficiently certain and definite the courts apply higher standards in the case of a criminal than a civil statute. . . . While a penal statute must be sufficiently definite to apprise a person of ordinary intelligence of the conduct which is prohibited, it is not necessary that the forbidden conduct be described with mathematical precision or absolute certainty. . . . A statute is not unconstitutional as indefinite because it employs general terms, when such terms convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act, for impossible standards of certainty are not required. Reasonable certainty is sufficient." Wharton's Criminal Law and Procedure, 1957, Vol. I, Section 18. To the same effect, 22 C.J.S., Criminal Law, Section 24(2)a; 14 Am. Jur., Criminal Law, Section 19. See also, *S. v. Partlow,* 91 N.C. 550; *S. v. Morrison,* 210 N.C. 117, 185 S.E. 674; *S. v. Coal Co.,* 210 N.C. 742, 188 S.E. 412.

This is said in *Boyce Motor Lines v. U. S.,* 342 U.S. 337, 96 L. Ed. 367: "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of prescribed conduct shall take the risk that he may cross the line."

The statutory offense created by G.S. 14-72.1 is composed of four essential elements: Whoever, one, without authority, two, willfully conceals the goods or merchandise of any store, three, not theretofore purchased by such person, four, while still upon the premises of the store, shall be guilty of a misdemeanor. "Willfully conceals" as used in the statute means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in violation of law, and this is an essential element of the statutory offense of shoplfting. *S. v. Dickens,* 215 N.C. 303, 1 S.E. 2d 837; *S. v. McDay,* 232 N.C. 388, 61 S.E. 2d 86; *S. v. Whitener,* 93 N.C. 590.

This statute defines with sufficient clarity and definiteness the acts

which are penalized, and informs a person of ordinary intelligence with reasonable precision what acts it intends to prohibt so that he may know what acts he should avoid, in order that he may not "cross the line" and bring himself within its penalties. The statute omits no essential provisions which go to impress the inhibited acts committed as being wrongful and criminal. It is sufficiently definite to guide the judge in its application and the lawyer in defending one charged with its violation.

G.S. 14-72.1 violates neither Article I, Section 17, of the North Carolina Constitution, nor the due process clauses of the Federal Constitution, by reason of, as defendant contends, vagueness and uncertainty, and of not informing a person of ordinary intelligence with reasonable precision of the acts it prohibits. Defendant's contention in this respect is untenable.

There is no merit in defendant's contention that her demurrer to the warrant and her motion to quash it, should be allowed, because the offense charged therein is not based on a violation of the common law.

After a thorough investigation we have found no case where the constitutionality of a shoplifting statute substantially similar to ours, or in any way similar to ours, has been tested in the courts of the various States. The briefs of the Attorney General and of the defendant have referred us to no such case.

The trial court erred in allowing defendant's demurrer to the warrant and her motion to quash it, and the order of the judge allowing her motion is

Reversed.

CARL T. HICKS AND EMILY M. HICKS, PETITIONERS v. EDWARD L. RUSSELL, RESPONDENT.

(Filed 13 December, 1961.)

1. Appeal and Error § 22—

An exception to the judgment and each finding of fact and each conclusion of law incorporated therein is a broadside exception which presents for review only whether the facts found support the judgment, and an exception may not be aided by the assignments of error.

2. Appeal and Error § 19—

An assignment of error unsupported by an exception duly taken and preserved will not be considered on appeal, and an exception appearing only in the notice of appeal is ineffectual.

3. Adoption § 3—

That the child sought to be adopted had been abandoned more than six months prior to the institution of the adoption proceedings does not relate to jurisdiction but merely obviates the necessity that the parents, surviving parent, or guardian of the child sought to be adopted be made a party to the proceeding. If the surviving parent is a party, a finding that he had abandoned the child obviates the necessity of his consent to the adoption.

4. Adoption § 5—

Where the surviving parent is a party to a proceeding for adoption by the maternal grandparents, and such surviving parent fails to file answer and deny that he had abandoned his children as alleged in the petition, the clerk upon the hearing of a motion for decree of adoption by default, properly determines whether an abandonment had taken place, and when there is no appeal from the decree of adoption based upon the clerk's finding upon supporting evidence that the parent had abandoned the child, the surviving parent is irrevocably bound by the order and judgment and may not thereafter challenge the validity thereof. G.S. 48-28.

5. Same—

The provision of G.S. 48-28 permitting a natural parent or guardian to attack a decree of adoption does not obtain when such parent or guardian is a party to the adoption proceeding.

The movant (respondent) appeals from *Mintz, J.*, May Mixed Term 1961 of GREENE.

This proceeding was instituted before the Clerk of the Superior Court of Greene County, North Carolina, on 18 May 1960, for the adoption of Carrol Lynn Russell, age 8; Edward L. Russell, Jr., age 6; Richard N. Russell, age 4; and Patricia Ann Russell, age 3.

The record reveals the following:

1. The petitioners, Carl T. Hicks and his wife, Emily M. Hicks, are the grandparents of the above-named minor children.

2. The respondent, Edward L. Russell, the husband of Ann Hicks Russell and the father of the above-named minor children, brought his wife and four children to the home of the petitioners on or about 1 September 1958 and left them. The whereabouts of the respondent was unknown from that time until a few months following the death of Ann Hicks Russell, the mother of the said children, on 5 February 1960.

3. From October 1958 until 4 September 1959, Ann Hicks Russell and her four children received support payments of approximately $280.00. These funds were not received from the respondent but from his sisters in the form of checks signed by them.

4. In September 1959, Ann Hicks Russell was served with a notice through an attorney in Utah, of her husband's pending action for di-

vorce. According to the notice, the custody of the children was to be given to the mother, plus support payments. Mrs. Russell responded through her attorney, accepting custody of the children.

5. Except for a payment of $80.00 made during May 1960, the respondent has made no contribution to the support of his wife and children since 4 September 1959.

6. In September 1958, the petitioners purchased a home for Ann Hicks Russell, their daughter, and her four children, and set up a budget of $350.00 per month for their support, an arrangement which prevailed until the death of Ann Hicks Russell on 5 February 1960. The petitioners have continued to maintain and support said minor children since the death of their mother.

7. The petitioners alleged in their petition that the respondent had abandoned said children and in order that the question of abandonment might be determined as provided by statute, the petitioners obtained service on the respondent by publication. The respondent was given thirty days from and after 20 June 1960 to answer or otherwise plead.

8. The respondent appeared through Owens and Langley, Attorneys at Law, Kinston, North Carolina, on 21 July 1960, and obtained a consent order granting the respondent until 10 August 1960 to answer, demur or otherwise plead to the petition filed in this proceeding. No answer or other pleadings were filed by the respondent.

9. In April 1960 the respondent came to North Carolina from Florida with a "woman who represented herself to be his wife."

10. On 15 December 1960, the Clerk of the Superior Court of Greene County entered an order of reference pursuant to the provisions of G.S. 48-16, requesting the Welfare Department of Greene County to make the investigation and report required by said statute.

11. On 31 January 1961, an exhaustive report of the proposed adoptions was filed with the Clerk of the Superior Court of Greene County. This report verified the allegations of the petition as to the amount contributed by the respondent or his sisters as set out hereinabove and further verified the fact that the petitioners, except for the aforesaid amounts, supported Ann Hicks Russell and her four children from September 1958 until the death of Ann Hicks Russell on 5 February 1960, and that the petitioners have furnished full maintenance and support of these minor children since the death of their mother except for the contribution of $80.00 in May 1960.

12. On 31 January 1961, upon motion of petitioners for judgment against the respondent by default final, the court entered an order in substance as follows: That a verified petition was filed with the court; that service by publication was obtained on the respondent; that he

appeared by attorney on 21 July 1960 and obtained additional time for answering or filing other pleading to 10 August 1960; that the respondent abandoned his four minor children on or about 5 February 1960 by leaving said minor children at the home of their grandparents, Carl T. Hicks and Emily M. Hicks (actually, the respondent left these children and their mother at the home of the petitioners on 1 September 1958); and that except for the payment of $80.00 during 1960, the respondent has failed to provide any support for said children since 4 September 1959.

13. Thereafter, on 6 February 1961, the Clerk of the Superior Court of Greene County appointed a next friend for each of the aforesaid children as provided in G.S. 48-9 (2). The next friend accepted the appointments and gave his consent to the adoption of each child in writing and said consent was filed with the court.

14. The court then found the facts substantially as follows and entered the final orders of adoption: (1) That all the necessary parties are properly before the court and that the time for answering or filing other pleading has expired. (2) Names of the children to be adopted. (3) Names of adoptive parents. (4) That the petition seeking adoption of these children was duly verified on 18 May 1960. (5) That the children were placed with the petitioners on the 1st day of September 1958 and that proper consent to the adoptions has been given in writing and has been filed in the proceeding. (6) That said minor children are by blood the grandchildren of Carl T. Hicks and Emily Minshew Hicks; that this case comes within the provisions of G.S. 48-21 (c); that the court in its discretion waives the entering of an interlocutory decree and the probationary period required by law in cases not coming within the provisions of the aforesaid section. (7) That the petitioners are fit and proper persons to have the care, custody and training of said children. (8) That the petitioners are financially able to provide for said children. (9) That said children are suitable children for adoption, and that the adoptions herein sought are for the best interest of each of said children.

Thereupon, final decrees of adoption were entered and the name of each child was changed from Russell to Hicks.

Sometime after the entry of the final adoption decrees in this cause, the respondent through his present counsel made a motion in the cause for each order, judgment or other decree entered therein to be declared void and of no legal force. He contends that because the court did not find that the respondent had wilfully abandoned his said children for a period of at least six months immediately preceding the institution of the adoption proceeding, the court had no jurisdiction of Edward L. Russell or of the said minor children.

This motion came on for hearing at the May Mixed Term 1961 of the Superior Court of Greene County. The court being informed that on 17 March 1961 the respondent had taken the children from the home of petitioners and removed them to the State of Utah, refused to consider the motion until such time as the children were returned to North Carolina. The children were returned to this jurisdiction by the Welfare Department of the State of Utah and the petitioners voluntarily assumed payment of the costs in connection with the return of the children. By consent, the hearing was resumed and concluded in Kinston, North Carolina, on 29 June 1961.

The court reviewed the entire proceedings, found the facts, and concluded as a matter of law that the record in this cause constitutes a valid and legal adoption of the children whom it purports to concern. That Edward L. Russell, having become a party to the proceeding and not having filed an answer or other pleading or made a further appearance, and not having taken any appeal from the orders entered herein nor from the final orders for adoption, is irrevocably bound by the adoptions consummated by the proceeding herein and cannot question the validity thereof.

The court then ordered, adjudged and decreed that the motion of the movant, Edward L. Russell, respondent herein, be denied and dismissed, and further "that the adoptions of the minors in this proceeding are hereby declared valid; and the final orders for adoption heretofore entered by the Clerk of the Superior Court of Greene County are hereby approved, ratified and confirmed as of the date of their entry."

The respondent appeals, assigning error.

Joyner, Howison & Mitchell; George W. Edwards; John Hill Paylor for petitioner appellees.

Jones, Reed & Griffin; W. Eugene Hansen (of Salt Lake City, Utah) for respondent appellant.

DENNY, J. The appellant purports to present twelve assignments of error, each based on a single exception set out in his notice of appeal as follows: "To the foregoing judgment and each finding of fact incorporated therein; each conclusion of law incorporated therein, and each order, adjudication and decree incorporated therein, the respondent Edward L. Russell objects and excepts (EXCEPTION #1) * * *."

No exception appears in the record to any finding of fact or conclusion of law except as noted in the notice of appeal and under the assignments of error. Each of the twelve assignments of error purports to be supported by Exception No. 1.

Under our Rules of Practice and our decisions, this is a broadside exception and presents nothing for our consideration but the question whether the facts found support the judgment. *Logan v. Sprinkle, post* 41; *Putnam v. Publications,* 245 N.C. 432, 96 S.E. 2d 445; *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96; *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242.

A single exception to "the findings of fact and conclusions of law based thereon" has been consistently held by this Court to be "a broadside exception and ineffectual." Strong, North Carolina Index, Vol. I, Appeal and Error, section 22, and cited cases. See also *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904.

Moreover, a broadside exception may not be aided by the assignment of error. *Suits v. Ins. Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Worsley v. Rendering Co.,* 239 N.C. 547, 80 S.E. 2d 467. Assignments of error unsupported by an exception duly taken and preserved will not be considered on appeal. *Logan v. Sprinkle, supra; Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223.

The General Assembly of North Carolina, in Chapter 300 of the 1949 Session Laws of North Carolina, declared its legislative policy with respect to the adoption of children. This policy is codified as G.S. 48-1. Subsection (3) thereof reads as follows: "When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this chapter should be liberally construed."

G.S. 48-2, subsection (3) provides: "For the purpose of this chapter, an abandoned child shall be any child under the age of 18 years who has been wilfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child."

G.S. 48-5 in pertinent part reads: "(a) In all cases where a court of competent jurisdiction has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this chapter nor shall their consent be required. (b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than ten days to the parent, parents, or guardian of the person, *the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place.* (Emphasis added.) (c) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of the

parent, parents, or guardian of the person shall not be required. * * *"

Likewise, in pertinent part, G.S. 48-9, subsection (2), reads as follows: "If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county superintendent of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper. * * *"

Under our adoption law, if it is found that a child has been abandoned for at least six months immediately preceding the institution of an action or proceeding to declare the child an abandoned child, then such parents, surviving parent, or guardian of the person, declared guilty of the abandonment, shall not be necessary parties to any proceeding brought under General Statutes, Chapter 48, Adoption of Minors.

Furthermore, where a court of competent jurisdiction has declared a child to be an abandoned child, the court is not ousted of its jurisdiction although it may be found that abandonment occurred less than six months prior to the institution of the proceeding to determine whether the child had been abandoned. The time of the abandonment is not determinative of jurisdiction, but is determinative of the question whether or not the parents, surviving parent, or guardian of the person, must be a party to the adoption proceeding.

Moreover, if it is determined that a child or children have been abandoned, the consent of the parent, or guardian guilty of the abandonment of such child or children need not be obtained.

The facts in this case tend to show that insofar as this respondent is concerned, these children would have become a public charge or gone wholly neglected and unprovided for had it not been for the petitioners herein. The respondent provided nothing for their support and maintenance for more than eight months from and after 4 September 1959. Neither is there any evidence tending to show that the respondent ever attempted to see or that he ever made any inquiry as to the health or welfare of these children from 1 September 1958 until 17 March 1961 when he took them from the home of the petitioners in defiance of the final orders of adoption entered 6 February 1961 and carried them out of this jurisdiction to the State of Utah.

It is provided in G.S. 48-28 as follows: "(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the

adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a natural parent or guardian of the person of the child. * * * (b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction."

The respondent having been a party to this proceeding and having failed to file an answer and deny that an abandonment had taken place as alleged in the petition, it became the duty of the Clerk of the Superior Court of Greene County to determine whether or not an abandonment had taken place. G.S. 48-5 (b). The aforesaid Clerk having found that the respondent had abandoned his children, and the respondent not having appealed therefrom or from the final orders of adoption entered on 6 February 1961, we hold that he is irrevocably bound by the orders and judgments entered in the adoption proceeding and is estopped by law from challenging the validity thereof. G.S. 48-28.

We further hold that the provision in G.S. 48-28, which permits a direct or collateral attack on an adoption proceeding by a natural parent or guardian of the person of the child, is limited to such natural parent or guardian of the person of the child who was not a party to the adoption proceeding.

The findings of fact by the court below were sufficient to support the judgment entered, and the judgment is

Affirmed.

BESS A. LOGAN, PLAINTIFF v. JOHN A. SPRINKLE AND WIFE, BESSIE L. SPRINKLE; ELSIE S. LEAKE AND HUSBAND, H. H. LEAKE; FRANCES S. KING AND HUSBAND, ALLAN H. KING; AND ETHEL G. SPRINKLE, ORIGINAL DEFENDANTS AND LOUIS C. BARNES AND WIFE, ALEE H. BARNES, ADDITIONAL DEFENDANTS.

(Filed 13 December, 1961.)

1. Appeal and Error § 22—

A sole exception to the findings of fact, conclusions of law and judgment, without any particular exception to any specific finding, presents for

review only whether the court's conclusions of law are supported by its findings.

2. Appeal and Error § 19—

An assignment of error not supported by an exception duly appearing in the record will not be considered.

3. Appeal and Error § 21—

An appeal itself constitutes an exception to the judgment and presents for decision whether the facts found support the judgment.

4. Appeal and Error § 22—

In the absence of a request for a particular finding of fact, appellant may not object to the failure of the court to find such fact.

5. Deeds § 19—

Where the owner of a development sells one of the eight lots therein subject to residential restrictions and thereafter conveys six of the lots subject to the residential restrictions with the exception that the purchaser of the six lots might construct a motel thereon, *held*, a motel is a commercial purpose which violates the residential restrictions, and the owner, by abandoning the general scheme of development for residential purposes, waives the right as against the purchaser of the one lot to enforce the restrictions.

6. Same—

Where the owner of a subdivision abandons the scheme of residential development as to a particular part thereof and thereafter the character of that particular part as well as the character of the adjacent land outside the development, is changed from residential to commercial purposes, other grantees of lots in the subdivision may not enforce the restrictive covenants against a grantee of a lot in that particular part, and the court properly considers the change in condition in the immediate area within as well as without the development in determining the rights of the grantees to enforce the covenants *inter se*.

APPEAL by original defendants from *Fountain, J.*, 19 June Term 1961 of FORSYTH.

This is an action to have restrictive covenants contained in plaintiff's deed declared null and void, and to enjoin the original defendants, who are appellants herein, from interfering with the plaintiff's unrestricted use of her property.

The parties waived a jury trial and agreed that his Honor, George M. Fountain, Judge Presiding, should consider an agreed statement of facts prepared by counsel for plaintiff and defendants, and "that the trial judge may arrive at his conclusions of law by these facts and render judgment thereon."

The agreed statement of facts and the facts found by the court below may be summarized as follows:

That prior to September 1954, the original defendants, John A. Sprinkle, Elsie S. Leake, Frances S. King, and Ethel G. Sprinkle, owned a tract of land in Forsyth County, northwest of the City of Winston-Salem. The land consists of a single triangular block which fronts on the southwest side of North Carolina Highway No. 67, and is bounded on the west by Valley Road and partially on the south and east by an unnamed thirty-foot street. During September 1954, the original defendants conveyed a portion of this tract of land to Nell M. Freeman, which deed is recorded in Deed Book 694, at page 62, in the office of the Register of Deeds of Forsyth County, North Carolina. Later, a map of this triangular block was prepared by a surveyor, dividing the block into eight lots and designating the subdivision as Beacon Hill, Section 1. This map is dated 4 November 1954 and is recorded in Plat Book 17, page 97, in the office of the Register of Deeds of Forsyth County.

That the deeds to the land in controversy did not describe the same by lot number or by reference to any map or plat, but the land described in the deeds is in all respects the same property as Lot No. 7 as shown on the plat of Beacon Hill, Section 1. The deed from the original defendants to Nell M. Freeman, the *mesne* conveyances, including plaintiff's deed dated 20 September 1955 and recorded in Deed Book 727, page 24, in the Forsyth County Registry, according to the agreed statement of facts all contain the following pertinent covenants: "(1) That the property shall be used solely for residential purposes; * * * (5) that only one dwelling shall be erected on said property."

That on 2 September 1955, the original defendants sold Lots Nos. 1 through 6 inclusive to Louis C. Barnes and wife, Alee H. Barnes, who were made additional parties defendant upon motion of the plaintiff. The deed conveying title to these six lots contained the same restrictive covenants set out hereinabove, with the additional proviso, "That said property shall be used for residential purposes, except such portion as may be used for a motel or a motor court with proper additions and facilities."

That the additional defendants, Louis C. Barnes and wife, Alee H. Barnes, entered upon the premises and constructed a multi-unit motel on these lots which they are now operating. There is no building in Section 1 of Beacon Hill except the motel on the property of the additional defendants.

That Lots Nos. 1 through 6 have a frontage of 723.0 feet on North Carolina Highway No. 67; that Lot No. 7 has a frontage of 155.75 feet on said highway and a frontage of 135.15 feet on Valley Road; that Lot No. 8 has no frontage on Highway 67 and lies to the rear of

Lots 4, 5, 6 and a portion of Lot No. 3, having a frontage of 350.9 feet on Valley Road.

That the motel of the defendants, Louis C. Barnes and wife, Alee H. Barnes, was one of the first businesses to be constructed along North Carolina Highway No. 67 in the vicinity of Beacon Hill, Section 1; that at approximately the same time the motel was constructed other businesses began to move into the area of Section 1, Beacon Hill, along North Carolina Highway No. 67; that businesses have continued to move into the area up to the present time, and now a majority of the property in the vicinity of Beacon Hill, Section 1, and fronting on North Carolina Highway No. 67, is being used for business; that a garage is now located across the highway from Lot No. 7 in Beacon Hill; that opposite the motel, located in Section 1, Beacon Hill, is a new business building now under construction, a nursery business is being operated near the garage across the street or road from the motel, and immediately west of Beacon Hill, Section 1, there is located a small shopping center containing numerous businesses as shown on a map, plaintiff's Exhibit No. 2. (Plaintiff's Exhibit No. 2 shows the location of nine business establishments on North Carolina Highway No. 67 and two on Valley Road which are located nearer to Lot No. 7 than any residence. In the immediate vicinity of Lot No. 7, plaintiff's exhibit shows the location of 26 business properties and only six houses, presumably residences.)

That at the time the original defendants conveyed the land now designated as Lot No. 7, as shown on the map of Beacon Hill, Section 1, to Nell M. Freeman in September 1954, it was the plan and intention of said original defendants to cut the property shown as Section 1, Beacon Hill, into lots and to restrict the property to residential use; that Lots Nos. 1 through 6 inclusive were thereafter sold by the original defendants to the additional defendants and the deed thereto did not restrict said six lots to residential use only but specifically authorized and permitted the construction of a motel with proper additions and facilities on said six lots; that the original plan of the defendants, other than the additional defendants, to restrict Beacon Hill, Section 1, to residential use only has been abandoned by said defendants by permitting the construction of a motel on six of the eight lots in the subdivision and by the failure to restrict any lot in the development to residential use other than Lot No. 7.

That Lot No. 7 of Beacon Hill, Section 1, is now undesirable for residential use and that said Lot No. 7 has a fair market value for residential use of approximately $1,000.00; that said lot is suitable for business use, fronts a highway, and has a fair market value of approximately $5,000.00 for business use; that the plaintiff has negotiated

a sale of the property for business use subject to the removal of the restrictions concerning residential use and the plaintiff proposes to sell Lot No. 7 to other parties to be used by them for business purposes.

That the plaintiff has heretofore requested, and in this action demands that the defendants release Lot No. 7 of Beacon Hill, Section 1, from the restrictive covenants set out and recorded in Deed Book 694, page 62, Forsyth County Registry, and the defendants have refused to release said restrictions.

Upon the foregoing findings of fact the court made the following conclusions of law:

"That Section 1 of Beacon Hill as shown on Exhibit 1 and as recorded in Plat Book 17, page 97, Forsyth County Registry, was intended by the defendants, other than the defendants Louis C. Barnes and wife, Alee H. Barnes, for residential use and it was the original intention of said defendants to restrict all of the lots in said Section 1 of Beacon Hill to residential use; that the defendants, other than the defendants Louis C. Barnes and wife, Alee H. Barnes, being the developers of the property, have abandoned their original plan for residential use by failing to restrict any other lots in the development to residential use.

"That the area along N. C. Highway 67 and in the vicinity of Section 1, Beacon Hill and in the vicinity of the plaintiff's property was vacant at the time the restrictions were placed on the property by the defendants, other than the defendants Louis C. Barnes and wife, Alee H. Barnes, and that the character of the neighborhood was that of vacant and residential property; that the character of the property in the same neighborhood at the present time has substantially changed and that a majority of the property in the area along N. C. Highway 67 is now business property. * * *

"That because of the abandonment of the original plan for restrictions to residential use only and because of the change in the nature of the adjoining lots in the area from residence to business use, the following restrictions as set out in the deed recorded in Deed Book 694, page 62, have been rendered inoperative, ineffective, null and void: '(1) That the property shall be used solely for residential purposes; * * * (5) that only one dwelling shall be erected on said property.'"

The court thereupon entered judgment, adjudging the foregoing restrictions to be inoperative, ineffective, null and void, and taxed the costs against the defendants.

The original defendants appeal, assigning error.

Averitt, White & Crumpler; Leslie G. Frye for plaintiff appellee.
Leake & Phillips for original defendants appellant.

DENNY, J. The appellants assign as error (1) that the findings of fact by the court below are contrary to the agreed statement of facts filed in this case and the evidence presented at the trial thereof; (2) that the conclusions of law by the court below are contrary to the facts and the law applicable to same; (3) that the judgment declaring the restrictive covenants contained in Deed Book 694, page 62, inoperative, ineffective, null and void, is contrary to the facts of the case and the law applicable to same; and (4) that the judgment invalidates restrictive covenants and destroys property rights contrary to law and equity.

However, these assignments of error are not supported by exceptions to the findings of fact or to the conclusions of law. Not a single exception appears in the record. The appellants merely made their appeal entry in the following language: "To the findings of fact, conclusions of law, and the signing and entry of the judgment the defendants, in open court, except, and give notice of appeal to the Supreme Court."

A single exception to the findings of fact and the conclusions of law presents nothing for review except whether or not the court's conclusions of law are supported by the findings of fact. *Kovacs v. Brewer,* 245 N.C. 630, 97 S.E. 2d 96; *Travis v. Johnston,* 244 N.C. 713, 95 S.E. 2d 94; *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223; *Winborne v. Stokes,* 238 N.C. 414, 78 S.E. 2d 171; *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351; *Wilson v. Robinson,* 224 N.C. 851, 32 S.E. 2d 601. Furthermore, an assignment of error unsupported by an exception duly taken and preserved, will not be considered on appeal. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118; *Barnette v. Woody, supra.* However, the appeal itself constitutes an exception to the judgment and presents for decision the question whether the facts found support the judgment. *Goldsboro v. R.R.,* 246 N.C. 101, 97 S.E. 2d 486; *Bishop v. Bishop,* 245 N.C. 573, 96 S.E. 2d 721; *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759.

Consequently, on this appeal, we are limited to a determination as to whether or not the facts found are sufficient to support the conclusions of law and the judgment entered pursuant thereto.

The appellants contend that the court's failure to find as a fact that the restrictive covenants were in each of the deeds in the chain of title from the original defendants to the plaintiff, was a material omission of competent and necessary evidence. This contention is without merit. The agreed statement of facts contained statements to the ef-

fect that all the deeds in plaintiff's chain of title contained the same restrictive covenants that the deed from the original defendants to Nell M. Freeman contained. Even so, in the absence of a request that the court find a particular fact, appellants may not object to the failure of the court to find such fact. *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133.

However, if the original defendants intended to develop the land surveyed and laid out as designated on the map or plat of Beacon Hill, Section 1, according to a general plan, restricting the lots shown therein to residential use only, they abandoned such intention when they conveyed six of the eight lots in the development to be used for the construction and operation of a motel, which is a commercial or business enterprise.

The use of a residence as a tourist home is violative of a covenant restricting the use of property to residential purposes. *Deitrick v. Leadbetter,* 175 Va. 170, 8 S.E. 2d 276, 127 A.L.R. 849; *Carr v. Trivett,* 24 Tenn. App. 308, 143 S.W. 2d 900. The erection and operation of a tourist camp violates a restriction against use of property for any purpose other than as a place of residence. *Cantieny v. Boze,* 209 Minn. 407, 296 N.W. 491, 173 A.L.R. 321. The construction of a motel on a lot or lots restricted to use as residential apartments is violative of such restrictive covenant. "A 'motel' cannot be regarded as an apartment house. It is a modern development of an inn or hotel, and serves transients." *Parish v. Newbury* (Ky.), 279 S.W. 2d 229.

Where a residential subdivision is laid out according to a general scheme or plan and all the lots sold or retained therein are subject to restrictive covenants, and the value of such development to a large extent rests upon the assurance given purchasers that they may rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that the essential residential nature of the property will not be destroyed, the courts will enforce the restrictions and will not permit them to be destroyed by slight departures from the original plan. *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408; *Vernon v. Realty Co.,* 226 N.C. 58, 36 S.E. 2d 710; *East Side Builders v. Brown,* 234 N.C. 517, 67 S.E. 2d 489.

On the other hand, when there is a general scheme for the benefit of the purchasers in a development, and then, either by permission or acquiescence, or by a long chain of violations, the property becomes so substantially changed that the whole character of the subdivision has been altered so that the whole objective for which the restrictive covenants were originally entered into must be considered at an end, then the courts will not enforce such restrictive covenants. Restrictive covenants will not be enforced merely to harass and annoy some par-

ticular person, when it is clear to the court that the objective for which the restrictive covenants were originally entered into have already failed. *Starkey v. Gardner, supra; Elrod v. Phillips,* 214 N.C. 472, 199 S.E. 722; *Snyder v. Caldwell,* 207 N.C. 626, 178 S.E. 83.

The subdivision of Beacon Hill, Section 1, was not developed according to a uniform scheme or plan for residential purposes. Therefore, cases like *Vernon v. Realty Co., supra,* and *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 120 S.E. 2d 817, cited and relied upon by the appellants, are not controlling on the facts in this case. Here, the original defendants have restricted only one lot for residential purposes in the entire subdivision. But, on the contrary, they have expressly authorized lots 1 to 6 inclusive, having a frontage of 723.0 feet on North Carolina Highway No. 67, being all the frontage in the subdivision on said highway except Lot No. 7 owned by the plaintiff, to be used for business and commercial purposes. And while there is no finding of fact with respect to Lot No. 8, the only lot in the subdivision now owned by the original defendants, the evidence tends to show that Lot No. 8 is so low "it wouldn't be any account for anything, because it is a drop-off, good for nothing but maybe a fish pond."

Since the subdivision under consideration was not developed according to a general plan or scheme, the grantees of property in the subdivision have no right to enforce the restrictions in any deed to any lot therein *inter se. Maples v. Horton,* 239 N.C. 394, 80 S.E. 2d 38; *Phillips v. Wearn,* 226 N.C. 290, 37 S.E. 2d 895; *Humphrey v. Beall,* 215 N.C. 15, 200 S.E. 918. Furthermore, in light of the findings by the court below, the court had the right to consider the changed conditions in the immediate area, without as well as within the development. *Muilenburg v. Blevins,* 242 N.C. 271, 87 S.E. 2d 493; *Shuford v. Oil Co.,* 243 N.C. 636, 91 S.E. 2d 903.

Apparently, the additional defendants concluded in the trial below that they had no right to enforce the restrictive covenants in plaintiff's deed to Lot No. 7, in this subdivision, hence they did not except to the findings of fact or the conclusions of law, neither did they appeal from the judgment entered pursuant thereto.

In our opinion, the appellants waived their right to enforce the restrictive covenants in plaintiff's deed by modifying the restrictions in the deed to the additional defendants, thereby authorizing the construction and operation of a motel, which is a business enterprise. *Shuford v. Oil Co., supra.*

We hold that the facts found by the court below are sufficient to support the conclusions of law and the judgment entered.

Affirmed.

JAMES W. MASON v. CLAUDE A. RENN, WILLIAM P. CLEMENT AND THOMAS W. ALLEN, JR., LOCAL REVIEW COMMITTEE.

(Filed 13 December, 1961.)

1. Agriculture § 11—

The findings of fact by the Review Committee in proceedings for the allotment of marketing quotas are conclusive on appeal when supported by competent evidence, and in the absence of exceptions to the Committee's findings, such findings will be presumed supported by competent evidence. 7 USCA, Section 1365.

2. Appeal and Error § 21—

The absence of exceptions in the record does not preclude review since the appeal itself will be considered an exception to the judgment, presenting the face of the record for review for errors of law appearing thereon.

3. Agriculture § 11—

Where the owner of a farm sells a part thereof but fails to have the crop allotments divided between the respective tracts for more than ten years, and the records of the farm at the time of the sale have been destroyed in accordance with applicable regulations, and there are no reliable records or evidence upon which the facts and conditions existing at the time of the sale may be determined, the County Committee, upon request of the purchaser for reconstitution, properly divides the allotments on the basis of the conditions existing at the time of the sale. Code of Federal Regulations, Section 719.7.

4. Same—

The County Committee properly uses the cropland method in redetermining allotments instead of the contribution method when the request for redetermination is made by the purchaser of a part of the farm more than six years subsequent to the acquisition of the farm by the seller and there is no evidence that the tract purchased had any allotments at the time it was acquired by the seller.

5. Same—

The ascertainment of the cropland acreage of the respective tracts by the County Committee upon request by the purchaser of a part of the farm for reconstitution of the crop allotments for the respective tracts, *is held* not erroneous as a matter of law upon the present record.

APPEAL by plaintiff from *Hall, J.*, February Civil Term 1961 of FRANKLIN.

This is an appeal from the judgment entered below affirming the determination of a Review Committee consisting of the defendants who were appointed by the Secretary of Agriculture pursuant to Section 363 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 63; 7 U.S.C. 1363). This Committee was called upon to review

the 1960 tobacco, cotton and wheat farm marketing quotas for Franklin County farm No. 55-035-K2679, being the farm of James W. Mason (hereinafter referred to as farm K-2679).

Pending this appeal James W. Mason died, leaving a last will and testament, devising to Mrs. Tinie L. Mason the lands involved in this action. J. F. Mason qualified as administrator c.t.a. of the estate of James W. Mason. Both these parties have been made parties plaintiff in substitution for James W. Mason, deceased, pursuant to an order of the court, and will be referred to hereinafter as appellants.

The Review Committee heard the evidence, considered the exhibits filed in the case, found the facts, made its conclusions, and determined as follows:

"FINDINGS OF FACT

"1. For an undetermined period prior to August 14, 1950, J. W. Mason was the owner-operator of a farm lying in Franklin, Wake, and Granville Counties, North Carolina, bearing Serial No. K-2679 and having allotments of tobacco, cotton, and wheat. On or about said date he granted by deed a portion of said farm to James G. Lye and wife. Neither party to this transaction gave proper notice thereof to the County ASC Committee until January 6, 1960, when James G. Lye filed a request for a redetermination of cropland on farm K-2679 and requested that the farm be divided.

"2. The cropland on farm K-2679 was measured by a representative of the County ASC Committee on February 5, 1960, on which date the tract of land owned by James G. Lye contained 59.5 acres of cropland, the portion of the farm retained by J. W. Mason contained 58.7 acres of cropland. The total cropland in the parent farm on such date was 118.2 acres.

"3. The Franklin County ASC Committee divided the tobacco, wheat, and cotton farm marketing quotas determined for the parent farm K-2679 betwen the tract of the farm owned by James G. Lye and the portion retained by J. W. Mason in the same proportion that the acreage of cropland in each tract, as determined in 1960, bore to the cropland determined for the parent farm for 1960.

"4. Because of the lack of reliable records and evidence a determination cannot be made as to the facts and conditions existing at the time Mason sold the land to Lye.

"5. There were other reconstitutions of the parent farm K-2679 during the period 1950-1960, but the Lye tract was not separated from the parent farm until 1960.

"a. On or about November 1950 James G. Lye and wife sold a part of their tract to one L. C. Lowery and the County Committee trans-

ferred an allotment to the said Lowery from the parent farm K-2679, carried on the records as operated by J. W. Mason.

"b. In a redetermination of cropland made for the parent farm in 1956, because of a sale of a portion of the farm by J. W. Mason to Durham YMCA and a resulting division of the farm marketing quotas, the cropland on the Lye tract was measured, at the direction of J. W. Mason, along with the other cropland in the farm. The Lye tract at that time contained 83.2 acres of cropland, all of which were credited to J. W. Mason with his knowledge.

"c. At the time he sold the tract to Lye, Mason owned several tracts of land in Wake and Franklin Counties, all of which were combined in one ASC contract, No. K-2679 in his name, in Franklin County. In 1958 the land covered by said contract located in Wake County and not covered by Franklin County photography was transferred from the Franklin County ASC Office to the Wake County ASC Office under contract No. 2679-A, with J. W. Mason as the owner and operator, and the remaining land covered by K-2679 continued under said contract No. as before.

"6. No allotment crops have been planted on the Lye tract since August 14, 1950.

"7. At the time of the sale by Mason to Lye, the tract involved therein did not have a separate flue-cured tobacco allotment nor any allotment of cotton or wheat, the said tract being a part of the parent farm No. K-2679.

"CONCLUSIONS

"1. The Notice of Farm Acreage Allotment and Marketing Quota form placed the responsibility on the applicant to report any change in the ownership, operation, or the control of the farm for the years 1951 through 1959.

"2. The County Committee, in accordance with Section 719.8(a)(2) of the Farm Constitution and Allotment Record Regulations, properly used the cropland method in apportioning the farm marketing quotas for the parent farm between the tracts of land owned by J. W. Mason and James G. Lye.

"3. The County Committee established the allotment for farm K-2679 in accordance with the law and regulations.

"DETERMINATION

"The flue-cured tobacco acreage allotment determined for the applicant's farm K-2679 is 5.41 acres. The application for the allotment of 10.90 is denied.

"The Review Committee carefully considered the proposed findings of fact and conclusions filed by applicant, and incorporated many of them in its findings but rejected all not specifically incorporated in the Committee's findings.

"The conclusions are rejected in toto.

"Done at Louisburg, North Carolina, this 21st day of June 1960."

It was stipulated by counsel for the respective parties "that the papers in the farm file folder for Farm No. K-2679, which form a part of the record in this cause as filed by the defendants, Review Committee, cover the years 1955, 1956, 1957, 1958 and 1959, and that such papers for the year 1954 and previous years have been destroyed by the local county committee in accordance with applicable regulations requiring such destruction."

It was agreed that the court below should hear this matter upon the records filed with the Clerk of the Superior Court of Franklin County without oral arguments of counsel but upon written briefs. The court, after examination and study of said records and briefs, being of the opinion and finding that the determination of the Review Committee is supported by substantial evidence and that the determination is in accordance with the law applicable thereto, thereupon affirmed the determination of the Review Committee.

To the judgment and the conclusions therein contained, the plaintiff J. W. Mason excepted and appealed to the Supreme Court, assigning error.

W. M. Jolly and John F. Matthews for plaintiff.

William H. Orrick, Asst. United States Attorney General; Robert H. Cowen, United States Attorney; Irvin B. Tucker, Jr., Asst. United States Attorney; John G. Laughlin and John C. Eldridge, Attorneys, Department of Justice.

DENNY, J. This action was instituted and heard in the Superior Court of Franklin County, North Carolina, pursuant to the provisions of 7 U.S.C.A., Section 1365, of the Agricultural Adjustment Act.

Under the required procedure set forth in Section 1365 of the above Act, the Review Committee was required "to certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact."

It is provided in 7 U.S.C.A., Section 1366: "The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive." See *Burleson v. Francis,* 246 N.C. 619, 99 S.E. 2d 767; *Luke v. Review Committee,* 155 F. Supp. 719; *Lee v. DeBerry,* 219 S.C. 382, 65

S.E. 2d 775, where this provision of the law has been considered and applied.

In this connection, it is well to note that in the application for review of the evidence introduced before the Review Committee, the original plaintiff, James W. Mason, never took an exception to any of the Committee's findings of fact, conclusions of law or the determination. Therefore, the findings of fact by the Review Committee stand unchallenged and 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, and cited cases. Furthermore, neither of the two assignments of error set out in the record on appeal is supported by an exception. This, however, does not foreclose the right of the present appellants to have the court consider and determine the legal questions presented by the appeal itself. *Gibson v. Ins. Co.*, 232 N.C. 712, 62 S.E. 2d 320. An appeal itself is considered an exception to the judgment and any other matters appearing upon the face of the record. *Dixon v. Osborne*, 201 N.C. 489, 160 S.E. 579; *Russos v. Bailey*, 228 N.C. 783, 47 S.E. 2d 22.

The Code of Federal Regulations, Section 719.7, revised as of 1 January 1960, reads as follows: "(a) *Applicability.* Whenever the county committee determines that a farm should be reconstituted the farm allotments and farm history and soil bank base acreages shall be reviewed and reconstituted in accordance with the regulations in this part and related county office records shall be revised as necessary to properly reflect basic allotment data for each farm as reconstituted. To the extent practicable all reconstitutions shall be based on facts and conditions existing at the time the change requiring the reconstitution occurred rather than on facts and conditions existing at the time the actual reconstitution action is taken by the county committee."

Since it was stipulated by the parties that the records in the farm file for farm K-2679 for the year 1954 and previous years have been destroyed by the local County Committee in accordance with applicable regulations requiring such destruction, and in view of the finding in Finding of Fact No. 4, to the effect that because of the lack of reliable records and evidence a determination cannot be made as to the facts and conditions existing at the time Mason sold the land to Lye, we hold that the County Committee was authorized to make the allotments based on the conditions as they existed at the time James G. Lye filed a request on 6 January 1960 for a redetermination of the cropland on farm K-2679 and requested that the farm be divided.

The appellants insist and argue that the County Committee used the cropland method in redetermining the allotments when the contribution method should have been used. They further contend that in arriving at the cropland on the Lye tract of land, the County Committee included as "cropland," land devoted to pasture and production of hay in contravention of applicable regulations.

The contribution method and the cropland method are set out in the Code of Federal Regulations (Cumulative Supplement), Section 719.8 (a), as follows: "(1) *Contribution method.* If the farm to be divided is the result of a combination which became effective during the six-year period immediately prior to the current year, each tract which is identical to a tract which went into the combination and which is being separated from the parent farm in whole or in part shall share in the allotments and history acreages for the parent farm for the current year in the same proportion that each tract contributed to the allotments for the parent farm at the time of the combination * * *.

"(2) *Cropland method.* If the contribution rule is not applicable, the current year allotments and allotment crop history acreages determined for the parent farm, shall, except as otherwise provided under contribution and history methods, be apportioned among the tracts in the same proportion that the acreage of cropland * * * in each such tract bears to the cropland * * * for the parent farm * * *."

We do not understand that the appellants contend that the history method is applicable to this case; hence, we deem it unnecessary to set out the statutory provision with respect thereto which may be found in the Code of Federal Regulations (Cumulative Supplement), Section 719.8 (a) (3).

We concede that if James W. Mason had obtained the tract of land sold to James G. Lye within six years immediately prior to 1960 instead of during the year 1942, and if when the Lye tract was combined with the Mason land it had allotments of tobacco, corn, and wheat, which were combined with Mason's allotments, then it would have been incumbent on the County Committee to have used the contribution method and to have allotted to the Lye farm such allotments as that tract contributed to the Mason farm allotments at the time of the combination. However, there is no evidence or finding of fact to show what allotments the Lye farm contributed to the parent farm allotments in 1942, if any. There is evidence tending to show that no crop acreage was allotted to the Lye tract of land or that James G. Lye produced any allotment crops from 1950 through 1959. On the other hand, there is evidence tending to show that Mason and Lye recognized that the owner of the Lye tract was entitled to allotments,

for Lye consented for Mason to continue to use the allotments, whatever they were. Moreover, there is evidence tending to show that Mason continued to use all the acreage allotted to farm K-2679 prior to the division and reconstitution in 1960.

It is possible that the Lye tract of land at the time it was purchased by James W. Mason in 1942, made no substantial contribution to the Mason farm allotments. It is also possible that when Mason sold this 164-acre tract of land to James G. Lye in 1950 the farm had but little if any cropland thereon that would have entitled Lye to any substantial portion of the crop allotments allotted to Mason for the combined farms. Even so, by neglecting for a period of approximately ten years to request a division of the farms, and to have the crop acreage allotments determined for the respective farms, the division in 1960, based on cropland on the respective tracts of land at that time, may have resulted in the Lye tract of land having received a larger crop acreage allotment than it would have been entitled to in 1950. Be that as it may, in view of the stipulation of the parties and the findings of fact by the Review Committee, the appellants cannot complain unless there was error of law made by the County Committee including as cropland on the Lye tract of land, land not eligible to be included as cropland under the law and the Federal regulations pertaining thereto.

It is provided in the Code of Federal Regulations, Section 719.10, in pertinent part, as follows: "The definition of cropland requires certain factual determinations and provides latitude for county committee judgment with respect to several factors. * * * A land area which is not in an established rotation pattern recognized in the community or which was not tilled within the preceding five-year period shall be classified as noncropland. * * *

"(a) *Tilled land.* Cropland planted or devoted to a crop (other than a permanent vegetative cover) and from which a crop is harvested or on which tillage operations are carried out in a workmanlike manner during the summer growing season in preparation of the land for the seeding of a crop for harvest shall be considered as meeting the 'tilled' requirement for that year. * * *

"(b) *Rotation.* This factor, perhaps more than any other, requires flexibility in application because of the variety of crops grown and production practices peculiar to specific areas of the country. It is a means of recognizing these local practices but must not be used as a device to establish or maintain an unrealistic cropland figure. As a general rule, land may be considered to be in a rotation pattern when a recognized system of cropping plans or land use is carried out over a period of years resulting in the land area being devoted to those

crops and land uses which contribute reasonable beneficial effects to the land. The county committee should determine a reasonable period of years, after which cropland that is not in an established rotation pattern will be reclassified as noncropland. As a matter of general policy this period should normally not exceed five years. It may be necessary in some areas to establish a longer rotation period for perennial legumes and grasses.

"(c) *Permanent vegetative cover (other than trees).* Cropland established in permanent vegetative cover, other than trees, shall be considered as cropland for a period of five years including the year of establishment and as long thereafter as it is determined to be in an established rotation pattern. Meadowland on which a light seeding or fertilizing operation is carried out at intervals will not be considered as tilled for the purpose of retaining the cropland classification on the area. Pasturing any acreage or cutting hay from native hayland shall not be considered as cropping."

There was evidence before the Review Committee to the effect that in 1959 Lye cultivated on his farm 11 acres of corn and 14 acres of sorghum that was used for silage for cows, and that 20 acres in millet and soy beans were used for temporary pasture; that practically all of the permanent pasture had been rotated within five years, except a 12-acre tract and a 5-acre tract which have been in fescue and clover since 1950.

It certainly cannot be held as a matter of law that the County Committee included land not eligible to be included as cropland in determining the cropland of the Lye farm in 1960.

In light of the findings of fact by the Review Committee and the applicable provisions of the Agricultural Adjustment Act and the Federal regulations pertaining thereto, in our opinion the judgment of the court below should be upheld.

Affirmed.

PEE DEE ELECTRIC MEMBERSHIP CORPORATION v. CAROLINA POWER & LIGHT COMPANY, ORIGINAL DEFENDANT; AND THE TOWN OF ROCKINGHAM, BELER DIXON AND RAYMOND TREECE, ADDITIONAL DEFENDANTS.

(Filed 13 December, 1961.)

1. Injunctions § 2—

Injunctive relief will be granted only when irreparable injury is both real and immediate.

2. Electricity § 2; Injunctions § 14—

Where, in an action by an electric membership corporation against a power company, the respective parties pray for injunctive relief but seek primarily a determination of their respective legal rights in regard to service to customers in a specified area, and there is no threat by either to interfere with the rights of the other as adjudicated by the court, the judgment of the court should adjudicate the rights of each party, but the judgment should not contain sweeping injunctive provisions to protect rights which are not threatened, and on appeal from such judgment, the judgment must be vacated and the cause remanded.

3. Costs § 3—

Where judgment is rendered partly in favor of plaintiff and partly in favor of two defendants, taxation of the costs as between plaintiff and these defendants rests within the discretion of the court. G.S. 6-20.

APPEAL by plaintiff from *Preyer, J.*, February 13th Term, 1961, of RICHMOND.

Reference is made to our decision on former appeal, *Membership Corp. v. Light Co.*, 253 N.C. 610, 117 S.E. 2d 764, for a statement of the facts, the contentions of the parties and the judgment then under consideration. This Court held said judgment erroneous and remanded the cause.

Thereafter, in the superior court, there was a hearing on motions for judgment in accordance with this Court's opinion. The court entered judgment in which it was Ordered, Adjudged and Decreed:

"1. That the plaintiff is not entitled to the relief prayed for in the complaint, and the same is hereby denied.

"2. That by way of affirmative relief granted to the defendant Power Company;

"(a) The plaintiff be, and it is hereby, permanently enjoined and restrained from competing with the defendant Carolina Power & Light Company by supplying electric service to any person or concern at any place, or premises, or for any purpose, within the corporate limits of the Town of Rockingham, including the annexed Knob Hill area in controversy in this action, EXCEPT plaintiff may continue to serve from its distribution lines constructed by it in the said Knob Hill area prior to January 9, 1957, persons who were its members prior to that date on premises which were occupied on January 9, 1957 by such members so long as they desire to continue to be members of the plaintiff and desire a continuance of its service.

"(b) The plaintiff be, and it is hereby, enjoined and restrained from interfering in any manner with the defendant Carolina Power & Light Company in its business of supplying electricity to the

Town of Rockingham and to its inhabitants at any place within the Town of Rockingham, including the said annexed Knob Hill area.

"3. That, by way of affirmative relief granted to the Town of Rockingham;

"(a) The plaintiff is hereby enjoined and restrained from supplying electricity to any person, concern or premise, within the Town of Rockingham, EXCEPT plaintiff may continue to serve from distribution lines constructed by it in the said Knob Hill area prior to January 9, 1957, persons who were its members prior to that date on premises which were occupied on January 9, 1957 by such members so long as they desire to continue to be members of the plaintiff and desire a continuance of its service.

"(b) The plaintiff is hereby enjoined and restrained from maintaining its poles, lines and facilities upon, over or across any street or public way within the Town of Rockingham, EXCEPT such distribution facilities constructed by it prior to January 9, 1957, as are necessary to continue electric service to persons who were its members on that date who desire to continue their membership and to receive electric service from plaintiff; however, the lines used by plaintiff for this purpose shall be subject to the police power of the Town of Rockingham with respect to their location, condition, maintenance and operation.

"4. That, by way of affirmative relief granted to Beler Dixon and Raymond Treece, the Carolina Power & Light Company be and it is hereby ordered and directed to perform its franchise duty by specifically performing (a) its contract with Beler Dixon to supply him with electricity at his residence in the annexed Knob Hill area, and (b) to specifically perform its contract with Raymond Treece to supply him with electricity at his residence in the annexed Knob Hill area; that the plaintiff is hereby enjoined and restrained from in any manner interfering with the Carolina Power & Light Company in the performance of said contracts.

"5. That the costs of this action, to be assessed by the Clerk, be taxed against the plaintiff."

Plaintiff excepted (1) to the court's refusal to sign the judgment tendered by it, and (2) to each provision of the judgment signed, and appealed.

Brock & McLendon, W. G. Pittman and Branch & Hux for plaintiff, appellant.

Bynum & Bynum, A. Y. Arledge and W. Reid Thompson for defendant Carolina Power & Light Company, appellee.

C. B. Deane and A. A. Webb for defendant Town of Rockingham, appellee.

Leath & Blount for defendants Dixon and Treece, appellees.

William T. Crisp for North Carolina Electric Membership Corporation, amicus curiae.

BOBBITT, J. When Knob Hill, by annexation on January 9, 1957, was included within the corporate limits of Rockingham, sixty-six residences in this area were being served by Pee Dee. Prior to said annexation, the Power Company did not supply electric service in Knob Hill and had no lines or facilities therein.

Pee Dee, based on Article 8 of its contract of January 5, 1956, with the Power Company, contended it had the exclusive right, notwithstanding said annexation, to serve *that part* of Knob Hill within three hundred feet of distribution lines constructed by Pee Dee prior to January 9, 1957.

The Power Company and Rockingham contended the Power Company, on and after January 9, 1957, had the exclusive right and the duty to supply electric service within the corporate limits of Rockingham, including *all* of Knob Hill; and that Pee Dee should be required to dispose of or dismantle the distribution lines constructed by it prior to January 9, 1957.

This Court reached these conclusions:

1. "Pee Dee may continue to serve from distribution lines constructed in Knob Hill prior to January 9, 1957, persons who were its members on that date and who desire to continue their membership and to receive service from Pee Dee."

2. ". . . the Town of Rockingham may not force Pee Dee to discontinue service from said lines to those persons who were members of Pee Dee prior to January 9, 1957, so long as they continue members of Pee Dee and desire continuance of its service. However, Pee Dee, on and after January 9, 1957, had no right to extend its then existing facilities or to serve persons other than members whom it was serving when Knob Hill became a part of Rockingham."

While the respective parties prayed for injunctive relief, they sought primarily a determination of their legal rights in respect of service in that part of Knob Hill within three hundred feet of distribution lines constructed by Pee Dee prior to January 9, 1957. Their respective basic rights were determined and declared on former appeal.

Nothing in the record indicates Pee Dee has provided service in Knob Hill except that which it is permitted to provide under our decision. Nor does it appear that Pee Dee will attempt to do so. Too, it does not appear that the Power Company or Rockingham will at-

tempt to interfere with the exercise by Pee Dee of its legal rights under our decision. A well established rule of this Court is that injunctive relief will be granted only when irreparable injury is both *real* and *immediate. Wilcher v. Sharpe,* 236 N.C. 308, 72 S.E. 2d 662, and cases cited; *Hudson v. R. R.,* 242 N.C. 650, 668, 89 S.E. 2d 441.

In the first paragraph of the present judgment, there is a positive and complete denial of all relief sought by Pee Dee. Since our decision was that Pee Dee had certain definite and positive rights, albeit less than those for which it contended, which rights were denied and challenged by defendants, such positive and complete denial of relief to Pee Dee is not in accordance with our decision. There is no affirmative adjudication of Pee Dee's legal rights.

In the second paragraph of the present judgment, the Power Company, but not Pee Dee, is granted affirmative relief. In 2(a), Pee Dee is enjoined from supplying service to any person or premises within the corporate limits of Rockingham, including Knob Hill, and in 2(b) from interfering with the Power Company "in its business of supplying electricity to the Town of Rockingham and to its inhabitants at any place within the Town of Rockingham, including the said annexed Knob Hill area." True, in 2(a), but not in 2(b), as an exception to said injunction, it is provided that Pee Dee "may continue to serve from its distribution lines constructed by it in the said Knob Hill area prior to January 9, 1957, persons who were its members prior to that date on premises which were occupied on Januay 9, 1957 by such members so long as they desire to continue to be members of the plaintiff and desire a continuance of its service." If injunctive relief were appropriate, we perceive no reason for such a sweeping injunction. Pee Dee has never asserted any right to provide service within the corporate limits of Rockingham except *that part* of Knob Hill within three hundred feet of distribution lines constructed by it prior to January 9, 1957. Moreover, our decision did not limit Pee Dee's right to provide service to those of its members who, prior to January 9, 1957, were *occupants* of premises then served by Pee Dee.

In the third paragraph of the present judgment, Rockingham but not Pee Dee, is granted affirmative relief. Pee Dee has never asserted any right to maintain "its poles, lines and facilities upon, over or across any street or public way within the Town of Rockingham" except to the extent necessary to provide service for *that part* of Knob Hill within three hundred feet of the distribution lines constructed by Pee Dee prior to January 9, 1957. Hence, as stated with reference to 2(a) and 2(b), if injunctive relief were appropriate, we perceive no reason for such a sweeping injunction.

In paragraph 3(b) it was adjudged that Pee Dee's lines "shall be

subject to the police power of the Town of Rockingham with respect to their location, condition, maintenance and operation." We perceive no reason to incorporate this correct general statement, equally applicable to the lines of Pee Dee and to the lines of the Power Company, in the judgment. If and when Rockingham, *in the exercise of its police power,* should challenge the "location, condition, maintenance and operation" of Pee Dee's present lines, the respective rights of Pee Dee and Rockingham will be for adjudication in the factual situation then presented.

In the fourth paragraph of the present judgment, Dixon and Treece are granted affirmative relief. The Power Company is ordered and directed to perform its contracts with them and Pee Dee is enjoined from interfering with such performance. Our decision fully recognizes the right of Dixon and of Treece to obtain service from the Power Company. Nothing suggests Pee Dee will attempt to interfere with the Power Company's performance of such service. Since the Power Company asserts vigorously its exclusive right to provide service to Dixon and Treece, the order requiring it to do so would seem superfluous. Indeed, the Power Company, *pendente lite,* is providing such service.

In the fifth paragraph of the present judgment, *all* costs are taxed against the plaintiff. Since our decision was partly in favor of Pee Dee, partly in favor of the Power Company and of Rockingham, and wholly in favor of Dixon and Treece, it would seem, as between Pee Dee, the Power Company and Rockingham, that the taxation of costs is within the discretion of the court. G.S. 6-20.

The present judgment fails to adjudicate positively the legal rights of Pee Dee under our decision. Injunctive provisions, if otherwise applicable, should relate solely to *that part* of Knob Hill within three hundred feet of distribution lines constructed by Pee Dee prior to January 9, 1957, the only area involved in the controversy; and, if injunctive provisions were deemed appropriate, such provisions should not relate solely to Pee Dee. However, in our view, injunctive provisions, under the present factual situation, are unnecessary to protect either plaintiff or defendants from irreparable injury; and the judgment should be limited to an adjudication of the respective basic legal rights of the parties in the light of the present factual situation. Hence, the present judgment is vacated.

The cause is remanded with instructions that judgment be entered substantially as follows:

1. That Pee Dee be and is authorized, and has the exclusive right, to serve from distribution lines constructed by it in Knob Hill prior to January 9, 1957, persons who were members of Pee Dee on that date

so long as they continue their membership in Pee Dee and desire continuance of its service.

2. That Pee Dee has no right to extend the facilities constructed by it in Knob Hill prior to January 9, 1957, or to provide service from its then existing facilities except as expressly authorized in paragraph 1 hereof.

3. That the Power Company be and is authorized, and has the exclusive right, to supply electricity within the corporate limits of Rockingham, including that part of Knob Hill within three hundred feet of distribution lines constructed by Pee Dee prior to January 9, 1957, except to those persons Pee Dee is expressly authorized to serve in paragraph 1 hereof.

4. That the Power Company be and is authorized and directed to supply electric service to Dixon and Treece in accordance with their contracts therefor.

Costs will be taxed in accordance with the court's discretion.

Judgment vacated and cause remanded.

DUKE POWER COMPANY AND THE TOWN OF HUDSON v. BLUE RIDGE ELECTRIC MEMBERSHIP CORPORATION.

(Filed 13 December, 1961.)

1. Electricity § 2—

Judgment is properly entered adjudicating that an electric membership corporation can continue to furnish service to those who were members and receiving service at the time the place where the service was rendered was annexed by a municipality but is not entitled to furnish service within such territory to those who were not members at the time of the annexation. The judgment should predicate the respective rights of the membership corporation and the power company to furnish service upon the basis of membership and place of service rather than the residence of the customers.

2. Same; Constitutional Law § 6—

Public policy as to customers which may be served by an electric membership corporation is a matter within the province of the General Assembly and not the courts.

APPEAL by defendant from *Pless, J.*, March-April 1961 Term of CALDWELL.

This is an appeal by defendant from a judgment entered by Judge Pless adjudging the rights of the parties as he interpreted the opinion

of this Court in *Power Co. v. Membership Corp.*, 253 N.C. 596, 117 S.E. 2d 812, filed 20 January 1961, which remanded the case to the Superior Court because of error committed by Judge Farthing.

Townsend & Todd, Carl Horn, Jr., William I. Ward, Jr., and L. H. Wall for plaintiff appellees.

Williams & Whisnant and Claude F. Seila for defendant appellant.

RODMAN, J. This action was begun in 1959 to compel defendant to discontinue services to its members residing in Hudson, which although a municipal corporation was a rural area when defendant began furnishing electric service to properties owned or used by its members in Hudson. Hudson joined with Power Co. in seeking to prevent defendant from continuing to provide services to its members and to compel it to remove its lines from the streets of Hudson. Although a rural area when the action was begun, it had ceased to be a rural area when the hearing was had in June 1960. The judgment appealed from provided: "Blue Ridge Electric Membership Corporation is hereby enjoined and restrained from providing or supplying electric service to any person or persons inside the corporate limits of the Town of Hudson . . ." The judgment further required Blue Ridge to "remove, or otherwise dispose of, with the permission of the Town of Hudson, its electric wires, poles, and equipment from over, across, and along the public streets inside the original corporate limits and from those public streets inside the annexed portions of the town, and from the buildings of all persons, businesses, and manufacturing establishments within the corporate limits of the Town of Hudson, both inside the original corporate limits and inside the annexed areas of the town." What is said in the opinion filed in January 1961 must be interpreted in the light of Judge Farthing's judgment. We concluded our opinion with this language: "Blue Ridge can only provide service to its members. G.S. 117-16. Membership is not terminated by a change in the character of the community from rural to urban. Blue Ridge has the right and the duty to serve its members. The court erred in requiring it to remove or otherwise dispose of its properties within the corporate limits of Hudson."

On the same day the opinion was filed on the prior appeal, an opinion was filed in the case of *Membership Corp. v. Light Co.*, 253 N.C. 610, 117 S.E. 2d 764. There Pee Dee Membership Corporation had sought an adjudication of its rights to continue to serve its members who were changed from citizens of a rural area to citizens of an urban area by the enlargement of the boundaries of the Town of Rockingham. There, not only was the right of membership corporations

to continue existing service in an area changed from rural to urban recognized, but the limitation on that right was declared. They may not, when an area changes from rural to urban, expand their services in the urban area. New services are limited to rural areas.

The opinions in these cases, written, in each instance, for a unanimous Court, ought not to be regarded as expressing different and conflicting opinions as to what the law is. Both opinions declare the right of membership corporations to continue to serve, notwithstanding the change in the character of the community from rural to urban. On the prior appeal in this case it was not deemed necessary to go beyond that question.

When the cause was heard by Judge Pless, defendant tendered a judgment dismissing the action, taxing plaintiffs with the costs, permanently enjoining Power Co. from providing or supplying service to designated properties in Hudson, requiring Power Co. to remove its facilities and power lines within 300 feet of defendant's power lines, and permanently enjoining Power Co. "from furnishing or offering to furnish electric energy to anyone who, at the time of the proposed service, is receiving electric service from defendant, or whose premises are capable of being served by the existing facilities of the defendant without extension of the defendant's distribution system other than by the construction of secondary lines not exceeding 300 feet in length, either within or without the corporate limits of the Town of Hudson . . ."

The judgment tendered would, if entered, prohibit Power Co. from serving those not members of defendant and who had no legal right to membership in defendant. It would thus in effect give judicial approval to an *ultra vires* act by defendant. Judge Pless properly refused to sign the judgment.

Defendant's argument that a wise public policy dictates its right to sell electricity and to accept for membership not only those who reside in rural areas but residents of urban areas when the character of the community served changes from rural to urban is addressed to the wrong forum. The Legislature, in the exercise of its discretion, has declared a field which electric membership corporations may serve. Courts have no right to usurp legislative power and by judicial decrees formulate a public policy not declared by the Legislature.

The judgment signed by Judge Pless provided that "Blue Ridge Electric Membership Corporation can continue to maintain and operate its electric distribution lines and facilities within the Town of Hudson as such electric lines and facilities existed prior to April 1, 1960, the date of the 1960 Federal census . . . and . . . can continue to supply and furnish electric power and service to its members only

who *resided* in Hudson prior to April 1, 1960 . . . on premises which were occupied on that date so long as such consumer *residents* continue to be members of Blue Ridge Electric Membership Corporation. Blue Ridge Membership Corporation is not permitted to build, construct, or maintain new and additional electric lines and otherwise extend its facilities in the Town of Hudson after April 1, 1960 . . . nor is it permitted to provide or supply electric power and service to any person, persons, or concerns inside the corporate limits of Hudson who were not its members *and residents* of Hudson prior to April 1, 1960 . . ." Except for the italicized words indicating that residence in Hudson was an essential element to the right to continue to receive service, the judgment signed by Judge Pless is in conformity to the law as declared on the prior appeal and in the related case of *Membership Corp. v. Light Co., supra.* A member who was receiving current in Hudson prior to 1960 may continue to receive current as then provided even though he was not then and is not now a resident of Hudson. The test is: Where is the service rendered?, not the residence of the member. The judgment signed should be reformed to permit continued service to members at premises owned or occupied by them prior to 1 April 1960. The judgment will be modified to so provide, and as thus modified the judgment is

Affirmed.

IN THE MATTER OF THE ESTATE OF PAUL PERRY. DECEASED, ROLAND PERRY, ADMINISTRATOR.

(Filed 13 December, 1961.)

1. Husband and Wife § 15—

The wife has no claim on rents and profits from an estate by the entireties which had accrued at time of the husband's death. G.S. 28-10, G.S. 30-4, G.S. 52-19.

2. Same; Husband and Wife § 17; Descent and Distribution § 6; Action § 5—

Where the wife feloniously slays her husband, equity will decree that she hold the rents and profits from lands theretofore held by them by the entireties as a constructive trustee for the benefit of the husband's distributees, at least during the full term of the husband's life expectancy, in accordance with the equitable principle that a person will not be permitted to benefit from his own wrong.

APPEAL by Lorraine Perry, petitioner, from an order signed February 27, 1961, by *McKinnon, Judge* holding the courts of the Eleventh Judicial District. From LEE.

A final account filed July 29, 1960, by Roland Perry, administrator of the estate of Paul Perry, deceased, showed a balance for distribution of $1,091.53, which was paid by the administrator to the Clerk of the Superior Court of Lee County pursuant to G.S. 28-160 and G.S. 28-161.

Lorraine Perry, the widow of Paul Perry, by petition filed with said clerk, asserted her ownership and demanded payment of said $1,091.53. An answer to said petition was filed in behalf of Sylvia K. Perry by her general guardian, the North Carolina National Bank, asserting her ownership and demanding payment of said $1,091.53. Sylvia K. Perry, a minor, is the only child of Paul Perry.

From an order of the clerk adjudging the petitioner entitled to said $1,091.53, the respondent excepted and appealed to the judge of the superior court; and, by consent, the said appeal was heard by Judge McKinnon and the order was signed in Lillington, North Carolina.

Judge McKinnon, based "(o)n the record, pleadings and stipulations," made findings of fact, conclusions of law and entered judgment as follows:

"1. That Paul Perry and Lorraine Perry were husband and wife and Sylvia K. Perry, minor, is the only living issue of their union;

"2. That at the time of the death of Paul Perry, the said Paul Perry and wife, Lorraine Perry, owned certain real estate in East Sanford Township, Lee County, North Carolina, upon which was located a dwelling house, by the entireties;

"3. That Lorraine Perry did willfully and feloniously kill and murder Paul Perry, her husband, who died intestate, and did plead guilty to said crime at the October-November Term of Lee Superior Court, 1956;

"4. That Roland Perry qualified and acted as the Administrator and with his final account paid into the Office of the Clerk of Superior Court of Lee County, $1,091.53, which is the entire net rental of the lands described in paragraph 2 above, and Lorraine Perry waived any claim for rentals in excess of said sum;

"5. That at the time of his death, Paul Perry was 33 years of age and had a life expectancy of 37.69 years and Lorraine Perry was 32 years of age and had a life expectancy of 38.59 years.

"CONCLUSIONS OF LAW

"(1) That Paul Perry during his lifetime was entitled to the rents and profits from the lands described in paragraph 2 above;

"(2) That Lorraine Perry is not entitled to the rents and profits of said lands, for to allow her same would let her benefit from her own wrong;

"(3) Sylvia K. Perry, Minor, the daughter of Paul Perry and Lorraine Perry, and Paul Perry's sole heir at law, is entitled to the sum of $1,091.53, in the hands of the Clerk of Superior Court of Lee County.

"NOW, THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the sum of $1,091.53, in the hands of the Clerk of Superior Court of Lee County be disbursed to North Carolina National Bank, General Guardian for Sylvia K. Perry."

Lorraine Perry, the petitioner, excepted to said conclusions of law and to said judgment and appealed.

Pittman, Staton & Betts for petitioner, appellant.
Hoyle & Hoyle for respondent, appellee.

BOBBITT, J. The order from which petitioner appeals relates directly and solely to the $1,091.53 now held by the clerk. This is the (net) amount of the rents collected by the administrator from real estate owned by Paul Perry and wife, Lorraine Perry, as tenants by the entirety, at the death of Paul Perry, intestate, on July 15, 1956.

Lorraine Perry, the petitioner, wilfully and feloniously killed and murdered Paul Perry, her husband; and, at the October-November Term, 1956, of Lee Superior Court, she entered a plea of guilty of murder in the second degree.

Rents from said estate, accrued but unpaid at the death of Paul Perry, constituted a part of his personal estate. Clearly, under express statutory provisions and on equitable principles, Lorraine Perry has no interest in such accrued rents. G.S. 28-10; G.S. 30-4; G.S. 52-19; *Garner v. Phillips*, 229 N.C. 160, 47 S.E. 2d 845.

It may be implied, although not expressly stated, that the $1,091.53 was derived wholly from rents accruing subsequent to the death of Paul Perry. We shall assume this to be true.

Incidents of an estate by the entirety include the following: (1) "Upon the death of one, either the husband or the wife, the whole estate belongs to the other by right of purchase under the original grant or devise and by virtue of survivorship—and not otherwise—because he or she was seized of the whole from the beginning, and the one who died had no estate which was descendible or devisable." *Davis v. Bass*, 188 N.C. 200, 204, 124 S.E. 566. (2) ". . . the husband is en-

titled during the coverture to the full possession, control and use of the estate, and to the rents and profits arising therefrom to the exclusion of the wife." *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 486, 80 S.E. 2d 472.

Decisions in other jurisdictions are cited and discussed in the Annotation, "Felonious killing of one cotenant or tenant by the entireties by the other as affecting latter's rights in the property," 32 A.L.R. 2d 1099, which supersedes the Annotations in 51 A.L.R. 1106 and 98 A.L.R. 773.

As stated by *Devin, J.* (later *C.J.*), in *Garner v. Phillips, supra:* "It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong, or acquire property as the result of his own crime."

This Court has not directly passed upon the legal consequences to an estate by the entirety where the wife murders the husband. In *Bryant v. Bryant,* 193 N.C. 372, 137 S.E. 188, 51 A.L.R. 1100, the husband murdered the wife. Since both petitioner and respondent cite and rely thereon, full consideration of the factual situation and of the decision therein is appropriate.

In *Bryant,* the plaintiffs were the children of Ida Bryant, the deceased wife, and of Wash Bryant, her husband-murderer. Ida Bryant, at the time of her death, was in good health; and, under the mortuary table, had a longer expectancy of life. In the superior court, it was adjudged that the defendant (husband-murderer) held the legal title in trust for the plaintiffs; that the plaintiffs were the equitable owners and entitled to the actual possession thereof, "freed and discharged from the claims of the defendant," and that the defendant account to the plaintiffs for the rents and profits received by him. It was adjudged that defendant convey the land to plaintiffs and, upon his failure to do so, the judgment should operate as such conveyance. Upon the defendant's appeal, the said judgment was *modified* and affirmed.

The equitable doctrine on which this Court based decision was stated by *Adams, J.,* as follows: "As a question of common law the homicide does not prevent the legal title from passing to the criminal as the heir or devisee of his victim, but equity, acting *in personam,* compels the wrongdoer who has acquired the *res,* to hold it as a constructive trustee of the person wronged, or of his representatives, if he be dead; and this result follows although the homicide may not have been committed for the express purpose of acquiring title, if by reason of the homicide the title would have passed to the criminal under the common law." This equitable doctrine is succinctly stated in Restatement of the Law, Restitution § 188, as follows: "Where two persons have an interest in property and the interest of one of them

is enlarged by his murder of the other, to the extent to which it is enlarged he holds it upon a constructive trust for the estate of the other."

Applying this equitable doctrine, it was held the defendant, by his crime, could not take away his wife's contingent right to the whole estate upon surviving him. Hence, the defendant was held "a constructive trustee for the benefit of her heirs, the judge in effect having found as a fact that the deceased would have survived him." Immediately following, *Adams, J.*, adds this *dictum:* "Even in the absence of such finding, equity would probably give the victim's representatives the benefit of the doubt."

Pertinent to said *dictum, Adams, J.*, cites Ames, Lectures on Legal History, 321, where the author, in respect of joint tenancies, states: ". . . it being impossible to know which of the two would have outlived the other, equity would doubtless give the innocent victim the benefit of the doubt, as against the wrongdoer *who had deprived him of his chance of survivorship, . . .*" (Our italics) In the Restatement, Restitution § 188, Comment a, it is stated: "Thus, if the murderer had an interest in property contingent upon his surviving his victim, he is not entitled to keep the property, since although he survives the victim he does so as a result of the murder, and but for the murder he might have predeceased the victim, in which case he would not have been entitled to the property. It is immaterial that because of their respective ages, state of health or the like, it is probable that the murderer would have been the survivor." In this connection, see *Colton v. Wade* (Del.), 80 A. 2d 923.

In *Bryant,* it was held the defendant, by his crime, did not forfeit or impair *his own vested right* to the possession, control and use of the property and to the rents and profits therefrom. The decision is stated as follows: "Our conclusion is that the appellant holds *the interest of his deceased wife* in the property as a trustee for her heirs at law; that he should be perpetually enjoined from conveying the property in fee; that the plaintiffs should be adjudged the sole owners, *upon the appellant's death,* of the entire property as the heirs of their deceased mother; and that the judgment as thus modified should be affirmed." (Our italics)

Here the wife murdered her husband. During their joint lives, she had no right to the possession, control and use of the estate, and no interest in the rents and profits therefrom. She could not, by her crime, take away her husband's vested rights or acquire such rights. In respect thereof, she is a constructive trustee for Sylvia K. Perry, who is the equitable owner thereof. For present purposes, it is sufficient to

say that this status continues *at least* during the full term of Paul Perry's life expectancy.

Petitioner contends she is entitled to at least one-half of the rents and profits during her lifetime. She contends the husband's right to the rents and profits from an estate by the entirety during the joint lives of husband and wife is in recognition of his obligation to support his wife. True, "the rents and profits therefrom, which belong to the husband, may be charged with the support of his wife." *Porter v. Bank,* 251 N.C. 573, 577, 111 S.E. 2d 904. But in this respect, such rents and profits have the same status as other income and assets owned exclusively by the husband. It would be strange indeed if a wife who murders her husband could assert rights on the ground she thereby relieved him of his obligation to support her.

In the Annotation, "Married Women's Act as abolishing estates by entireties," 141 A.L.R. 179, 202, it is stated: "In a majority of jurisdictions the view is adopted that Married Women's Acts have destroyed the husband's exclusive right to the control, possession, and usufruct of the estate." However, in North Carolina and other jurisdictions, this view was *not* adopted. As stated by *Stacy, J.* (later *C.J.*), in *Davis v. Bass, supra:* "The husband was considered the owner of such rents and profits at common law, and none of the properties and incidents of this particular estate have been changed or altered in their nature and character by statute or by constitutional provision in North Carolina. It will be observed that Art. X, sec. 6 of the Constitution deals with the 'sole and separate property' of married women; and the Martin Act of 1911 (C.S., 2507) has been construed as not affecting estates held by husband and wife as tenants by the entirety. *Jones v. Smith,* 149 N.C. 317."

In a comprehensive article, "Tenancy by Entireties," by Oval A. Phipps, appearing in 25 Temple Law Quarterly 24, the author attaches a table indicating the present attributes of an estate by the entirety in the several states. In states where the wife and husband, during their joint lives, are equally entitled to the possession, control and use of the property, and to the rents and profits therefrom, it would seem, upon application of the equitable principles stated in *Bryant,* that the wife, notwithstanding she murdered her husband, would *retain* a vested interest to the extent of one-half of such rents and profits. But, as stated in the cited article, "In Massachusetts, Michigan and North Carolina, the husband, and only he, is vested with exclusive rights to the possession, management, and control of usufruct and profits during the marriage, but he may do nothing without the wife's joinder to defeat the survivorship right of the wife."

Attention is called to Chapter 210, Session Laws of 1961, which

adds to the General Statutes a new chapter, designated Chapter 31A, entitled "Acts Barring Property Rights." It appears this statute is based largely on an article, "Acquisition of Property by Wilfully Killing Another—A Statutory Solution," by John W. Wade, appearing in 49 Harvard Law Review 715 *et seq.* Suffice to say, this 1961 Act has no bearing on the present case. Decision here is based on the North Carolina law with reference to an estate by the entirety and upon the equitable principles declared and underlying the decision in *Bryant.*

For the reasons stated, the judgment of Judge McKinnon is affirmed.

Affirmed.

JOSEPH CASSETTA, BY HIS NEXT FRIEND, FRANK A. CASSETTA v. THOMAS S. COMPTON AND WIFE, ANN ADKERSON COMPTON

AND

FRANK A. CASSETTA v. THOMAS S. COMPTON AND WIFE, ANN ADKERSON COMPTON.

(Filed 13 December, 1961.)

1. Automobiles §§ 25, 46—

The operation of a motor vehicle at a speed greater than is reasonable and prudent under the conditions then existing is negligence *per se* notwithstanding that such speed may not exceed the applicable statutory limit, G.S. 20-141 (a) (c), and while plaintiff remains under the burden of proving that such violation was a proximate cause of the accident in which he was injured, an instruction that the violation of the statute should not constitute negligence *per se* but only a circumstance for consideration with other circumstances in evidence upon the question of due care, must be held for error.

2. Automobiles §§ 32, 46— Instruction on duty not to exceed speed which is reasonable under circumstances held prejudicial.

Where the evidence permits the inference that a child on a tricycle had entered a street from a driveway on the east side of the street and was on the west side of the street south of the projected southern line of the driveway at the time the driver of a vehicle traveling north struck the child, and the driver testifies that she did not see the child prior to the collision, the court should instruct the jury as to the driver's duty to decrease speed in the exercise of due care if the driver saw or should have seen the perilous position of the child on or near the street in time for precautionary action, and an instruction that a speed greater than was reasonable and prudent under the conditions then existing would not constitute negligence *per se* must be held prejudicial upon the evidence.

3. Automobiles §§ 32, 41m—

The evidence in this case, considered in the light most favorable to

plaintiffs, *is held* sufficient to require the submission to the jury of the issue of negligence of defendant driver in striking a child riding a tricycle on the street.

APPEALS by plaintiffs from *Gambill, J.*, March 20, 1961, Regular Civil Term, of GUILFORD (Greensboro Division).

Joseph Cassetta, then seven years and ten and one-half months old, received personal injuries on August 5, 1959, when he and the tricycle on which he was riding collided with a Dodge car, owned by defendant Thomas S. Compton and operated by his wife, defendant Ann Adkerson Compton, on Colonial Avenue in Greensboro, North Carolina.

An action was instituted by Joseph Cassetta, prosecuted in his behalf by his father and next friend, Frank A. Cassetta, to recover damages for personal injuries; and a separate action was instituted by Frank A. Cassetta to recover damages for the medical expenses incurred for the treatment of his son's injuries. The two actions, by consent, were consolidated for trial.

It was admitted that the Dodge car of defendant Thomas S. Compton was maintained by him as a family purpose car and that he is liable for the actionable negligence, if any, of his wife in the operation thereof.

Colonial Avenue is a paved street in a residential district. It is approximately 19 feet wide. It runs generally north and south. There was no marked center line. There were no sidewalks. The mishap occurred about 12:27 p.m. The weather was clear. Mrs. Compton was driving north on Colonial Avenue. Joseph entered Colonial Avenue from the driveway at 1903 Colonial Avenue, located on the east side of Colonial Avenue. Prior to collision, Joseph proceeded west on said driveway, with one foot on the back step of the tricycle and pushing with his other foot, entered Colonial Avenue and then turned left (south) on Colonial Avenue.

Plaintiffs alleged defendants were negligent in that: (1) Mrs. Compton was driving at a dangerous, unlawful and excessive speed under the circumstances then existing. (2) She was driving "to the left of the center of the street." (3) She was driving "without maintaining a careful, proper lookout to the front and side of the road so as to be able to see the child in time to avoid the said collision." (4) She failed to keep the Dodge car under proper control "when confronted by normal driving conditions in a residential neighborhood so that she was unable to avoid striking the said minor child."

Defendants denied all said allegations as to their negligence; and, for a further answer and defense, pleaded (1) unavoidable accident, and (2) contributory negligence on the part of Joseph.

The only evidence was that offered by plaintiffs. The evidence, except that relating solely to damages, consisted of the testimony of (1) Joseph, the minor plaintiff, (2) Howard Ryan, the investigating police officer, and (3) defendant Ann Adkerson Compton, called as a witness for plaintiffs.

The court submitted issues of negligence, contributory negligence and damages. The jury answered the negligence issue, "No," and did not reach the issues relating to contributory negligence and damages.

From a judgment that they have and recover nothing from defendants. plaintiffs excepted and appealed.

Hoyle, Boone, Dees & Johnson for plaintiffs, appellants.
Smith, Moore, Smith, Schell & Hunter for defendants, appellees.

BOBBITT, J. The court instructed the jury, in accordance with G.S. 20-141(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." The court then instructed the jury that, according to the evidence, Mrs. Compton was driving in a residential district, where the maximum legal speed was 35 miles per hour (G.S. 20-141(b) (2)), and there was no evidence Mrs. Compton's speed was in excess of 35 miles per hour. The court then, after reading G.S. 20-141(c), instructed the jury, in substance, the fact that Mrs. Compton's speed was 35 miles per hour or less did not relieve her of the obligation to exercise due care under the conditions then existing. The court then gave the instruction quoted in the next paragraph.

"The foregoing provision of this section — reading further from 20-141 — the foregoing provision of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant. That means, Gentlemen of the Jury, that in some instances certain statutes of North Carolina, if you violate those statutes you are guilty of negligence as a matter of law. The courts have held that is negligence *per se*. In this instance, even though you violate this section that I have read to you in this case, it is not negligence as a matter of law." Plaintiffs excepted and assign error in respect of this instruction.

The first sentence in the challenged instruction is an incomplete statement of the provisions of G.S. 20-141(e), which provides: "The foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant *as the proximate cause of an accident.*" (Our italics)

Immediately following the challenged instruction, the court con-

tinued: "It is to be taken as a circumstance that you may consider in determining whether or not the defendant was guilty of negligence, not as a matter of law but it is a circumstance that you take into consideration in determining whether or not in your opinion from this evidence, if you find from this evidence the defendant used due care in the operation of the automobile, taking into consideration all the circumstances that you find to have existed at that particular place in question on this particular day."

Thus, the jury was instructed, in effect, if Mrs. Compton's speed was 35 miles per hour or less but was greater than was reasonable and prudent under the conditions then existing, this would not constitute negligence *per se* but a circumstance for consideration along with all other circumstances in determining whether she used due care in the operation of her car.

Under G.S. 20-141, subsections (a) and (c), if a person drives a vehicle on a highway at a speed greater than is reasonable and prudent under conditions then existing, such person is guilty of negligence *per se*, that is, as a matter of law, notwithstanding the speed does not exceed the applicable maximum limits set forth in G.S. 20-141(b). *Rouse v. Jones*, 254 N.C. 575, 580, 119 S.E. 2d 628; *Hutchens v. Southard*, 254 N.C. 428, 432, 119 S.E. 2d 205, and cases cited; *Hinson v. Dawson*, 241 N.C. 714, 724, 86 S.E. 2d 585. True, as provided by G.S. 20-141(e), a violation of G.S. 20-141, subsections (a) and (c), has legal significance in a civil action only if it proximately causes injury. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331.

Defendants frankly concede the challenged instruction was erroneous but contend it was not prejudicial to plaintiffs. They base their contention on the rule stated in the next paragraph.

"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 the appellant to show this." *Perkins v. Langdon*, 237 N.C. 159, 178, 74 S.E. 2d 634; *Parks v. Washington*, 255 N.C. 478, 483, 122 S.E. 2d 70; *In re Will of Thompson*, 248 N.C. 588, 598, 104 S.E. 2d 280.

Consideration of the evidential facts stated below is necessary in order to determine whether the erroneous instruction was material and prejudicial to plaintiffs.

Joseph testified he lived "three or four doors" from (south of) the driveway at 1903 Colonial Avenue. He testified that, as he started down the driveway, he looked to his left and "didn't see anything coming"; that he didn't see anything except a car parked *next to his*

house; and that as he went down the driveway and into the street he "didn't slow up or anything."

Mrs. Compton testified that, as she approached and reached the point of collision, her speed was 15 or 20 miles an hour. Ryan testified as to skid marks made by the Compton car, the location of the Compton car when he arrived at the scene of collision, etc. Plaintiffs and defendants make conflicting contentions as to what this evidence tends to show in respect of speed.

Mrs. Compton testified further that, at the time of the collision, she was partly in the middle of the street, due to the fact she had just passed a car that was parked on her right; and that she believed her "left wheels then were across the center of the highway." She testified that, as she approached the scene of collision, she was looking "straight ahead." She testified: "As to whether I looked to the side, I don't remember, but I'm sure I was looking straight ahead. I usually do."

Mrs. Compton testified further she did not see Joseph before her car struck him. She testified: ". . . just as I went by the automobile parked on my right I heard a noise. At the same moment I saw this child coming off to my left." Again: "It was just the moment that I went by that car that I heard the noise." She testified the car she passed was parked "partly in the paved surface of the street." She did not testify as to the distance from the driveway at 1903 Colonial Avenue to this parked car.

The evidence tends to show the collision occurred approximately 12 feet from the east edge of the 19-foot paved street; that, as a result of the collision, the little blinker light under the left headlight of the Compton car was broken; and that, as a result of the collision, Joseph and the tricycle were knocked to the west (Mrs. Compton's left) edge of the street.

Ryan testified as to debris at the point of collision. However, he did not measure, nor did he recall, the distance of this debris from the (projected) south line of the paved driveway at 1903 Colonial Avenue. The collision, according to plaintiffs' allegations, occurred 8 feet south of said projected line. Joseph testified he got *almost* to the next driveway. The evidence tends to show these driveways were 23 feet apart.

Thus, the evidence tends to show that Joseph, at the time of the collision, had entered Colonial Avenue and was on the west side (for southbound traffic) thereof and south of the projected (south) line of the paved driveway at 1903 Colonial Avenue.

In view of the fact that Mrs. Compton did not see Joseph prior to the collision and did not attempt to decrease the speed of her car

prior to the collision, is the erroneous instruction material and prejudicial?

Whether Mrs. Compton was driving at a speed greater than was reasonable and prudent under the conditions then existing must be determined on the basis of what she could and should have seen by the exercise of due care, not on the basis of what she actually saw. If, by the exercise of due care, she could and should have seen Joseph in a perilous position as he proceeded down the driveway, or as he entered Colonial Avenue, or as he traveled thereon, this was one of "the conditions then existing"; and if, under these conditions, she continued to drive at 15 or 20 miles an hour without decreasing speed, then her speed at the time of collision was greater than was reasonable and prudent and constituted negligence *per se*. Any speed may be unlawful if the driver of a motor vehicle sees, or in the exercise of due care could and should have seen, a person or vehicle in his line of travel. *Murray v. Wyatt*, 245 N.C. 123, 128, 95 S.E. 2d 541.

Under the circumstances, we are constrained to hold the erroneous instruction was material and prejudicial. Whether Mrs. Compton's speed at the time of the collision, if negligence, proximately caused the collision, was for jury consideration and determination.

While the court, in general terms, instructed the jury that Mrs. Compton was required by law to exercise due care to keep a careful and proper lookout, there was no application of this rule of law to the specific factual situation disclosed by the evidence. A substantial part of the court's instructions on the first issue related to whether Mrs. Compton was negligent in respect of speed. But, whether she was negligent in respect of speed depended largely, as indicated above, on whether in the exercise of due care she could and should have seen Joseph in a perilous position and under these circumstances failed to decrease speed. No instruction was given purporting to explain the interrelation of the alleged failure of Mrs. Compton to exercise due care to keep a proper lookout and her alleged negligence in respect of speed.

Defendants contend the erroneous instruction was not prejudicial to plaintiffs because their motions for judgment of nonsuit should have been granted. However, when the evidence is considered in the light most favorable to plaintiffs, we are of opinion it was sufficient to require that the issues raised by the pleadings be submitted to the jury.

The questions raised by plaintiffs' other assignments of error may not recur upon a new trial. Hence, particular consideration thereof upon the present record is deemed inappropriate.

New trial.

DURHAM BANK & TRUST COMPANY AND BURWELL A. ALLEN, ADMINISTRATORS OF THE ESTATE OF CHARLES SNEAD ALLEN, DECEASED, v. FORREST A. POLLARD.

(Filed 13 December, 1961.)

1. Pleadings § 33—

If motion to strike irrelevant and redundant matter from a pleading is made before answer or demurrer and before the expiration of time for answering or demurring, the motion is made as a matter of right. G.S. 1-153.

2. Pleadings § 34—

Allegations are irrelevant if evidence to prove the facts therein alleged is incompetent, and allegations are redundant if the facts therein alleged are alleged with excessive fullness or are merely repetitious of the same facts theretofore alleged in the pleading, and the denial of a motion to strike will be reversed if the matter sought to be stricken is irrelevant or redundant, and its retention in the pleading would cause harm or injustice to movant.

3. Evidence § 19—

Ordinarily, evidence of a conviction or an acquittal in a criminal prosecution is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or an acquittal was entered.

4. Same; Death § 5—

In an action to recover for wrongful death, evidence that defendant had theretofore been convicted in a criminal action for the slaying of plaintiff's intestate is incompetent, and therefore allegations in the complaint as to such conviction are irrelevant and should be stricken on motion aptly made.

Certiorari to review an order of *Williams, J.*, denying defendant's motion, made in apt time before the time for answering or otherwise pleading had expired or extension of time to plead or answer had been granted, to strike certain portions of plaintiffs' complaint. Judge Williams heard the motion at 10 April 1961 Civil Term of Durham, and entered his order on 4 May 1961, allowing defendant's motion in part and denying it in part. Defendant excepted to that part of the order denying his motion in part, and filed a petition with us for a writ of *certiorari*, pursuant to Rule 4(a), (2), Rules of Practice in the Supreme Court. 254 N.C. 783, 785. We allowed the petition on 16 June 1961.

Brooks and Brooks By: E. C. Brooks, Jr., for plaintiffs, appellees.
McLendon, Brim, Holderness & Brooks By: L. P. McLendon, Jr., By: J. V. Hunter, III, for defendant, appellant.

PARKER, J. This is an action to recover damages for the death of plaintiffs' intestate, Charles Snead Allen, allegedly caused by the wrongful act of the defendant, Forrest A. Pollard, in slaying him on 24 April 1960.

Defendant in apt time filed a written motion to strike from the complaint paragraphs 3, 4, 7, 8, 10, 11, 12, 13, 15, 18, 19, 20 and 23, and parts of paragraphs 14 and 22. Judge Williams in his order allowed the motion to strike as to paragraphs 3, 4, 7, 13 and 15, and as to parts of paragraphs 14 and 22. He denied the motion to strike as to pragraphs 8, 10, 11, 12, 18, 19, 20 and 23. We allowed, as stated above, defendant's petition for a writ of *certiorari* to review Judge Williams's order denying defendant's motion to strike from the complaint the paragraphs specified above.

Defendant has two assignments of error: One, Judge Williams's denial of his motion to strike paragraphs 8 and 18 of the complaint. Two, his denial of his motion to strike paragraph 19 of the complaint.

This is stated in defendant's brief: "The defendant also excepted to the failure of the Trial Court to strike Paragraphs 10, 11, 12, 20 and 23, but defendant now desires to abandon those exceptions."

Paragraph 8 of the complaint reads:

> "Plaintiffs are informed and believe and therefore allege that on Monday, September 12, 1960, trial of the said Forrest A. Pollard was commenced in the Durham County Superior Court, Criminal Division, and said trial continued to September 17, 1960, at which time the jury, after deliberation, returned a verdict which convicted the defendant of manslaughter. That the said Forrest A. Pollard, pursuant to an Order of the Court, was imprisoned in the State's Prison at Raleigh, N. C., for a term of twenty years and no appeal to the Supreme Court of North Carolina, from the above sentence, was ever perfected."

Paragraph 18 of the complaint reads:

> "Plaintiffs are informed and believe, and therefore allege, that on the night of April 23, 1960, the said defendant Forrest A. Pollard went to the home of Charles Snead Allen; that shortly thereafter he left the home and went to his automobile to obtain his shotgun; that the said Charles Snead Allen was in the front yard of his own home when the said Forrest A. Pollard, with force and

arms, did feloniously and willfully kill and slay the said Charles Snead Allen. That, as hereinbefore alleged, the said Forrest A. Pollard was later indicted by a Grand Jury of Durham County, was tried and convicted by a jury impaneled in Durham County, of feloniously and willfully killing and slaying the said Charles Snead Allen, in violation of the laws of the State of North Carolina."

G.S. 1-153 reads: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted." As defendant made his motion in apt time, he can claim the benefits of the statute as a matter of right, rather than of grace. *Daniel v. Gardner,* 240 N.C. 249, 81 S.E. 2d 660; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412; *Hill v. Stansbury,* 221 N.C. 339, 20 S.E. 2d 308.

This is said in *Daniel v. Gardner, supra:* "1. Allegations which set forth matters foreign and immaterial to the controversy are considered irrelevant; whereas, excessive fullness of detail or the repetition of facts are treated as being redundant. (Citing authority). 2. On motion to strike, the test of relevancy is the right of the pleader to present in evidence upon the trial the facts to which the allegations relate. (Citing authority). 3. Nothing should remain in a pleading over objection which is incompetent to be shown in evidence. (Citing authority). 4. The function of a pleading is not the narration of the evidence, but rather the statement of the substantive, ultimate facts upon which the right to relief is founded."

"The denying or overruling of a motion to strike matter from a pleading under the provisions of G.S. 1-153 is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) that its retention in the pleading will cause harm or injustice to the moving party." *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185.

The general and traditional rule supported by a great majority of the jurisdictions is that, in the absence of a statutory provision to the contrary, evidence of a conviction and of a judgment therein, or of an acquittal, rendered in a criminal prosecution, is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or of acquittal was rendered, or when there is a verdict of acquittal to constitute a bar to a subsequent civil action based on the same facts. While the same facts may be involved in two cases, one civil and the other criminal, the parties are necessarily different, for, whereas one action is prosecuted by an in-

dividual, the other is maintained by the state. *Warren v. Ins. Co.*, 215 N.C. 402, 2 S.E. 2d 17; *Smith v. New Dixie Lines*, 201 Va. 466, 111 S.E. 2d 434; *Crawford v. Sumerau*, 100 Ga. App. 499, 111 S.E. 2d 746; *Interstate Dry Goods Stores v. Williamson*, 91 W. Va. 156, 112 S.E. 301, 31 A.L.R. 258; *S. v. Fitzgerald*, 140 Me. 314, 37 A. 2d 799; *Neibling v. Terry*, 352 Mo. 396, 177 S.W. 2d 502, 152 A.L.R. 249; *Nowak v. Orange*, 349 Pa. 217, 36 A. 2d 781; *Auslander v. Penn. R. Co.*, 350 Pa. 473, 39 A. 2d 595; *Krowka v. Colt Patent Fire Arm Mfg. Co.*, 125 Conn. 705, 8 A. 2d 5; *Seidman v. Seidman*, 53 R.I. 96, 164 A. 194; *Silva v. Silva*, 297 Mass. 217, 7 N.E. 2d 601; *Montgomery v. Crum*, 199 Ind. 660, 161 N.E. 251; *Cottingham v. Weeks*, 54 Ga. 275; Annotations, 31 A.L.R. 262, 57 A.L.R. 504, 80 A.L.R. 1145, 130 A.L.R. 690, 18 A.L.R. 2d 1290 and 1299, where many cases from many jurisdictions are cited; 4 Am. Jur., Assault and Battery, § 156; 20 Am. Jur., Evidence, § 1011; 50 C.J.S., Judgments, § 754, b, (1), p. 269.

In this connection it is apposite to cite our following decisions: *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1; *Swinson v. Nance*, 219 N.C. 772, 15 S.E. 2d 284; *Briggs v. Briggs*, 215 N.C. 78, 1 S.E. 2d 118. In the *Watters* case we held that the testimony on cross-examination of one defendant by another defendant that the questioned defendant had been convicted of driving while under the influence of intoxicating liquor as a result of the collision of automobiles on which the civil action for damages for personal injuries, in which he was testifying, was based was incompetent for the purpose of impeaching him as a witness. In the *Briggs* case we held: A judgment in a criminal action for abandonment is not *res judicata* as to the wife's right to counsel fees and support pending litigation of a suit for divorce thereafter instituted by the husband, the defendant in the criminal action.

There are exceptions to, and limitations of this general and traditional rule, which are not applicable here, for instance in an action for malicious prosecution or false arrest. 50 C.J.S., Judgments, § 754, b, (2), p. 273; 20 Am. Jur., Evidence, § 1012.

There is a minority rule which approves of the admission in civil actions of a previous criminal conviction as evidence of the facts upon which it was based. Annotations 31 A.L.R. 275, 57 A.L.R. 505, 80 A.L.R. 1147, 130 A.L.R. 695, 18 A.L.R. 2d 1299, where such cases are given. However, many, if not most, of the leading cases approving of such admission seem to have involved the situation where the convicted criminal seeks to take advantage of rights arising from the crime for which he has been convicted. *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Anno.

18 A.L.R. 2d 1300 *et seq.*, where many cases to this effect are analyzed and cited.

The Supreme Court of Appeals of Virginia in *Smith v. New Dixie Lines, supra,* had this to say of its former decision in the *Heller* case:

> "The general rule, however, was not followed under the facts presented in *Eagle, Star & British Dominions Ins. Co. v. Heller,* 149 Va. 82, 106, 140 S.E. 314, 321, 57 A.L.R. 490. In that case Heller recovered a judgment under a fire insurance policy covering the very property he had been convicted of burning. The defendant company assigned as error the rejection by the trial court of its pleas of *res judicata* and *estoppel* and the exclusion of evidence of the plaintiff's conviction of arson. This court, in reversing and entering judgment for the defendant, held that the general rule that records in a criminal case are not admissible in evidence in civil suits involving substantially the same issues is subject to an exception where a plaintiff seeks to recover in an action on an insurance policy covering property which he has wilfully burned with intent to defraud the insurer. This court applied a logical exception to the general rule in that case, but there is no sound reason for applying an exception to the rule under the facts of this case."

The instant case is not one where a convicted criminal seeks to take advantage of rights arising from the crime for which he was convicted, as in the Virginia *Heller* case, and it is to be distinctly understood that nothing that we have said in this decision is applicable to such a situation, if and when such a situation should confront us for decision.

Our case of *Bank v. McCaskill,* 174 N.C. 362, 93 S.E. 905, relied on by plaintiffs, concerns the admissibility in evidence of a judgment *in rem* rendered in a federal court in an action brought in the state court by a different creditor attacking the deed upon the same ground. This Court held it was admissible in evidence, but not conclusive. That case is clearly distinguishable from, and not applicable to the facts in the instant case.

Plaintiffs call to our attention 1961 Session Laws, Chapter 210, and particularly Article 4, Sections 13 and 15 of the statute. This statute is entitled, "Acts Barring Property Rights," and states in Article 4, Section 15, "This Chapter . . . shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong." It is plain and clear that this statute is not applicable to the present case.

Applying the general and traditional rule, above set forth, that evidence of a conviction and of a judgment therein rendered in a crimi-

nal prosecution is not admissible in a purely civil action like the present case to establish the truth of the facts on which it was based, and as we have no statute to the contrary, the defendant has successfully carried the burden of clearly showing that the record affirmatively reveals that the allegations of paragraph 8 of the complaint, and the last sentence of paragraph 18 of the complaint are clearly irrelevant, in that plaintiffs cannot present in evidence upon the trial the facts there alleged, and that their retention in the complaint will cause him harm or injustice.

Defendant has also clearly shown that the record affirmatively reveals that the first sentence of paragraph 18 of the complaint and the allegations of paragraph 19 of the complaint are redundant, in that they are mere repetitions of paragraph 6 of the complaint, which defendant did not ask to be stricken, and that they should be stricken. Plaintiffs in their brief candidly admit that paragraph 19 of their complaint merely repeats the allegations of paragraph 6 of their complaint.

Judge Williams allowed plaintiffs thirty days in which to file an amended complaint to make it conform to his order. Their amended complaint was apparently filed on 11 May 1961, and is in the record. In their amended complaint they repeat the allegations of paragraphs 8, 18 and 19 of their original complaint. What we have said here in respect to those paragraphs is applicable to the same allegations repeated in their amended complaint.

The trial judge committed prejudicial error in not striking from the original complaint paragraphs 8, 18 and 19.

Reversed.

RUTH BULLIN v. BILLY MOORE.

(Filed 13 December, 1961.)

1. Appeal and Error § 41; Automobiles § 38—

Where several witnesses have testified from their observation as to the excessive speed of defendant's car at or immediately before the accident, the admission of plaintiff's testimony as to such speed, being merely cumulative, will not be held prejudicial even if it be conceded that plaintiff's opinion was based in part upon what a patrolman told plaintiff as to the distance her vehicle was pushed by defendant's car after the collision rather than plaintiff's own knowledge of the physical facts at the scene of the accident.

2. Evidence § 51—

It is not required that an expert testify in response to hypothetical

questions when the witness has himself examined the person in question and is giving his expert opinion based on facts which he himself had observed.

3. Appeal and Error § 45—

Where the rights of the parties are determined by the answer of the jury to prior issues, alleged error relating to a subsequent issue cannot be prejudicial.

APPEAL by defendant from *Sink, E.J.*, at July 1961 Civil Term of SURRY.

Civil action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Defendant in his answer denied negligence, alleged that plaintiff was contributorily negligent, and alleged, as a counterclaim, that plaintiff's negligence was the sole proximate cause of damage sustained by his automobile in the collision out of which the controversy arose.

At the trial, plaintiff offered evidence tending to show, among other things, that on 5 August, 1960, she was driving a pickup truck in a northerly direction along N. C. Highway 268 in Surry County north of Copeland, North Carolina; that as she approached the driveway to her house, she slowed down, gave an appropriate signal to turn left and began to turn into said driveway; that defendant's automobile approached her from the rear at a high rate of speed and attempted, without sounding his horn, to pass plaintiff on the left side; that while attempting to pass, defendant drove into the left side of plaintiff's vehicle, pushing it sideways some 78 feet; that plaintiff was carried to the hospital after the collision and returned home that night; that plaintiff went back to the doctor several times after that; and that plaintiff suffered pain and received possibly permanent injuries as a result of the collision.

Defendant offered evidence tending to show that he was driving his automobile behind plaintiff's vehicle at a speed of approximately 40 to 45 miles per hour immediately prior to the collision; that as he approached plaintiff's truck from the rear, he saw that the way ahead was clear, blew his horn and started to pass plaintiff; that plaintiff, without giving any signal of any kind, immediately turned left in front of him causing him to collide with her truck; and that as a result of the collision, his automobile was damaged in the amount of $1,200.00.

These issues were submitted to the jury and answered as follows:

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

"2. Did the plaintiff by her own negligence contribute to her injuries as alleged in the answer? Answer: No.

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $4,000.00.

"4. Was the defendant's automobile damaged by the negligence of the plaintiff as alleged in the cross-action? Answer: No.

"5. What amount, if any, is the defendant entitled to recover of the plaintiff? Answer: _____."

From judgment on the verdict, defendant appeals to the Supreme Court and assigns error.

Allen, Henderson & Williams for plaintiff appellee.
Norman & Reid for defendant appellant.

WINBORNE, C.J. The question for decision on this appeal is whether the trial and judgment can be sustained in the face of the exceptions shown in the record and debated on briefs. We are constrained to answer in the affirmative.

Question I: Did the court err in failing to strike plaintiff's testimony as to defendant's speed?

The record reveals that on cross-examination, plaintiff was asked to state the facts on which she based the belief that defendant was driving at a speed of 80 miles per hour. The questions and answers were as follows:

Q. "Now, on what did you found that belief?"

A. "The fact that he pushed me sideways, my truck, and the front end of my truck was in a bank, and the fact that he pushed me sideways through that bank. You can't do that at 50 miles an hour."

Q. "In other words?"

A. "I was going through a bank, and he was pushing me sideways."

Q. "And, of course, how did you know how far the pickup went down the road, or how far it was pushed?"

A. "The patrolman told me (the actual number of feet)."

Whereupon, defendant moved to strike all of plaintiff's testimony with reference to speed, on the ground that she had no basis for her opinion except hearsay. The motion was denied.

In this connection, if it should appear that plaintiff's opinion of defendant's speed was based, to some extent, on what she was told by the patrolman as to the exact distance her truck was pushed, it also appears from the above testimony that her opinion was based, in part, on the physical occurrences which she experienced and subsequently observed at the scene of the collision. And to this extent, it might well be argued that the jury was entitled to the benefit of this testimony on the theory, often stated by this Court in connection with

evidence of speed, that "physical facts speak their own language and are often heard above the voices of witnesses." *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Powers v. Sternberg,* 213 N.C. 41; 195 S.E. 88, and many others.

However, if it be conceded that it was error to admit plaintiff's testimony as to defendant's speed, it does not appear that such error would be prejudicial to defendant. Plaintiff's witness, Sid Parker, testified that he observed defendant's automobile for at least a quarter of a mile immediately before it struck plaintiff's truck, and that, in his opinion, defendant's car was traveling approximately 70 miles per hour at the time. Another witness, Billy Smith, testified that he was standing in a service station which is situated on Highway 268 about three-tenths or a quarter of a mile from the scene of the collision, and that he observed the defendant's car pass the service station immediately prior to the accident. In his opinion, the defendant was traveling at a speed of 75 miles per hour when he passed the service station.

Therefore, it appears that there was sufficient evidence tending to show that defendant's automobile was being driven at a speed of 70 miles per hour or more immediately prior to the collision. In such a situation, the rule is that the admission of incompetent evidence will not be held prejudcial when its import is abundantly established by other competent testimony. *Belhaven v. Hodges,* 226 N.C. 485, 39 S.E. 2d 366; *Carpenter, Solicitor, v. Boyles,* 213 N.C. 432, 196 S.E. 850; *Owens v. Lbr. Co.,* 212 N.C. 133, 193 S.E. 219; *Pickett v. Fulford,* 211 N.C. 160, 189 S.E. 488; *Phipps v. Indemnity Co.,* 203 N.C. 420, 166 S.E. 327; *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575.

Question II: Did the court err in allowing the following questions to be asked of an expert witness, the witness being the doctor who examined and treated plaintiff for injuries received in the accident?

Q. "And if Mrs. Bullin stated that she had a recurrence of stiffness of the neck since the accident, could that be attributable or is it probable for it to be attributable to the accident?"

Objection. Overruled.

A. "I think it is possible to attribute it to the neck injury sustained in the accident. Now, how probable, I couldn't say."

Q. "And, of course, Dr. Dudley, I assume that that might go on for an indefinite period of time."

A. "Yes, sir."

Objection. Overruled.

Defendant contends that the above questions were "highly improper and prejudicial", in that they were not hypothetical questions

with the applicable facts of plaintiff's injuries incorporated therein. We cannot agree. As was stated by *Adams, J.*, speaking of substantially similar testimony in *Dulin v. Henderson-Gilmer Co.*, 192 N.C. 638, 135 S.E. 614: "The witness testified as an expert, giving his opinion as to the usual and ultimate effect or consequence of such injuries as the plaintiff received. *Alley v. Pipe Co.*, 159 N.C. 327. His opinion was formed after he had made an examination of the plaintiff's teeth, and it was not necessary that all his answers should be based upon a hypothetical statement of facts. *In re Peterson*, 136 N.C. 13." See also *Dickson v. Coach Co.*, and *Chappell v. Coach Co.*, 233 N.C. 167, 63 S.E. 2d 297.

Queston III: Is defendant entitled to a new trial because of error in the court's charge relative to issues 4 and 5 involving defendant's right to recover on his counterclaim for damage to his automobile?

The court charged as follows:

"Mrs. Bullin, on the contrary, contends and insists, with respect to the claim for damage to his car, that there is not evidence before you to determine how or what happened to the car, when it was bought, when it was sold, and whether it was injured or damaged otherwise."

Defendant cites various portions of record and contends that such evidence is contained therein. Further, defendant argues that whether or not there is evidence is a question for the court. Thus, by stating plaintiff's contention that there was no evidence of the matters in question, the court gave an erroneous view of the law in stating the contentions of the parties. This, defendant argues, is prejudicial error according to law as stated in *Blanton v. Carolina Dairy, Inc.*, 238 N.C. 382, 77 S.E. 2d 922.

However, the record indicates that the court's charge was correct on Issues 1 (relating to defendant's negligence) and 2 (relating to plaintiff's contributory negligence). The jury answered both of these issues in favor of plaintiff. Thus, at this point, the rights of the parties were determined, and defendant was precluded from recovering on his counterclaim. (The court properly instructed the members of the jury not to consider Issues 4 and 5 if they answered Issues 1 and 2 in favor of plaintiff). In such case, if it be conceded that there is error in the above quoted portion of the court's charge, such error would not be prejudicial to defendant. As was stated by *Clarkson, J.*, in *Reid v. Reid*, 206 N.C. 1, 173 S.E. 10, "The Court will not consider exceptions and assignments of error arising upon the trial of other issues, when one issue decisive of appellant's right to recover has been found against him." *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Winborne v. Lloyd*, 209 N.C. 483, 183 S.E. 756; *Ginsberg v. Leach*, 111 N.C. 15, 15 S.E. 882.

We have given careful consideration to all of defendant's assignments of error, and we find no error sufficently prejudicial to disturb the judgment of the court below. Hence in the trial below, we find

No error.

HERMAN J. SCARBOROUGH v. GRADY INGRAM AND BOOKER T. INGRAM.

(Filed 13 December, 1961.)

1. Automobiles § 11—

The violation of the statutory requirements in regard to lighting devices to be used by motor vehicles operating at night constitutes negligence as a matter of law. G.S. 20-129, G.S. 20-129.1.

2. Automobiles § 8—

It is negligence for the operator of a motor vehicle to turn left when a reasonably prudent person would realize in the exercise of due care that such movement could not be made in safety under the circumstances. G.S. 20-154(a).

3. Automobiles § 41h—

Evidence tending to show that defendant was operating his vehicle at night without the lighting devices required by statute and that he attempted to turn left into a driveway at a time when he saw or could have seen the lights of plaintiff's vehicle following him so closely that a reasonably prudent person would have realized the turn could not be made in safety, *is held* sufficient to be submitted to the jury on the issue of negligence.

4. Automobiles § 42d—

Evidence tending to show that plaintiff was traveling within the statutory maximum speed limit, that defendant's truck was traveling ahead of him at night without lighting devices required by statute, that defendant's truck had a flat bottom, presenting a minimum area to be picked up by the lights of a following vehicle, and was of dark color, and that plaintiff's car struck the rear of defendant's vehicle as it slowed and had started to make a left turn into a driveway, *is held* not to show contributory negligence as a matter of law on the part of plaintiff. G.S. 20-141(e).

5. Automobiles § 46; Negligence § 28—

The charge of the court in this case, construed contextually, held not subject to the objection that it required defendant to establish that plaintiff was guilty of each of the alleged negligent acts relied upon as constituting contributory negligence in order to answer that issue in the affirmative.

APPEAL by defendant Booker T. Ingram from *Gwyn, J.*, May 1961 Term of MONTGOMERY.

Plaintiff instituted this action to recover compensation for personal injuries and property damages resulting from a collision between the motor vehicle owned and operated by him and a 1946 Ford truck owned by Grady Ingram, operated by Booker T. Ingram. The collision occurred about 7:45 p.m. on 21 June 1960 on U. S. Highway 220, just north of the southern boundary of Ellerbe. Both vehicles were traveling northwardly.

To support his claim for damages plaintiff alleged these negligent acts of appellant: (1) Operating his motor vehicle on a dark, rainy night without lights. (2) Making a left turn without ascertaining that he could do so with safety to others using the highway. (3) Failure to give any signal of defendant's intent to make a left turn. (4) Operation of a motor vehicle in a reckless manner in violation of G.S. 20-140.

Defendants denied the collision was due to any negligent act of theirs, and as an additional defense pleaded reckless driving, excessive and unreasonable speed under existing conditions, failure of plaintiff to keep a lookout or control of his vehicle, and inability to stop within the range of plaintiff's headlights as contributory negligence barring recovery.

Motions of defendants for nonsuit were allowed as to defendant Grady Ingram and overruled as to defendant Booker T. Ingram. Issues of negligence, contributory negligence, and damages were submitted to the jury. It answered the first issue yes, the second, no, and fixed the damages sustained. Judgment was entered on the verdict. Booker T. Ingram (hereafter referred to as defendant) appealed.

Jones & Jones for plaintiff appellee.
David H. Armstrong for defendant appellant.

RODMAN, J. The first question for determination is the court's ruling on defendant's motion for nonsuit. Defendant asserts the refusal to allow his motion is erroneous for two reasons: (1) Plaintiff failed to offer any evidence of negligence proximately causing plaintiff's injuries, and (2) all the evidence establishes as a matter of law plaintiff's negligence proximately causing the collision and resulting damage.

Defendant's evidence suffices to establish these facts: The collision occurred at night in a residential area of a town where the maximum speed limit was 35 m.p.h. Shortly before the collision he had come into Highway 220 from a filling station. He headed north when he came on the highway, traveling 20 to 25 m.p.h. He intended to turn into a

private drive on the west side of the highway some 300 yards north of the filling station. It was dark and rainy. The truck was not equipped with rear reflectors required by G.S. 20-129.1(a). Plaintiff's car was of the compact class.

In addition to the foregoing noncontroverted facts, there is evidence from which the jury could find these additional facts: (1) Defendant's truck not only was not equipped with the reflectors required by statute, but also it did not have in operation the lights required by G.S. 20-129(a) (d). (2) The truck was dark in color, blending with the darkness of the night. It had a flat body without standards or side boards, presenting a minimum area to be picked up by the lights of an approaching vehicle. (3) Defendant saw or should have seen the lights of plaintiff's car traveling northwardly in the same lane with defendant. (4) Defendant, although intending to make a left turn, had not at the moment of the collision begun to execute his intention or had just begun to execute his intention and was entering the left lane when the collision occurred, or had so far executed his intent as to completely block both lanes of the highway.

The statutes prescribing lighting devices to be used by motor vehicles operating at night (G.S. 20-129 and 129.1) were enacted in the interest of public safety. *S. v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. A violation of these statutes constitutes negligence as a matter of law. *Bridges v. Jackson,* 255 N.C. 333; *Lyday v. R.R.,* 253 N.C. 687, 117 S.E. 2d 778.

The jury could find from the evidence that defendant saw the light of plaintiff's car approaching, saw the vehicle was so close to the truck when defendant started to make his left turn that a prudent person would have realized that the turn could not be made in safety. Hence the turn made, or attempted, was within the prohibition of G.S. 20-154(a).

The evidence was sufficient to support a finding that defendant had violated the statutes enacted to promote safety on the highway, proximately causing the collision. This would require submission to the jury unless, as defendant says, all of the evidence establishes plaintiff's contributory negligence as a matter of law.

We must, therefore, determine the question: Does all the evidence lead to the single conclusion that the collision and resulting injuries and damage were proximately caused by plaintiff's negligence? The answer is no. Plaintiff, according to his testimony, was traveling at a speed of 30 m.p.h. after entering Ellerbe. This speed is less than the maximum permissible speed. There was a slight curve in the highway south of the point of collision. The distance from the curve to the point of collision is not shown. Plaintiff testified: "I didn't see the truck.

I can't say the distance that I saw it. Yes, I looked. It was right in front of me, and the darkness and the curve, and when the lights picked it up, I was right on it. . . . The reason that I did not see the truck until I got to it was due to the fact that it had no lights on it. My lights were in good order." The color of defendant's vehicle reduced its visibility on this rainy, dark night, and because of the flat body without standards or side boards the light from plaintiff's automobile would not disclose the truck ahead until close to it.

The law applicable to cases of this character was well stated by *Ervin, J.*, in *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276. That case was decided in 1951. The rule then enunciated was recognized by the Legislature of 1953 as a proper statement of the law when it enacted c. 1145, S.L. 1953, now incorporated in G.S. 20-141(e). It is there expressly declared "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 in any civil action . . ." Plaintiff's testimony and the inferences which can fairly be drawn from the testimony offered by defendant bring plaintiff within the language and meaning of this statutory provision. Unless we ignore the express language of the statute and hold that the mere failure to see an unlighted object on a highway in time to avoid a collision constitutes negligence because conclusively demonstrating the operator either was not keeping the lookout required by statute or was driving at an unreasonable rate of speed, plaintiff is entitled to have his case submitted to the jury. The other facts appearing in the record to which we have called attention tend to negative the assertion that plaintiff failed to act with reasonable prudence. The conclusion here reached is supported by *Privette v. Lewis*, 255 N.C. 612; *Carrigan v. Dover*, 251 N.C. 97, 110 S.E. 2d 825; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19; *Burchette v. Distributing Co.*, 243 N.C. 120, 90 S.E. 2d 232.

The court charged: "(You will bear in mind the evidence in its entirety. You will bear in mind the law which relates to that issue. With all that in mind, you are instructed upon the second issue that if the defendant has satisfied you from the evidence and by its greater weight that the plaintiff was negligent in the operation of his automobile, and has further satisfied you from the evidence and by its greater weight that such negligence on his part was the proximate cause or one of the proximate causes of his injury and damage, as alleged in the answer, then it will be your duty to answer that second issue YES. If the defendant has failed to so satisfy you, it will be your duty to answer that second issue NO.)" Defendant excepted to the

foregoing, contending the court thereby required him to establish each of the eight alleged negligent acts of plaintiff before the jury could answer the issue of contributory negligence yes. If the charge was fairly susceptible to such an interpretation, defendant would be entitled to a new trial; but the quoted portion is not of itself fairly susceptible to such an interpretation, and when the charge is read as a whole, we cannot conceive that the jury placed such an interpretation on the language used.

We have examined each of the remaining thirty-five assignments of error but find nothing warranting a new trial or requiring discussion.

No error.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. THE EMPLOYERS' FIRE INSURANCE COMPANY; ANDY FOPPE, INC; ANTHONY F. BYRNES AND FRANCIS RYCK.

(Filed 13 December, 1961.)

Insurance § 57—

A garage liability policy which expressly excludes from coverage employees of insured does not cover the liability of a prospect driving the car with insured's consent for negligent injury to an employee of the insured riding in the car with the prospect to demonstrate the vehicle, even though the prospect is an additional insured under the provisions of the policy and the policy contains a severability of interests clause.

APPEAL by plaintiff and defendant Ryck from *Patton, J.*, regular June 5, 1961, A Term, MECKLENBURG Superior Court.

The plaintiff State Farm Mutual Insurance Company, (hereafter called State Farm) instituted this civil action to have the court by declaratory judgment determine the rights and liabilities of the parties for the personal injuries suffered by Anthony F. Byrnes as a result of the negligent operation of a 1959 Nash automobile owned by the defendant Andy Foppe, Inc., (hereafter called Foppe) and driven by John Francis Ryck. At the time of the accident Ryck held an automobile indemnity insurance policy in which the plaintiff agreed to indemnify him against loss by reason of his operation of his 1953 Oldsmobile, or a non-owned automobile if used with the owner's consent. The policy provided that in case of a non-owned automobile the coverage should be excess insurance.

The accident occurred on May 9, 1959, while Ryck was driving a new Nash automobile owned by Foppe. Riding with Ryck and demon-

strating the automobile was Anthony F. Byrnes. In the course of the demonstration Ryck lost control and had an accident in which Byrnes was injured At the time of the injury Byrnes was acting in the scope of his employment and engaged in the discharge of his duties as Foppe's employee. Byrnes filed a claim against Foppe and was paid workmen's compensation by Foppe, or by Foppe's industrial insurance carrier.

Byrnes instituted a civil action in the superior court against Ryck to recover damages for the injury. Ryck called on State Farm to defend the action and to discharge the liability. State Farm instituted this action for declaratory judgment as to the rights and liabilities of the parties, including Employers' Fire Insurance Company (hereafter called Employers). At the time of the injury Foppe was the insured in a garage liability policy by which Employers' obligated itself to pay all sums within its limitations (subject to the exclusions) which the insured should be obligated to pay as damages because of injury resulting from the ownership, maintenance or use of any automobile in connection with the insured's business. Under the heading "Exclusions," appears the following: "This policy does not apply (d) under coverage A (bodily injury) and C (medical treatment for the injury) to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured: (e) under Coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law." The policy appears to contain a severability of interests clause.

The foregoing is the substance of the stipulations of the parties upon the basis of which Judge Patton entered the following judgment:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED, DECREED AND DECLARED:
>
> "1. The Employers' Fire Insurance Company has no obligation to John Francis Ryck to defend the action commenced against him and pending in the Superior Court of Mecklenburg County, North Carolina, by Anthony F. Byrnes or to pay all or any part of any Judgment which may be rendered in such action, and neither the said John Francis Ryck nor any other party to this action has any claim, existing or potential, against The Employers' Fire Insurance Company arising out of or attributable to injury and damage sustained by Anthony F. Byrnes in the collision in which he was involved on May 9, 1959, and referred to above.
>
> "2. The Employers' Fire Insurance Company has no obligation, existing or prospective, to pay State Farm Mutual Automobile

Insurance Company all or any part of such sums as State Farm Mutual Automobile Insurance Company may have heretofore or hereafter expended in defense of the civil action referred to in paragraph 8, above, or any similar action by the said Anthony F. Byrnes against John Francis Ryck, and The Employers' Fire Insurance Company has no obligation to pay or reimburse State Farm Mutual Automobile Insurance Company all or any part of any sum which State Farm Mutual Automobile Insurance Company may pay in settlement of such Civil Action or in discharge of any or application to any Judgment which may be rendered against John Francis Ryck therein.

"3. State Farm Mutual Insurance Company is obligated under the terms of its policy to defend John Francis Ryck in the Civil Action commenced against him in the Superior Court of Mecklenburg County by Anthony F. Byrnes referred to above, and to pay to the extent of its policy limit any Judgment which may be rendered against the said Ryck in that action; provided, however, that this Judgment shall not be deemed to preclude or bar any defense arising out of matters or conduct occurring subsequent to this Judgment under the terms of the policy of the State Farm Mutual Automobile Insurance Company and the law of the State of North Carolina."

The plaintiff and defendant Ryck excepted to the judgment and appealed.

John H. Small; Deal, Hutchins & Minor, By Roy L. Deal, for plaintiff, appellant.

Francis O. Clarkson, Jr., for defendant John Francis Ryck, appellant.

Carpenter, Webb & Golding, By William B. Webb, for defendant The Employers' Fire Insurance Company, appellee.

HIGGINS, J. The plaintiff admits its policy covers Ryck's liability for the accident which occurred while Ryck was operating the 1959 Nash with the consent of its owner, Foppe, Inc. It contends, however, its coverage is excess insurance and the defendant Employers' garage policy provides the primary coverage which should be exhausted before claim is asserted against the plaintiff. The plaintiff further contends (1) that Ryck, while driving Foppe's Nash with Foppe's consent, was "an additional insured" under the garage policy and hence within its coverage; (2) that the exclusion clauses in the garage policy remove from the coverage only the employees of Ryck and those to whom Ryck pays workmen's compensation; (3) under the severability

of interests clause in the garage policy, Ryck is afforded separate, complete coverage for injury except to his own employees.

On the other hand, Employers' insists its garage policy does not cover Ryck's liability to Foppe's employee, Anthony F. Byrnes, who at the time of the injury was Foppe's employee, acting within the scope of his employment. In addition, Foppe and his industrial insurance carrier paid workmen's compensation to Byrnes for the injury. Hence, Foppe and Employers' contend the garage policy specifically and in plain terms excludes Foppe's employees (of whom Byrnes is one) from all coverage under the policy.

The controversy presents to this Court for the first time the legal question whether the exclusion clauses in Employers' garage policy refer to and exclude from coverage Ryck's employees or Foppe's employees. On this question appellate courts in other jurisdictions are in disagreement. The contentions pro and con, with supporting authorities, are reviewed in the well-written opinion of *Judge Weick* in *Kelly v. State Automobile Insurance Association,* decided on April 13, 1961, by the Court of Appeals for the Sixth Circuit and reported in 288 Fed. 2d 734. Also, many cases dealing with the question are cited and analyzed in 50 A.L.R. 78, *et seq.* The decisions cited by the plaintiff hold the term "insured" as used in insurance policies means the named insured and any additional insured included in the coverage. However, a substantial number of the decisions go one step further and hold the term "employee of the insured" means the employee of the insured who invokes the protection of the coverage, and unless the injured is the employee of the person who causes the injury the exclusionary clause does not prevent recovery against the insured and the insurer. Some of the cases supporting this view are: *Pullen v. Employers' Assurance Corp.,* 230 La. 867, 89 So. 2d 373; *Motor Vehicle Casualty Co. v. Smith,* 247 Minn. 151, 76 N.W. 2d 486; *Cimarron Ins. Co. v. Travelers Ins. Co.* (Ore) 355 P. 2d 742; *Kaifer v. Georgia Casualty Co.,* 67 Fed. 2d 309 (9th Ct.); *Sandstrom v. Clausen's Estate,* 258 Wis. 534, 46 N.W. 2d 317. In considering the Wisconsin cases it should be noted the state statute requires the inclusion of a clause extending protection to all persons (with certain exceptions) who operate an insured's vehicle with the owner's consent.

When Employers' and Foppe entered into the garage insurance contract we are certain the employees they intended to exclude were Foppe's employees. Without support is the argument that some other employees and not Foppe's were within the contemplation of the parties when they made the contract. We are certain that not within the contemplation of the parties were the employees of Ryck who was under the wheel of Foppe's vehicle for a few minutes and by his care-

lessness injured one of Foppe's employees who at the moment of injury was about his employer's business. To arrive at the conclusion Ryck's employees and not Foppe's are excluded requires complicated, circuitous and involved reasoning.

The Supreme Court of South Dakota, in *Birrenkott v. McManamy,* 65 S.D. 581, 276 N.W. 725, succinctly states the defendant's side of the controversy: "Appellant contends on this appeal the exemption clause relating to employees of the insured should be limited to the employees of the person for whom the policy is invoked. The court cannot agree with the contention of appellant. Such an interpretation of the exclusion clause would mean that the policy affords greater protection to one who obtains consent of the owner to use his vehicle than it affords to the insured himself."

In the case of *Lumbermen's Mutual Casualty Co. v. Stukes,* 164 Fed. 2d 571, *Judge Parker* stated the rule: ". . . but this clause (excluding employees) used in the policy shows clear intent that coverage should be extended only to liability to the public and that there should be no coverage in case of employees of the insured." To like effect is *Webb v. American Fire & Casualty Co.,* 148 Fla. 714, 5 So. 2d 252; *Travelers Ins. Co. v. Ohio Farmers Indemnity Co.,* 262 Fed. 2d 132; *Standard Oil Co. of Texas v. Transport Ins. Co.,* 324 S.W. 2d 331; *Pearson v. Johnson,* 215 Minn. 480, 10 N.W. 2d 357; *Associated Indemnity Co. v. Wachsmith,* 2 Wash. 2d 679, 99 P. 2d 420.

In this case Foppe bought an insurance policy to protect it in the operation of its garage business. Its employees, while in the discharge of their duties, were exempt from coverage. These employees had separate coverage under workmen's compensation. The premium paid to Employers' for the coverage furnished in the garage policy was based on the risk involved, expressly excluding the insured's employees. According to plain, direct, and simple reasoning, Byrnes, as one of Foppe's employees, is excluded from the coverage and neither Foppe nor Foppe's insurer is liable.

Judge Patton gave effect to the plain language of the policy by holding Foppe and Employers' are not liable for Byrnes' injury. Notwithstanding the plaintiff's excellent brief, earnest argument, and the recognized rule of construction in favor of the insured and against the insurer, we think the sounder view and the better reasoned cases support the judgment entered in the court below.

Affirmed.

GLADYS HARRELL v. WALTER R. HARRELL, JR.

(Filed 13 December, 1961.)

Divorce and Alimony § 18—

An allowance of subsistence and counsel fees to the wife *pendente lite* and an allowance to her of monthly support for the child of the marriage in her custody, will not be disturbed on appeal when supported by the court's findings of fact, notwithstanding that definite details as to the earnings of the husband were not available, the amounts being reasonable upon the facts found and the order being subject to modification upon motion.

BOBBITT and HIGGINS, JJ., dissent.

APPEAL by defendant from *Johnston, J.,* (Resident Judge) March 18, 1961, in Chambers at the Forsyth County Courthouse (Order signed April 26, 1961), of FORSYTH.

Civil action instituted in the Superior Court of Forsyth County on the 13th day of April, 1960, under G.S. 50-16, for alimony without divorce, property settlement, custody of child and attorney's fees.

Thereafter, as stated in brief of defendant appellant, pursuant to notice, a number of hearings were held before the Resident Judge upon plaintiff's application for subsistence and counsel fees during the pendency of this cause. And on 5 August, 1960, an order of compulsory reference was entered, to which defendant excepted. This order was reviewed by this Court at the Fall Term of 1960, and the order of compulsory reference was vacated and the cause remanded for further proceedings in accordance with law. See case reported as *Harrell v. Harrell* in 253 N.C., at page 758, 117 S.E. 2d 728.

And the record discloses that the cause came on for hearing before Johnston, J., upon application of plaintiff for alimony *pendente lite,* for support for the minor child born of the marriage, and for custody of the child, "and after full consideration of the evidence presented by both the plaintiff and the defendant, and after hearing arguments by counsel for plaintiff and arguments by counsel for defendant, the court makes the following findings of facts:

"1. That the plaintiff and the defendant are citizens and residents of Forsyth County, North Carolina.

"2. That the plaintiff and the defendant were married on December 30, 1954, and separated on March 10, 1960.

"3. That Walter Harrell, III, was born to the marriage of these parties on July 27, 1955, and that he is now five years old and that Walter Harrell, III, is now in the care and custody of the plaintiff and has been in the care and custody of the plaintiff continuously since March 10, 1960.

"4. That because of the defendant's excessive use of intoxicating beverages and because of his abusive treatment of the plaintiff, and other conduct of the defendant as alleged in plaintiff's complaint, defendant forced plaintiff to separate herself and their child from the defendant and that by so doing the defendant wrongfully abandoned his wife and child. That since such wrongful abandonment of the plaintiff by the defendant, the defendant has failed to furnish adequate support to the plaintiff and to Walter Harrell, III, and has failed to furnish plaintiff with subsistence in accordance with his means and condition in life.

"5. That the defendant is a strong, able-bodied man who operates W. R. Harrell Produce Company, a corporation organized and existing under the laws of the State of Florida, and that the defendant has annual earnings in excess of $15,000.00 per year.

"6. That the plaintiff is the mother of Walter Harrell, III, and has had the sole and exclusive custody of Walter Harrell, III, since March 10, 1960. The court finds as a fact that the plaintiff is a fit and proper person to have sole and exclusive custody of said minor child and that it would be to the best interest of said minor child to remain in the custody of the plaintiff.

"7. It appearing to the court that the plaintiff should be allowed as temporary subsistence for herself the sum of $200.00 per month and for the maintenance and support of the minor child born to the marriage the sum of $200.00 per month, and it further appearing that the plaintiff is a fit and proper person to have the custody of said child and that the sole and exclusive custody of the child should be awarded to the plaintiff."

Thereupon, the court "Ordered, Adjudged and Decreed that the plaintiff shall have, and the same is hereby allowed the sum of $200.00 per month as temporary subsistence for herself and the sum of $200.00 per month for the maintenance and support of the child born of the marriage, and first payment to be made on April 1, 1961, and on the first of each succeeding month."

The court further ordered, adjudged and decreed in pertinent part that the amount of $700.00 is to be paid as reasonable attorney's fee in this matter by the defendant.

The defendant objects to the signing of the order allowing the plaintiff the temporary subsistence, counsel fees and court costs pending the determination of this action. The objection was overruled. Defendant excepts. Defendant moves that said order be set aside. Motion overruled. Defendant excepts, and appeals to Supreme Court, and assigns error.

Robert B. Wilson, Jr., for plaintiff appellee.
W. Scott Buck for defendant appellant.

WINBORNE, C.J. In disposing of the former appeal this Court had this to say: "* * * Pending the trial and final determination of the issues in an action for alimony without divorce, the wife may apply to the court for reasonable subsistence and attorney's fees to be secured from the husband's estate or earnings, according to his condition and circumstances." Indeed, "Any allowance ordered may be modified or vacated at any time, on the application of either party. G.S. 50-16. The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation (citing *Mercer v. Mercer,* 253 N.C. 164, 116 S.E. 2d 443). The amount of the allowance for subsistence *pendente lite* is for the trial judge. He has full power to act without intervention of a jury, and his discretion in this respect is not reviewable, except in case of manifest abuse of discretion. (Citing *Mercer v. Mercer, surpra; Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226). The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who has no income but is able-bodied and capable of earning may be ordered to pay subsistence. (Citing cases).

"The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. It is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. Its purpose is to give her reasonable subsistence pending trial and without delay * * *."

And in closing the opinion *Moore, J.,* speaking for the Court, declared: "The Court has jurisdiction of the parties and has plenary power and authority to require the disclosure of any information within their knowledge or available to them bearing upon a temporary allowance. It is not necessary that the parties agree as to what the husband's income is. The findings of the court will not be disturbed if based on competent evidence. *Mercer v. Mercer, supra.*"

Moreover, it must be borne in mind that the allowance, as stated above, is subject to modification from time to time. In that light, it may not be amiss to grant allowance *pendente lite.* The parties may seek modification accordingly. It is apparent that definite details are not available.

The specific assignments of error have been given due consideration and are found to be without merit.

Hence the judgment from which appeal is taken is

Affirmed.

BOBBITT and HIGGINS, JJ., dissent.

STATE v. GERALD THOMAS CASPER.

(Filed 13 December, 1961.)

1. Homicide § 20— Evidence of defendant's guilt of murder in the second degree held sufficient to sustain conviction.

Evidence tending to show that defendant and deceased were sitting in his car in front of her house drinking late at night, that defendant "passed out," that when he regained consciousness some two hours later he was sitting in his car in a wooded area, that blood of a single type was on defendant's clothes, the deceased, and in the car and also on a cinder block, apparently the murder weapon, found at the scene, and that defendant left the scene, hid his clothes and the seatcovers of the car, and washed the blood from the car, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, notwithstanding the absence of evidence of motive.

2. Criminal Law § 43—

Where photographs are identified as accurate representations of the scene of the crime by the witness, the photographs are competent in evidence for the purpose of enabling the witness to explain his testimony, and a general objection to the admission of the photographs in evidence cannot be sustained.

3. Criminal Law § 90—

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. Rule of Practice in the Supreme Court No. 21.

4. Criminal Law § 164—

Where the jury convicts the defendant of murder in the second degree, asserted error in submitting the question of defendant's guilt of murder in the first degree is rendered harmless.

APPEAL by defendant from *McKimmon, J.*, December 1960 Term, WAKE Superior Court.

Criminal prosecution upon a bill of indictment charging Gerald Thomas Casper with the capital felony of murder in the first degree in the killing of one Doris Vivian Powell. Upon arraignment, the defendant entered a plea of not guilty.

The State's evidence tended to show the following: In the late afternoon of May 2, 1960, the dead body of Doris Vivian Powell was found in a wooded area near a dirt road leading from Glascock Street to Lyons Park in the outskirts of Raleigh. The face and head of the deceased were horribly mangled and covered with blood. Nearby was a cinder block, also covered with blood.

On the night of May 1, the deceased, the defendant, and Ed Faircloth, a friend of the deceased, were together, riding around Raleigh in the defendant's automobile, from about 9:00 o'clock until about 2:30 when they returned to the home of the deceased. Faircloth and the

deceased got out of the car, started into the house, whereupon the deceased returned to the car, had a short conversation with the defendant, who then drove away. Faircloth and the deceased entered her house where he called a cab which appeared in about ten minutes and carried him to the bus station where he caught a bus to Winston-Salem.

During the police investigation the defendant stated he, according to prearrangement, drove back to the home of the deceased after Faircloth left, and that he and the deceased sat in the car where they continued drinking; that he "passed out" while he was there and does not remember leaving the vicinity of the deceased's home. Thereafter the next thing he remembered "was waking up" about 5:00 or 5:30 on the morning of May 2. "He stated that he looked around and saw blood on the dashboard . . . on the seat covers and blood on him." His first thought was that he had been in a fight. He looked in the rear view mirror to see if he had any wounds. At that time he saw a body a short distance in front of his vehicle; that he became scared, got back in the car and went home. He further stated he washed the blood from the dashboard, took the bloodstained seat covers from the car, concealed them, took off his bloody clothes and hid them under the bunk in the trailer where he lived.

The officers found the clothes, obtained blood samples from them, from the cinder block, and from the deceased's body. Analysis showed all the blood to have been of the same type.

The State offered in evidence photographs of the dead body, the cinder block and other blocks and building materials near the place where the body was found. A witness (the first to inspect the scene) testified the photographs fairly represented the conditions which he saw and described though he did not see the actual taking of the photographs. The defendant entered a general objection to their admission which the court overruled.

At the close of the State's evidence the defendant moved to dismiss. The court overruled the motion. The defendant rested and renewed his motion to dismiss, which was again overruled. The defendant requested the court to instruct the jury that in no event could it return a verdict of guilty of murder in the first degree. The court refused to charge as requested. The jury returned a verdict guilty of murder in the second degree. The court entered judgment that the defendant be confined in the State's prison for not less than 25 years nor more than 30 years. The defendant appealed, assigning errors.

T. W. Bruton, Attorney General, Harry W. McGalliard, Asst. Attorney General, for the State.

Blanchard and Farmer, for defendant, appellant.

HIGGINS, J. The defendant argues the court committed error in refusing to allow his motion to dismiss at the close of the evidence. He insists if he is not entitled to have his conviction reversed, he is entitled to a new trial (1) because of the erroneous admission of the photographs in evidence and (2) because of the court's failure to charge the jury that in no event could it return a verdict of guilty of murder in the first degree.

The evidence in the case fails to show any motive for the killing. Nevertheless, it does show by the defendant's admission that he and the deceased were in his vehicle outside her home in Raleigh about three o'clock in the morning. Both were drinking. He "passed out." He awoke in the vehicle about two hours later. His clothes and his vehicle were covered with blood. The body of the deceased was a few feet in front of his vehicle. He left the scene, went home, hid his clothes, washed the blood from the interior of the automobile, removed and concealed the bloodstained seat covers. The blood on his clothes, on what appeared to be the death weapon, and on the body of the deceased was of the same type.

The evidence does not disclose the distance between the home of the deceased in Raleigh and the place where her body was found on the outskirts. The evidence permits the inference the killing took place where the body was found because the cinder block apparently used as the weapon and other building materials were present at that place. There was no evidence that a cinder block was available as a weapon at the home of the deceased. At the same time, the blood in the vehicle may have been from a wound inflicted in the vehicle or outside, and the body carried in the vehicle, or the blood in the vehicle may have come from the defendant's bloody clothes.

While the case is not without its mysterious aspect, we think the evidence sufficient to require its submission to the jury under the applicable rules stated in: *State v. Parrish,* 251 N.C. 274, 111 S.E. 2d 314; *State v. Davis,* 246 N.C. 73, 97 S.E. 2d 444; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and other cases therein cited.

The photographs introduced were identified as accurate representations. They were offered and admitted over general objection. They were properly admissible for the limited purpose of enabling the witness the better to explain and the court and jury the better to understand and interpret his testimony. If the defendant had requested that their admission be so limited, failure of the court to do so would have been error. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. However, when a general objection is interposed and overruled it will not be considered reversible error if the evidence is competent for any purpose. Rules of Practice in the Supreme Court, Rule 21, 254 N.C. 803; *State v. Ham,*

224 N.C. 128, 29 S.E. 2d 449; *State v. Tuttle,* 207 N.C. 649, 178 S.E. 76; *State v. McGlammery,* 173 N.C. 748, 91 S.E. 371. The assignment of error based on the admission of the photographs, therefore, is not sustained.

Lastly, the defendant argues he should be granted a new trial for failure of the court to charge that in no event could he be convicted of murder in the first degree. The jury acquitted of the capital felony. Conviction of murder in the second degree rendered harmless any error with respect to a higher offense. *State v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218.

The evidence was sufficient to survive the motion for nonsuit. What it proved, or failed to prove, was for the jury. In the trial, therefore, in law there is

No error.

JOSEPH FREDERICK HORNE AND WIFE, DIXIE SMITH HORNE v. C. A. CLONINGER, JR.

(Filed 13 December, 1961.)

1. Fraud § 12—

Where the sale of property is tainted with fraud, the purchaser has his election to rescind the sale or keep the property and recover the difference between its actual value at the time of the purchase and its value as represented.

2. Vendor and Purchaser § 5; Cancellation and Rescission of Instruments § 5—

Where the vendor of a house and lot fraudulently fails to disclose that the dwelling was constructed over a ditch filled with refuse and trash, which had been grassed over and landscaped so as to conceal its condition, and as a result thereof the foundation settles and gives way, the purchasers, electing to sue for damages, are entitled to recover the difference in the actual value of the property at the time of the sale and the value of the house and lot had it been as impliedly represented, and the cost of repairs, either at the time of discovery or at the time of the trial, is not the test of actual damage.

APPEAL by defendant from *Pless, J.,* January 1961 Term, CATAWBA Superior Court.

The plaintiffs instituted this civil action to recover $7,100 actual, and $10,000 punitive damages on account of the defendant's alleged fraudulent concealment and failure to disclose the fact that a dwelling

house built by the defendant and sold to the plaintiffs had been constructed over a ditch filled with refuse, trash, and dirt, and grassed over and landscaped in such manner as to conceal from view and not discernible by inspection, the insecure foundation which settled and caused parts of it to give way.

The defendant denied any fraud or concealment. He alleged the plaintiffs had lived in the house as his tenants for ten months prior to the sale and that they had full knowledge of the construction; that they knew a crack had developed in the foundation; that the defendant reduced the asking price for the house and lot from $16,500 to $15,000 because of the defect.

The parties offered evidence tending to support their respective contentions. At the close of the evidence the court overruled the defendant's motion for nonsuit, holding that the evidence was sufficient to go to the jury on the issues of fraud and damages but insufficient to raise an issue of punitive damages. The jury answered the issue of fraud against the defendant and fixed the actual damages at $7,000. The presiding judge reduced the recovery to $6,000. From the judgment thereon, the defendant appealed.

Corne and Warlick, By Thomas W. Warlick for plaintiffs, appellees.
Richard A. Williams for defendant appellant.

HIGGINS, J. The court correctly held the evidence sufficient to go to the jury on the issues of fraud and damages (*Brooks v. Ervin Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454) but insufficient on punitive damages (*Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785). The charge on the issue of fraud was correct and in accord with the established authorities. With respect to damages, however, the court fell into error — induced in part, at least — by the emphasis the parties placed on the cost of moving the house from the sinking to a solid foundation.

On the issue of damages, the court charged: "That is, if you should find that they (plaintiffs) have used ordinary and reasonable diligence in attempting to see what this situation was . . . and find that it would now cost somewhere in the neighborhood of the amount asked for to fix it, then they would be entitled to recover that amount or some amount in that general vicinity . . . The result is . . . that you can return as your answer to this second issue, if you come to it, such amount from $1.00 on up to the amount sued for, $7,100, or any figure in between that you find represents the cost of repairing the property at a time when it was discovered by the plaintiffs, or in the exercise of

ordinary and reasonable diligence it should have been discovered by them."

The courts have been careful to define the rights of parties to a fraudulent transaction. The purchaser has the right at his election to rescind or to keep the property and recover the difference between its actual value and its value as represented. *Hutchins v. Davis*, 230 N.C. 67, 52 S.E. 2d 210. "The great weight of authority sustains the general rule that a person acquiring property by virtue of a commercial transaction, who has been defrauded by false representations . . . may recover as damages in a tort action the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representation had been true." 24 Am. Jur., Fraud and Deceit, § 227, p. 55. To like effect, *Hutchins v. Davis, surpra; Morrison v. Hartley*, 178 N.C. 618, 101 S.E. 375; *Lunn v. Shermer*, 93 N.C. 164; *Small v. Pool*, 30 N.C. 47.

The rights of the parties are determined as of the date of the transaction. The statute of limitations on plaintiffs' cause of action, however, begins to run from the time the fraud was discovered, or should have been discovered. *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 101 S.E. 2d 8.

The jury, having established the fraud, should have awarded as damages the difference between the actual value and the value if the house and lot had been as represented. Cost of repairs, either at discovery or at the time of the trial, is not the test of actual damages. For the error indicated, the judgment and verdict are set aside and the defendant is awarded a

New trial.

STATE v. WILLARD EUGENE HARVELL AND JOHN FRANKLIN COBLE.

(Filed 13 December, 1961.)

Criminal Law § 106—

An instruction to the effect that if the jury should find beyond a reasonable doubt from the evidence that one of defendants was guilty of acts constituting the crime, that the jury should convict him and also the other defendants, is prejudicial as to such other defendants.

APPEAL by defendants from *Gambill, J.*, at March 27, 1961, Term of GUILFORD-GREENSBORO Division.

Criminal prosecution upon three separate bills of indictment charging each defendant, Willard Eugene Harvell and John Franklin Coble, and a non-appealing defendant, Riggie William Gibson, with robbery with firearms.

Pleas: By each, Not Guilty.

And the record of defendants' statement of case on appeal indicates that the State's witness Gray had made the acquaintance of the three defendants, all young men, in a cafe on Elm Street in Greensboro, and that at the suggestion of Gray, the four of them proceeded to another cafe across the street and drank beer and played the juke box on money supplied by Gray. The four proceeded from the cafe in Gray's automobile to a small store on U. S. Highway 220 south of Greensboro, where Gibson, the non-appealing defendant, apparently either robbed or attempted to rob a grocery store. And the record shows there is some evidence that the two appealing defendants were either accessories or accomplices. (As to this there is no charge). Gibson and Gray had gone into the store. They emerged therefrom on the run to the automobile where Harvell and Coble were waiting. The four of them left in an automobile — Gray driving. He drove to a dirt road where a change of drivers took place, — Harvell taking the wheel. What else took place at this juncture was disputed. Gray testified that Gibson knocked him down and the other two defendants took his money — Coble using a knife. The defendants denied this, contending that at the most Gibson knocked or pushed Gray down calling him a vile name, and that he immediately helped him up.

The four persons then continued a drive over a route concerning which the testimony differs. At any rate, they stopped at one point at a cafe on a highway and all four partook of refreshments, Harvell a coca cola, and the others beer. After this they drove to a shopping center. There Harvell, Coble and Gibson parted company with Gray.

All three defendants were convicted of common law robbery, and sentenced. Willard Eugene Harvell and John Franklin Coble appealed therefrom to Supreme Court and assign error.

Attorney General Bruton, Assistant Attorney General G. Andrew Jones for the State.

E. L. Alston, Jr. for defendants appellants.

WINBORNE, C. J. The defendant appellants challenge, and the Court holds properly so, as prejudicial to them that portion of the charge to which Exception No. 11 is directed and on which Assignment 10 is based. There the court charged as follows:

"(M) 'that as to Riggie William Gibson, if you are satisfied from the evidence and beyond a reasonable doubt, the burden being on the State to so satisfy you that he, Riggie William Gibson, on the first day of March, 1961, robbed Louis Gray, the robbery being as defined to you by the court, that is he took money off of him or goods off of him, or that he was present and that he took them against his will and by force and by the use of a dangerous weapon off the person of Louis Gray, if you are satisfied of that from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged in the bill of indictment as to the defendant Riggie William Gibson, and likewise as to each of the other defendants.' (N) As shown by Exception No. 11."

The gravamen of the complaint of the appealing defendants as to this assignment is that the court said in effect that if the jury should find that Riggie William Gibson did certain acts, then it should find him guilty as charged in the bill of indictment and should find "likewise as to each of the other defendants." The point is well taken.

New trial.

JAMES WHITLEY v. CITY OF DURHAM.

(Filed 13 December, 1961.)

Municipal Corporations § 12—

The evidence in this case *is held* not to disclose contributory negligence as a matter of law on the part of a motorist in failing to anticipate that loose dirt, stones, and cinders around a manhole protruding some several inches above the surface of the street would give way and permit his car, when it was driven over the manhole, to drop on the manhole, throwing plaintiff against the door of the car, causing it to open, and plaintiff to fall to his injury.

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

This action was begun in the Civil County Court of Durham County on 22 December 1960 to recover for personal injuries sustained when defendant's motor vehicle, on the night of 26 September 1959, collided with the top of a manhole in Chautauqua, one of the public streets of Durham. Plaintiff alleged his injuries were proximately caused by defendant's negligent failure to keep said street in reasonable repair as required by G.S. 160-54. Damages in the sum of $515 were alleged.

Defendant denied the alleged negligence and as an additional defense pleaded contributory negligence.

Issues arising on the pleadings were answered as follows:

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

"ANSWER: Yes.

"2. If so, did the plaintiff, by his own negligence contribute to the damages sustained, as alleged in the Answer?

"ANSWER: No.

"3. In what amount, if any, is the plaintiff entitled to recover of the defendant?

"ANSWER: $200.00."

Thereupon judgment was entered in plaintiff's favor for $200 plus costs, including an attorney's fee of $150. Defendant excepted and appealed to the Superior Court as authorized by G.S. 7-378. It assigned as error the refusal of the trial court to allow its motion of nonsuit. Judge Williams held the evidence established contributory negligence. He thereupon reversed the trial court and dismissed the action. From that judgment plaintiff appealed to this Court.

Lisbon C. Berry, Jr. and Daniel K. Edwards for plaintiff appellant.
Claude V. Jones for defendant appellee.

PER CURIAM. On oral argument counsel for defendant properly conceded the evidence was sufficient to support the answers to the first and third issues, and if plaintiff was entitled to recover, the attorney's fee fixed by the court was within the statutory authority of that court. G.S. 6-21.1.

The sole question for decision therefore is: Does the evidence establish as a matter of law plaintiff's negligence proximately contributing to his injury? Our examination leads to the conclusion that the answer is no.

The evidence permits these factual inferences: The collision occurred at night. Plaintiff was traveling 15 to 20 m.p.h. His lights were on and in good condition. Chautauqua connects Cecil and Nelson Streets. These intersections were lighted, but there were no lights between Cecil and Nelson. The manhole was midway between the streets and in the center of Chautauqua. Chautauqua was a dirt street with cinders and stone scattered on the surface. There was a ditch on each side of the street. The street had been graded with sharp declines to the ditches. Vehicles traveling in the direction plaintiff was going had to pass over the manhole to stay out of the ditch. The manhole protruded two or three inches above the surface of the ground. The center of Chautauqua Street was raised all the way from Cecil to Nel-

son. The car tracks on each side were lower than the center of the street. There was loose dirt and rock around the manhole. The under portion of the automobile struck the elevated part of the manhole. Plaintiff was thrown against the door of his car, causing it to open. He fell or was thrown out and knocked unconscious.

The description given would not, in our opinion, cause a prudent motorist to anticipate the loose stone, dirt, and cinders around the manhole would be pushed aside by the automobile, permitting it to drop on the manhole. Whether the injury was proximately caused by plaintiff's negligence was, as the trial court held, a question to be determined by the court sitting as a jury and not by the court as a matter of law.

The judgment of the Superior Court which sustained defendant's motion to nonsuit and for that reason dismissed the action is

Reversed.

KENNETH WAYNE LONG, BY HIS NEXT FRIEND, VONNIE LONG *v.* PAULINE GASKINS.

(Filed 13 December, 1961.)

APPEAL by plaintiff from *McKinnon, J.*, May Term 1961 of BRUNSWICK.

This is a civil action to recover for personal injuries sustained by the plaintiff Kenneth Wayne Long when struck by an automobile operated by the defendant on the State highway leading from Ash to Longwood in Brunswick County. This is a paved highway, 18 feet wide. The plaintiff, six years of age, and his sister, Irma Long, ten years of age, were walking in a southerly direction on the right shoulder of the highway going towards their home, about 2:00 p.m. on 28 February 1960. Another sister of plaintiff, Marcia Long, nine years of age, and a brother, Clint Long, four years of age, were walking along the left shoulder of the highway on the opposite side of the road at the above time.

It was stipulated that there was a path on the right shoulder of the road about 18 inches from the hard surface and that the shoulder was six feet wide. Irma Long testified that she was walking along this path and that Kenneth was behind her "in this path which was pretty wide."

An automobile approached from the direction in which the children were walking. The defendant, driving a 1951 Studebaker automobile, traveling in the same direction in which the four children were walking, saw the children approximately 200 yards before she reached the point where they were walking on the shoulder of the highway. The evidence tends to show that the defendant met and passed the automobile proceeding from the opposite direction; that some distance before overtaking the plaintiff and the other children the defendant was traveling about 40 to 45 miles per hour; that when she saw the children she applied her brakes and slowed down to 20 or 25 miles an hour and blew her horn; that when the defendant came to within 20 feet of plaintiff, he darted out in front of her; that she pulled her car to the left and was about the center of the highway when the plaintiff was struck. The right parking light was broken by the contact with the child. The defendant stopped her car on the right side of the highway about 25 or 30 feet from where the plaintiff was lying. After the accident the child was lying about two or three feet from the edge of the pavement in the right lane of the highway. Irma and Marcia Long testified that if the defendant blew her horn they did not hear it.

The case was submitted to the jury on appropriate issues. The issue as to the defendant's negligence was answered in her favor. The plaintiff appeals, assigning error.

Herring, Walton & Parker for plaintiff appellant.
Edward L. Williamson for defendant appellee.

PER CURIAM. A careful examination of the plaintiff's exceptions and assignments of error leads us to the conclusion that the plaintiff has had a fair trial, free from any error sufficiently prejudicial to warrant a new trial.

The verdict of the jury and the judgment entered below will be upheld.

No error.

HARRIS AND HARRIS CONSTRUCTION COMPANY, INC., PLAINTIFF, v. CRAIN AND DENBO, INC., AND THE TOWN OF MOUNT OLIVE AND AETNA INSURANCE COMPANY, ADDITIONAL DEFENDANT.

(Filed 12 January, 1962.)

1. Appeal and Error § 19—

Where appellant notes an exception but makes no assignment of error based thereon, the exception is deemed abandoned.

2. Trial § 56—

Where voluminous evidence is introduced in a trial by the court under agreement of the parties, the fact that some of the evidence admitted is of questionable relevancy and some incompetent as hearsay does not require a new trial, since it will be presumed that the court disregarded the incompetent or irrelevant testimony in making its decision.

3. Appeal and Error § 49—

The findings of fact of the trial court are conclusive on appeal if supported by competent evidence.

4. Contracts § 16—

Conditions precedent are not favored by the law, and whether a condition is precedent and must be performed before the contract comes into existence, or whether it is a condition concurrent or subsequent, depends upon the intention of the parties, which is to be determined in the light of the circumstances of the case, the nature of the contract, and the relation of the parties, together with other evidence competent on the question of intent.

5. Contracts § 12—

The interpretation given the agreement by the parties themselves prior to controversy will be given weight in construing the instrument.

6. Contracts § 16— Requirement that subcontractor deposit monies in joint account held not condition precedent.

The construction subcontract in suit provided that the subcontractor should deposit a specified sum in a bank in a joint account and that payments received for work done and payments made in the prosecution of the work should be handled through this account. The contract also provided that the contractor might take over the project if the subcontractor violated any material provisions of the agreement. The subcontractor, with the knowledge of the contractor, began the work without making the deposit. *Held:* The validity of the subcontract did not depend upon the subcontractor's ability, financial or otherwise, to begin the work or prosecute it to completion, the subcontractor's inability in any of these respects being merely cause for the taking over of the project by the contractor, and the provision for the deposit was not a condition precedent, and thus the failure of the subcontractor to make the deposit does not entitle the subcontractor to treat the contract as inoperative and it is not entitled to recover upon *quantum meruit* for work and labor expended by it in partial performance of the construction project.

7. Contracts § 23; Waiver § 2—

A party to a contract may excuse or waive nonperformance of a condition by the other party to the agreement, but waiver is a question of intent and does not obtain unless intended by the one party and so understood by the other, or one party has so acted as to mislead the other, and the question of intent to excuse nonperformance is ordinarily a question of fact and may rarely be inferred as a matter of law.

8. Same; Contracts § 21— Evidence held to support finding that breach of contract was not waived and that such breach entitled the contractor to take over the project under the terms of the agreement.

The construction contract in suit provided that the subcontractor should make a deposit in a joint account in a specified sum for the purpose of assuring the subcontractor's financial ability to perform the work. The evidence disclosed that the contractor permitted the subcontractor to unload materials at the site with the understanding that the required deposit was not waived and that the contractor repeatedly demanded compliance with the requirement of a deposit until the subcontractor categorically refused to make the deposit about a month after the work had been started. *Held:* The evidence supports the court's finding that the requirement of the joint deposit was not waived, and further that such provision was a material condition of the contract entitling the contractor to take over the project under the provisions of the agreement that the contractor might do so upon a substantial violation of any provision of the subcontract.

9. Principal and Surety §§ 1, 9—

The obligee of a surety bond is not ordinarily under duty to disclose to the surety facts relating to the character of the risk unless the obligee knows a fact of vital importance to the risk and knows that the surety will not be able to discover such fact in the exercise of due diligence, so that the failure to disclose such fact amounts to a contrary representation to the surety.

10. Same— Evidence held to support finding that there was no fraudulent concealment from the surety of fact materially affecting the risk.

One contractor agreed to bid on a construction project and then subcontract the work to another contractor for a stipulated sum. The evidence disclosed that the surety for the subcontractor would not furnish bond if the contractor took such a large profit, and suggested a profit to the contractor in a lesser amount, which provision was written into the subcontract. Thereafter, without knowledge of the surety, a letter was written suggesting a larger profit to the contractor than that specified in the subcontract. The evidence further tended to show that this letter created a suspicion on the part of the contractor that something was wrong, but the evidence did not disclose that if the contractor made further investigation it learned any facts not already known to the surety or which could not have been discovered by a reasonable investigation by the surety, and further, that the contractor did not agree to permit the letter to modify the subcontract, and so advised the subcontractor. *Held:* The burden was upon the surety to prove a fraudulent concealment of a fact materially affecting the risk, and since the secret modification

did not become effective, the risk to the surety was in no way increased thereby, and therefore, the evidence supports the court's finding that there was no fraudulent concealment of material facts affecting the risk entitling the surety to nonsuit in the contractor's action to recover damages resulting from the subcontractor's breach of the agreement.

11. Damages § 8—

An injured party is under duty to minimize the resulting damages if he can do so with reasonable exertion or trifling expense, but the burden of proving failure of the injured party to take reasonable steps to minimize the loss is on the party asserting such failure, and nonsuit on the ground that the entire loss could and should have been avoided may not be allowed on movant's evidence unless such evidence establishes such failure so clearly that no other reasonable inference may be drawn therefrom.

12. Same— Evidence held not to show arbitrary refusal of injured party to execute substitute contract which would have avoided loss.

The contractor took over the performance of the work upon breach of condition by the subcontractor, and sought to recover against the subcontractor and the surety on the subcontractor's performance bond for the resulting loss. The surety introduced evidence that after the breach, a third contractor proposed to take over the project so as to avoid all loss. The evidence further tended to show that the contractee made investigation and advised the contractor by letter that it was not approving subletting the work to the third contractor because it found that such third contractor had no experience record in construction work sufficient to justify approving subletting to the third contractor. *Held:* The contractor was liable to the contractee for the performance of the work, and therefore the surety's evidence does not show as the sole reasonable inference that the refusal of the contractor to sublet the work to the third contractor was arbitrary and unreasonable, and the surety's motion to nonsuit was properly denied.

13. Contracts § 29—

Where, as a result of breach of contract by the subcontractor, the contractor takes over the performance of the work, the contractor is entitled to recover the sums expended by it in the performance of the work and the profit it would have realized except for the breach by the subcontractor.

14. Same—

Where the contractor takes over the project upon breach of the subcontract by the subcontractor, and sues for the resulting damages, the allowance of all on-the-job overhead of the contractor as an item of damage precludes the allowance, in addition, of a percentage of the contractor's general overhead expenses, it being provided in the subcontract that the general overhead expenses of the contractor should be paid from its profits, and loss of profits being recovered by the contractor as a separate item.

15. Damages § 2; Contracts § 29—

While interest should not ordinarily be allowed upon a claim for un-

liquidated damages, the tendency is to allow interest on the amount ascertained as damages for breach of contract, and it is at least within the discretion of the trial court in a trial by the court under an agreement of the parties to allow interest on the amount of damages ascertained by it from the date of demand by the injured party. G.S. 24-5.

APPEAL by plaintiff, Harris and Harris Construction Company, Inc., and additional defendant, Aetna Insurance Company, from *Mintz, J.*, May 15, 1961 Civil Term of WAYNE.

Harris and Harris Construction Company, Inc. (hereinafter referred to as "Harris"), and Crain and Denbo, Inc. (hereinafter called "Crain"), are corporations organized under the laws of this State and have their principal offices in Durham, North Carolina. The Town of Mount Olive is a municipal corporation and is located in Wayne County, North Carolina. Aetna Insurance Company (hereinafter called "Aetna") is a Connecticut corporation and is duly licensed to do business in North Carolina.

On 26 June 1956, pursuant to public notice, Mount Olive received bids for construction of water and sewer improvements. Crain submitted a bid and was awarded the contract. Harris did not have a state contractor's license and could not bid, but had requested that Crain bid. Crain is a licensed contractor. The proposal was prepared by Harris, revised by Crain, and submitted. It was the understanding that Harris was to do the work as subcontractor. On 6 July 1956 the Town and Crain executed the prime contract for construction of the improvements. On the same date Harris and Crain executed a subcontract. Among other things the subcontract required that Harris furnish a performance and payment bond and, before beginning work, make a deposit of $30,000 in a designated bank, the deposit to be subject to joint control. On 20 July 1956 Aetna executed a performance and payment bond as surety for Harris. Harris ordered materials and, with permission of Crain, unloaded and placed them on the job, and made other preparations for construction. Harris did not make the $30,000 deposit, but began laying water lines on August 17. When Crain learned that the water lines were being laid, it ordered Harris to stop work, advised that the subcontract was in default for failure to make the required deposit, and stated that it (Crain) was taking over the construction. Harris worked on August 17th and 18th, but did not return to work on the 20th, Monday. Crain began construction work on August 22nd. Harris resumed work on August 27th, but Crain demanded of the Town engineers that Harris be removed from the job. Harris' employees were arrested by a police officer for trespassing. Harris did not return to the job after August 27th. Crain finished the construction and it was accepted by the Town on 13 December 1957.

The cost incurred by Crain in constructing the improvements was greatly in excess of the subcontract amount. On 31 December 1957 Crain demanded of Aetna that it pay the deficiency pursuant to its performance and payment bond.

Other pertinent facts are set out in the opinion.

Harris instituted this action against Crain for damages for breach of the subcontract, and, on motion of Harris, the Town of Mount Olive was made a party defendant. Harris alleged that the Town conspired with Crain to prevent Harris from performing the subcontract. Crain answered, denied that it had breached the subcontract, and set up counterclaim for the excess of the cost of construction above the contract amount. On motion of Crain, Aetna was made an additional defendant and required to answer upon its obligation in the performance and payment bond.

All parties waived jury trial. The case was heard by Mintz, J., sitting as judge and jury. Plaintiff, Harris, offered evidence and rested. The motion of the Town of Mount Olive for nonsuit was allowed. Crain and Aetna offered evidence. The court found facts, made conclusions of law, and entered judgment. It was adjudged that plaintiff, Harris, recover nothing, and that Crain have and recover of Harris and Aetna, jointly and severally, the sum of $257,432.34 together with interest thereon at 6% per annum from 31 December 1957 until paid.

Plaintiff, Harris, and additional defendant, Aetna, appealed and assigned errors.

J. L. Zimmerman and Williams & Zimmerman for plaintiff appellant.

Fletcher, Lake and Boyce for Aetna Insurance Company, appellant.

Brooks and Brooks; Jones & Vann; and Taylor, Allen and Warren for defendant Crain and Denbo, Inc., appellee.

MOORE, J. Appeals, involving procedural questions, in cases relating to the subject matter of this action have been heard by this Court on two previous occasions. *Crain and Denbo, Inc. v. Construction Co.*, 250 N.C. 106, 108 S.E. 2d 122 (1959); *Crain and Denbo, Inc., v. Construction Co.*, 252 N.C. 836, 114 S.E. 2d 809 (1960). The instant case was instituted in Durham County. On motion the court in its discretion, for convenience of witnesses, removed it to Wayne County for trial.

At the close of plaintiff's evidence the court allowed the motion of the Town of Mount Olive for nonsuit. Plaintiff noted an exception, but makes no assignment of error based thereon. The exception is deemed

abandoned. *Rose v. Bank,* 217 N.C. 600, 9 S.E. 2d 2. The Town is not involved on this appeal.

Plaintiff's assignments of error 1 to 5 bring forward numerous exceptions to the admission and exclusion of evidence. Each has been carefully considered. We find in them nothing sufficiently prejudicial to warrant a new trial. True, some of the evidence admitted is of questionable relevancy, and some is of the hearsay variety. But "in a hearing by the court under agreement of the parties, the rules of evidence are not so strictly enforced as in a trial by jury, since it will be presumed that incompetent evidence was disregarded by the court in making its decision." 4 Strong: N. C. Index, Trial, S. 56, p. 363. The evidence excluded is either immaterial or is irrelevant to plaintiff's theory of the case.

Plaintiff's assignments of error 6 to 30 are addressed to findings of fact. It is contended in some instances that the findings are not supported by the pleadings, and in others not supported by competent evidence. The arguments in plaintiff's brief in support of these assignments are summary, general and indefinite. It is doubtful that they are in compliance with the rules of this Court. Rule 28, Rules of Practice in the Supreme Court. To consider and discuss these assignments severally the Court would be required to make repeated voyages of discovery through the record and list and catalog the evidence bearing upon each questioned finding of fact. The printed record contains 764 pages. In addition, there are voluminous exhibits which are not included in the bound record. The entire record has been carefully read and considered. In our opinion the findings of fact deal with the material issues raised by the pleadings. Where a jury trial has been waived, the findings of fact of the trial judge are as effective as the verdict of a jury, and are conclusive on appeal, if there is competent evidence to support such findings. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114. It is our opinion that the findings of fact questioned by plaintiff are supported by competent evidence, except as hereinafter stated.

Plaintiff's action was laid upon the theory that the subcontract was breached by Crain, the work was wrongfully taken over by Crain, plaintiff was dismissed and prevented from performing his obligations under the subcontract by Crain's injurious conduct, and plaintiff was damaged by reason of the breach on Crain's part. Plaintiff insisted at all times that it was entitled to perform the work. Yet, at the close of plaintiff's evidence, the court allowed its motion to be permitted to amend the complaint so as to allege a cause for relief upon *quantum meruit* — $32,769.55 for labor performed and materials furnished.

Pursuing the *quantum meruit* theory, plaintiff contends that the

provision of the subcontract requiring it to deposit $30,000 in a joint account was a condition precedent to the taking effect of the subcontract, that the deposit was never made and therefore the subcontract never became a binding agreement, and that plaintiff is entitled to recover the value of labor performed and materials furnished by it in prosecution of the work.

The subcontract stipulates the respective rights, duties and obligations of Harris and Crain with respect to the work, fixes their compensation, and in clause 14 provides:

> "(a) Before the Sub-Contractor shall begin his work, a Special Account shall be opened in the Durham Industrial Bank in the name of HARRIS AND HARRIS, MOUNT OLIVE ACCOUNT. The Sub-Contractor agrees to deposit in this account the sum of THIRTY THOUSAND ($30,000.00) Dollars with which to finance his operations, and no part of this said $30,000.00 is to be withdrawn from the account until this account is disbursed as outlined hereinafter and after final payment is received from the Town of Mount Olive, N. C., by the Contractor at the completion and acceptance of the work.
>
> "(b) Disbursements from this Special Account shall be made only by checks drawn against it for the sole purpose of paying for the items listed in Clause 2 as direct costs of the work. Checks shall be signed by Mr. W. A. Harris for the Sub-Contractor and countersigned by H. S. Crain or E. M. Denbo for the Contractor.
>
> . . .
>
> "(c) Applicable funds derived from the performance of the work will be deposited in the Special Account by the Contractor as set forth in Clause 15(c) hereinafter.
>
> "(d) If, at any time, the funds in the said Special Account shall be insufficient to pay the sum total of any payrolls or other bills then owing for items of expense referred to in Clause 2, then it shall be the obligation of the Sub-Contractor to promptly deposit such additional funds as may be required to pay all such bills, payroll or other expenses then owing. . . ."

The question then is whether making the deposit was a condition precedent, a condition to be performed before the agreement of the parties could become a binding contract.

The trial court concluded as a matter of law that "the making of a deposit of $30,000.00 by Harris and Harris Construction Company, Inc., as required by clause 14(a) of the subcontract . . . was not a condition precedent to the taking effect of a valid and binding subcontract between the parties."

". . . (A) contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations . . . In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement." *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 493, 196 S.E. 848. "Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. . . ." 3 Williston on Contracts (Rev. Ed.), s. 665, p. 1909. "Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties." *Wade v. Lutterloh*, 196 N.C. 116, 120, 144 S.E. 694 (citing Page on the Law of Contracts, Vol. 5, 2nd Ed., s. 2948).

The parties by their acts and conduct showed that they considered the subcontract effective and binding long before Harris defaulted in making the deposit. The time set by the town engineers for beginning construction was August 1st. Harris, with approval of Crain, ordered materials for the project immediately after the letting on June 26th. It continued to order materials after the subcontract was executed on July 6th. It unloaded the materials and placed them on the job, procured a storage lot, rented an office, and made other preparations to begin construction. On July 20th Harris furnished a performance and payment bond with surety, as required by the subcontract. There was no definite refusal to make the deposit until about the middle of August. In its pleadings Harris alleged with particularity the existence of the subcontract and the breach thereof by Crain. It at no time before trial contended that the subcontract was not binding. Crain has consistently maintained that the subcontract is effective. Aetna regarded the subcontract as binding, and when Crain declared Harris to be in default and took over the work Aetna proposed substitute subcontractors. ". . . (T)he *ante litem motam* practical interpretation of the parties is a safe guide in the interpretation of contracts." *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906. "Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise. . . ." Restatement of the Law, Contracts, s. 261.

Crain submitted the bid and executed the prime contract at the solicitation of Harris. When Harris and Crain thereafter signed the subcontract, the positive duty was immediately cast upon Harris or

Crain, one or the other, to construct or cause to be constructed the water and sewer improvements in any event. The performance of the duty, and the right to receive compensation therefor from the Town, on the part of Harris or Crain, one or the other, did not depend on a deposit being made by Harris. By the terms of the subcontract Crain was authorized to take the prosecution of the work out of the hands of Harris if Harris defaulted in certain specified respects or was "guilty of a substantial violation of any provision (of the) . . . subcontract." Under the subcontract Harris might default before beginning work or at any time during its prosecution. The requirement that Harris make the deposit was for the purpose of assuring Crain that Harris had financial ability to make the improvements which were to cost the Town approximately a half million dollars. The provision for the deposit and joint account was only a part of the contract, albeit an important part. If Crain took over the work pursuant to the provisions of the subcontract and the cost to Crain was greater than the contract amount, then Harris or his surety was obligated to pay Crain the difference. The fact that no duty of performance on either side can arise until the happening of a condition does not necessarily make the validity of the contract depend upon it happening. 3 Williston on Contracts, s. 666, p. 1912.

In our opinion the deposit requirement was not a condition precedent to the taking effect of the subcontract and Harris' liability thereunder. ". . . (T)he provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction." *Larson v. Thoresen*, 254 P. 2d 656 (Cal. 1953). The clause in question was merely a condition precedent to Harris' right to begin work, and the validity of the subcontract did not depend upon his ability, financial or otherwise, to begin the work or to prosecute it to completion.

Plaintiff further contends that, if the subcontract was valid and binding, the provision thereof requiring it to deposit $30,000 in a joint account before beginning work was waived by Crain when Crain consented to and approved the ordering of materials, placing them on the job, procuring a storage site, renting an office and making other preparations for laying water and sewer lines. In short, plaintiff says that work had begun with the consent of Crain, the deposit requirement was thereby waived by Crain, and Crain's taking over of the work was wrongful and in violation of the subcontract.

It is well established that a written contract may be waived, and the provisions in a contract may be waived. A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A party may excuse performance expressly or by

conduct which naturally and justly leads the other party to believe that performance is dispensed with. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other. It is a question of intent, which may be inferred from a party's conduct. Intent is an operation of the mind and should be proven and found as a fact and is rarely to be inferred as a matter of law. *Manufacturing Co. v. Lefkowitz,* 204 N.C. 449, 168 S.E. 517, and authorities there cited.

The trial court found as a fact that neither Crain nor Harris "waived or intended to waive the requirement of the sub-contract agreement . . . that the sum of $30,000.00 was to be deposited in a Special Account before the sub-contractor should begin work. . . ." (Finding of Fact 11).

Crain consented and agreed that Harris might order and unload materials. There was evidence on the part of Crain that when Harris requested permission to unload pipe and other materials consent was given with the distinct understanding that the required deposit was not waived and no pipe was to be laid until the deposit was made. There was also evidence that Crain repeatedly demanded, verbally and by letter, compliance with the deposit requirement during the period from the signing of the subcontract to the middle of August when Harris categorically refused to make the deposit. The finding of fact by the court is supported by competent evidence and will not be disturbed.

Plaintiff further insists that if the failure to make the deposit was a breach of the subcontract, "it is not a material or substantial breach for which rescission is permitted." Crain does not seek to rescind the subcontract; it seeks damages for the breach. *Childress v. Trading Post,* 247 N.C. 150, 100 S.E. 2d 391. The court concluded as a matter of law that the failure of Harris to make the deposit justified Crain "in declaring the sub-contract in default and in taking over the performance of the work." This is in accord with the express agreement and understanding of the parties. The subcontract authorizes Crain to take over the work if Harris is "guilty of a substantial violation of any provision (of the) . . . sub-contract." The violation was not only substantial but complete.

We agree with the finding of the court below that Harris "breached its subcontract . . . and . . . is not entitled to recover against Crain and Denbo, Inc."

Aetna assigns as error the overruling of its motion for nonsuit. Aetna contends that the motion should have been allowed on either of two grounds: (1) That Crain and Harris made an agreement which increased the surety's risk and failed to disclose this agreement to

Aetna, or at the very least, Crain had knowledge of facts increasing the risk, which facts were not known to Aetna and were not disclosed to it by Crain; (2) that any loss sustained by Crain is due to its failure to take reasonable steps to avoid loss after it took over the work from Harris.

(1). On 26 June 1956, the day Crain submitted its bid, Harris delivered a letter to Crain agreeing to subcontract the project for a sum $80,000 less than the award, and thereby to allow Crain a profit of $80,000. Harris had previously applied to Aetna for performance bond, and Aetna had an agent present when the bids were opened. The agent learned that the letter had been given, stated to Crain and Harris that Aetna would not furnish bond on this basis, and suggested a profit to Crain of 4% of the award. The subcontract which was executed on July 6th incorporated the 4% suggestion. On July 7th a letter was written on Crain's typewriter and signed by Harris, stating that Harris would pay Crain a profit of $72,500, less 4% of the award. A copy of the subcontract was delivered to Aetna, but it knew nothing of the letter of July 7th until after the commencement of litigation. The bond was executed by Aetna on July 20th. Harris offered evidence that an officer of Crain dictated the letter and it was typed by a stenographer employed by Crain. Crain's evidence tends to show that Harris had at times used Crain's facilities for writing letters, this letter was not dictated by anyone connected with Crain, it was found at Crain's office by one of its officials, Crain's officials conferred and came to the conclusion something was wrong and thought that a further investigation should be made immediately as to Harris' ability to perform the contract, Crain conferred with its attorney and on the advice received filed the letter and advised Harris by telephone that the letter was not accepted and Crain would not agree to it, no rejection was noted on the face of the letter and it was not called to the attention of Aetna. Aetna knew that Harris was not licensed, had written bonds for Harris on prior occasions, made an investigation on this occasion but did not request any information from Crain.

"If the creditor 'knows or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risk, of which he has knowledge, and he has an opportunity before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterwards avoid it.'" 4 Williston on Contracts, Rev. Ed., s. 1249, p. 3577. "It was at one time asserted . . . that all the information in obligee's power must be given to enable the promisor to estimate the character of the risk he

is invited to undertake. This view, however, finds no support today. 'A surety is in general a friend of the principal debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all of the information which he requires.' This is the rule applicable unless there is some fact, which the creditor knows the surety probably will not discover, of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a contrary representation to the surety." *ibid,* pp. 3575-6. "The concealment must in fact or in law be fraudulent." 50 Am. Jur., Suretyship, s. 164, p. 1012. "There is nothing in the mere nature of the contract of suretyship itself which requires the obligee to disclose to the proposed surety all the material facts affecting the risk. There must be a duty on the part of the obligee to make the disclosure. . . ." *ibid,* s. 165, p. 1012.

Aetna alleged that Harris and Crain, with intent to deceive and defraud Aetna and thereby induce it to execute the bond, as surety, concealed the letter in question from Aetna, and falsely represented to Aetna that the subcontract was the entire agreement. This is an affirmative defense and the burden is upon Aetna to sustain the allegation unless Crain by its own evidence establishes the defense so that the only reasonable inference that can be drawn from such evidence is that Crain was guilty of fraudulent concealment, affecting the surety's risk. *Slaughter v. Insurance Co.,* 250 N.C. 265, 108 S.E. 2d 438. The evidence in the light most favorable to Crain is that Crain did not agree to permit the letter to modify the subcontract in any way and so advised Harris. In this view the alleged secret modification did not become effective and the risk to the surety was in no way increased. It is true that the letter created a suspicion on the part of Crain that something was wrong. If Crain made any further investigation of Harris' ability to perform the subcontract agreement, the evidence does not disclose that Crain learned any facts not already known to Aetna or which Aetna could not have discovered by a reasonable investigation of its own. Aetna was not entitled to a nonsuit on this ground. The court found as a fact that there was no secret, supplemental agreement, and no fraudulent concealment of material facts affecting the risk (Finding of Fact 18). This finding is based on competent evidence and is conclusive.

(2). "A party injured by the breach of contract by the other party thereto is required to protect himself from loss if he can do so with reasonable exertion or trifling expense, and ordinarily will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." 2 Strong: N. C. Index,

Damages, s. 8, p. 8; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277.

On 15 September 1956, about three weeks after Crain had taken over the Mount Olive project, Fields and Associates, consisting of W. G. Fields and wife and F. M. Carlisle, offered in writing to complete the project on the same terms as those contained in the Harris subcontract, and to begin work two days later. The offer was to remain open for nine days. Attached to the offer was a list of equipment valued at $65,940, a list of assets of Mr. and Mrs. Fields showing net worth of approximately $300,000, and a commitment for a loan of $50,000. Aetna offered to make substitute bond for Fields and Associates. Crain submitted the proposal to the project engineer, employed by the Town. Crain did not recommend or request either the approval or rejection of the proposal. The prime contract required Crain, the contractor, to submit in writing the names of proposed subcontractors to the project engineer, and prohibited the employment of "any that the Engineer may object to as incompetent or unfit." The project engineer in a letter to Crain on 21 September 1956 stated: "After carefully checking the background or construction experience of all of the principals involved in this proposed subcontract, we find no experience record in construction work of this type where we as Engineers for the Town of Mount Olive could justify approving them on a project of anywhere near this size. . . .(W)e are not approving your subletting of this work to (Fields and Associates). . . ." Crain then declined the offer. Aetna contends that the project engineer's statement is not a finding of incompetency or unfitness, that the failure and refusal of Crain and the project engineer to approve and accept the offer was arbitrary, and that Fields and Associates had sufficient assets to have saved Crain and Aetna from loss had the offer been accepted.

Under the prime contract Crain was responsible to the Town for all acts and omissions of his subcontractors and of all persons either directly or indirectly employed by it. The burden of showing arbitrariness is upon Aetna. "Where the rule as to the duty to minimize damages applies, the party who is at fault has the burden of showing matters in mitigation." 2 Strong: N. C. Index, Damages, s. 8, p. 8; *Bank v. Bloomfield,* 246 N.C. 492, 501, 98 S.E. 2d 865. As to this, Aetna stands in the shoes of Harris. If from the evidence of Crain arbitrary and unreasonable conduct appears so clearly that no other reasonable inference may be drawn and the defense is thus established, the motion for nonsuit should have been allowed. But if contrary inferences are permissible, it was a question for the jury (judge in this case).

Crain's evidence tends to show that the project engineer contacted

the city manager of Chapel Hill, N. C. (home of Fields and Associates), various contractors, materialmen, and others. He was advised that the man proposed for foreman had recently been dismissed from a job for drinking, that W. G. Fields had retired from business, and that Fields' son had some small equipment and had been doing small jobs. Carlisle, one of the associates, had been working on the Mount Olive job as resident engineer and an employee of the project engineer; he was competent for such duties as had been assigned to him but had had no experience in contracting and general project management; he had had some former connection with Harris. Fields and Associates was not a going concern and had no organization. Crain advised Aetna that it was willing to accept a qualified substitute contractor if approved by the project engineer, but no other substitutes were proposed.

This evidence tends to show reasonable investigation and decision on the part of the project engineer. His letter to Crain is in effect a finding of unfitness of Fields and Associates. There is no evidence that Crain exerted any influence on the project engineer to withhold approval. There was a question of fact to be determined. The court found as a fact "that the action of the Engineer in making such investigation was reasonable and made in good faith and was not arbitrary or capricious" (from Finding of Fact 19). This concludes the matter.

The court did not err in denying Aetna's motion for nonsuit.

Because of unusually rainy weather, soil conditions and the fact that defects in the work done by Harris had to be corrected, the cost incurred by Crain in completing the project was greatly in excess of the contract amount. Among the items of expense claimed by Crain and allowed by the court was one of $36,657.82 for "overhead." Aetna contends that overhead is not an allowable expense in this case as a matter of law, and that there is no evidence in the record to sustain a finding of overhead expense attributable to a breach of contract on the part of Harris.

In a suit for damages arising out of a breach of contract the party injured by the breach is entitled to "full compensation for the loss and to be placed as near as may be in the position which he would have occupied had the contract not been breached." *Troitino v. Goodman, supra.* Crain is entitled to recover his loss, or the value of his contract, consisting of two distinct items: (1) what has been expended towards performance (less the value of materials on hand); and (2) the profit which would have been realized had there been no breach. *Machine Co. v. Tobacco Co.,* 141 N.C. 284, 295, 53 S.E. 885.

We have not, after careful search, found a North Carolina decision bearing directly upon the question as to whether or not general over-

head expenses, such as those claimed by Crain, are legitimate charges as part of the cost of performance. Decisions from other jurisdictions have been examined. In a suit upon a building contract, providing for compensation on a cost plus basis, a claim for general overhead expenses, including salaries of executive or administrative officials, interest charges, depreciation, taxes and general office expenses, was not allowed. *Lytle, Campbell & Co. v. Somers, Fitler & Todd Co.*, 120 A. 409 (Pa. 1923). In suits by contractors for damages resulting from work interruptions and delays caused by conduct of owners, overhead expenses were allowed, but these expenses consisted of on-the-job overhead such as supervision of employees, timekeepers, maintenance of euipment, office and telephone, car fares and incidental expenses. *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 F. 2d 823 (6th Cir. 1941); *M. H. McCloskey, Jr., Inc. v. U. S.*, 66 Ct. Cls. 105 (1928). Where owners wrongfully terminated building contracts and dismissed the contractors, in actions upon *quantum meruit* the contractors were allowed overhead expenses, but whether these expenses were confined to on-the-job overhead does not clearly appear. *Snyder v. School District of the City of Reading*, 166 A. 875 (Pa. 1933); *Dravo Contracting Co. v. James Rees & Sons Co.*, 140 A. 148 (Pa. 1927). In a case in which the contractor failed to perform any part of the contract and the owner completed the work and sued the contractor for the cost of the work in excess of the contract amount, overhead expenses were allowed, and the court said: "It is now well recognized that contractors have an overhead expense. This varies with the size and character of the contract and the amount involved. It is computable by experience." *Elias v. Wright*, 276 F. 908 (2d Cir. 1921). In a case involving contractor and subcontractor, the subcontractor declared the contract breached, quit work, and sued the contractor for the value of services performed; the contractor counterclaimed against the subcontractor and surety; the contractor's recovery included a 10% charge for overhead. On appeal the overhead was allowed, but no profit. *Sofarelli Bros. v. Elgin*, 129 F. 2d 785 (4th Cir. 1942).

In an action for damages for breach of a construction contract "The profits and losses must be determined according to the circumstances of the case and the subject matter of the contract." *Grand Trunk Western R. Co. v. H. W. Nelson Co., supra.*

Crain, in calculating the general overhead claimed by it, prorated the total overhead expenses for the construction period among the projects being constructed during the period, in accordance with respective amounts involved in the several projects. 48.77% of general overhead was allocated to the Mount Olive project. The total general overhead was $77,414.13. In addition to the claim for general over-

head. Crain claimed the following items as on-the-job expenses: Rent (office and typewriter) $1420.00; telephone and telegraph $1521.36, travel $969.25, use of automobile $1651.00, miscellaneous services $2082.12, miscellaneous expense $807.75, and other similar items, all totalling $13,905.52. These seem to cover in part, at least, on-the-job overhead. Hal S. Crain, testifying for Crain, said: "Had Harris & Harris performed the work, I don't think it would have taken very much to keep the books and records. . . . That item, $36,078.00, which we label 'overhead' includes other than keeping the books, rent, telephone, telegraph, our general expenses in the home office. . . . We apportioned the general operating expense of our Durham Office, including such things as the salary of our secretary in the Durham office. . . . I believe we employed additional help in our Durham office because of the Mount Olive job at the peak, though not through the whole project. I do not remember what that total is. I do not think we allocated that specifically to the Mount Olive job. . . . If Harris & Harris had completely performed the contract, we might have incurred approximately the same overhead expenses, but we would have had additional work. . . . If Harris & Harris had performed their contract, our secretary's salary would have been the same. It would be a speculation as to whether the other expenses of our office would have been substantially the same. I don't know how to answer that. I do not know how much of the expense of running our Durham office for these 15 months was due directly to the fact that Harris & Harris did not perform the subcontract."

The subcontract between Harris and Crain provided 4% of the project amount for profit to Crain, out of which Crain was to maintain a superintendent on the job, construct a shed, and keep the books and records for the project. Prior to the execution of the subcontract the parties had agreed on a profit of $80,000.00 to Crain. After the execution, Harris offered a profit of $72,500.00 but Crain refused it. It is our interpretation of the contract that the parties intended that general overhead expenses of Crain should be paid from profit. Furthermore, the subcontract contemplated that Crain, under specified circumstances, might have to take over the work, yet the contract fails to provide for Crain to receive extra profit or compensation in such event. It is our opinion, and we decide, as a matter of law that the court erred in allowing Crain the item of $36,657.82 for overhead, and that it is entitled to recover only such damages and expenses as resulted directly from the breach by Harris, plus the profit provided for in the contract.

Since the sum of $36,657.82 is to be deducted from Crain's recovery herein, the $1420.00 deducted from profit in Finding of Fact 47, on

account of clerical help for bookkeeping, shall be added to the recovery.

In the subcontract Crain agreed to place a general superintendent on the project without cost to Harris. It was contemplated that this expense should be paid by Crain from profits. The salary of the superintendent was included by Crain in labor costs. However, the court deducted it from profits and thereby allowed credit in accordance with the contract (Finding of Fact 47).

The final question is whether or not the court erred in allowing interest on Crain's recovery from 31 December 1957, the date of Crain's demand for payment from Aetna.

Aetna at all times denied liability and refused payment.

On 31 December 1957 Crain demanded payment of $359,697.62. In an action filed by it in Wayne County on 28 April 1958 the same amount was demanded. When its counterclaim was filed in this action the amount claimed was $300,672.07. By amendment at the trial the claim was reduced to $296,083.55. By further amendment at the trial the claim was down to $276,083.45. Crain's accountant testified that the loss, as of 31 December 1957, was $242,749.50. The judgment allows a recovery of $257,432.34.

"It may be stated as a general rule, that interest is not allowed on unliquidated damages or demands, for the reason that the person liable does not know what sum he owes and therefore, can be in no default for not paying." 15 Am. Jur., Damages, s. 161, pp. 579, 580. "Although a claim may in a sense be unliquidated, interest thereon will generally be allowed where the amount due can readily be ascertained by mere computation, or by a legal or recognized standard." 47 C.J.S., Interest, s. 19, p. 31.

We have a statute which provides that "all sums of money due by contract of any kind, except money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest. . . ." G.S. 24-5.

Lewis v. Rountree, 79 N.C. 122 (1878), was an action to recover damages for breach of warranty of quality of rosin. With respect to interest the court said: "It is a rule which may be gathered from the cases that whenever a debtor has notice or ought to know that he owes a *certain* sum, and when he is to pay, if he fails to pay it, he ought to pay interest. In the present case although we may assume that the defendant had notice by the commencement of the action, that he was looked to for the payment of damages, yet as a fact, not only was the amount technically unliquidated, but owing to the unsettled state of

the law, it was uncertain. He could not safely and without risk pay any sum until it was ascertained by a judgment. . . ."

The *Lewis* case was criticized in *Bond v. Cotton Mills,* 166 N.C. 20, 81 S.E. 936 (1914), an action by creditors of an insolvent contractor to recover the balance due the contractor on a building contract. The Court makes reference to the statute (now G.S. 24-5) and states the following rule: ". . . (W)henever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or *from evidence relevant to the inquiry,* . . . interest should be added. . . ." (Emphasis added.)

Since the decision in *Bond* there has been a definite trend in the North Carolina cases toward allowance of interest in almost all types of cases involving breach of contract. The following cases should be examined in this light. In *Perry v. Norton,* 182 N.C. 585, 109 S.E. 641, defendant, in order to retain plaintiff as an employee, promised plaintiff $40.00 per month salary, a house rent free, and to deed plaintiff the house when the plantation on which it was located was sold. Defendant sold the plantation and house to another. Plaintiff sued for value of improvements made on the house and land, and for services rendered. He recovered judgment with interest from the date of the sale of the plantation. This Court affirmed stating that "the jury 'ascertained from the terms (of the agreement) and the relevant evidence' the amount of plaintiff's claim." *Thomas v. Realty Company,* 195 N.C. 591, 143 S.E. 144, was a suit upon *quantum meruit* for services rendered. The Court declared that the measure of damages was "the reasonable value of the services rendered." Plaintiff recovered $18,500 with interest from 5 June 1925, the date on which services were completed and demand for payment was made. The Supreme Court found no error and stated: "This sum is due, by contract, and under C.S., 2309 (now G.S. 24-5) bears interest from the date on which it was due."

For cases in which interest has been allowed upon judgments recovered upon surety contracts, see *Carrig v. Gilbert-Varker Corporation,* 50 N.E. 2d 59 and *George H. Sampson Co. v. Commonwealth,* 88 N.E. 911. It is true that Crain counterclaimed for more than was due, but Aetna could have paid the part which was definitely ascertained and contested the disputed portion, or could have "tendered the correct amount and stopped the running of interest." *Miller v. Barnwell Bros., Inc.,* 137 F. 2d 257 (4th Cir. 1943).

At the very least it was within the discretion of the court to allow interest in this case, and we cannot say, as a matter of law, that in doing so the court erred. Interest starts running from the date of de-

mand, 31 December 1957. *High Point v. Power Co.*, 120 F. 2d 866 (4th Cir. 1941).

The judgment of the court below decreeing that Crain and Denbo, Inc. recover the sum of $257,432.34, will be modified by subtracting from said sum $36,657.82, and then adding $1420.00, thereby making the principal recovery $222,194.52 instead of $257,432.34. In all other respects the judgment is affirmed. The cause is remanded to the Superior Court of Wayne County that judgment may be entered in accordance with this opinion.

Modified and affirmed.

THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, AN UNINCORPORATED RELIGIOUS ASSOCIATION, M. L. JOHNSON, MODERATOR; DEWEY C. BOLING, ASSISTANT MODERATOR; R. N. HINNANT, CLERK; RALPH BARNES, TREASURER; CONSTITUTING THE OFFICERS OF SAID CONFERENCE; M. L. JOHNSON, R. N. HINNANT, EARL GLENN, R. H. JACKSON, AND RALPH BARNES, CONSTITUTING THE EXECUTIVE COMMITTEE OF SAID CONFERENCE, v. RONALD CREECH

AND

J. G. TEASLEY, OLIF PASCHALL, CALVIN GRIFFIN, JOE PEELE, THE BOARD OF DEACONS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH, AND H. M. ALFORD, LEONARD GIBBS, BOYCE MOIZE, TRUSTEES, AND LEO PASCHALL, CHURCH CLERK, AND H. A. STEWART, CHURCH TREASURER, ALL OFFICERS OF THE OFFICIAL BOARD OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH AND OTHERS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH UNITED IN INTEREST AS RECOGNIZED BY THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA KNOWN AS THE J. G. TEASLEY FACTION, v. RONALD CREECH.

AND

THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, AN UNINCORPORATED RELIGIOUS ASSOCIATION; AND M. L. JOHNSON, MODERATOR; DEWEY BOLING, ASSISTANT MODERATOR; R. N. HINNANT, CLERK; RALPH BARNES, TREASURER: OFFICERS OF SAID CONFERENCE: M. L. JOHNSON, R. N. HINNANT, EARL GLENN, R. H. JACKSON AND RALPH BARNES, EXECUTIVE COMMITTEE OF SAID CONFERENCE, AND J. G. TEASLEY, OLIF PASCHALL, CALVIN GRIFFIN, JOE PEELE, THE BOARD OF DEACONS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH; AND H. M. ALFORD, LEONARD GIBBS, BOYCE MOIZE, INDIVIDUALLY AND AS TRUSTEES; AND LEO PAS-

CONFERENCE *v.* CREECH AND TEASLEY *v.* CREECH AND MILES.

CHALL, CHURCH CLERK; AND H. A. STEWART, CHURCH TREASURER, ALL OFFICERS OF THE OFFICIAL BOARDS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH AND OTHERS OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH UNITED IN INTEREST AS RECOGNIZED BY THE WESTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA, KNOWN AS THE J. G. TEASLEY FACTION, v. JAMES A. MILES, LLOYD WILLIFORD, RICHARD BLAKE, SAM WELLS, MACON PERRY, BOBBY McCORKLE, TOM LEE, ARNOLD GOODMAN, CLYDE POWELL, ALL DEFENDANTS PURPORTING TO BE MEMBERS OF THE BOARDS OF DEACONS OF THE EDGEMONT FREE WILL BAPTIST CHURCH; AND GROVER C. MYERS; AND J. E. CHAPPELL, INDIVIDUALLY AND AS THE PURPORTED BOARD OF TRUSTEES OF THE EDGEMONT ORIGINAL FREE WILL BAPTIST CHURCH, AND OTHERS UNITED IN INTEREST WITH THE ABOVE NAMED, KNOWN AS THE JAMES A. MILES FACTION.

(Filed 12 January, 1962.)

1. Appeal and Error § 50—

Upon appeal from an order continuing a temporary restraining order to the hearing, the Supreme Court does not decide the ultimate questions and issues raised by the pleadings, but only whether or not there was error in continuing the temporary restraining order pending trial on the merits.

2. Injunctions § 13—

Ordinarily, a temporary restraining order will be continued to the hearing if there is probable cause for supposing plaintiff will be able to sustain his primary equity and if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if it appears that the restraining order is necessary to protect plaintiff's rights until the controversy can be determined on the merits.

3. Same—

The court has discretion to continue a temporary restraining order to the hearing upon the pleadings and affidavits alone, but the court should take into consideration the inconvenience and damage to defendant as well as the benefits which will accrue to plaintiff.

4. Appeal and Error § 50—

On appeal in injunctive cases the Supreme Court may review the findings, but it will be presumed that the judgment entered below is correct and the burden is upon appellant to assign and show error.

5. Religious Societies § 2—

A church may be congregational in some respects and connectional in others.

6. Religious Societies § 3—

Civil courts have no jurisdiction over or right to supervise purely ecclesiastical questions or church polity, but the courts do have jurisdiction over contractual and property rights involved in a church controversy, in the decision of which the courts will inquire into matters of church government only to the extent of determining whether the church tri-

bunal acted within the scope of its authority and observed its own organic forms and rules.

7. Same; Injunctions § 13— Order restraining defendant from acting as a minister of particular church held properly continued to hearing upon prima facie showing that plaintiffs had authority to oust him.

Where, in an action to oust a minister who had been employed by a church affiliated with the conference of the denomination and who had been endorsed by such conference as a minister of the denomination, it is made to appear upon motion to show cause that there is probable cause that upon the trial upon the merits plaintiffs can show that the conference has authority to revoke the rights and privileges of the minister to act as pastor of the particular church and to prohibit him from holding himself out as a minister of the denomination among its member churches, the court properly continues an order restraining such minister from acting as pastor of the particular church, but it is error for the court to prescribe rules or conditions for the readmission of the minister to good standing in the church or conference, since this is an ecclesiastical matter, nor should it restrain such minister from exercising any ministerial functions with respect to other member churches of the conference in the absence of allegation that he had attempted or threatened to exercise such functions.

8. Same—

Where there is controversy between two factions of a congregation of a church as to the right to use and control the church property, the courts have authority to determine which faction is the true congregation of the church by reason of adherence to the articles of faith and polity and customs and usages of the denomination.

9. Same—

Upon the hearing of an order to show cause entered in an action to determine the right to use and control church property, the court should not grant exclusive control and use of the church property to either faction of the congregation, but should seek to maintain the *status quo* as nearly as possible and permit both factions to share the use and possession of the church properties on an equal basis until the hearing on the merits, and the court is without authority to prescribe rules or conditions upon which members of one faction might be restored to membership in the true congregation of the church, this being an ecclesiastical question.

10. Injunctions § 13—

In continuing a temporary restraining order to the hearing the court should not grant plaintiffs relief in excess of that to which they are entitled upon the facts alleged in their pleadings, and should seek to maintain the *status quo* as nearly as possible pending the determination of the cause upon the merits.

APPEAL by defendants from *Williams, J.*, May 1961 Civil Term of DURHAM.

Three civil actions were consolidated for hearing.

The Western Conference of Original Free Will Baptists of North Carolina (hereinafter called Western Conference) is plaintiff in one action and co-plaintiff in another.

J. G. Teasley and others associated with him (known as the Teasley faction) are, or claim to be, members (some officials) of Edgemont Original Free Will Baptist Church of Durham, North Carolina (hereinafter called Edgemont Church). The Teasley faction is plaintiff in one action and co-plaintiff with Western Conference in another.

James A. Miles and others associated with him (known as the Miles faction) are, or claim to be, members (some officials) of Edgemont Church. The Miles faction is defendant in the action instituted by the Western Conference and the Teasley faction jointly.

Ronald Creech is, or claims to be, pastor of the Edgemont Church and is defendant in the other two actions.

The actions were instituted 24 April 1961.

(1) The facts, as alleged in plaintiffs' pleadings and set out in their affidavits and exhibits are briefly summarized as follows:

The Original Free Will Baptists of North Carolina had their beginning in this State in 1727 with the establishment of a church in Perquimans County. The present membership of the denomination in North Carolina is approximately 50,000, the largest membership of any State in the United States. This denomination has since its inception organized into Conferences or Associations in the Annual Conference. For a long time there was one Conference. Now there are nine Conferences, constituted for the most part according to geographical location in the State. The Western Conference was formed in 1886.

The Conferences operate under the "Statement of Faith and Discipline for Original Free Will Baptists of North Carolina" (hereinafter called the Discipline). The Discipline has at former times been designated by other titles and has from time to time been revised. The last revision was in 1955.

The Discipline contains, among others, the following provisions:

"Organization of the Church," page 44:

> "When a sufficient number of believers desire to be organized into a church, they shall make application to the moderator of the conference or association within whose bounds the proposed church is to be located. The moderator shall call the executive committee or officers of said conference or association immediately for an investigation. If the investigation is satisfactory, the organization is perfected. . . ."

"The Pastor," page 46:

> "The church shall call its own pastor out of the duly ordained ministers upon such terms as may be mutually agreeable. A pastorate shall not be terminated by the church or pastor without a ninety-day previous notice, or unless agreed to by both parties."

"The Ministry," pages 47 to 48. This section makes provision for the ordaining of ministers by the Conference Ordaining Council and provides:

> "Every minister, licensed or ordained, shall unite himself with the conference or association of which his local church is a member. . . .
>
> "Each conference or association assumes and exercises authority over Original Free Will Baptist ministers in its jurisdiction or bounds.
>
> "A charge against an ordained or licensed minister must be presented to the committee in writing, signed by the accuser, together with the evidence to support the charges.
>
> "This trial committee shall give the accused a private trial, hearing first the evidence supporting the accusations, and then hearing the evidence in his defense. After all evidence, for and against, has been presented, all persons shall retire, leaving the committee to determine its verdict and report same.
>
> "It is mutually understood that the verdict of this committee is final."

"Independence of Churches," pages 52 and 53.

> "Each local church is a distinct and independent organization, with full authority to manage its own internal affairs, elect its officers, receive, dismiss, discipline and exclude members. But this principle of independence of each church is not held as a law of isolation; on the contrary, churches conveniently situated associate and co-operate in all things which tend to advance the common cause. Councils are, therefore, called in the organization of a church, and the settlement of serious difficulties. On the same principles, the churches meet by delegation in the annual conference or association. The annual conference or association being the highest tribunal, shall have final disciplinary authority over the local church."

According to the minutes of the Western Conference and other Conferences they have on occasions exercised jurisdiction in disciplining

local churches, deciding between factions in local churches, and in disciplining and revoking the credentials of ministers.

The Edgemont Church was organized in 1922 in accordance with the Discipline and was admitted into the Western Conference on October 18, 1923. It has been a member of and has participated in the proceedings and activities of the Western Conference continuously since that date.

Ronald Creech became pastor of Edgemont Church in October 1957 and a member of the Western Conference on October 16, 1957.

Prior to August 1960 strife and dissension arose in the Edgemont Church because of the conduct of Creech, supported and acquiesced in by the Miles faction, in departing from the customs, usages and doctrine of the Original Free Will Baptists of North Carolina. They had expelled members without proper hearing, arbitrarily removed elected officers, advocated the doctrine of "eternal security" which is contrary to that chapter of the Discipline entitled "Perserverance of the Saints," and otherwise acted contrary to the customs, usages, polity and doctrine of the Church.

About 23 August 1960 the Teasley faction brought charges supported by evidence, all in writing, and requested action by the Western Conference. The Executive Committee, which acts for the Conference when it is not in session, and the Board of Ordination attempted on several occasions in August and September 1960 to mediate the disputes. Creech and the Miles faction refused to agree to a time or place for meeting, refused to meet in good faith, took over all the property and records of the Edgemont Church and refused to permit either the Teasley faction or the Conference Committee to use the Church's facilities.

The Miles faction passed a resolution on September 4, 1960 recognizing Creech as pastor and purporting to authorize him pursuant to G.S. 51-1 to perform marriage ceremonies.

In late August Creech and the Miles faction were advised by letter of the charges against them. The Executive Committee and Board of Ordination notified them that a hearing would be held on September 23, 1960, in King's Chapel Church in Durham to consider the charges. Neither Creech nor the Miles faction attended. The joint committees heard evidence of the accusers and later, in executive session, found the following facts: (numbering ours)

(1) Since 1957 the spirit of cooperation, by pastor and church, with the established and approved programs of the Western Conference and State Convention has decreased and these programs have often been the objects of severe criticism in the Challenger, the weekly bulletin of the Edgemont Church.

(2) Dissension has arisen in the membership of Edgemont Church that has created factions, strife and unrest.

(3) The Teasley faction presented petitions containing charges of denominational irregularities of doctrine and administration against the pastor and the Miles faction.

(4) The pastor and the Miles faction have defied and repudiated the jurisdiction of the Western Conference.

The doctrine of eternal security has been advocated by some of the members of the Miles faction and tolerated by other members, even to the point that the pastor has been "pressured" to take a neutral position on this question; this doctrine is in direct conflict with Chapter 13 of Discipline entitled "Perserverance of the Saints."

(6) The Miles faction removed from membership and office several members for the sole reason that they had contacted Conference officials about the conditions in Edgemont Church.

(7) Efforts were made by the Miles faction to exact compliance from J. G. Teasley by intimidation and implied threats of hurt to be done to his son, a Free Will Baptist minister.

(8) The Miles faction acted together to secure passage of a resolution to recognize Creech as pastor of Edgemont Church, to authorize him to perform marriage ceremonies, and to approve sending a letter to the joint committee denying that there was a dispute in the church.

(9) The Miles faction has caused the church to cease using Sunday School literature published by the Free Will Baptist Press, which had formerly been used for many years.

(10) Through the Challenger the Miles faction and Creech have embarrassed the Western Conference and the State Convention in the Church program by unjust criticism and "misrepresented reports."

More than 120 members of the Edgemont Church, including the Teasley faction, petitioned the Western Conference, reaffirmed their acceptance of the Discipline and the doctrines, practices and policies of the denomination, and asked to be recognized as the true congregation of the Edgemont Church.

The joint committee advised the Miles faction that it had been guilty of irregularities, and that in the opinion of the committee this faction should restore to membership and office those who had been expelled, and should establish its adherence to the doctrines, practices and policies of the Original Frce Will Baptists of North Carolina and accept the Discipline in its entirety. The Miles faction ignored the suggestion.

On January 18, 1961, at the annual meeting of the Western Confer-

ence the following motion was made and adopted by a vote of 98 for and 22 against:

> "In view of the fact that Ronald Creech has refused to recognize the jurisdiction of the Western Carolina Conference, by refusing to appear before the Executive Committee and Board of Ordination to answer charges filed against him, and has resorted to the Civil Courts, and has obtained a restraining order to prevent the Committee and Board from reporting their action to the conference, and is even attempting to extract an enormous amount of money; I move that his Ministerial rights and Credentials, held by reason of his endorsement by and membership in the Western Conference, be and are hereby declared annulled until such time as he presents himself fully to the jurisdiction of the Western Conference and its duly constituted boards and committees, without restraint."

The Western Conference also adopted a motion by a vote of 88 to 10 that the report of the joint committee (not copied herein) be adopted as duly authorized, and be made the action of the Conference (among other things, recognition of the Teasley faction as the true congregation of the Edgemont Church), and that the delegates representing the true congregation be seated.

In defiance of the conference action, Creech and the Miles faction continued in possession of the properties and records of the Edgemont Church until the instant actions were instituted. In the meanwhile the Teasley faction met in locations other than church property, elected officers and functioned generally as a church.

(2) Facts, as set out in defendants' affidavits and exhibits, are in brief summary as follows:

The Edgemont Church owns property valued in excess of $125,000.00, has a membership of about 850 men, women and children, has an annual income of approximately $35,000.00, and is one of the largest Free Will Baptist Churches in the United States.

It is an independent, autonomous church. Through the will of a majority of its congregation it has voluntarily associated with the Western Conference and other similar church organizations, including the National Association of Original Free Will Baptists of the United States.

On January 22, 1961 the congregation of Edgemont Church by vote of 226 to 0 severed its fellowship with the Western Conference.

Edgemont Church has no written constitution or by-laws. The State Convention has as a governing document the Discipline (hereinbefore referred to).

The Edgemont Church has made great progress under the ministry of Rev. Ronald Creech. Shortly before August 1960 a dispute arose between the Teasley faction, a small minority group, and the overwhelming majority of the congregation over the retention of Creech as pastor. The congregation voted 310 to 16 to retain Creech as pastor. The congregation expelled five members for causing continued unrest and for refusal to abide by majority decisions.

The Western Conference undertook to hold a trial of the Miles faction on charges never disclosed to the church, on accusations made by undisclosed persons. The Edgemont Church notified the officials of the Western Conference that there was no longer any unrest in the church and declined the offers of officials of the Western Conference to mediate. As was its right as an autonomous, congregational church, Edgemont refused to participate in a proceeding involving its internal affairs, to-wit, retention of its pastor and election of its officers.

The officials of the Western Conference met with the Teasley faction and thereafter refused to recognize the majority congregation of Edgemont Church as the true congregation, and withdrew the hand of fellowship from it.

Rev. Ronald Creech was ordained an Original Free Will Baptist minister by the Cumberland Association of Free Will Baptists, State of Tennessee, on January 15, 1951. He was called by a majority vote of the Edgemont Church on October 6, 1957, and has a contract of employment that can only be terminated by a majority vote of the Edgemont Church membership upon 90 days notice. He became a member of the Western Conference. At the time of the instant suits Rev. Creech and the Edgemont Church had severed their relationship with the Western Conference and applied for membership in the Cape Fear Conference. Creech is recognized as an ordained Original Free Will Baptist minister by the National Association of Free Will Baptists. On several occasions a vote was demanded by the Board of Deacons of Edgemont Church concerning the dismissal of Creech as pastor. Each time the vote was 7 to 2 for his retention. The congregational vote above referred to was also taken, by written ballot. None of the members who were expelled as trouble makers were prohibited from attending church services, Nevertheless, the Teasley faction withdrew from the church and functioned separately after August 24, 1960.

The officials of the Western Conference refused to give Creech a copy of the charges against him or to tell him the names of his accusers. He refused for this reason to attend the "hearing" scheduled for consideration of the charges.

In the actions instituted by them plaintiffs seek: (a) to have the Teasley faction declared the true officers and congregation of Edge-

mont Church and entitled to the use and possession of the church property and records; (b) to enjoin the Miles faction from holding itself out as the true officers and congregation of Edgemont Church, and from interfering with the Teasley faction in its use and possession of the church property and records; and (c) to restrain defendant Creech from holding himself out as pastor of the Edgemont Church, from performing any ministerial functions with relation to this church or as an Original Free Will Baptist minister, and from using and occupying the church parsonage.

There were various motions, proceedings and orders not material to this appeal, and they are not referred to herein.

Defendants were directed to show cause on 10 May 1961 why the injunctive relief prayed for by plaintiffs should not be granted pending a trial of the actions on the merits. On the date specified the parties appeared and the court heard and considered the pleadings, affidavits, exhibits and arguments of counsel. The court took the causes under advisement and on 30 June 1961 entered a separate order in each case. The court made findings of fact and conclusions in keeping with the pleadings, evidence and contentions of plaintiffs.

The judgments proper entered in the respective cases are as follows:

Case No. 4736 *(Western Conference v. Creech):*

"IT IS . . . DECREED that the defendant Ronald Creech is, until the trial of this cause is held on its merits and a final determination made, or until this Court orders otherwise, hereby immediately enjoined and restrained as follows:

"1. That the defendant Ronald Creech be immediately enjoined and restrained from holding himself out and acting in the capacity of an Original Free Will Baptist minister, said privilege being held by reason of his endorsement by and membership in the Western Conference, until such time as he presents himself fully to the jurisdiction of the Western Conference and its duly constituted Boards and Committees without restraint and then and there submits himself to the authority, ruling, and decisions of said Conference Committees to the end that their rulings be final and binding upon the defendant. That pending, during and after the defendant's appearance, if such be made, before the proper Conference committee or committees and a final report of such committee action and decisions, being immediately made known in writing to the Judge presiding over the Durham County Superior Court, that said Court have and retain jurisdiction over the defendant Ronald Creech.

"2. That the defendant Ronald Creech be restrained and enjoined from preaching, reading prayers or performing any ministerial function whatsoever in the pulpit, church annex, Sunday School Annex or

Church Parsonage in any church which is a member of the Original Free Will Baptist denomination or any of the organizations of the Original Free Will Baptists of North Carolina, until such time as he submits himself to the jurisdiction of the Western Conference as prescribed in paragraph one of this Order."

Case No. 4737 *(Teasley Faction v. Creech):*

"IT IS . . . DECREED that the defendant, Ronald Creech, is, until the trial of this cause is held on its merits and a final determination made, or until this Court orders otherwise, hereby immediately enjoined and restrained as follows:

"1. From occupying the pulpit and acting or attempting to act as the pastor of the Edgemont Original Free Will Baptist Church or performing any ministerial function whatsoever from the pulpit, in the Church Annex, Sunday School Annex, or Church Parsonage of the Edgemont Original Free Will Baptist Church or from having any other person designated by him from doing such acts until he is employed by these plaintiffs as their regular minister.

"2. From publishing, mailing or distributing the church bulletin known as 'THE CHALLENGER' so long as he represents thereon that he is the pastor and that this is the official church bulletin of the Edgemont Original Free Will Baptist Church, Durham, North Carolina.

"3. From occupying the parsonage of the Edgemont Original Free Will Baptist Church until he is employed by these plaintiffs as their regular minister. That the defendant is to vacate this parsonage on or before the 1st day of August 1961."

Case No. 4738 *(Western Conference and Teasley Faction v. Miles Faction):*

"IT IS . . . DECREED that the above named defendants (listing eleven members of the Miles faction by name), and each of them, and all persons acting with and in concert or under their direction or the direction of any of them, and all other persons to whom notice and knowledge of this order may come, are, until a hearing is held, the merits of this cause are determined, and until this Court orders otherwise, hereby immediately and forthwith enjoined and restrained as follows:

"1. From holding themselves out as the official church board of the Edgemont Original Free Will Baptist Church, Durham, North Carolina, and further from holding themselves out as being the true congregation of the Edgemont Original Free Will Baptist Church, Durham, North Carolina.

"2. From interfering with the plaintiffs J. G. Teasley Associates

use and benefit of the real and personal property belonging to the Edgemont Original Free Will Baptist Church.

"That further, these above named defendants and each of them may, if they desire, attend any and all church services in the Edgemont Original Free Will Baptist Church. That the above named defendants may, as they individually elect, become members of the true congregation of this church by each of them individually reaffirming their acceptance of the Statement of Faith and Discipline of Original Free Will Baptists of North Carolina; they recognizing the authority of the Western Conference and their loyalty to the doctrines, practices, policies of the Original Free Will Baptists of North Carolina and of the Western Conference of Original Free Will Baptists of North Carolina.

"3. That the above named defendants and more especially those defendants who are designated as officials of the Edgemont Original Free Will Baptists of North Carolina are directed to take no further action whatsoever either individually or collectively as officers of this church.

"That further, the above named defendants are to immediately turn over to the plaintiffs J. G. Teasley Associates the official church books, records and all other property both real and personal belonging to the Edgemont Original Free Will Baptist Church except what money now may be in the hands of the defendants which is to be kept and retained by them."

Defendants appeal and assign errors.

Fletcher, Lake & Boyce for defendant, appellants.
Jones & Vann and Clarence Kirk for plaintiff, appellees.

MOORE, J. We do not decide here the ultimate questions and issues raised by the pleadings. Defendants appeal from temporary restraining orders. The sole question before us is whether or not the court erred in granting the temporary injunctions pending trial on the merits. *Service Co. v. Shelby,* 252 N.C. 816, 115 S.E. 2d 12.

Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. *Edmonds v. Hall,* 236 N.C. 153, 72 S.E. 2d 221.

It ordinarily lies in the sound discretion of the court to determine

whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. *Service Co. v. Shelby, supra; Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116.

On appeal we are not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. "Even so, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error." *Lance v. Cogdill, supra.*

Defendants contend that Edgemont Church is an independent, autonomous, congregational church and its association with the Western Conference is on a voluntary basis. *Windley v. McCliney,* 161 N.C. 318, 77 S.E. 226. Plaintiffs, on the other hand, contend that it is, in part at least, a connectional church, is subject to the Discipline, customs and usages of the Original Free Will Baptists of North Carolina, and the Western Conference is the highest tribunal and final disciplinary authority over the local church. *Church Conference v. Locklear,* 246 N.C. 349, 98 S.E. 2d 453. A church may be congregational in some respects and connectional in others.

On final hearing it must be determined to what extent, if any, the Western Conference has authority and jurisdiction (1) to decide between factions in a member congregation, and determine whether or not a faction has forfeited the right to be recognized as the true congregation by reason of departure from the faith and polity of the denomination, and (2) to ordain, try, discipline, revoke ordination, and restore ministerial credentials to member ministers.

Such matters are, of course, ecclesiastical in nature and in the establishment and exercise of church polity the civil courts have no jurisdiction or right of supervision. *Bouldin v. Alexander,* 15 Wall. 131; *Watson v. Jones,* 13 Wall. 679; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114. ". . . (W)henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson v. Jones, supra.* "The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies . . . but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy." *Reid v. Johnston, supra.* Where civil, contracts or property rights are involved, the courts will inquire as to whether the church

tribunal acted within the scope of its authority and observed its own organic forms and rules. 45 Am. Jur., Religious Societies, s. 41, pp. 750-752. In the instant case the civil and contract rights of Rev. Creech and the property rights of the Edgemont Church congregation are involved.

From the evidence in the record there is probable cause for supposing that plaintiffs, at trial on the merits, can show that the Western Conference had authority to revoke the rights and credentials of Rev. Creech to act as pastor of the Edgemont Church and to forbid him to hold himself out as an Original Free Will Baptist minister by reason of endorsement by and membership in the Western Conference, and to determine that the Miles faction is not the true congregation of the Edgemont Church by reason of departure from the articles of faith and polity and from the customs and usages of the denomination; and that it, the Western Conference, acted within the scope of its authority and in accordance with its forms and rules.

Even so, in our opinion the orders appealed from grant relief, in certain respects, in excess of that to which plaintiffs are entitled upon the facts alleged in their pleadings, and in excess of the court's jurisdiction. *Collins v. Simms*, 254 N.C. 148, 118 S.E. 2d 402.

There is no showing that the Western Conference has any authority and jurisdiction beyond the churches and ministers which are its members. There is no allegation that Rev. Creech has attempted or threatened to exercise any ministerial functions with respect to any member churches of the Western Conference other than Edgemont Church. Moreover, the court is without jurisdiction to prescribe rules or conditions for readmission of Creech to good standing in the Edgemont Church or the Western Conference, for this is an ecclesiastical matter. We are advised that the order in case No. 4737 *(Teasley faction v. Creech)* has been modified so as to permit Creech to occupy the parsonage of the Edgemont Church pending the final determination of the action. If true, such order is effective and binding since there is no appeal therefrom.

The court is without authority and jurisdiction to prescribe rules or conditions by which members of the Miles faction may be restored to membership in the true congregation of Edgemont Church, assuming they are not such presently, since this is also an ecclesiastical matter.

The order in case No. 4738 *(Western Conference and Teasley faction v. Miles faction)* takes the church properties and records from the use and possession of one faction and give them exclusively to the other faction before there has been a final determination of the question as to which is the true congregation of the Edgemont Church. This is

contrary to the rulings of courts of equity in such situations. *Fredericks v. Huber,* 37 A. 90; 45 Am. Jur., Religious Societies, s. 64, p. 775. It might be finally determined that the true congregation consists of both factions. *Windley v. McCliney, supra.* Furthermore, it is the purpose of a temporary injunction to maintain as nearly as possible the *status quo. Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899. Provision should have been made for the two factions to share the use and possession of the church properties on an equal basis.

The Superior Court will modify the orders appealed from in accordance with this opinion. In all other respects the orders are affirmed.

Modified and affirmed.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF H. C. BUCHAN, JR., DECEASED, AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF H. C. BUCHAN, JR., v. MRS. RUTH LOWE BUCHAN, INDIVIDUALLY, AND MRS. RUTH LOWE BUCHAN, GENERAL GUARDIAN FOR MARY ELIZABETH BUCHAN, A MINOR.

(Filed 12 January, 1962.)

1. Appeal and Error § 21—

A sole exception to the judgment presents the question whether error of law appears on the face of the record, which includes whether the facts found by the trial court are sufficient to support the judgment.

2. Infants § 1—

The Superior Court has authority in its equity jurisdiction to protect the rights of infants, and will exercise this jurisdiction whenever necessary to preserve and protect the estate and interest of those who are underage.

3. Infants §§ 5, 6—

Neither the next friend nor guardian *ad litem* of an infant can consent to a judgment involving the interest of the infant without investigation and approval by the court.

4. Trusts § 3—

A trust which imposes duties upon the trustee in regard to the management and investment of the trust estate and the payment of the income therefrom to beneficiaries for an indefinite time, is an active trust.

5. Executors and Administrators § 31—

Where a will sets up an active trust for the benefit of the widow, the minor child of testator, and contingent beneficiaries, and the widow files a dissent, which is opposed by the trustee on the ground that the widow received more than half the estate and was not, therefore, entitled to dis-

sent, a settlement under which the widow withdraws her dissent upon the payment of a specified sum is not a family settlement, there being no agreement on the part of the guardian for the child, and possible contingent beneficiaries not being parties and agreeing thereto.

6. Same—

A family settlement of an active testamentary trust will not be approved unless some exigency or emergency growing out of the trust itself or directly affecting the *corpus* thereof arises which makes action by the court indispensable to the preservation of the trust, and such settlement will not be approved unless the rights of infants and contingent beneficiaries are represented and protected.

7. Same— Findings held insufficient to support conclusion that settlement between widow and trustee would be advantageous to infant beneficiary and contingent beneficiaries.

The will in suit set up one testamentary trust for the widow, with contingent limitation over to testator's child and others, and set up another trust for the benefit of the child, with contingent limitations over, with further provision that all estate taxes should be paid out of the *corpus* of the child's trust. The widow filed a dissent, and the widow and trustee thereafter agreed that the widow should withdraw the dissent upon the payment of a specified sum to her. There were no definite findings as to how much the estate taxes would be if the provisions of the will were carried out or as to the amount of these taxes if the widow's dissent should prevail. *Held:* The findings are insufficient to determine whether the proposed settlement will adequately protect the vested trust estate of the infant, and judgment directing the guardian *ad litem* of the infant to consent to the agreement is vacated and the cause remanded for specific findings of fact necessary to support a judgment.

8. Same—

Contingent beneficiaries of a testamentary trust must be made parties and their rights protected in an action seeking the approval of the court of a family settlement of the estate, and the Supreme Court, in the exercise of its supervisory powers will direct *ex mero motu* that a guardian *ad litem* be appointed to represent their contingent interests.

9. Appeal and Error §§ 50, 55—

Even though the Supreme Court has the right to review the evidence and find facts on appeal in a proceeding in equity, where there is not sufficient evidence in the record to enable the Court to safely and adequately find a material fact, the cause will be remanded for specific findings necessary to support a judgment.

APPEAL by T. E. Story, Guardian *ad litem* of Mary Elizabeth Buchan, a minor, from *McConnell, S.J.*, August 1961 Mixed Term of WILKES.

Suit for approval of a proposed settlement between Wachovia Bank and Trust Company, as executor and trustee of the will of H. C.

Buchan, Jr., deceased, and his widow, Ruth Lowe Buchan, respecting the administration of a trust estate created by the will.

H. C. Buchan, Jr., a resident of Wilkes County, died testate on 22 October 1960. He left him surviving a widow, Ruth Lowe Buchan, and one child of the marriage, Mary Elizabeth Buchan, a girl eleven years old living with her mother in Wilkes County.

This is a summary of the relevant provisions of the last will and testament of H. C. Buchan, Jr., deceased, which has no codicil, except when quoted:

Article II directs that all estate and inheritance taxes, and other taxes in the general nature thereof which shall become payable by reason of his death with respect to property passing under his will, or with respect to other property included in his gross estate for the purpose of such taxes, shall be paid out of the principal of his residuary estate remaining after satisfaction of all payments, bequests, and devises provided for by Article I, which provides for the payment of all of his just debts, funeral expenses, and a suitable marker for his grave out of the funds of his estate, and Articles II, III, and IV of his will.

Article III bequeaths all tangible personal property owned by him at his death, except such property customarily used in connection with his business and farming operations at the time of his death, to his wife, Ruth Lowe Buchan.

Article IV bequeaths and devises one-half of the residue and remainder of his estate remaining after the payments directed under Article I, and after the satisfaction of the bequest under Article III, "and before the satisfaction of or provision for any estate or inheritance taxes which shall become due or payable by reason of my death to Wachovia Bank and Trust Company in trust for the uses and purposes hereinafter set forth, and I direct that such one-half of the said residue and remainder of my property and estate shall be held in trust and administered for the benefit of my wife, Ruth Lowe Buchan, upon the following terms and provisions:"

One. During his wife's life all the income derived from this trust shall be paid to her in monthly or quarterly installments.

Two. The trustee is given absolute power, and its judgment in this respect shall be conclusive, to pay to his wife a part or all of the entire principal of the trust as it in its discretion shall from time to time deem requisite or desirable to meet the reasonable needs of his wife in her station in life.

Three. So much of the principal of this trust as shall remain in the hands of the trustee at the time of his wife's death shall be delivered, discharged of the trust, to such appointee or appointees of his wife in

such amounts or proportions and upon such terms as his wife shall appoint and direct in an effective will or codicil executed by her after the death of H. C. Buchan, Jr., and specifically referring to this power. If this power of appointment shall not be effectually exercised as to all or any of such principal, so much of the principal as shall not have been disposed of by such power of appointment, shall be added to and administered in accordance with the provisions of the trust hereinafter created for the benefit of his daughter, Mary Elizabeth Buchan, if such trust shall then be in existence; or, if such trust to his daughter shall have been theretofore terminated in full, the said principal shall thereupon vest in and be conveyed to his daughter's then living issue *per stirpes,* subject to the provisions of Article VI of his will; or, if such trust shall have been terminated in full, and if none of the issue of his daughter shall then be living, the said principal shall be delivered, discharged of the trust, to the then living person or persons who shall then be entitled to take his personal property under the intestacy laws then in effect in North Carolina, as if he had died intestate on the date of his wife's death.

Four. His wife is empowered to disclaim all or any portion of that part of his estate referred to in Article IV as his wife's share, and his trustee is authorized and directed to join in any such disclaimer, if his trustee shall deem its joinder necessary or desirable under the law to make his wife's disclaimer fully effective. Any portion of his estate so disclaimed shall pass as a part of his residuary estate.

Five. None of his wife's share shall be used for the payment of any estate, inheritance, transfer, succession, legacy, or similar taxes, which shall become payable by reason of his death, except to the extent that all other properties of his general estate shall be insufficient for the payment of such taxes.

Six. If any conflict shall arise between the provisions of Article IV and any other provision of his will, the provisions of Article IV shall control.

Article V bequeaths and devises all the residue and remainder of his estate (after satisfaction of or provision for all payments, devises and bequests provided for in the preceding parts of his will, and after satisfaction of or provision for all death taxes due by reason of his death) to Wachovia Bank and Trust Company in trust for the benefit of his daughter, Mary Elizabeth Buchan, upon the following terms and provisions:

One. The net income derived from the trust for his daughter shall be paid to her or applied for her benefit in such manner and in such amounts as his trustee in its sole discretion shall deem requisite or desirable for her suitable support and education until she shall attain the

age of thirty years. So much of the income as shall not be so paid or applied shall accumulate in the hands of his trustee and be added to the principal of the trust for his daughter. Upon her attaining the age of thirty years, the entire net income derived from the trust for her benefit shall be paid to her in monthly or quarterly installments so long as she lives.

Two. If in the judgment of his trustee the income payable to his daughter, supplemented by income available to her from other sources, shall not be sufficient to meet the reasonable needs of his daughter in her station in life, as to all of which the judgment of his trustee shall be conclusive, then his trustee is authorized to pay to his daughter so much of the principal of the trust as his trustee in its sole discretion shall deem requisite or desirable to meet the reasonable needs of his daughter.

Three. Provision is made for the payment of parts of the trust to his daughter upon her attaining the age of thirty years, and upon her attaining the age of forty years, and in the event, in the judgment of the trustee, his daughter is not qualified to use and conserve the principal of a portion of the trust estate provided for her, the trustee is authorized to withhold the conveyance of all or any portion of the principal and to pay her the income. This is an elaborate provision, and a detailed summary of its provisions is not necessary to determine this appeal.

Four. So much of the principal of the trust estate provided for his daughter as shall remain in the hands of his trustee at the time of her death shall be delivered, discharged of the trust, to such appointee or appointees of his daughter as his daughter shall appoint and direct in an effective will or codicil executed by her after her father's death, and specifically referring to this power, provided, however, that she cannot exercise this power "in favor of herself, her estate, her creditors, or the creditors of her estate." So much of the principal of the trust for her benefit as shall not have been disposed of by the effective exercise of the power of appointment, shall thereupon vest in and be conveyed to the living issue *per stirpes* of his daughter, Mary Elizabeth Buchan, subject to the provisions of Article VI of his will; or, if his daughter shall leave no issue surviving her, the said properties shall, upon his daughter's death, be added to and administered as a part of the trust created for his wife, if his wife shall then be living; or, if neither his wife nor any issue of his daughter shall survive his daughter, the said properties shall, upon the death of his daughter, be conveyed to the then living person or persons who shall then be entitled to take his personal property under the laws of intestacy then

in effect in North Carolina—as if he had died intestate on the date of his daughter's death.

Article VI provides that the trustee shall hold in trust any funds and properties constituting a part of his estate which may vest among the issue of his daughter who shall be under twenty-one years of age at the time of vesting upon certain terms and conditions and for a certain period of time. The details of this elaborate article are not relevant here.

Article VII appoints Wachovia Bank and Trust Company executor of his will and defines the powers granted it acting in its capacity as executor or trustee.

The will of H. C. Buchan, Jr., was duly probated in common form, and Wachovia Bank and Trust Company duly qualified as executor of the last will and testament of H. C. Buchan, Jr., deceased, and letters of administration were duly issued to it. Ruth Lowe Buchan was duly appointed, and duly qualified as general guardian of her daughter, Mary Elizabeth Buchan.

On 2 March 1961 Ruth Lowe Buchan filed a written dissent to the will of her husband upon the alleged ground that under his will, "and including such property as might pass under the will and that property passing in any manner outside the will" as a result of her husband's death, she did not receive one-half or more in value of all of his property passing by reason of his death; that she has a right to dissent "by reason of General Statutes of North Carolina 30-1, and subsequent sections of Chapter 30"; that she files this dissent in person, and in lieu of taking under the will "elects to treat said will as a nullity and to take an intestate share of the estate of H. Carl Buchan, Jr."

Wachovia Bank and Trust Company filed what it terms an answer to the widow's dissent averring that she has no right to dissent to the will on the ground that she received under her husband's will one-half of his estate, which is not subject to the payment of any estate, inheritance, transfer, succession, legacy, or similar taxes, and in addition further alleging, on information and belief, that she has received proceeds from insurance policies on her husband's life in the amount of over $400,000.00.

Ruth Lowe Buchan filed a reply to the answer of Wachovia Bank and Trust Company to her dissent alleging in elaborate detail the grounds set forth in her dissent, and averring that she has received proceeds from insurance policies on her husband's life in the sum of $354,308.91, that she paid a substantial amount on the premiums, and that on one policy in the amount of $50,000.00 the insurance company has refused payment. In her reply she further alleges, on information

and belief, that the gross estate of her husband will exceed $4,000,000.00 before taxes, not including any insurance proceeds received by her, tangible personal property, or real estate passing to her by operation of law.

While Ruth Lowe Buchan's dissent was pending negotiations were initiated between Wachovia Bank and Trust Company, as executor and trustee of the will of H. C. Buchan, Jr., and his widow, Ruth Lowe Buchan, to compromise her dissent, and a tentative settlement was agreed upon. As a result of which the present action was instituted to get the advice and consent of the court, pursuant to its general equity jurisdiction, to what the parties term a family settlement.

At the July Mixed Term 1961 Judge McConnell finding as a fact that in the present suit there may be an inconsistency or conflict between the interest of Ruth Lowe Buchan individually and the interest of her ward, Mary Elizabeth Buchan, and that it is just and proper that the ward should be represented by some completely disinterested person who could adequately protect the ward's interests, upon petition of Wachovia Bank and Trust Company, executor and trustee, and with the consent of Ruth Lowe Buchan, general guardian of her daughter, appointed T. E. Story, a reputable member of the Wilkes County Bar, guardian *ad litem* of Mary Elizabeth Buchan in this proceeding. T. E. Story, guardian *ad litem* was made a party defendant, and filed an answer in this suit and in the dissent proceeding. Mary Elizabeth Buchan was also made a party to the suit.

When the suit came on to be heard by Judge McConnell all parties waived a jury trial. It appears that the only evidence presented to the court was the pleadings, the will, the instruments in respect to the appointment of T. E. Story guardian *ad litem* of Mary Elizabeth Buchan, and an affidavit of E. D. Beach, a certified public accountant, in respect to the computation of inheritance and estate taxes on the estate of H. C. Buchan, Jr., deceased, whether the terms of the will are carried out in full or whether the widow's dissent becomes effective, attached to the answer of T. E. Story, guardian *ad litem* in the dissent proceeding, and also oral testimony by Ruth Lowe Buchan, as stated in the judgment of Judge McConnell. These are the relevant findings of fact summarized as made by the judge, except when quoted, omitting findings of fact setting forth what we have stated above:

Plaintiff requests the advice and direction of the court relative to a proposed compromise settlement of Ruth Lowe Buchan's dissent proceeding to the will of H. C. Buchan, Jr. The proposed settlement is that Wachovia Bank and Trust Company, in its capacity as trustee, will pay to Ruth Lowe Buchan from the *corpus* of funds held by it in trust for the benefit of Ruth Lowe Buchan under Article IV of the will of

H. C. Buchan, Jr., the sum of $400,000.00. An integral part of the proposed compromise settlement involves the withdrawal, by consent of all the parties, of Ruth Lowe Buchan's dissent to the will.

An issue has been drawn between the parties as to the statutory right of Ruth Lowe Buchan to dissent from her husband's will. The Wachovia Bank and Trust Company and Ruth Lowe Buchan do not desire to accept the hazards and expenses incident to the trial of the issues raised in her dissent proceeding to her husband's will, and desire amicably to settle and compromise all matters in controversy between them in the dissent proceeding on the terms above set forth.

The guardian *ad litem* indicated to the court "that in the event said compromise settlement is consummated and the litigation terminated, the minor will suffer a contingent loss of approximately $493,400.00, this loss being contingent upon said litigation being continued to a conclusion and the widow being successful in her effort to dissent from the will."

"(16) That in the event said dissent proceeding is terminated in favor of the widow and she is successful in dissenting from the will, then the minor's trust under the will of her father will be increased by at least $493,400; that this Court further finds that the minor, Mary Elizabeth Buchan, does not now have any vested interest in this sum of at least $493,400.00, and that such interest as she has, if any, is based upon a contingency, to wit, the outcome of doubtful litigation; that this Court further finds as a fact that the proposed compromise settlement will not alter or diminish the interest bequeathed to the minor, Mary Elizabeth Buchan, under the will of her father; that said proposed compromise settlement will and does operate to carry out the intent of the testator with respect to said minor as contained in the will of the said deceased, H. Carl Buchan, Jr.; that the amount of $493,400.00 set out in this paragraph is predicated upon a net estate of $5,000,000.00; that in the event said net estate should exceed $5,000,000.00, this amount would be increased in proportion to the amount of the increase in the net estate. The net estate of H. Carl Buchan, Jr. is at least $5,000,000.00.

"(17) The minor, Mary Elizabeth Buchan, is the only child of H. Carl Buchan, Jr. and of the widow, Ruth Lowe Buchan, and that she is the only child born of the union between Ruth Lowe Buchan and the deceased, H. Carl Buchan, Jr.; that the minor, Mary Elizabeth Buchan, is twelve years of age and she lives and resides in the home of her mother and has so resided all of her life; that she will in all probability continue to be a member of

the family circle composed of her and her mother until she is emancipated; that it is the opinion of this Court and this Court so finds that the proposed compromise settlement will, insofar as it applies to said minor and said widow, prevent any possible family dissension regarding this matter now or in the future and will tend now and in the future to strengthen and hold the family affection between the mother and the daughter; that this judgment is in the nature of a family settlement and is made for the sake of family harmony both for the present and for the future; that said proposed compromise settlement authorized by this judgment will further operate to bring to an end and settle further litigation which would prove vexatious, expensive and hazardous to all parties.

"(18) That this Court has carefully considered the terms of the proposed compromise settlement and the terms of this judgment and the Court has carefully considered and heard all evidence pertaining to this judgment and to said settlement, documentary and otherwise, and has weighed said evidence especially in light of the manner in which it pertains and affects the minor, Mary Elizabeth Buchan; that after a careful consideration of the pleadings, all the evidence and facts pertaining to said compromise settlement and to this judgment and after a careful and deliberate consideration of all the evidence, both documentary and otherwise, as the same affects said minor, this Court is of the opinion and so holds and finds as a fact that this judgment and said proposed compromise settlement are to the best and lasting interest of said minor child, Mary Elizabeth Buchan, and that the same is fair, reasonable and proper considering all the circumstances.

"(19) All of the parties hereto, except T. E. Story, guardian *ad litem,* have consented to a proposed judgment to be entered in the dissent proceeding, a copy of which is attached hereto and incorporated herein by reference, under the terms of which Ruth Lowe Buchan, the widow of H. Carl Buchan, Jr., will withdraw her dissent and by which Wachovia Bank and Trust Company, Trustee under the Will of H. Carl Buchan, Jr., will pay to Ruth Lowe Buchan from the trust created for her benefit under Article IV of said will the sum of $400,000.00. T. E. Story, guardian *ad litem,* has declined to consent to said judgment in the dissent proceeding without a final judgment in this proceeding authorizing and directing him to do so.

"(20) All parties to this action, except T. E. Story, guardian *ad litem* for Mary Elizabeth Buchan, have consented to this judgment and have indicated their consent by their signatures hereto."

Based on its findings of fact the court entered judgment as follows: Wachovia Bank and Trust Company, as executor and trustee, under the will of H. C. Buchan, Jr., deceased, is authorized and directed to consent to the proposed judgment to be entered in the dissent proceeding, and to do all things necessary to consummate the proposed compromise settlement. T. E. Story, guardian *ad litem* of Mary Elizabeth Buchan, is authorized and directed to do likewise. "The Wachovia Bank and Trust Company, in its capacity as Trustee under the Will of H. Carl Buchan, Jr., is authorized, empowered and directed to pay to Ruth Lowe Buchan, individually, the sum of $400,000, which amount shall be paid from the corpus of the trust for the benefit of the said Ruth Lowe Buchan under Article IV of the Will of H. Carl Buchan, Jr., and that no part of said payment of $400,000 shall be paid from the trust for the benefit of Mary Elizabeth Buchan created by the will of her father, H. Carl Buchan, Jr., nor from any other sums to which the said Mary Elizabeth Buchan may be entitled under said will, and Wachovia Bank and Trust Company, Trustee, is further authorized to do all other things necessary, convenient or proper in connection with the payment of said $400,000.00."

The Wachovia Bank and Trust Company, Trustee under the will, is taxed with the costs of this suit, and is directed to pay such costs from the funds held by it as trustee for the benefit of Ruth Lowe Buchan under Article IV of the will of H. C. Buchan, Jr., Wachovia Bank and Trust Company and Ruth Lowe Buchan, and their counsel, consented in writing to the judgment.

T. E. Story, guardian *ad litem* of Mary Elizabeth Buchan, excepted to the judgment rendered, and appealed to the Supreme Court.

T. E. Story, Guardian Ad Litem of Mary Elizabeth Buchan, and Attorney for defendant appellant.

W. G. Mitchell, Attorney for defendant appellee, Ruth Lowe Buchan.

McElwee & Hall, By W. H. McElwee, Attorney for plaintiff, Wachovia Bank & Trust Company, appellee.

PARKER, J. The appellant, T. E. Story, guardian *ad litem* of Mary Elizabeth Buchan, has only one exception in the record, and that is to the judgment. This exception raises the question whether any error of law appears on the face of the record proper. This includes the question whether the facts found by Judge McConnell are sufficient to support the judgment. *Moore v. Owens,* 255 N.C. 336, 121 S.E. 2d 540; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486.

The testamentary trusts created by the will of H. C. Buchan, Jr., for his wife and infant daughter, with contingent interests for possible

issue of his daughter, and for his heirs at law under the intestacy laws of North Carolina, if his daughter does not exercise the power of appointment vested in her by Article V(4) of her father's will and dies without issue surviving her, and also with contingent interests for his wife and daughter, are the subject matter of the agreement between Wachovia Bank and Trust Company, trustee of these trusts, and his widow, Ruth Lowe Buchan.

When a testamentary trust is the subject matter of the agreement, there are material limitations upon its application, which are clearly set forth in *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713, and in *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203.

Among these limitations set forth in the *Carter* case are these:

"(2) The rule that the law looks with favor upon family agreements does not prevail when the rights of infants are involved. A court of equity looks with a jealous eye on a contract that materially affects the rights of infants. Their welfare is the guiding star in determining its reasonableness and validity.

"(3) A court of equity will not modify or permit the modification of a trust on technical objections merely because its terms are objectionable to interested parties or their welfare will be served thereby. It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants.

". . . (5) The exigency, contingency, or emergency necessary to invite the intervention of the courts must relate to and grow out of the trust itself or directly affect the *corpus* thereof or the income therefrom."

The superior court of North Carolina in its equity jurisdiction has inherent authority over the property of infants, since it stands in *loco parentis,* and has the same jurisdiction in this respect as that of the English High Courts of Chancery. *Coxe v. Charles Stores Co.,* 215 N.C. 380, 1 S.E. 2d 848. "It is unquestionable that courts of equity have general jurisdiction over the property of infants and that infancy alone is sufficient to sustain the right of supervision. The jurisdiction in all cases is complete and may be exercised in order to afford relief wherever it may be necessary to preserve and protect the estates and interests of those who are underage." *Bank v. Alexander,* 188 N.C. 667, 125 S.E. 385.

"It is well settled in this jurisdiction, at least, that in the case of infant parties, the next friend, guardian *ad litem,* or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court." *Butler v. Winston,* 223 N.C. 421, 27 S.E. 2d 124.

The theory of the trial below was "that this judgment is in the nature of a family settlement." The trusts created by the will are active trusts. *Fuller v. Hedgpeth,* 239 N.C. 370, 80 S.E. 2d 18; Strong's N. C. Index, Vol. 4, Trusts, p. 375. A settlement between Ruth Lowe Buchan and the trustee is not a family settlement. *Harris v. Citizens Bank & Trust Co.,* 172 Va. 111, 143, 200 S.E. 652, 665; 57 Am. Jur., Wills, sec. 1005. It would seem that the family settlement doctrine is not applicable to this suit. *Duffy v. Duffy,* 221 N.C. 521, 20 S.E. 2d 835; *Deal v. Trust Co.,* 218 N.C. 483, 11 S.E. 2d 464.

However, the superior court of Wilkes County in the exercise of its equity jurisdiction has jurisdiction over the parties and over the subject matter of this suit concerning the trust property of the infant Mary Elizabeth Buchan, whether vested or contingent, and over the suit.

The infant Mary Elizabeth Buchan has a vested right in the trust estate created for her benefit by Article V of her father's will. She has only a contingent interest in the trust estate created for her mother, Ruth Lowe Buchan, by Article IV of her father's will. The proposed agreement between the trustee and Ruth Lowe Buchan provides for the payment to Ruth Lowe Buchan of the sum of $400,000.00 from the *corpus* of the trust estate created for her benefit by Article IV of the will, and that the costs shall be paid from this trust estate. However, the trust estate created for the infant Mary Elizabeth Buchan has the burden of paying all the taxes specified in Article II and Article V of the will, as set forth above. There are no definite findings of fact by Judge McConnell as to the taxable value of the estate of the late H. C. Buchan, Jr., and as to the amount of these taxes if the provisions of the will are carried out as written, or as to the amount of these taxes if the widow's dissent prevails, and she takes an intestate share of the estate. The difference in these taxes will materially affect the rights of the infant Mary Elizabeth Buchan and the *corpus* of the vested trust estate created for her benefit by Article V of her father's will. Based on the facts found by Judge McConnell we cannot safely and accurately determine whether the proposed settlement will adequately protect the vested trust estate of the infant Mary Elizabeth Buchan.

The briefs of the appellees state that if the proposed settlement is approved by the court, and the widow's dissent is withdrawn, it will result in substantial tax savings to the estate, and this appears from the affidavit of E. D. Beach attached to the answer of the guardian *ad litem* in the dissent proceeding. This affidavit assumes that the gross taxable value of the estate of H. C. Buchan, Jr., is estimated at $5,000,000.00. Will that estimate prove correct? The findings of fact and

the record give no definite answer. The appellees have offered no evidence in this respect. Assuming that in this equity proceeding we have the right to review and weigh all the evidence in the case and find the facts, *Greensboro Bank and Trust Co. v. Royster,* 194 N.C. 799, 139 S.E. 774; McIntosh, N. C. Practice and Procedure, 2d Ed., Vol. 1, Supreme Court, sec. 61; 5A C.J.S., Appeal and Error, sec. 1662, note 11, p. 583, where many North Carolina cases are cited, there is not sufficient evidence in the record for us safely and accurately to find the taxable value of the estate of H. C. Buchan, Jr., deceased, and the amount of taxes that will be due and payable if the terms of the will are carried out in full, or if the dissent of the widow prevails.

The possible issue of the infant Mary Elizabeth Buchan have contingent interests in the trust estate created for her benefit and the trust estate created for the benefit of the widow Ruth Lowe Buchan, which under the provisions of the will may vest. The heirs at law of H. C. Buchan, Jr., have contingent interests in the trust estate created for his widow and daughter, if his daughter dies without issue surviving her, and does not exercise the power of appointment given her by Article V (4) of the will, and these interests may vest, and these heirs at law may be *in posse* or *in esse.* The Supreme Court in the exercise of its supervisory powers, and acting *ex mero motu* is of the opinion that a guardian *ad litem* should be appointed to represent the possible issue of Mary Elizabeth Buchan, and a guardian *ad litem* should be appointed to represent the heirs at law of H. C. Buchan, Jr., so that their contingent interests can be protected. This language in Strong's N. C. Index, Vol. 2, Executors and Administrators, p. 345 is apposite: "Further, family settlements will not be approved when the rights of infants are not protected, nor when the agreement is to the detriment of contingent beneficiaries not *in esse.*"

The judgment states: ". . . it is the opinion of this court and this court so finds that the proposed compromise settlement will insofar as it applies to said minor and said widow, prevent any possible family dissension regarding this matter now or in the future, . . . that this judgment is in the nature of a family settlement and is made for the sake of family harmony both for the present and for the future." That seems to be pure speculation. The will of H. C. Buchan, Jr., has many complicated and interrelated parts, and whether in the years ahead controversies will arise between the trustee, Ruth Lowe Buchan, and Mary Elizabeth Buchan in respect to its terms and provisions seems beyond the wit of man to foresee. However that may be, we are here primarily concerned with the welfare of the infant Mary Elizabeth Buchan and the protection of her vested trust estate.

The findings of fact are not sufficient to support the judgment, and further rights of contingent beneficiaries under the will are adjudicated, and we cannot determine from the findings of fact that their contingent interests have been adequately protected. It is ordered that the judgment below be vacated, and the case is remanded to the superior court for specific findings of fact in respect to the matters and things set forth in the opinion.

Error and remanded.

PIEDMONT CANTEEN SERVICE, INC. v. WILLIAM JOHNSON, COMMISSIONER OF REVENUE FOR NORTH CAROLINA.

(Filed 12 January, 1962.)

1. Controversy Without Action § 2—

Where more than one inference can be drawn from facts stipulated by the parties, the court has the authority to find the ultimate determinative facts from the evidentiary facts stipulated.

2. Taxation § 29— Facts stipulated held to support finding that charge paid by lessee was rent subject to use tax and not a service charge.

The stipulated facts disclosed that plaintiff leased automatic vending machines, some of which sold the products of lessor and some of which did not, that lessee paid a rental charge on all the machines and, in addition, paid a "supplemental rental" on those machines which did not sell the products of lessor, calculated on a percentage of the gross sales of the products sold by those machines. It appeared further that lessor serviced all the machines and performed certain bookkeeping and promotional services. *Held:* The evidentiary facts support the finding of the ultimate fact that the "supplemental rental" was payment for the use of the machines and therefore was subject to the North Carolina use tax, and was not a mere service charge or an operating profit accruing to the lessor. G.S. 105-164.6.

3. Same—

Construing the North Carolina sales tax statute as a whole, it *is held* to impose a privilege or license tax upon retailers and not a purchasers' or consumers' tax, and therefore a retailer is not exempt from liability for the tax on articles selling for less than ten cents even though he may not recoup the tax from the purchaser in such instances. G.S. 105-164.10.

4. Statutes § 5—

A part of a statute is not to be interpreted out of context but the entire statute must be construed as a whole and harmonized to ascertain the intent of the legislature, the legislative intent being the guiding star in the interpretation of statutes. G.S. 105-164.10.

5. Same—

Where the language of a statute expresses the legislature's intent in clear and unambiguous terms, the words must be taken as a final expression of the meaning intended unaffected by the legislative history of the statute.

6. Taxation § 23—

An interpretative regulation by the Commission of Revenue will ordinarily be upheld if made pursuant to statutory authority and if not in conflict with the terms and purpose of the act pursuant to which it was made.

7. Taxation § 29—

The incorporation into the sales tax statute of the bracket system for computing the amount of sales tax which should be collected from the customer in the purchase of articles costing less than a dollar made no material change in the statute, the regulation of the Commissioner of Revenue being already in effect prior to its incorporation into the statute.

8. Taxation § 19—

One who claims an exemption or exception from a tax has the burden of bringing himself within the exemption or exception.

9. Taxation § 2— Fact that general rule necessarily results in hardship in particular instances does not render it unconstitutional.

G.S. 105-164.1, *et seq.*, imposes a sales tax on all retailers as a class and applies alike in its exceptions and exemptions to all retailers, and therefore if incidents of trade lead to inequality or hardship in recoupment of the tax from customers because of the necessity of specifying the price ranges within which the retailer may require the purchaser to pay the one, two, and three cents, with no tax collected from the purchaser on sales of less than ten cents, such inequality is inherent in the application of any general rule and does not render the tax unconstitutional as violating the due process clause of the State Constitution or the 14th Amendment of the Federal Constitution.

10. Constitutional Law § 4; Taxation § 36—

Only those whose personal, property, or constitutional rights are injuriously affected or threatened by a statute may challenge its constitutionality, and where a retailer does not make it appear that he had suffered any monetary damage by the method used in determining his right to recoup the tax from his customers, he is not in a position to challenge the constitutionality of the statute on the ground that the method of recoupment resulted in unjust discrimination between retailers.

APPEAL by plaintiff from *Bickett, J.*, June 5, 1961 Civil Term of WAKE.

Plaintiff, Piedmont Canteen Service, Inc. (hereinafter called "Piedmont") is a North Carolina corporation, having its principal office in Greensboro, North Carolina. It sells at retail within this State cigarettes, bakery products, candy, bottled drinks and coffee through coin

operated automatic vending machines. It leases the machines from Automatic Canteen Company of America (hereinafter called "Automatic"), of Chicago, Illinois.

Auditors of the North Carolina Department of Revenue examined Piedmont's records for the period 10 June 1956 to 11 April 1959 and on 15 May 1959 proposed an assessment of additional sales and use taxes. On 26 June 1959 Piedmont protested the proposed assessment and was granted a hearing before the Commissioner of Revenue on 29 September 1959. The Commissioner sustained the assessments, authorized waiver of penalty, and notified Piedmont on 25 July 1960. Piedmont gave notice of intention to petition the Tax Review Board for administrative review in accordance with G.S. 105-241.2.

Piedmont abandoned its application for administrative review and on 22 August 1960 paid under protest the sales and use tax assessments claimed by the Commissioner, and demanded refund. In apt time Piedmont instituted this action, pursuant to G.S. 105-267, to recover the following amounts which had been included in the payment: $11,992.99 sales tax and $1,969.25 interest, and $967.82 use tax and $158.91 interest — total $15,088.97.

The cause was heard by the judge upon a "stipulation" (agreed statement of facts). The court entered judgment denying the relief prayed for in the complaint.

Plaintiff appeals.

Henderson & Henderson, Lloyd F. Baucom, and Robert D. Stewart for plaintiff appellant.

Attorney General Bruton and Assistant Attorneys General Pullen and Abbott for defendant appellee.

MOORE, J. We first consider the use tax assessment.

By the terms of the lease agreement for use of the vending machines Piedmont was obligated to pay, and did pay, Automatic rental on three bases: (1) Initial rent, to cover Automatic's cost of placing machines in Piedmont's place of business; (2) period rent, for 65 company periods or five years to cover amortization of the cost of machines to Automatic; and (3) residual rent, a nominal rental charged by Automatic for use of machines more than five years old. These three rentals were paid with respect to all of the machines leased by Piedmont.

In addition, Piedmont paid to Automatic a separate fee designated in the lease contract as "supplemental rent." "Supplemental rent" applied only to machines through which bottle drinks and coffee were sold. The bakery products, candy and like items, which were sold through the other machines, were packaged and supplied to Piedmont

by Automatic, and with respect to these items Automatic made a profit from wholesaler's markup, and no "supplemental rent" was charged for the use of the machines vending these items. A part of the products sold through the drink and coffee machines was purchased by Piedmont locally, and as to these Automatic realized no Wholesaler's profit. Since Automatic received no wholesaler's profit from the products sold through the drink and coffee machines, the "supplemental rent" was paid for the use of such machines to compensate for the absence of profit. The "supplemental rent" was a percentage of the gross sales of products sold through the drink and coffee machines.

The lease agreement was not available at the trial. Piedmont's manager explained its terms, as above outlined, and his testimony was included in the stipulation. His testimony also contained the following facts and explanations: Supplemental rent "was not designed as a fee or charge for the use of the equipment but was, instead, a payment required by Automatic as part compensation for engineering services, public relation services and other benefits rendered by Automatic to plaintiff. . . . (S)upplemental rental was not . . . charged by Automatic upon any gross sales made through vending machines vending a product such as candy, bakery products and the like which had been purchased by plaintiff from Automatic and on which Automatic had made a profit. . . . 'Supplemental rental' was applicable to and payable only with respect to leased drink and coffee machines through which products were dispensed, part of which were not purchased at wholesale from Automatic. . . . Piedmont . . . could not have used such leased drink and coffee machine . . . without payment of the 'supplemental rental.' The payments were made by plaintiff to Automatic . . . for the right to use its vending machines and its franchise in North Carolina. Automatic . . . furnished bookkeeping service, repair service and promotional help to Piedmont . . . in connection with the use of all of its vending machines located in North Carolina. Such service was furnished for machines on which no 'supplemental rental' was paid as well as on machines on which 'supplemental rental' was paid. If Piedmont failed to pay any of the fees designated in the contract as rental, Automatic . . . could have deprived Piedmont of the use of the machines on which fees required by the contract had not been paid and could have also deprived Piedmont of its franchise. . . . Piedmont could not have used bakery goods, cigarette and candy machines under the franchise agreement if plaintiff had not purchased such items directly from Automatic . . . or in such fashion as to enable Automatic . . . to make a profit comparable to wholesaler's profit or 'product override.'"

For the audit period Piedmont paid Automatic $32,260.22, "supple-

mental rental" on drink and coffee machines. The Commissioner of Revenue contends that this payment was "rent" for the use of vending machines in this State and that use tax on this amount, at the rate of 3%, was due and payable. G.S. 105-164.6. On the other hand, plaintiff contends that the payment was a service charge or an "operating profit accruing to the franchising company where an override or surcharge upon products sold was, for one reason or another, uncollected," and was not, in fact, "rent" for use of machines.

The trial court found as a fact that the "supplemental rental" was based on the amount of the gross sales made through the drink and coffee machines and was not related to services rendered in connection with such machines, that Automatic rendered the same services to all its machines (whether subject to supplemental rental or not), and that Piedmont paid the supplemental rental for the right to use the drink and coffee machines in North Carolina. The court concluded that the 3% use tax on the supplemental rental paid by plaintiff was "lawfully assessed and collected" by the Commissioner of Revenue.

Where jury trial has been waived and evidentiary facts stipulated, if more than one inference can be drawn from these facts, it is permissible for the court to find the ultimate determinative facts from the evidence stipulated. *Credit Association v. Whedbee,* 251 N.C. 24, 29, 110 S.E. 2d 795. Where different inferences can be drawn from the evidence the ultimate issue is for the trial judge when jury trial is waived. *Turnage Co. v. Morton,* 240 N.C. 94, 99, 81 S.E. 2d 135.

In the findings and judgment of the court with respect to the use tax assessed and collected we find no error. The evidentiary facts stipulated permit, if not compel, the inference that the "supplemental rental" was payment for the use of the machines and the exercise of the franchise therefor in North Carolina. Moreover, the contracting parties designated it as "rental" in their lease agreement. *Trust Co. v. Processing Co.,* 242 N.C. 370, 88 S.E. 2d 233.

We now consider the challenged sales tax assessment.

The total amount of Piedmont's retail sales through vending machines for the audit period was $1,758,491.83. Of this amount $399,766.43 was realized from sales of items priced at less than ten cents per unit. It is plaintiff's contention that it is not liable for payment of 3% sales tax on the $399,766.43 received by it from sales of items priced at less than ten cents each. The Commissioner of Revenue contends to the contrary.

G.S. 105-164.10 provides in part that "every retailer . . . shall add to the sale price and collect from the purchaser on all taxable retail sales an amount equal to the following: (1) No amount on sales of less than 10c; (2) 1c on sales of 10c and over but not in excess of

35c; (3) 2c on sales of 36c and over but not in excess of 70c; (4) . . ." (semi-colons added.)

Plaintiff's argument rests upon the premise that the North Carolina sales tax is, as a matter of law and by intent of the legislature, a purchasers' or consumers' tax. It insists that, since the tax is a purchasers' tax and the retailer cannot charge and collect the tax on sales of less than ten cents, the sales of items through vendings machines priced at less than ten cents each are nontaxable, and that its receipts of $399,-766.43 from the sale of such items are exempt from assessment for sales tax.

We do not agree that the North Carolina sales tax is a purchasers' or consumers' tax in the sense contended by plaintiff. It is true that the act makes provision for retailers to pass the tax on to and collect it from the purchasers, but the tax is primarily and essentially a privilege or license tax imposed on retailers. A part of a statute may not be interpreted out of context so as to render it inharmonious to the intent of the act, but must be construed as a part of the whole. *Watson Industries v. Shaw,* 235 N.C. 203, 69 S.E. 2d 505; *State v. Barksdale,* 181 N.C. 621, 107 S.E. 505; *White v. State,* 306 P. 2d 230 (Wash. 1957).

Sales tax provisions are contained in Article 5, Chapter 105 of the General Statutes of North Carolina. Division I states the title and purpose of the act. "This article shall be known as the 'North Carolina Sales and Use Tax Act.' " G.S. 105-164.1. "Purpose:— The taxes herein imposed shall be in addition to all other license, privilege or excise taxes. . . ." G.S. 105-164.2. Division II, part 1, imposes and levies the retail sales tax. "Imposition of tax; retailer. — There is hereby levied and imposed . . . a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail . . . in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales . . . , to wit: (1) at the rate of three per cent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales for the purpose of remitting the amount of the tax due the State and to include each and every taxable retail sale or amount of taxes collected whichever be the greater." G.S. 105-164.4. "The said tax shall be collected from the retailer . . . and paid by him at the time and in the manner as hereinafter provided." G.S. 105-164.4(4). "Any person who shall engage or continue in any business for which a privilege tax is imposed by this article shall . . . apply for and obtain from the Commissioner upon payment of the sum of one dollar ($1.00) a license to engage in and conduct such business upon condition that such person

shall pay the tax accruing to the State . . . under the provisions of this article. . . ." G.S. 105-164.4(6).

From the foregoing provisions, explaining the purpose and imposing the tax, it is clear that the Legislature intended that the sales tax be primarily a privilege or license tax on retailers. The legislative intent is the guiding star in the interpretation of statutes. *Watson Industries v. Shaw, supra; Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484. Plaintiff cites certain language in the Report of the Tax Study Commission (1956) as indicative of the intention of the Legislature to levy a sales tax against consumers. This report was available to the General Assembly when the act was rewritten in 1957. But where the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history. *Hedrick v. Graham,* 245 N.C. 249, 260, 96 S.E. 2d 129; *Raleigh v. Bank,* 223 N.C. 286, 26 S.E. 2d 573.

Plaintiff maintains that this Court has interpreted the act as a levy of tax upon consumers, and quotes from *Assurance Co. v. Gold,* 249 N.C. 461, 106 S.E. 2d 875, and *Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754. The former involves a tax on insurance premiums and the Court points out a similarity to sales tax in language which is pure *dictum.* The latter relates to sales tax liability on flowers grown by a retail florist, and the language relied on relates to an administrative provision and the nature and purpose of the law is not directly involved. But in *Watson Industries v. Shaw, supra,* construing the act, this Court declared that "Our sales tax statute, G.S. 105, Art. 5, levies a tax upon the sale of tangible personal property in this State by a 'retail' merchant as a privilege tax for engaging or continuing in the business of a retail merchant." See also *Robinson & Hale, Inc. v. Shaw,* 242 N.C. 486, 87 S.E. 2d 909.

Plaintiff places its reliance upon some of the language in G.S. 105-164.10, quoted above, which provides a bracket system for collecting the tax from consumers. It will be observed that G.S. 105-164.10 is included in Part 4 of Division II of Article 5, which contains certain administrative provisions enabling the retailer by authority of law to pass the tax on to purchasers. It does not relieve the retailer of any tax liability; it provides him a ready legal means for recoupment. The tax must be added to the purchase price and constitutes a debt from purchaser to retailer until paid, but failure to charge or collect the tax from purchaser shall not affect retailer's liability. G.S. 105-164.7. Any retailer who advertises that he will absorb the tax shall be guilty of a misdemeanor. G.S. 105-164.9. G.S. 105-164.10, upon which plaintiff relies and which provides a "Retail Bracket System"

and states that no amount of tax shall be collected on sales of less than ten cents, states that the bracket system is "for the convenience of the retailer in collecting the tax and to facilitate the administration of this article." It further states that the "use of the . . . bracket does not relieve the retailer from the duty and liability to remit to the Commissioner an amount equal to three per cent (3%) of the gross receipts derived from all taxable retail sales during the taxable period." Thus, it is seen that the Legislature was careful to state, in all instances where administrative provisions might be construed to shift the burden of the tax from retailer to purchaser, that such provisions do not relieve the retailer from his privilege tax liability. Furthermore, it is made clear that the bracket system is for the convenience of the retailer.

Plaintiff seems to concede that the act constituted a privilege tax prior to the effective date of Ch. 1340, S.L. 1957, which rewrote the sales tax law. But it asserts that the law, by virtue of the 1957 enactment, made it a consumers' tax from and after July 1, 1957, for the reason that the bracket system was written into the act and thereby became compulsory. It is true that the bracket system was not a part of the act itself prior to July 1, 1957. Nevertheless, the 1957 act did not materially change the administration of the law in this respect. The Commissioner had theretofore promulgated a bracket system and its observance by retailers was not optional, as contended by plaintiff, but was compulsory. G.S. 105-186 (Chap. 262, P.L. 1939) empowered and directed the Commissioner of Revenue "to devise, promulgate and enforce regulations under which retail merchants shall collect from the consumers, by rule uniform as to classes of business, the sales tax levied upon their business . . . ," which regulations "may include plans which require both more and less than the prescribed rate of the tax on the sale price. . . ." It further provided that such regulations should "become effective after reasonable notice to the retail merchants and when so promulgated they shall have the full force and effect of law" and that "any merchant who violates such rules and regulations shall be guilty of a misdemeanor." An interpretative regulation made by the Commissioner of Revenue will ordinarily be upheld if made pursuant to statutory authority and if not in conflict with the terms and purpose of the act pursuant to which it was made. *Campbell v. Currie,* 251 N.C. 329, 111 S.E. 2d 319. The bracket system promulgated by the Commissioner and in force prior to July 1, 1957, was as effective and enforceable as if enacted directly by the Legislature. It contained a provision that no tax be collected by the retailer on sales of less than ten cents. Thus the 1957 act made no material change in the effect of the bracket system, and made no

change in the nature of the tax by reason of the inclusion of the bracket system in the act itself.

Plaintiff refers to the various provisions of the act imposing tax liability upon retailers and adverts to the language which, in each instance, levies the tax upon "total net *taxable* sales." It contends that the items priced at less than ten cents per unit and sold through the vending machines are *nontaxable* under the bracket system and are therefore exempt. One who claims an exemption or exception from tax coverage has the burden of bringing himself within the exemption or exception. *Sabine v. Gill,* 229 N.C. 599, 51 S.E. 2d 1; *Henderson v. Gill, supra; Motor Co. v. Maxwell,* 210 N.C. 725, 188 S.E. 389; *Smoky Mountain Canteen Co. v. Kizer,* 247 S.W. 2d 69 (Tenn. 1952). The act itself provides that "to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of . . . retailers are subject to the retail sales tax until the contrary is established by the proper records. . . ." G.S. 105-164.26. During the audit period and prior to the 1961 amendment sales of many types of merchandise, such as essential foods and medicines, were exempt. G.S. 105-164.13. Plaintiff claims no exemption under this section and makes no contention that any of the types of merchandise sold by it are exempt or nontaxable because of the nature of the merchandise. Its sole contention is that the items priced at less than ten cents each and sold through vending machines are nontaxable because of the low unit price. This contention is not sustained. The expression "total net taxable sales" and expressions of similar purport, as used in the act, mean the total of all retail sales, except those excluded in whole or in part by Part 1 of Division II which imposes and levies the tax, and except those which are exempt under G.S. 105-164.13. The sales which plaintiff claims are nontaxable are not so excluded or exempted. While not necessary to a decision in this case, it is of interest to observe that the act in no particular exempts goods from the tax on retailers because of smallness of unit price. Moreover, the bracket system (G.S. 105-164.10) provides that a retailer shall collect from a purchaser "no amount on *sales* of less than 10c." It has reference to *sales,* not *unit price* of goods. Plaintiff does not, and in all probability cannot, show what portion of its *sales,* if any, were less than ten cents. It is not to be assumed that all customers who purchased merchandise through vending machines, containing items priced at less than ten cents per unit, purchased only one unit each. Such assumption would be contrary to common knowledge and experience. If a customer buys two or more items priced at less than ten cents each so that the sale amounts to ten cents or more, "the retailer's failure to . . . collect said tax from the purchaser shall not affect" the retailer's liability to the State. The retailer is not

to be excused from liability merely because it is to his advantage to make use of a method of selling which will not permit him to keep a proper record of sales or to make the collections required by law.

Finally, plaintiff contends that the act as written and administered discriminates against retailers who sell merchandise through vending machines, especially if their machines sell items priced at less than ten cents each, and that the act, as to such retailers, therefore violates the due process clause of the Constitution of North Carolina and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff relies mainly upon the decision in *Winslow-Spacarb, Inc. v. Evatt,* 59 N.E. 2d 924 (Ohio 1945), a case involving sales of drinks, priced at five cents each, through vending machines. The Ohio law imposed a 3% sales tax and provided that no tax could be collected "if the *price* is less than nine cents." (Emphasis ours.) The court held that the Ohio tax was a consumers' tax and stated: "If Section 5546-12a were to be applied to such a vendor who collects no tax from the consumer, the vendor would be paying three per cent on his gross retail sales entirely out of his own pocket, while other vendors in the same vicinity selling similar and other commodities, some of their sales being taxable and others not, would have the privilege and advantage of deducting 'the amount of tax paid to the state by means of cancelling prepaid tax receipts,' for which expenditure they have been reimbursed by the consumer, thus placing them in a more favored position and in some instances, at least, causing them to pay little or nothing. The result would be an unfair discrimination among vendors, in violation of the equal protection clauses . . . of the Constitution of Ohio and the 14th Amendment to the Constitution of the United States."

In jurisdictions where the sales tax is imposed as a privilege tax on retailers the court, in situations somewhat similar to that in the instant case, have consistently held that the tax does not violate constitutional provisions relating to due process and equal protection. *F. W. Woolworth & Co. v. Gray,* 46 N.W. 2d 295 (N.D. 1951); *State v. Woods,* 5 S. 2d 732 (Ala. 1942); *White v. State,* 306 P. 2d 230 (Wash. 1957); *Smoky Mountain Canteen Co. v. Kizer, supra; W. F. Jensen Candy Co. v. State Tax Commission,* 61 P. 2d 629, 107 A.L.R. 261 (Utah 1936); *Roth Drugs v. Johnson,* 57 P. 2d 1022 (Cal. 1936).

North Carolina pioneered in the sales tax field and its sales tax law differs in some respects from the laws of the other States which have been in litigation respecting their validity. For this reason none of the cases listed above are exactly on all fours with the case at bar. But with respect to constitutionality *White v. State, supra,* is quite

similar. The State of Washington imposes a 3% tax on retail sales. The Tax Commission promulgated a bracket system for collection of the tax from purchasers. The bracket provided for no tax on sales of less than fourteen cents. Plaintiffs were engaged in sales through vending machines of merchandise priced at less than fourteen cents per unit, and collected no tax on its sales. Pursuant to statute the State required plaintiffs to pay 3% of its gross sales as tax. In discussing the validity and contitutionality of the sales tax law, as applied to plaintiffs, the court said:

> "The appellants point out that the system adopted sometimes results in inequities, as in their case; and consequently, they say, they are denied the equal protection of the laws and are deprived of their property without due process. This would be true if the statute and regulations were discriminatory, or if they provided an arbitrary and unreasonable classification. *Power Mfg. Co. v. Saunders,* 274 U.S. 490, 47 S. Ct. 678, 71 L. Ed. 1165; *Quaker City Cab Co. v. Commonwealth of Pennsylvania,* 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927. But the law makes no attempt to discriminate among sellers, nor does it classify them. It is true that it classifies sales for the purpose of applying the rate, but the rate remains constant throughout the schedule, and the schedule applies alike to every seller. In its general application, it imposes no hardship. It is only when a seller chooses to sell only items which are priced at a point on the schedule where less than the full tax is to be collected that he is forced to absorb part or all of the tax, and this is the exception rather than the rule."
>
> "We conclude that the statute in question requires the seller to pay the tax imposed when he fails for any reason to collect it; that the use of the bracket system authorized by the statute and adopted by the commission is reasonable and is designed to accomplish the purposes of the tax law as effectively as possible; that the law is neither arbitrary nor discriminatory and violates no constitutional right of the appellants."

The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. Dealing with a somewhat similar question, *Cardoza, J.*, stated: "We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group

within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox v. Standard Oil Co.*, 294 U.S. 87, 102.

On this record plaintiff is in no position to challenge the constitutionality of the sales tax law. Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights. *Leonard v. Maxwell*, 216 N.C. 89, 98, 3 S.E. 2d 316; *St. George v. Hardie*, 147 N.C. 88, 98, 60 S.E. 920. Approximately 76% of plaintiff's receipts from sales of merchandise during the audit period was from sales of items priced at ten cents and above. The record does not disclose how much tax it actually collected during the audit period. It is common knowledge that merchandise sold through vending machines, such as cigarettes, drinks, bakery products and candy, is priced at twenty-five cents or less per item. If, for instance, its average sale (of items priced at ten cents and above) has been twenty cents, and if the tax has been collected as the law requires, plaintiff has collected 5% on more than three-fourths of its total receipts. In such case it has collected more than 3% of its total sales (including sales of items priced at less than ten cents each). Plaintiff makes no showing on this record that it has suffered any financial loss by reason of the sales tax as administered.

The judgment below is

Affirmed.

F. L. PASCHAL AND THE GUILFORD NATIONAL BANK, EXECUTORS OF THE LAST WILL AND TESTAMENT OF L. B. PASCHAL, DECEASED, AND H. L. PASCHAL v. JAMES AUTRY, OSCAR AUTRY, EDWARD AUTRY, ADA WHITTED AND HUSBAND JAMES WHITTED, SALLIE REDIUS AND HUSBAND HOBART REDIUS, HARRY LEE McKAY, JASPER RICHARDSON, NORWOOD RICHARDSON, DAVID McKAY AND W. A. JOHNSON.

(Filed 12 January, 1962.)

1. Abatement and Revival § 13; Executors and Administrators § 6; Descent and Distribution § 1—

A right of action to recover for the wrongful cutting and removal of timber from land does not abate upon the death of the owner of the land, G.S. 1-74, G.S. 28-172, and such right of action as to timber cut prior to

the death of the owner vests in his personal representative and may not be maintained by the heirs, subject to exception when there is no administration, but upon the death of the owner, title to his lands vests in his heirs or devisees and therefore the right to recover damage for timber cut after the death of the owner must be brought by them and cannot be maintained by the personal representative.

2. Appeal and Error § 5—

Where a corporation acting as excutor has merged subsequent to the institution of the action, the new corporation should be substituted as a party.

3. Trespass to Try Title § 5; Adverse Possession § 21—

In an action in trespass, judgment may not be rendered that defendant had acquired title to a part of the *locus in quo* by adverse possession when there is no allegation of title by adverse possession in defendant's pleadings, regardless of proof introduced by defendant.

4. Pleadings § 28—

To establish a cause of action there must be *allegata* and *probata*, and the two must correspond.

5. Judgments § 29—

Persons who are not parties to the action and whose rights are not devolved from a party, are not bound by the judgment.

6. Executors and Administrators § 6—

Since title to the lands of a decedent vests immediately upon his death in his heirs, the personal representative of the decedent may not maintain an action to adjudicate and locate the boundaries of land which was owned by decedent in the absence of a provision in the will giving him such right.

7. Trespass to Try Title § 1—

In an action in trespass in which the question of title is injected, all persons claiming an interest in the lands as heirs of a decedent should be made parties.

8. Appeal and Error § 21—

An exception to the judgment presents the question whether error of law appears on the face of the record proper, which includes 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.

9. Appeal and Error § 55—

Where it is apparent on the face of a record proper that the judgment adjudicates matters not presented by the pleadings, adjudicates causes which the parties to the action cannot maintain, and that necessary parties were not joined, the cause will be remanded.

APPEAL by defendants from *Clark, J.*, May 1961 Term of BLADEN.

Civil action to recover damages for the unlawful cutting and re-

moval of timber, and to enjoin defendants from further trespassing on land.

The record does not disclose when this action was instituted: the record does not contain the summons, as required by Rule 19, Rules of Practice in the Supreme Court. 254 N.C. 785, 795-6.

It appears from the substance of a consent order, summarized in the record, entered at the November Term 1958, that the original plaintiffs were L. B. Paschal and H. L. Paschal, that L. B. Paschal died after the institution of the action, and that F. L. Paschal and the Guilford National Bank, Executors of the will of L. B. Paschal deceased, were made parties plaintiff in the stead of L. B. Paschal, and adopted the complaint as their own.

The complaint alleges in substance, except when quoted: "That the plaintiffs, prior to the 2nd day of April 1958, and since the 2nd day of April 1958, the plaintiff, L. B. Paschal, are the owners of and in possession" of a certain tract of land described by metes and bounds containing 96 acres situate in Bladen County. This is the same land described in a deed dated 19 August 1952 from David R. Smith *et uxor* to H. L. Paschal and L. B. Paschal, and properly recorded. Defendants through their agents David McKay and W. A. Johnson have wrongfully cut and removed timber from their land of the value of $1,500.00, for which they are entitled to recover damages in the sum of $3,000.00. G.S. 1-539.1.

Defendants' answer alleges in substance, except when quoted: They have no knowledge or information sufficient to form a belief as to whether plaintiffs own and are in possession of the tract of land described in the complaint, and therefore deny the allegations of the complaint in respect thereto. They deny that they have wrongfully cut and removed any timber from plaintiffs' land. And for a further answer and defense they allege that by deed dated 1 February 1904 T. D. Carter and wife conveyed to Edward Autry a certain tract of land consisting of 16.7 acres in Bladen County, which is described by metes and bounds. Edward Autry died intestate, and left him surviving "as his heirs at law the defendants James Autry, Oscar Autry, Edward Autry, Ada Whitted, Sally Redius, and they, with others who are heirs at law of Edward Autry, are the owners in fee simple of the tract of land next above described, and the said heirs defend this action for themselves and numerous other heirs of Edward Autry as a class." The defendants David McKay and W. A. Johnson have no right or interest in the said lands. If any part of the lands plaintiffs claim to own is within the boundaries of the tract of land described in their answer, then they deny plaintiffs' title to it.

Defendants by leave of court filed an amended answer in which they

allege in substance: They, and those under whom they claim, have been in adverse possession of the land described in their answer for more than seven years under color of title next preceding the commencement of this action, and therefore plead the seven-year statute of limitations in bar of plaintiffs' right to recover the tract of land, or any part thereof, described in their answer. They also plead twenty years adverse possession as a defense in respect to the land described in their answer. If it should be found that they cut and removed any timber on land belonging to plaintiffs, they cut it in good faith, believing they were the owners of the land upon which the timber was cut.

It appears from the record that the action was heard by Robert H. Burns, Jr., referee, on 14 April 1960. However, no order of reference is in the record, and we do not know whether the reference was by consent or compulsory. It appears the order of reference was entered by Judge Mallard.

The parties stipulated as follows: Plaintiffs and defendants claim record title from a common source, to-wit, T. D. Carter and wife. The plaintiffs, as to the land described in the deed from H. L. Paschal and wife to L. B. Paschal, have a connected chain of record title to the common source. The defendants, as to the land described in the deed from T. D. Carter and wife to Edward Autry, have a connected chain of record title to the common source. The deed under which defendants claim has priority of registration over the deeds under which plaintiffs claim.

From the stipulations of the parties, and other parts of the record, it appears that L. B. Paschal was the owner in fee at the time of his death on 9 July 1958 of the tract of land described in the complaint. In the hearing before the referee L. B. Paschal's son Louis G. Paschal testified: "I am the son of L. B. Paschal and under the will of my father, my mother, brothers and sisters are the owners of this tract of land" —the land described in the complaint.

The referee's seventh and eighth findings of fact are as follows:

> "7. Title to the said tract, containing 96 acres, more or less, hereinafter called the Paschal tract, passed through certain intervening transfers, as indicated by the attached abstracts, to L. B. Paschal, who died testate on the 9th day of July, 1958, leaving a will which is of record in Will Book No. 5, at page 408, office of Clerk of Superior Court of Bladen County. F. L. Paschal and the Guilford National Bank of Greensboro are the executors of said will, and the other plaintiffs are beneficiaries thereunder.
>
> "8. As stipulated, the plaintiffs, as to such land as is legally

described in the deed from H. L. Paschal and wife, to L. B. Paschal, registered in Book 134, page 454, have a connected chain of record title to the common source, to-wit: T. D. Carter and wife, Emma Carter."

L. B. Paschal's will is not in the record. According to the record before us the widow of L. B. Paschal and his children are not parties to the action, unless F. L. Paschal who appears as one of the executors of his will is a son, and if so, he appears in a representative and not an individual capacity.

The referee in a preliminary statement to his report stated: "In order to simplify the issues relating to the title to the lands in controversy, certain stipulations were entered into among the parties as indicated by said transcript." These stipulations are set forth above.

The referee made elaborate findings of fact. From these findings of fact the following appears: The land of L. B. Paschal's heirs and the land of the defendants were parts of a tract of land containing 274 acres formerly owned by T. D. Carter and wife. By deed dated 1 February 1904, and recorded 27 November 1906, T. D. Carter and wife conveyed to Edward Autry, ancestor of defendants, a part of this 274 acres containing 16.7 acres, which was the southern and southeast portion of the 274 acres. Afterwards T. D. Carter and wife by deed dated 16 November 1907, and recorded the same day, conveyed to Adolphus Rich the said 274 acres of land, except the 16.7 acres formerly conveyed to Edward Autry. The heirs at law of Adolphus Rich in 1938 conveyed 96 acres of this land to W. I. Merritt, which as shown by the seventh and eighth findings of fact is the land now owned by the heirs of L. B. Paschal. The 96 acres of land owned by the L. B. Paschal heirs and the 16.7 acres now owned by the defendants adjoin. The twelfth finding of fact is: "As to the record title of the lands in controversy, the issue hinges upon the true location of the defendants' 16.7 acre tract above mentioned."

The description of the land in the complaint reads in part: "Beginning at Ned Autry's upper corner of the Emma Carter land on the Canal . . . thence south 70 degrees west 5.80 chains to Ned Autry's corner at the edge of the bay; thence his line north 36½ degrees west 20.00 chains to the beginning, containing 96 acres, more or less."

The referee made conclusions of law to this effect: Plaintiffs are the owners in fee simple and are entitled to the immediate possession of the tract of land described in the complaint, "excepting that part which is included within the known and visible lines and boundaries of a cultivated field located near or along the northern portion of the line connecting point '1' and '13' ". "The defendants are the owners

of and are entitled to the immediate possession of the said cultivated field up to the known and visible lines and boundaries thereof, by virtue of their possession for twenty years and more without color of title." Plaintiffs are entitled to recover from defendant David McKay the sum of $1,200.00 for cutting and removing timber.

The referee recommended to the court as follows: That judgment be entered in conformity with his conclusions of law, and "that a further survey be ordered to determine, establish and describe the known and visible lines and boundaries of the cultivated field above mentioned, which lies within the bounds of the lands contended for by the plaintiffs, to which they have record legal title."

Defendants filed what they call "Exceptions and Motion" to the referee's report, which are really arguments instead of pure exceptions. Defendants have no exceptions in the record, except in these so-called exceptions.

Judge Clark heard the referee's report and defendants' "Exceptions and Motion," and entered judgment approving and confirming the referee's report in all respects, except that he reduced the amount of damages for wrongfully cutting and removing timber to $600.00.

From the judgment entered, defendants appeal.

Clark, Clark & Grady, By Giles R. Clark for defendants appellants.
Leon D. Smith for plaintiffs appellees.

PARKER, J. Defendants' assignments of error are not supported by any exceptions, except in the assignments of error. We allowed their motion to "group the exceptions to the assignments of error," but even now their assignments of error are not supported by any exceptions, except in the assignments of error.

The judgment of Judge Clark confirming the referee's report awards damages for plaintiffs against defendant David McKay for the wrongful cutting and removal of timber from the lands described in the complaint, adjudicates the boundaries and the location on the premises of the lands of the heirs of L. B. Paschal, and further adjudges that defendants have acquired title by adverse possession for more than twenty years without color of title to a cultivated field, "which lies within the bounds of the lands contended for by the plaintiffs, to which they have record legal title."

In respect to the cutting of timber plaintiffs' evidence shows the following: W. A. Johnson for the Autrys on 11 and 12 January 1955 cut timber on the lands claimed by the original plaintiffs. In 1955 David McKay cut one thousand trees and Mr. Paschal—the record does not show which Paschal—stopped him. In 1958 David McKay's

boys cut around 75 cords worth four or five dollars a cord. L. B. Paschal died 9 July 1958.

It would seem that the original plaintiffs were L. B. Paschal and H. L. Paschal, who apparently owned this 96 acres of land when the action was instituted. The record does not disclose the date of the conveyance by H. L. Paschal and wife of his interest in this land to L. B. Paschal.

The evidence of plaintiffs tends to show that the cutting and removal of timber from the 96 acre tract during the year 1955 occurred during the lifetime of L. B. Paschal, and that at the time of the 1955 cutting and removal he and H. L. Paschal owned the 96 acre tract of land. In other words, the cause of action for the cutting and removal of the timber during the year 1955 accrued during the lifetime of L. B. Paschal, to him in proportion to his interest in the land. We cannot determine from the record whether the 1958 cutting by David McKay's boys accrued prior to or subsequent to L. B. Paschal's death.

The rule of the common law that a personal right of action dies with the person has been changed by G.S. 1-74 and G.S. 28-172, and if a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to L. B. Paschal deceased, in whole or in part, accrued during his lifetime, the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees. *Mast v. Sapp,* 140 N.C. 533, 53 S.E. 350, 5 L.R.A. (N.S.) 379; 111 Am. St. Rep. 864, 6 Ann. Cas. 384; *Suskin v. Maryland Trust Co.,* 214 N.C. 347, 199 S.E. 276; *McIntyre v. Josey,* 239 N.C. 109, 79 S.E. 2d 202; Strong's N. C. Index, Vol. 1, Abatement and Revival, sec. 9; *Penn Mutual Life Ins. Co. v. Heiss,* 141 Ill. 35, 33 Am. St. Rep. 273; 21 Am. Jur., Executors and Administrators, sec. 910; 33 C.J.S., Executors and Administrators, pp. 1055-6, rights of action connected with realty. G.S. 28-175, Actions which do not survive, has no application here. See also *Inman v. Meares,* 247 N.C. 661, 101 S.E. 2d 692.

We are not confronted here with special circumstances, for instance, where there is no administration of an estate and no necessity for an administration, as where there are no debts against it, etc. In such a case, it seems that the heirs' right of action for injury to real property, which accrued before the intestate's death, is generally recognized in most jurisdictions. 26A C.J.S., Descent and Distribution, sec. 85.

The judgment affirms the referee's report, except the judgment reduces the amount of damages awarded to plaintiffs against David McKay. We cannot determine from the judgment and referee's report whether the award of such damages included the cutting of tim-

ber by David McKay's boys in 1958, as shown by plaintiffs' evidence, and if so, whether this cutting of timber occurred prior to, or subsequent to, L. B. Paschal's death. If any cutting of timber by David McKay's boys occurred subsequent to L. B. Paschal's death, it cannot be recovered in an action by his executors, but the action must be brought by his devisees or heirs.

The Guilford National Bank appears here as a coexecutor and a party plaintiff. It is a matter of common knowledge that this bank no longer exists, but has been merged into the North Carolina National Bank, which should be substituted as party plaintiff.

The judgment adjudicates that the defendants are the owners of a cultivated field by reason of their actual adverse possession of it for twenty years without color of title, which cultivated field lies within the bounds of the lands contended for by the plaintiffs, and to which plaintiffs have record legal title. Defendants in their answer and amended answer have not alleged that they have acquired title by reason of twenty years adverse possession to any part of the land described in the complaint as belonging to the devisees or heirs of L. B. Paschal deceased, and, therefore, they cannot recover any part of the land described in the complaint by reason of twenty years adverse possession, no matter what their proof is. To establish a cause of action there must be both *allegata* and *probata*, and the two must correspond. Strong's N. C. Index, Vol. 3, Pleadings, sec. 28, where many cases are cited. This manifest error of law appears on the face of the record proper. As the devisees or heirs of L. B. Paschal deceased are not parties to the action, they are not bound by this adjudication. *Carney v. Edwards*, 256 N.C. 20, 122 S.E. 2d 786.

The judgment affirming the referee's report, except as to the reduction of damages awarded plaintiffs against David McKay, adjudicates the boundaries and location on the premises of the land described in the complaint. It would seem that it is necessary to determine these questions before it can be determined whether any timber was wrongfully cut and removed by the defendants, or any one of them, from the land described in the complaint. That was the theory of the trial below.

"Title to land of decedents does not vest in their executors but in their heirs at law or devisees." *Hinkle v. Walker*, 213 N.C. 657, 197 S.E. 129. The executors of L. B. Paschal have no right to maintain a cause of action to determine the boundaries and the location on the premises of the land described in the complaint owned by their decedent. The realty of their decedent did not vest in them, and they have no power to maintain an action concerning the realty, unless there is a provision in the will to that effect, and that is not shown.

The will is not in the record. This Court held in *Floyd v. Herring,* 64 N.C. 409, following *Ferebee v. Procter,* 19 N.C. 439, that "A personal representative has no control of the freehold estate of the deceased, unless it is vested in him by a will, or where there is a deficiency of personal assets and he obtains a license to sell real estate for the payment of debts. The control derived from a will may be either a naked power of sale or a power coupled with an interest. The heir of the testator is not divested of the estate which the law casts upon him, by any power or trust until it is executed." This is quoted in *Speed v. Perry,* 167 N.C. 122, 83 S.E. 176, and also in part in *Linker v. Linker,* 213 N.C. 351, 196 S.E. 329.

"Under the law, an administrator has no inherent interest in, title to, or control over the realty of his intestate." *Pack v. Newman,* 232 N.C. 397, 61 S.E. 2d 90.

"In the absence of a statute or will conferring title to, or the possession of, a decedent's realty upon the executor or administrator or giving him the right to maintain actions concerning the realty, the right of litigation concerning the realty of a decedent is vested solely in his heirs to the exclusion of the personal representative of the decedent." 21 Am. Jur., Executors and Administrators, sec. 1007. See Strong's N. C. Index, Vol. 2, Executors and Administrators, sec. 6.

The devisees or heirs at law of L. B. Paschal deceased are not bound by a judgment adjudicating the boundaries and fixing the location on the premises of the realty of L. B. Paschal deceased rendered in a cause to which they are not parties. *Oxendine v. Lewis,* 251 N.C. 702, 111 S.E. 2d 870.

It appears from the answer that all the heirs of Edward Autry are not parties defendant, and that the defendants who are some of his heirs defend the "action for themselves and numerous other heirs of Edward Autry as a class." How numerous these other heirs are the record does not show. Nor does it appear that the interest of the "other heirs" is similar to and consistent with those who are defendants. It would seem that the safe, if not necessary, procedure would be to make these "other heirs" parties defendant, so as to comply with due process, and bind them by the judgment finally rendered.

Defendants' exception to the judgment raises the question whether any 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 judgment, or whether the judgment is regular in form and supported by the verdict. *Moore v. Owens,* 255 N.C. 336, 121 S.E. 2d 540.

For manifest error of law appearing on the face of the record proper adjudicating the defendants the owners by twenty years adverse pos-

session without color of title of a cultivated field to which the devisees or heirs of L. B. Paschal deceased have record title, and for the reason that the judgment adjudges the boundaries and location on the premises of the land described in the complaint, a cause of action which the executors of L. B. Paschal deceased cannot maintain, and for the further reason that we cannot determine from the record whether the award of damages includes wrongful cutting and removal of timber occurring after L. B. Paschal's death, the judgment below is set aside and a new trial is ordered. The devisees or heirs at law of L. B. Paschal deceased should be made parties plaintiff, and all the heirs of Edward Autry deceased should be made parties defendant, in order that all the matters in controversy here between them may be finally adjudicated, and all such parties bound by the judgment finally rendered. It would seem that the parties should apply to the trial court for permission to recast their pleadings so as clearly to allege the matters in controversy between them.

Error and remanded.

BUNN CURTIS BREWER, EMPLOYEE v. POWERS TRUCKING COMPANY, EMPLOYER, AND IOWA MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 12 January, 1962.)

1. **Master and Servant §§ 60, 61— Evidence held to take cause out of usual rule that accident occurring while employee is going to or from his employer's plant does not arise in course of employment.**

Evidence to the effect that when an employee lacked transportation the employer sent its vehicle to transport the employee from his home to the plant and back to his home, that on the occasion in question claimant's car would not start and the employer sent a fellow employee to transport him to the plant, that thereafter claimant made a trip in the employer's truck to a farm in the regular course of the employment of loading poultry and transporting it to the plant, that on the direct route back to the plant claimant passed his home stopped only to get his car, got the assistance of his fellow employees and started his car so that the employer would not have to furnish him transportation back to his home after he had completed his duties at the plant, and that he was injured while driving his personal car on the direct route to the plant, *is held* to support a finding that the accident arose out of and in the course of employment, since the facts take the cause out of the usual rule that injury received while going to and from work does not arise in the course of employment.

2. **Master and Servant § 90—**

The Industrial Commission has authority to review, modify, adopt, or

reject findings of a hearing commissioner and may *ex mero motu* strike out a finding of the hearing commissioner and his conclusion of law based thereon in order to make the record comply with the law, even though there is no exception to the finding or conclusion. G.S. 97-85.

3. Master and Servant § 73a— Unintentional violation of statute, even though causing injury, does not require reduction of award.

The fact that the accident causing plaintiff's injury was the result of his violation of statutory regulation governing the operation of motor vehicles on the highway does not warrant the reduction of the award under G.S. 97-12 if such violation was not wilful but merely negligent, and the action of the Industrial Commission in striking out the finding and conclusion of the hearing commissioner in regard to the reduction of the award will not be disturbed even though the Commission does not specifically find that the violation of statutory duty was not wilful, there being evidence that claimant's injuries resulted primarily when a following vehicle crashed into the rear of his vehicle after it was immobilized in the accident resulting from claimant's negligence.

APPEAL by defendants from *Gwyn, J.*, 30 January 1961 Civil Term of RANDOLPH.

This proceeding originated before the North Carolina Industrial Commission pursuant to our Workmen's Compensation Act.

A claim was filed by Bunn Curtis Brewer, an employee of the defendant Powers Trucking Company. A hearing was held before Commissioner Ransdell in Ashboro, North Carolina, on 18 May 1959. It was held that the accident causing injury to Bunn Curtis Brewer arose out of and in the course of his employment, and an award was entered granting compensation for temporary total disability. On appeal to the Commission the cause was remanded "for the purpose of taking additional evidence to the end that a determination of the issue of causation may be made and that a determination of the issue of whether plaintiff willfully failed in the performance of a statutory duty may be reached."

A second hearing was held before Deputy Commissioner Shuford in Asheboro on 22 March 1960; the parties stipulated:

"1. That the parties are subject to and bound by the provisions of the Workmen's Compensation Act, the defendant employer regularly employing five or more employees.

"2. That Iowa Mutual Insurance Company is the compensation carrier and was on the risk at the time complained of.

"3. That on and prior to September 8, 1958, plaintiff was regularly employed by the defendant employer at an average weekly wage of $75.00."

Findings of fact and conclusions of law pertinent to this appeal are as follows:

"1. That the defendant employer is a trucking concern which primarily hauls live poultry from farm to market.

"2. That plaintiff is 31 years of age and at the time complained of had been employed by the defendant employer for approximately three years; that his job was that of weighmaster or foreman of a work crew of eight men; that plaintiff and the men under his direction would receive instructions to go to a particular farm, catch, weigh, crate, and load on defendant employer's trucks live poultry for market; that plaintiff and the men working under him went to work customarily anywhere from 11:00 P.M. to 1:00 A.M. each work day and worked until the job was completed, usually arriving back at the employer's place of business around 10:00 A.M. the next morning; that plaintiff always came back to the employer's place of business, as he had been instructed, after the loading was completed to turn in the weight tickets on the poultry loaded, check to see if there existed any mechanical trouble with the trucks and if so get a mechanic to fix it, gas up the trucks, and put down the speedometer readings.

"3. That it was customary if an employee did not have transportation to go to the employer's place of business to begin work for the employer to send a vehicle after him and then carry him home when the work day was completed; that the employees, including the plaintiff, were not furnished transportation by the employer as a part of the contract of employment.

"4. That on the night of September 7, 1958, the battery in plaintiff's automobile was out of order and the employer sent a fellow employee to get him at his home; that he remained at the trucking company for approximately 20 minutes and received instructions to go to a farm 40 miles away at Graham and load some poultry; that three trucks and eight employees made the trip; that after the work there was finished and the poultry was weighed and loaded, plaintiff and the employees under him then left Graham to report back to the employer's office in Bennett, riding in the employer's pickup truck furnished for this purpose.

"5. That plaintiff's home was located 2-½ miles from the trucking company on the road leading from Graham to Bennett; that on the return trip from Graham, plaintiff requested the driver of the employer's pickup to stop at his (plaintiff's) home for him to secure his car, a Mercury automobile, to drive back to the trucking company so that the employer would not have to bring him back home after he had finished his work at the office; that plaintiff did not go inside his home but went directly from the company truck to his car, some 30 feet from the highway in his driveway; that at plaintiff's direction, the driver of the company pickup then pushed plaintiff's vehicle to get it

started, driving in the direction of Graham until the motor started; that plaintiff and the driver of the company pickup then turned around and went back toward the trucking company office; that the pickup stopped and picked up the other six employees who had been left in front of plaintiff's home, and they all started to the office, all eight employees except plaintiff then riding in the cab of the company pickup; that when they reached a point approximately two miles from the trucking company and one-half mile from plaintiff's home on the most direct route between said points, plaintiff's automobile collided with a State Highway truck on the truck's right-hand side of the road and on plaintiff's left-hand side of the road; that the company pickup then collided with the rear of plaintiff's vehicle.

(Findings of Fact Nos. 6 and 7 relate to injuries which are not in dispute on this appeal.)

"8. That in the way and manner set out in the previous findings, plaintiff sustained an injury by accident arising out of and in the course of his employment. * * *

"9. Prior to and at the time of the injury by accident giving rise thereto, plaintiff drove in the center of and on the left side of the highway. He also drove at a speed which was greater than was reasonable and prudent under the conditions then existing. Plaintiff's injury was caused by his willful failure to perform a statutory duty."

The Deputy Commissioner made the following conclusions of law:

"1. On 8 September 1958, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. G.S. 97-2(6).

"2. (This conclusion of law relates to plaintiff's injuries only.)

"3. Plaintiff's injury was caused by his willful failure to perform a statutory duty and plaintiff's compensation should therefore be reduced ten per cent. G.S. 97-12; G.S. 20-141; G.S. 20-146."

An award was entered giving compensation to Bunn Curtis Brewer in accordance with these findings and conclusions. The defendants appealed to the Commission. After hearing and review, the Commission, Commissioner Peters dissenting, struck finding of fact No. 9 and conclusion of law No. 3, and amended the award accordingly. On appeal to the Superior Court the Commission's ruling was affirmed.

The defendants appeal, assigning error.

Moody & Moody; Ottway Burton; Linwood T. Peoples for plaintiff appellee.

Simms & Simms for defendants appellant.

DENNY, J. The defendants assign as error the action of the court

below in overruling defendants' exception and assignment of error challenging the finding of fact to the effect that plaintiff sustained an injury by accident arising out of and in the course of his employment.

In our opinion, this case does not fall within the general rule that injuries sustained by an employee while on his way to or returning from work are not compensable. As stated in Volume I, Larson's Workmen's Compensation Law, Section 16.00, page 222: "The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, whether or not separately compensated for, is in itself a substantial part of the services for which the worker is employed." The principle applicable to the facts in this case is well stated in Volume I, *ibid.*, Section 25.00, page 384: "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." *Jackson v. Creamery*, 202 N.C. 196, 162 S.E. 359; *Michaux v. Bottling Co.*, 205 N.C. 786, 172 S.E. 406; *Mion v. Marble & Tile Co.*, 217 N.C. 743, 9 S.E. 2d 501; *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862; *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476.

In *Jackson v. Creamery, supra,* the plaintiff was employed to deliver milk and solicit customers. The Creamery was located outside but near the City of Asheville. Jackson had no regular hours but his day's work usually ended about 7:00 p.m. At the completion of his day's work, it was his duty to return the milk truck to the Creamery. On the day in question, having worked for fifteen hours, the plaintiff stopped and parked his employer's truck in front of a cafe and had supper, got a shave and haircut, and also shot a game or two of pool. Thereafter, while returning the truck to the Creamery he had an accident and was injured. The Industrial Commission concluded that even if the claimant temporarily abandoned his master's business when visiting the barber shop and poolroom and other places for his personal business and for his personal amusement, he resumed it on starting to return the truck of the master to its proper place, and awarded compensation. The ruling of the Commission was affirmed upon appeal to the Superior Court and the ruling of the lower court was upheld on appeal to this Court.

The facts in *Mion v. Marble & Tile Co., supra,* are similar to those in the instant case. In the *Mion* case, the office of the defendant employer was located in Charlotte, North Carolina. Six employees, including Alfred Mion, were working on a job some fifteen miles away in South Carolina. They reported for work at the office in Charlotte on the day in question and were transported by truck to the job site. At

the close of the work day, a sedan was sent to bring them back to Charlotte. To avoid overcrowding the car the foreman of the crew suggested that Mion ride back in the private automobile of a fellow employee. On the return trip there was an accident in which Mion was killed. This Court affirmed the Commission's ruling that the accident arose out of and in the course of the employment. *Winborne, J.*, now *C.J.*, speaking for the Court, said: "In the light of this evidence this case does not come within the rule that ordinarily injury by accident, while the employee is going to or returning from his work in a conveyance of a third person over which his employer had no control, does not arise out of or in the course of his employment. See *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540, and cases cited. But, rather, the evidence tends to show that at the time of the accident Mion was actually in the course of his employment, performing a part of his duty thereunder and for which he was being paid the same as when actually laying tile."

In the instant case, making the trip to Graham to load poultry and the return trip to the place of business of the employer in Bennett after the poultry was loaded, constituted a substantial part of the services for which the plaintiff was employed. We hold that under the facts in this case, the transfer of this employee from the truck of the employer to his automobile in order that he might have it so that he could return home after he made his required report at the office of his employer, did not constitute a distinct departure on a personal errand, disassociated from his master's business. No detour was involved. The plaintiff's home was located on the most direct route between Graham and Bennett. When the collision occurred, the plaintiff was proceeding on this direct route to the place of business of his employer. This assignment of error is overruled.

The defendants assign as error the action of the Commission in striking out finding of fact No. 9 by Deputy Commissioner Shuford and his conclusion of law No. 3 based thereon. The appellants argue this was error since the plaintiff did not appeal from the findings of fact or to the conclusions of law set out in the opinion and award filed by Deputy Commissioner Shuford.

In the case of *McDowell v. Town of Kure Beach*, 251 N.C. 818, 112 S.E. 2d 390, an award was made on 20 March 1958 by the hearing Commissioner in favor of plaintiff, awarding the employee $32.50 per week during a designated period for temporary total disability, and $4.88 per week for 300 weeks from and after 28 December 1957 for a fifteen per cent permanent partial disability. The defendant Town and its carrier appealed to the Full Commission. In the meantime the case of *Kellams v. Metal Products, Inc.*, 248 N.C. 199, 102 S.E. 2d 841,

was handed down on 9 April 1958, in which this Court held that compensation awarded an employee for permanent partial disability in accordance with the provisions of G.S. 97-31 was subject to the maximum and minimum provisions of G.S. 97-29. The last cited statute provides for a minimum compensation of $10.00 per week. The Commission determined that McDowell's accident giving rise to his claim fell within the period governed by the Kellams decision. Thereupon, the Commission held that the plaintiff was entitled, as a matter of right, to have his award amended to comply with the law. The award was amended by the Commission *ex mero motu* to provide for compensation to be paid plaintiff at the rate of $10.00 per week for 300 weeks from and after 28 December 1957 for his fifteen per cent permanent partial disability. On appeal to the Superior Court the Commission was reversed. The plaintiff appealed to this Court and we reversed the lower court and remanded the cause for further proceeding in accord with the law. In the *McDowell* case this Court said: " * * * (T)he Workmen's Compensation Act of North Carolina provides orderly procedure after an award is entered upon findings of fact and conclusions of law by the hearing Commissioner. It is provided by G.S. 97-85 that 'if application is made to the Commission within seven days from the date when notice of the award shall have been given, the Full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties, or their representatives, and, if proper, amend the award.' Indeed, an 'award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, * * * but not thereafter, appeal from the decision of said Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office.' " (G.S. 97-86) This Court further held: " * * * (T)he Commission has, and ought to have authority to make its own records comply with the law — as indicated by the General Assembly; and it should do so even *ex mero motu*."

It is true that G.S. 97-12 provides in pertinent part: " * * * When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section."

The appellants contend that since the plaintiff did not appeal and,

therefore, did not comply with the requirements of Rule XX of the Commission, the Commission is bound by the findings of fact found by Deputy Commissioner Shuford. We do not concur in this view. Rules promulgated by the Commission are for the benefit of the Commission and must be complied with by the parties to a proceeding brought pursuant to the provisions of our Workmen's Compensation Act. However, these rules do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a Deputy Commissioner or by an individual member of the Commission when acting as a hearing Commissioner. In fact, the Commission is the fact finding body under our Workmen's Compensation Act. The finding of facts is one of the primary duties of the Commission. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760; *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515. A finding of fact by a hearing Commissioner or by a Deputy Commissioner never reaches the Superior Court or this court unless it has been affirmed by the Commission. 100 C.J.S., Workmen's Compensation, Section 687, page 1044. Certainly, the power to review the evidence, reconsider it, receive further evidence, rehear the parties or their representatives, and, if proper, to amend the award, carries with it the power to modify or strike out findings of fact made by the Deputy Commissioner or hearing Commissioner if in the judgment of the Commission such finding is not proper.

The appellants cite and rely upon the case of *Aetna Life Ins. Co. v. Carroll*, 169 Ga. 333, 150 S.E. 208, in support of their contention that finding of fact No. 9 by the Deputy Commissioner and the conclusion of law based thereon should be upheld. The Georgia Workmen's Compensation Act provides: "No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including * * * willful failure or refusal to * * * perform a duty required by statute * * *."

In the last cited case the Supreme Court of Georgia held that the dependants of a deceased employee who approached a railroad intersection on the highway at a speed greater than that prescribed by the statute and collided with a train, were not entitled to recover compensation on the theory that the commission of a crime by an employee is willful misconduct within the meaning of the Georgia statute and the employer should not be required to pay compensation for the employee's injury or death due to his violation of the criminal statute, such violation being the proximate cause of his injury or death.

In the case of *Carey v. Bryan & Rollins* (Super. Ct.), 117 A. 2d 240, the Court rejected the rule laid down in the *Carroll* case, pointing out that the case deals with the construction of the words "willful misconduct" which do not appear in the Delaware statute although, in

other respects, the pertinent provisions of the Georgia statute is almost identical with the Delaware Compensation Act. This statement applies equally to our own Act. The Delaware Court said: "There is such conflict and confusion among the various statutes and decisions relating to this phase of the law of workmen's compensation, precedents from other jurisdictions are of little value. * * * The only reasonable course, therefore, is to confine ourselves to the precise language of our statute and an attempt to determine the intention of our Legislature. * * * I find the rule of the *Carroll* case to be unacceptably harsh when considered in the light of the humanitarian purposes of the Workmen's Compensation Law. It does not seem consonant with the spirit of such legislation to hold that a forfeiture of all rights of compensation may result from an inadvertent and unintentional violation of a traffic law. * * *

"It is held that violation of a penal motor vehicle statute does not, per se, constitute a 'wilful failure to perform a duty required by statute' and forfeiture under 19 Del. C. § 2353(b) and that, in order to invoke the forfeiture provisions of the Workmen's Compensation Law, the employer has the burden of proving by a preponderance of the evidence that the violation of the statute was 'wilful', *i.e.*, intentional and deliberate and not just careless and inadvertent. * * *"

However, in the case of *Armour & Co. v. Little*, 83 Ga. App. 762, 64 S.E. 2d 707, the Court in considering the failure of an employee to use a safety device said: "The wilfulness contemplated by the statute amounts to more than a mere act of the will, and carries with it the idea of premeditation, obstinacy and intentional wrongdoing, so that the mere doing of a thoughtless act which does not constitute deliberate disobedience does not deprive one of compensation."

In striking out finding of fact No. 9 and the conclusion of law based thereon, in the instant case, the Commission may have concluded that the evidence warranted no more than a finding that the plaintiff carelessly and negligently operated his automobile at an excessive rate of speed and was guilty of negligence *per se*, but was not guilty of the willful failure to perform a statutory duty. If so, it would have been appropriate for the Commission to have so found. Even so, the action of the Commission was tantamount to a finding that the conduct of plaintiff did not warrant exaction of the ten per cent penalty. Moreover, a careful examination of the evidence leads us to the conclusion that it would be extremely difficult, if not impossible, to ascertain whether the plaintiff was the more seriously injured in the first collision when his car collided with the State Highway truck or in the second collision when the employer's truck was driven into the rear of plaintiff's automobile immediately after the first collision. Accord-

ing to the evidence of the Highway Patrolman, plaintiff's car left skid marks for 168 feet before it collided with the State Highway truck, and the employer's truck, which was following plaintiff's car, skidded 165 feet before it collided with the rear of plaintiff's automobile. The evidence further tended to show that the defendant employer's truck was being driven at a distance of approximately 100 feet behind the plaintiff's car immediately prior to the accident.

A careful consideration of the exceptions and assignments of error of the appellants leads us to the conclusion that the judgment of the court below should be upheld.

Affirmed.

IN RE CLARENCE M. SIMMONS BY S. B. FRINK, GUARDIAN.

(Filed 12 January, 1962.)

1. **Insane Persons § 2—**

The fact that notice was served on a person only some half-hour before the hearing in which he was adjudged incompetent is in itself insufficient to invalidate the adjudication, the incompetent being present at the hearing and being examined by the jury, and no request for a continuance having been made.

2. **Same—**

Where neither the incompetent nor persons acting for him have challenged the validity of the adjudication of his mental incapacity, the proceeding being regular on its face, strangers to the proceeding may not collaterally attack the adjudication and the appointment of a guardian pursuant thereto, nor challenge the right of the guardian to institute proceedings to preserve the incompetent's estate.

3. **Guardian and Ward §§ 2, 4; Insane Persons § 4; Judicial Sales § 5—**

A person appointed guardian of a minor has no authority to act for his ward after the ward has attained his majority, even though the ward is at that time and remains thereafter mentally incompetent, and, after the ward has attained his majority, such guardian has no authority to seek the sanction of the court for sale of the ward's property, nor has the court authority to authorize a sale on petition of such guardian, and the sale may be set aside on motion in the cause, the lack of authority not appearing on the face of the record.

4. **Same—**

Where a person purporting to act as guardian for a minor or insane person in petitioning for sale of lands of the ward, acts not in the interest of the ward but for a third person, and sells the lands for a gross-

ly inadequate price, the sale is voidable and is properly set aside on motion in the cause upon evidence disclosing the facts, and such sale becomes void when vacated and can pass no title to the purchaser.

5. Appeal and Error § 49; Judgments § 27—

Where, upon the hearing of a motion to set aside an order there is abundant and competent evidence to sustain a finding by the court, the fact that other evidence of doubtful competency was also admitted is not ground for disturbing the result, since it will be presumed that incompetent evidence was disregarded by the court in making its decision.

APPEAL by S. B. Frink, guardian, H. O. Peterson, Paul Brown and wife, Mary Brown, and Henry Smith, respondents, from *Craven, S.J.*, July 1961 Special Term of Brunswick.

In April 1961 Clarence Moody Johnson, acting through his guardian, Ernest Hewett, filed with the clerk of the Superior Court of Brunswick County a petition to vacate and set aside an order made by the clerk of the Superior Court of Brunswick County on 15 April 1942 in a proceeding as here captioned, which order, approved and confirmed by the judge then presiding over the courts of Brunswick County, authorized Frink, called guardian, to sell the lands of Clarence M. Johnson.

The facts alleged by Hewett, as guardian for Clarence Moody Johnson, hereafter designated as movant, to support the prayer for relief are summarily stated: Movant is and has been since birth *non compos mentis*. He is the son of Lena Simmons. He and his brother William Simmons were legally adopted by A. J. Johnson and wife, Mary M., in 1920. The surname was then changed from Simmons to Johnson. Mary M. Johnson died testate on 3 September 1922, owning four contiguous tracts containing 240.7 acres. Movant was, in 1942, the owner of this land, having acquired title by the will of Mrs. Johnson and by descent from his brother, likewise a devisee of Mrs. Johnson. On 12 November 1937 Frink applied for the appointment of a guardian for "Clarence Johnson, alias Clarence M. Simmons . . . To the end, therefore, that the estate of the said minor orphan may be preserved and managed according to law . . ." Frink was thereupon appointed as guardian for the minor. Movant was an adult when this proceeding was instituted in March 1942. Frink has not been his guardian since movant reached his majority. The petition filed by Frink, purporting to act as guardian, did not disclose the interest of his alleged ward in the lands nor the value of his interest therein. The court made no findings of fact with respect to the estate or value of movant's interest in the properties. The sum of $15, recited as having been offered, was wholly and grossly inadequate. The facts alleged in the petition filed by Frink did not warrant or authorize any sale of the interest of movant. Frink,

purporting to act under the order signed by the clerk in 1942, executed a deed to H. O. Peterson, Sr. for the purported sum of $15. Peterson knew movant, knew his mental condition, and took the deed from Frink as guardian with knowledge of movant's good title. Movant was adjudged *non compos mentis* in September 1960. Ernest Hewett was then appointed and is now acting as guardian for movant. Hewett acted diligently in seeking to avoid the sale made in 1942.

Notice of the motion with a copy thereof was served on respondents Peterson, Brown, and Smith. Frink and Peterson answered the petition. They admitted Mrs. Johnson owned the lands described at her death, that she died testate, that movant and his brother were legally adopted. They denied movant was the owner of the lands in 1942 when the petition was filed to sell, asserting the land had, prior thereto, been sold for nonpayment of taxes. They denied movant was *non compos mentis*. They alleged Frink had not been removed as guardian and was legally acting as such when the petition to sell was filed in 1942. They deny any irregularity in the proceeding which authorized the sale or in the conveyance executed pursuant to the order of court, and the asserted diligence of movant. Brown and wife appeared. They adopted as their own the answer of Frink and Peterson. Smith, although served with process, did not appear until after the hearing in the Superior Court.

The motion was heard by the clerk in May 1961. Concluding the order of sale entered 15 April 1942 was valid, he denied the motion. Movant appealed to the Superior Court. Judge Craven heard the evidence offered by the parties, found the facts substantially as alleged by movant, specifically finding:

"XXI. S. B. Frink, called as witness by the movant, testified and upon his testimony, the Court now finds as a fact that he had never before seen the said Clarence Moody Johnson prior to the hearing on appeal of this motion in the cause; that at the time the said S. B. Frink instituted Special Proceeding No. 53, he neither knew the mental state nor condition of the said Clarence Moody Johnson (referred to as Clarence M. Simmons in said proceeding) nor his age; that he never knew the nature, extent or value of said Clarence Moody Johnson's interest or estate in the lands, said lands being the same lands as is described in paragraph II of this motion in the cause; that he never received payment of the $15.00 referred to in the above mentioned order of the Clerk, and that he never filed any report of the proceeds of the sale to the Superior Court of Brunswick County as directed by Judge Thompson and that S. B. Frink acted for and relied upon an attorney, now deceased, in preparation of the proceeding.

XXII. That on and at all times after the filing in Special Proceeding

No. 53 by S. B. Frink of the said petition therein dated March 23, 1942, Clarence Moody Johnson was, has been, and is a mental defective without intellectual understanding and unable rationally to transact business matters or to understand the nature and extent of his property and his rights of ownership incident thereto.

"XXIII. Prior to the appointment of Ernest Hewett on September 12, 1960, no other guardian for Clarence Moody Johnson has been appointed except the appointment of S. B. Frink on November 12, 1937, as above mentioned."

Based on his findings, Judge Craven concluded that Frink was not guardian for movant in March 1942 when the petition to sell was filed, the guardianship having terminated because Clarence Moody Johnson had attained his majority. Based on his findings and conclusions, he rendered judgment awarding movant the relief prayed for.

The record shows exceptions to the findings of fact and conclusions of law filed by H. O. Peterson, Paul Brown and wife, Mary Brown, and by Henry Smith, who had not theretofore appeared or participated in the proceeding. These parties appealed. The record does not disclose any exceptions filed by Frink either to the findings of fact or conclusions of law, nor did he, so far as the record discloses, appeal from the judgment. He is designated as one of the respondents assigning error. Henry Smith is not named as one of the respondents who assigned error. Notwithstanding the record, a brief has been filed here designated as "Brief of S. B. FRINK, H. O. PETERSON, PAUL BROWN and wife, and HENRY SMITH, RESPONDENT APPELLANTS."

For the purpose of this appeal we treat those named on the brief as appellants.

A. H. Gainey, James A. Bowman, Fletcher, Lake & Boyce for movant appellee.

S. Bunn Frink and Isaac C. Wright for respondent appellants.

RODMAN, J. Appellants propound seven questions, each of which they say must be answered in the affirmative to sustain the judgment.

The first is: Was Hewett's appointment as guardian invalid? They contend the record establishes the inquisition in lunacy was a nullity because notice of hearing was not served on the alleged incompetent until 4 p.m. and the hearing was had at 4:30 p.m. on the same date. This short interval of time deprived Johnson of an opportunity to prepare his defense and establish his mental competency, and because of this lack of time in which to prepare a defense, the adjudication with respect to his mental competency was a nullity. True the record

shows that notice was served on Johnson at 4 p.m., and the time set for the hearing was 4:30 p.m.; but it also shows that Johnson was present at the hearing and examined by the jury. There is nothing to suggest that he requested a delay for the purpose of establishing his mental capacity. His failure to request a continuance when he had the opportunity to do so was a waiver of his right. *Collins v. Highway Com.*, 237 N.C. 277, 74 S.E. 2d 709.

Although adjudged incompetent on 12 September 1960, the date on which Hewett was appointed as guardian, the record contains no suggestion that Johnson has ever since that date complained of the manner in which the hearing was had with respect to his mental condition. The proceeding was regular on its face. Appellants cannot collaterally attack Hewett's appointment. *Arrington v. Short*, 10 N.C. 71; *Bethea v. McLennon*, 23 N.C. 523; *In re Propst*, 144 N.C. 562; Anno. 23 A.L.R. 606; 25 Am. Jur. 35; 39 C.J.S. 59.

The court found Johnson lacking in mental capacity to transact business, a condition existing prior to March 1942 and continuing until the hearing in 1961. The finding is supported by the evidence. Based on that finding, appellants should not now be permitted to challenge Hewett's effort to preserve for the incompetent his estate. *Moore v. Lewis*, 250 N.C. 77, 108 S.E. 2d 26; *Smith v. Smith*, 106 N.C. 498.

The next five questions propounded may be merged and reduced to this question: Do the facts alleged and found suffice to support the judgment vacating the order of sale? The answer is yes.

It is alleged and found that Johnson reached his majority prior to March 1942. Frink was appointed as guardian in November 1937 because Johnson was then a minor. The evidence is sufficient to support these allegations and findings. There is no evidence to the contrary. Frink testified he did not recall having ever seen movant prior to July 1961 and did not know how old he was in 1942.

When one is appointed as guardian for a minor, his right to act terminates when the ward reaches his majority. *Melton v. McKesson*, 35 N.C. 475; *Adams v. Adams*, 212 N.C. 337, 193 S.E. 661; 39 C.J.S. 62; 25 Am. Jur. 37.

Coon et al. v. Cook, 6 Ind. 268, bears a remarkable factual similarity to this case. There the court, in 1839, appointed one Hiatt guardian for Nancy Coon, a minor 18 years of age. She reached her majority in November 1842. She was then insane. After she reached her majority, her guardian obtained an order authorizing a sale of her property. The Supreme Court of Indiana said: "When Hiatt was appointed, his ward was just eighteen years old. At that time, she does not appear to have been represented as insane. The order of the Probate Court is very explicit. It reads thus: 'Ordered, that *David Hiatt*

be and he is hereby appointed guardian of *Nancy Coon,* infant, and minor heir of *John Coon,* deceased.' This appointment, of course, ceased to exist when her minority ceased; and that event occurred on the 16th of *November,* 1842. In point of fact, she was then insane; but that circumstance could not prevent her arrival at full age. There is no legitimate rule of construction that would extend the force of the above order of appointment beyond the last-named period, except so far as a settlement of the trust might require."

Frink as guardian was, in 1942, *functus officio,* totally lacking in authority to seek court authority for a sale of movant's property. Because of such want of authority to act for movant, the court acted improperly in authorizing the sale.

The power of a court to act on an unauthorized appearance was fully and carefully considered in *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897. There *Moore, J.,* reviewed at length prior decisions of this Court. No good purpose could be served by another review of the authorities. No plausible reason has been advanced why we would reverse the conclusion then reached that a court cannot authorize a sale or other disposition of one's properties upon application of one who has no authority to request the disposition, and when want of authority appears on the face of the record, the judgment is void; but when lack of authority does not appear on the face of the record, a motion in the cause is the proper procedure to obtain relief.

Not only was the court warranted in vacating the order of sale because Frink was, at the time he filed the petition, without authority to act; but if then the duly authorized guardian, the facts stated in Finding XXI were of themselves sufficient to support the judgment.

A guardian must in fact act *for* his ward. Here it is established Frink was not acting for his ward but "*acted for* and relied upon an attorney, now deceased, in preparation of the proceeding." (Emphasis added.) For whom was this other attorney acting? Why should he seek a sale of the property for less than a dime per acre? The law to be applied to these facts has been declared in many cases. The application is illustrated in *White v. Osborne,* 251 N.C. 56, 110 S.E. 2d 449; *Hall v. Shippers Express,* 234 N.C. 38, 65 S.E. 2d 333; *Butler v. Winston,* 223 N.C. 421, 27 S.E. 2d 124; *Cobb v. Fountain,* 187 N.C. 335, 121 S.E. 614; *Hughes v. Pritchard,* 153 N.C. 135, 69 S.E. 3; *Moore v. Gidney,* 75 N.C. 34.

The final question propounded by appellants is stated thus: "Are affidavits admissible instead of witnesses being examined subject to cross-examination?" While the brief does not specify the affidavits claimed to be incompetent, we assume the question is directed to four affidavits stating the opinion of affiants that movant was incompetent

and had been incompetent since birth. No argument is advanced in support of the question propounded. The affidavits supplement plenary parol testimony to the same effect given by witnesses cross-examined at length by appellants. Conceding but not deciding that these affidavits ought to have been excluded, appellants' assignment of error does not warrant another hearing. As said by *Parker, J.*, in quoting from Annotated Cases 1917C, p. 660; "The general rule deducible from the cases appears to be that where a case has been tried before the court without a jury the admission of incompetent evidence is ordinarily deemed to have been harmless unless it affirmatively appears that the action of the court was influenced thereby. In other words it is presumed that incompetent evidence was disregarded by the court in making up its decision." *Mercer v. Mercer*, 253 N.C. 164, 116 S.E. 2d 443.

In evaluating the challenged evidence, it must be remembered that the prime purpose in offering this evidence was to repel the assertion that if wrong had been done, it was so venerable because of age as to render it immune to attack.

Respondents do not argue that the $15 which Peterson was to have paid for the 240 acres or movant's interest therein was in fact a fair consideration, nor do the other movants assert they are in better position in that respect than Peterson. The order entered in 1942 authorizing the sale became void when vacated because entered on motion of one without authority to act for the owner.

Affirmed.

MARGARET ANN SOWERS, BY HER NEXT FRIEND, WALTER F. SOWERS, PLAINTIFF v. FORSYTH WAREHOUSE COMPANY, TRADING AS STAR WAREHOUSE, ORIGINAL DEFENDANT, AND CITY OF WINSTON-SALEM, ADDITIONAL DEFENDANT.

(Filed 12 January, 1962.)

1. Municipal Corporations § 39—

Where a claim for personal injuries resulting from a defect in a sidewalk is not filed with the municipality within the time specified in its charter and there is no allegation or evidence of incapacity or disability of claimant excusing the failure to file the claim within the time limited, an action against the city on the claim is properly nonsuited.

2. Negligence § 34—

Ordinarily, an abutting property owner is not under duty to keep the

sidewalk in a safe condition and may not be held liable for injuries resulting from a defect in the sidewalk unless the sidewalk was constructed by the property owner or the property owner causes or contributes to the existence of such defect.

3. Same— Evidence held insufficient to show liability of abutting landowner for defect in sidewalk.

Water from a downspout on defendant's warehouse passed under a metal strip covered with some inch and a half of concrete, level with the contiguous sidewalk. For a distance of some 12 inches from the curb the concrete over the metal strip became broken, and the exposed metal strip rusted. Plaintiff was injured when she stepped on the exposed metal strip and her heel was cut by a jagged edge of the metal. *Held:* Even though the evidence disclosed that the defect had existed for a sufficient length of time to give the abutting property owner notice thereof, nonsuit as to such owner was properly entered in the absence of evidence that it either constructed the sidewalk or the drain thereunder, or had in some manner caused the defective condition, or that it was required by statute or ordinance to keep the sidewalk in repair.

HIGGINS, J., dissents as to defendant Warehouse Company.

APPEAL by plaintiff from *Crissman, J.*, January 23, 1961 Term of FORSYTH.

On May 30, 1959, plaintiff and two other young ladies were walking westwardly, three abreast, along the concrete public sidewalk on the north side of Seventh Street in Winston-Salem. Plaintiff, who was next to the curb, stepped into a defective place in the sidewalk and was injured.

Plaintiff, by her next friend, instituted this action December 15, 1959, against defendant Warehouse Company. Later, on August 31, 1960, the City of Winston-Salem was made a party defendant.

The Warehouse Company admitted it owned "a tract of land on the north side of the sidewalk abutting on Seventh Street" and that a warehouse was constructed on its said property in 1946.

Plaintiff alleged the Warehouse Company, to allow rain water from the roof to escape, "constructed under the sidewalk on Seventh Street a culvert leading from a downspout at the side of the building under the pavement and through the curb to the pavement or gutter of Seventh Street"; that, when installing the culvert under the sidewalk, the Warehouse Company "removed a portion of the paved sidewalk, placed in the paving of the sidewalk a piece of thin sheet iron approximately four feet long equal to the width of the sidewalk, and approximately two feet wide, and laid a thin sheet of concrete over the sheet iron"; that "(t)he thin sheet of concrete was built level with the surface of the sidewalk and was approximately only about an inch or an inch and a half in thickness"; that "(w)ater ran under the sheet iron and the concrete covering"; that, "(i)n the course of time,

the thin sheet iron rusted and fell partly away, leaving only a thin shell of cement over the culvert under the sidewalk through which the water ran"; that, "(a) portion of the thin sheet of cement along the sidewalk next to the curb and for a distance of about 12 inches inside the curb broke away, leaving a jagged hole and also a part of the sheet metal projecting into the hole"; and that "weeds were permitted to grow at each side of the hole in the culvert . . . thus obscuring or partly obscuring, the view of the defect in the sidewalk." Plaintiff alleged defendants, notwithstanding they knew or should have known of the existence of this defective condition, were negligent in that, being under the legal duty to maintain said sidewalk in a reasonably safe condition for use by the public, they failed to repair said culvert and sidewalk.

Plaintiff alleged she stepped into the hole in the culvert and that the rusted sheet metal cut a severe gash in her left heel.

Both defendants denied negligence and pleaded plaintiff's contributory negligence in bar of her right to recover. In addition, the City of Winston-Salem pleaded plaintiff's failure to present notice of her claim and to institute suit within the time prescribed by Section 115 of its Charter in bar of plaintiff's right to recover against it.

The only evidence was that offered by plaintiff; and, at the conclusion thereof, the court, allowing defendants' motions therefor, entered judgments of involuntary nonsuit as to both defendants and dismissed plaintiff's action. Plaintiff excepted and appealed.

J. F. Motsinger and Deal, Hutchins & Minor for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton & Stockton and Norwood Robinson for defendant Warehouse Company, appellee.

Womble, Carlyle, Sandridge & Rice for defendant City of Winston-Salem, appellee.

BOBBITT, J. It was stipulated that Section 115 of the Charter of Winston-Salem provides:

> "All claims or demands against the City of Winston-Salem arising in tort shall be presented to the board of aldermen or said city or to the mayor, in writing, signed by the claimant, his attorney or agent, within ninety (90) days after said claim or demand is due or the cause of action accrues; no suit or action shall be brought thereon within ten (10) days or after the expiration of twelve (12) months from the time said claim is so presented, and, unless the claim is so presented within ninety (90) days after

the cause of action accrued and unless suit is brought within twelve (12) months thereafter, any action thereon shall be barred."

Plaintiff was injured May 30, 1959. It was stipulated that "no notice of claim was presented to the defendant, the City of Winston-Salem, by the plaintiff, Margaret Sowers, or by anyone in her behalf." Plaintiff's action against the City of Winston-Salem was instituted August 31, 1960.

In *Carter v. Greensboro,* 249 N.C. 328, 331, 106 S.E. 2d 564, the rule (relevant to such charter provisions) established by our decisions is stated by *Higgins, J.*, as follows: "Ordinarily, the giving of timely notice is a condition precedent to the right to maintain an action, and nonsuit is proper unless the plaintiff alleges and proves notice. (Citations) However, there is an exception to the rule. The plaintiff may relieve himself from the necessity of giving notice by alleging and proving that at the time notice should have been given he was under such mental or physical disability as rendered it impossible for him by any ordinary means at his command to give notice; and that he actually gave notice within a reasonable time after the disability was removed. (Citations)"

Plaintiff did not plead she had given notice as required by Section 115 nor did she plead any facts tending to show her mental or physical inability to give the required notice. It appears from the evidence: Plaintiff became sixteen years of age on June 2, 1959. She had completed the tenth grade. Thereafter, she completed the eleventh grade (1959-1960) and was in the twelfth grade at the time of trial. Immediately after her injury, she was in the hospital one week and thereafter confined to her bed at home for a week or so. The injury to her left heel required that she use crutches and a cane for about six weeks. On the afternoon of May 30, 1959, a few hours after plaintiff was injured, Walter Sowers, plaintiff's uncle, and Cletus Sowers, plaintiff's father, inspected the defective place in the sidewalk; and Bennie S. Orrell, at the request of plaintiff's mother, made photographs thereof. Moreover, Walter Sowers was appointed next friend for plaintiff on December 15, 1959. In this connection, see *Rowland v. Beauchamp,* 253 N.C. 231, 116 S.E. 2d 720, and cases cited.

Plaintiff's failure to comply with the requirements of Section 115 of its charter constitutes a bar to her alleged action against the City of Winston-Salem. This was sufficient to require that the court grant the motion of the City of Winston-Salem for judgment of involuntary nonsuit.

Hereafter, we consider whether the evidence was sufficient to re-

quire submission to the jury as between plaintiff and the Warehouse Company.

Plaintiff's *evidence* tended to show the facts narrated below.

On May 30, 1959, there was a paved sidewalk, about five feet wide, along the north side of Seventh Street. A grass plot, estimated as one or two feet wide, was between the north edge of the paved sidewalk and the south wall of the one-story warehouse building. There were no entrances or exits in this wall from Oak Street down to Cherry Street. A downspout carried water from the roof of the warehouse building to the foot of said wall. Water then flowed through a drain or culvert, passing under the paved sidewalk and through a break in the curb, into Seventh Street. A metal strip approximately twelve inches wide, at the top of this underground drain or culvert, extended from the curb to the wall of the building. Concrete, estimated as one to one and a half inches in depth, covered this metal strip where it passed under the sidewalk. This concrete covering constituted a portion of the surface of the sidewalk.

The defective portion of the sidewalk where plaintiff stepped was next to the curb. Here, the concrete surface was broken and the metal strip exposed. The hole in the sidewalk extended from the curb back into the sidewalk a distance estimated as being some twelve to eighteen inches and extended some twelve inches (east-west) along the sidewalk. No broken pieces of concrete were there on May 30, 1959. The edges of the concrete around the hole were dark. Weeds were growing out of the hole. After plaintiff's injury, the metal strip was split "right down through the center." Orrell testified: "It was rusty, and it had split, and one piece was mashed down and the other was still holding up." Plaintiff was injured when her left heel was cut by some portion of the metal strip.

Plaintiff's witnesses testified to said defective condition of the sidewalk when observed by them *after* plaintiff was injured. No witness testified to having observed said defective condition at any time prior to plaintiff's injury. Even so, we think the evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that the hole in the sidewalk exposing the metal cover of the culvert had existed for such length of time as to give notice of the defective condition of the sidewalk to a person charged with the legal duty of exercising due care to maintain the sidewalk in a reasonably safe condition. Our task is to determine whether *the evidence* was sufficient to support a finding that the Warehouse Company was charged with such legal duty.

Plaintiff offered no evidence to support her allegations that the

Warehouse Company, after the sidewalk had been paved, removed a portion thereof, constructed the drain or culvert and placed a covering of concrete on the metal strip. (Note: Plaintiff did offer, *as against the City of Winston-Salem,* a portion of its further answer and defense in which the city alleged, upon information and belief, facts in support of plaintiff's said allegations.) There was no evidence as to when or by whom the sidewalk was paved, or as to whether it was paved before or after the drain or culvert was installed, or as to when or by whom the drain or culvert was installed, or as to whether the concrete covering was or appeared to have been constructed at a time different from the time the entire sidewalk was constructed.

Thus, the narrow question confronting us is this: Is the fact that the drain or culvert was the means by which water from the roof of the warehouse building was carried into Seventh Street sufficient to impose on the Warehouse Company the legal duty to maintain the public paved sidewalk under which the water flowed in a reasonably safe condition for use by the public?

"With respect to the duty to construct, maintain, clean, or otherwise care for sidewalks, the general rule in this country is that no such duty rests upon the owners or occupants of abutting premises, in the absence of statute or ordinance imposing it upon them." 25 Am. Jur., Highways § 65; 40 C.J.S., Highways § 253, p. 291; Annotations: 41 A.L.R. 212, 93 A.L.R. 799; 115 Am. St. Rep. 993. As stated by *Winborne, J.* (now *C.J.*) in *Klassette v. Drug Co.,* 227 N.C. 353, 362, 42 S.E. 2d 411, "in so far as pedestrians are concerned, any liability of owner, or of occupant of abutting property for hazardous condition existent upon adjacent sidewalk is limited to conditions created or maintained by him, and must be predicated upon his negligence in that respect."

In *Boetsch v. Kenney* (N.J.), 154 A. 194, and in *Gainfort v. 229 Raritan Avenue Corporation* (N.J.), 22 A. 2d 893, cited by plaintiff, the factual situation was quite different from that now under consideration. In *Boetsch,* the case was submitted and the plaintiff, a pedestrian, recovered from the abutting landowner on the theory (supported by evidence) "that the defendant had broken the pavement and made a hole therein, and that thereafter he failed to exercise reasonable care that the hole and condition so created should not make the highway unsafe for passing pedestrians." In *Gainfort,* as stated in plaintiff's brief, "the facts were that the former owner of the abutting property had a 550 gallon tank under the sidewalk, which tank he removed, then filled in the excavation and built a new sidewalk over it. The new sidewalk settled causing holes from which plaintiff fell and was injured."

In our research, the decision most favorable to plaintiff's position is *City of Louisville v. Metropolitan Realty Co.* (Ky.), 182 S.W. 172. There a drainpipe with metal covering extended from defendant's building across the public sidewalk. Water from the roof flowed through a downpipe and then through said drainpipe to the street. The evidence was held insufficient to show when and by whom these drains were constructed. However, the evidence did show that defendant owned the building and that these drains served its property exclusively. It was held the defendant, as abutting landowner, had the primary duty to keep the portion of the sidewalk crossed by the drain in good repair for use by pedestrians. A pedestrian fell when he stepped on the metal covering over the drainpipe, which metal covering, from rust or other causes, had holes in it. In a prior action, the pedestrian had recovered judgment against the City of Louisville. The City of Louisville brought suit against the Metropolitan Realty Company and recovered on the ground the abutting landowner was primarily liable for damages proximately caused by negligence in respect of the metal covering over said drainpipe.

The facts in the cited Kentucky case differ from those here considered in that the defective metal covering constituted a part of the surface of the public sidewalk and was constructed and intended for pedestrian use. In this respect, the Kentucky case was similar to many cases where the abutting owner or occupant is held liable for a defectice condition *of the covering* over an opening or vault in the sidewalk, constituting a part of the surface of the public sidewalk, constructed and in use for the exclusive benefit of the abutting owner or occupant. Annotation: 62 A.L.R. 1067; 31 A.L.R. 2d 1334. In this connection, see *Markham v. Improvement Co.*, 201 N.C. 117, 158 S.E. 852.

Here, it was not intended that pedestrians should walk upon the metal strip at the top of the underground drain or culvert. It was intended that pedestrians should walk on the concrete covering over the metal strip. This constituted a part of the surface of the public sidewalk. There is no evidence the metal strip was insufficient to support the concrete covering. So far as the evidence discloses, the concrete sidewalk over this metal strip was in good condition except where the concrete near the curb had been broken. There is no evidence as to what caused the concrete near the curb to break. It would seem that greater use would be made by pedestrians of portions of the five-foot sidewalk other than that next to the curb.

It comes to this: Where water is carried from the premises of an abutting landowner through an underground pipe or covered culvert to the city street, and a concrete sidewalk is constructed over such pipe or such covered culvert, and the sidewalk is broken to the extent

the pipe or covered culvert is exposed, is the abutting landowner liable to a pedestrian for injuries caused by the defective condition of the sidewalk in the absence of evidence that the abutting landowner either constructed the sidewalk or that he was required by statute or ordinance to keep it in good repair or that he had in some manner caused the defective condition in the sidewalk. We are constrained to answer in the negative.

It may be, if the full facts were disclosed, the law would impose upon the Warehouse Company the duty to exercise due care to keep the portion of the sidewalk over said culvert in good repair. However, when consideration is limited to the facts adduced by plaintiff's evidence, we are of opinion, and so decide, that the evidence was insufficient to support a finding that the Warehouse Company was guilty of a breach of legal duty.

Having reached the conclusion that plaintiff's action against the City of Winston-Salem is barred and that plaintiff's evidence is insufficient to make out a case of actionable negligence against the Warehouse Company, we need not decide or discuss whether, as contended by both defendants, plaintiff's action is barred by her contributory negligence.

Affirmed.

HIGGINS, J., dissents as to defendant Warehouse Company.

STERLING G. GILLIAM, ANCILLARY ADMINISTRATOR OF NORMA ESTER MADAK, DECEASED, PLAINTIFF v. PROPST CONSTRUCTION COMPANY, DEFENDANT, AND MICHAEL MADAK AND DAVID KING, ADDITIONAL DEFENDANTS.

(Filed 12 January, 1962.)

1. Highways § 7—

A contractor constructing a highway in conformity with plans and specifications prepared by the Highway Commission may not be held liable because a curve on a segment of such highway was too sharp to be traversed by a vehicle at a speed in excess of 25 miles per hour.

2. Same—

Where a portion of a highway is opened to public use after the Highway Commission, in the exercise of its statutory duty, had erected such signs thereon as it thought proper, G.S. 136-30; G.S. 136-32, the duty of the company constructing the highway to maintain barricades, danger signals, and signs thereon terminates, and thereafter the contractor may

not be held liable on the ground that the injury in suit was the result of its negligent failure to maintain a warning sign of a curve that could not be traversed by a vehicle traveling in excess of 25 miles per hour.

PARKER, J. dissents.

APPEAL by plaintiff from *Bundy, J.*, June 1961 Civil Term of VANCE.

This is an action to recover damages for personal injuries to and wrongful death of plaintiff's intestate, who suffered injuries resulting in death when the automobile in which she was riding ran off an embankment on U. S. Highway No. 1 on the night of 27 December 1957.

The asserted liability of defendant Propst Construction Company, hereafter referred to as defendant, is based on plaintiff's allegation that defendant, having control of the highway because of its contract for construction, negligently failed to give motorists using the road adequate and timely warning by signs or barricades of the hazardous condition created by the construction, which failure to warn caused the driver of the motor vehicle in which plaintiff's intestate was riding to run off the highway.

At the conclusion of the evidence for plaintiff and defendant, it renewed its motion for nonsuit. The motion was allowed and plaintiff appealed.

Blackburn & Blackburn for plaintiff appellant.
Perry & Kittrell for Propst Construction Company.

RODMAN, J. Appellant assigns several errors, but the basic question is this: Does the evidence, viewed in the light most favorable to plaintiff, suffice to impose a duty on defendant to warn of the specific hazard complained of? Unless this question can be answered in the affirmative, the judgment must be affirmed.

Necessarily the answer requires a review of the evidence. Summarized, the evidence shows these facts: The Highway Commission, desirous of facilitating the flow of traffic on U. S. 1, in the summer of 1957, contracted with defendant to construct the road at a new location so as to by-pass Henderson. The work to be done covered a distance slightly in excess of 10 miles. U. S. 1 is a north-south highway. Highway 158 is an east-west road. On and prior to 27 December 1957 these roads merged into a single highway near Greystone, three miles northeast of Henderson. From the point of merger they continued northeastwardly as a single highway some 10-12 miles to Norlina. The junction of 1 and 158 near Greystone was the northern terminus of defendant's work. The southern terminus was near Kittrell, some seven miles south of Henderson. To facilitate the movement

of traffic at the junction, the contract required the construction of a bridge over 158, a short distance west of the point where the two roads merged. Traffic moving north but desiring to go west on 158 would proceed up a ramp and pass over this bridge, then down an arc or semicircle and into 158 headed westwardly and in the right or northern lane. It thus permitted such travelers to pass over eastbound traffic on 158 rather than intersecting it at that level. The bridge was about 14 feet above 158. The radius of the semicircle leading down from the bridge to 158 was short, resulting in a sharp right curve and decline. (The record does not disclose the length of this arc or the grade.) Traffic moving north and expecting to continue on No. 1 would not use the overpass. Such traffic would remain in its right-hand lane, curving eastwardly at ground level to the junction of 1 and 158. Southbound travel from Norlina would use the ramp to pass over 158. The ramp on the south side of the bridge was straight. The curve was on the north side. Travel from Norlina wishing to go west on 158 would remain at ground level, continuing in its right-hand lane, and pass under the bridge. The road, as designed by the Highway Commission, permitted all traffic to remain in its right-hand lane without having to cross another line at ground level.

The contract between the Highway Commission and defendant contained these provisions: "The contractor shall maintain the work during construction and until the work is finally accepted."

"The time of actual completion of a project shall be considered the date on which all work has been satisfactorily completed in accordance with the contract and these specifications."

"The contractor shall at all times so conduct his work as to insure the least possible obstruction to traffic. The safety and convenience of the general public and the residents along the highway and the protection of persons and property shall be provided for by the contractor at all times."

"The contractor shall provide, erect, and maintain all necessary barricades, suitable and sufficient red lights, danger signals, detour and other signs, provide a sufficient number of watchmen and take all necessary precautions for the protection of the work and the safety of the public."

"The contractor shall indemnify and save harmless the commission . . . because of any act or omission, neglect, or misconduct of said contractor."

"The contract will be considered complete when all work has been finished, the final inspection made by the Engineer, and the project accepted by the Commission. The contractor's responsibility shall then cease, except as set forth in his bond."

"When any project, or portion thereof, or any structure, has been completed, it may be opened to traffic, if and as deemed expedient by the Engineer. Such opening shall not be held in any way a final acceptance of the work or any part of it or a waiver to any provisions of the contract."

Plaintiff began work in the summer of 1957. The work was accepted and final payment made in the summer of 1958. Defendant, having completed its work except for the construction of some drains and other details not related to the movement of traffic over the road, requested permission from the Highway Commission to suspend operations until the weather improved in the spring. At that time traffic was prevented from using the overpass by blockades.

Acting on this request, the Highway Commission erected traffic signals at points selected by it. This was done on 21 December 1957. When these signs had been erected, the barricades were removed and the road opened for traffic.

On the afternoon of 27 December 1957 plaintiff's intestate, hereafter abbreviated to plaintiff, her husband, Michael Madak, and her kinsman, David King, left Fort Bragg in her husband's automobile. Their destination was Detroit, Michigan. The husband drove from Fort Bragg to a point just north of Raleigh. There he changed places with King, who was driving at the time of the accident which happened about 7:00 p.m. Plaintiff was in the back seat. King testified: "We planned to follow U.S. #1 from Raleigh to Richmond. As we approached Henderson, we drove on the by-pass around the town. The surface of this road was very dark asphalt. The surface of the road was smooth and sufficiently wide for our travelling purposes, and the road was in good condition the whole length of the by-pass. I do not remember the bridge or seeing the concrete guard rails on the bridge, but I do remember the incline. I observed one speed sign which I would say was a quarter or half a mile in distance back from the scene of the accident. I might have seen other signs but I was looking for signs pointing to Richmond where I was going. I did not see a Route #1 sign directing traffic off to the right, or a second sign directing traffic to U.S. 1 to turn to the right. I might have seen a sign with the name 'Norlina' and an arrow pointing to the right but I did not know where Norlina was. I cannot say positively that I did see that sign, nor did I see the sign that read 'Stop Sign Ahead' in the vicinity of the accident. I was traveling at a speed between 45 and 50 m.p.h." He further stated that he did not see any signs of any description.

There was evidence that the posted speed limit at the point refered to by King was 55 m.p.h., but a safe speed to negotiate the curve and decline from the bridge to enter 158 would be 25 m.p.h., and the

vehicle in which plaintiff was riding ran off the road because of the inability of the driver to negotiate the curve and decline at the speed at which he was travelling.

At the time of the accident, King, the driver, should have seen on the right-hand side of the road, if he had been observant, standard highway signs erected by the Commission which gave the following information: (1) A sign saying Junction 158. This sign was located some 1000 feet or more south of the point where U.S. 1 divided; (2) 300 to 500 feet north of the junction sign, a sign showing that Route 1 had a right turn or curve, No. 158 west was straight ahead, 158 east likewise had a right turn or curve; (3) about 300 feet north of the second sign a sign with directions similar to those on the second sign; (4) at the point where the right and left lanes of U.S. 1 separated a sign with an arrow pointing to the right with the word "Norlina"; (5) at the south end of the bridge and on the right or east side a sign reading "Stop Sign Ahead."

Had King been attentive and observed the signs, he would have remained in the right lane and not gone on the overpass.

Plaintiff does not allege and there is nothing in the record to suggest that there was any defect in the manner in which defendant executed the work included in his contract with the Highway Commission. Such hazard as existed was caused by the short radius of the curve designed by the Highway Commission. A vehicle could not remain on the curve at a speed of 45 m.p.h.

The State Highway Commission is given general supervision of all matters relating to the construction of State highways, letting of contracts therefor, and the selection of materials to be used in the construction of these highways. G.S. 136-18. The Commission is authorized by statute to fix reasonable and safe speeds under special conditions and to indicate these safe speeds by appropriate signs. G.S. 20-141(d).

Tort liability cannot be imposed on a contractor who constructs a road conforming to plans and specifications prepared by the Highway Commission merely because such road cannot be safely used at a speed in excess of 25 m.p.h.

As said in the notes to *Taylor v. Westerfield,* 69 A.L.R. 482 (490): "One who contracts with a public body for the performance of public work is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the performance of the contract, where he is not guilty of negligence." *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182; 40 C.J.S. 208; 27 Am. Jur. 532.

Since there is neither evidence nor suggestion of dereliction of duty in the manner in which defendant constructed the road, the only basis on which liability can be predicated is the assertion that defendant ow-

ed plaintiff a duty to warn the public that the road constructed in accordance with the Commission's plans could not be used at a speed in excess of 25 m.p.h. We are of the opinion and hold that no such duty was imposed on the defendant when the Highway Commission accepted the work by directing that it be opened for traffic, posting such signs thereon as it deemed proper.

The contract provision requiring the contractor to erect barricades and other warning devices relates to hazards created by the contractor in performance of his work. These provisions of the contract were not intended to impose the duty on the contractor to warn of dangers resulting from the use of the completed project.

The contract contained a specific provision authorizing the Highway Commission to open to public use completed portions of the work. The evidence shows the road was not opened to public use until the Highway Commission, in the exercise of its statutory duty, had erected such signs as it thought proper. G.S. 136-30, 32. When so opened, defendant's responsibility to the traveling public to warn about conditions on the opened area terminated. *Haynes v. Norfolk Bridge & Construction Co.*, 253 N.W. 344; *Rengstorf v. Winston Bros. Co.*, 208 N.W. 995; *Cunningham v. T. A. Gillespie Co.*, 135 N.E. 105; *Memphis Asphalt & Paving Co. v. Fleming*, 132 S.W. 222; *Armstrong v. City of Tulsa*, 226 P. 560; *Tidewater Const. Corp. v. Manly*, 75 S.E. 2d 500. The Highway Commission's determination of what signs should be erected for the information of the traveling public was exclusive once it authorized the opening of the road for public use. G.S. 136-30, 32.

Of course such an opening did not relieve defendant of its contractual obligation to the Highway Commission. It merely relieved defendant of its duty to inform the traveling public as to how such completed portion might be used. Its duty to warn of dangers relating to an unopened portion, if any, continued to exist.

Affirmed.

PARKER, J., dissents.

STATE v. SAMUEL LEE DUNSTON.

(Filed 12 January, 1962.)

1. Arrest and Bail § 6—

An indictment charging that defendant did unlawfully and wilfully resist a public officer while discharging and attempting to discharge a duty of his office is fatally defective in failing to charge the official duty the designated officer was discharging or attempting to discharge.

2. Criminal Law §§ 121, 139—

Where it appears that a bill of indictment or a separate count therein does not sufficiently charge an offense, the Supreme Court will arrest the judgment thereon *ex mero motu*.

3. Criminal Law § 87—

Where the record justifies the conclusion that after the jury had been impaneled and prosecution begun upon one bill of indictment other bills of indictment were consolidated for trial therewith, a new trial will be awarded even though the indictments might have been properly consolidated initially, since the defendant must be afforded opportunity to plead to the counts consolidated and to pass upon the impartiality of the jury upon such counts. G.S. 15-152.

APPEAL by defendant from *Carr, J.*, 5 June 1961 Regular Criminal Term of WAKE.

Criminal prosecution upon charges in separate bills of indictment. Bill No. 6408 included three counts, charging the defendant with: (1) careless and reckless driving; (2) speeding 90 miles per hour in a 55 miles per hour zone; and (3) unlawfully and wilfully "did resist, delay and obstruct a public officer, to wit, H. W. Hodges, a police officer for the Town of Wake Forest, N. C., while he the said H. W. Hodges was then and there attempting to discharge and discharging the duty of his office by hitting said officer in the stomach and kicking him on the legs * * *."

Bill No. 6409 charged the defendant with being the driver of a motor vehicle involved in a collision resulting in property damage to the automobile of one Ervin Dalzell, and did unlawfully and wilfully fail to immediately stop such vehicle at the scene of said accident and collision and did fail to give his name, address, operator's and chauffeur's license number, and the registration number of his vehicle to the owner of the other motor vehicle involved in the collision.

At the call of these cases, the Assistant Solicitor moved for the consolidation of the charge of "hit-and-run" in indictment No. 6409 and count No. 3 in bill of indictment No. 6408, resisting an officer. The court allowed the motion for consolidation. The defendant entered a plea of not guilty to these counts. The jury was chosen, sworn and

impaneled. H. W. Hodges was sworn and examined as a witness in behalf of the State. During the examination of this witness, according to the record, the "jury was impaneled on the charge of reckless driving." The defendant objected to the consolidation of this charge with the other charges for trial. The defendant's objection was overruled. He excepted. The examination of H. W. Hodges was resumed. Other witnesses were sworn and examined in behalf of the State.

The defendant moved for a nonsuit on all four counts. The court denied the motion as to each count except the count charging the defendant with speeding. Whereupon, the court found as a fact that the jury was not selected and impaneled to try the speeding charge and that it was not before the jury for disposition and denied the motion. Without objection by the defendant, the jury was impaneled to try the charge of speeding 90 miles an hour in a 55-mile zone. Witnesses were called to testify with respect to this charge and the State rested. The defendant renewed his motion for judgment as of nonsuit. Motion was denied and defendant excepted. The defendant offered evidence and rested.

After the charge of the court, the jurors returned for their verdict that the defendant was guilty of careless and reckless driving, speeding in excess of 70 miles an hour and not in excess of 75 miles per hour, and resisting an officer, but not guilty on the charge of hit-and-run.

The court consolidated the cases for judgment. From the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General H. Horton Rountree for the State.

Hubert H. Senter for defendant.

DENNY, J. At the threshold of this case we are confronted with a fatally defective count in bill of indictment No. 6408, charging the defendant with resisting an officer. The bill of indictment is defective in that it does not allege all the facts necessary to constitute an offense under G.S. 14-223. Here, as in the case of *S. v. Stonestreet*, 243 N.C. 28, 89 S.E. 2d 734, the bill fails to charge the official duty the named officer was discharging or attempting to discharge. *S. v. Harvey*, 242 N.C. 111, 86 S.E. 2d 793; *S. v. Eason*, 242 N.C. 59, 86 S.E. 2d 774.

It is the duty of this Court to carefully scrutinize the record on appeal. And if it appears that a judgment has been entered on a bill of indictment or upon a separate count therein and that such bill or count does not sufficiently charge an offense, it is the duty of this Court, *ex mero motu*, to arrest judgment. *S. v. Thorne*, 238 N.C. 392, 78 S.E. 2d 140; *S. v. Watkins*, 101 N.C. 702, 8 S.E. 346.

The appellant's first assignment of error is to the action of the trial court in consolidating the charge of careless and reckless driving with the charges of hit-and-run and resisting an officer after the trial had commenced and the State had begun to offer testimony. After this additional count had been consolidated with the counts originally consolidated for trial, the State continued to examine H. W. Hodges. The defendant objected to each question propounded to this witness. Whereupon, the court stated: "If you are objecting to it, I will permit you to examine the jury further if you want to." Defendant's counsel then announced that "the defendant passes the jury, but does not waive any objection made." The Assistant Solicitor then announced that "the State passes the jury."

Assignment of error No. 2 is to the order of the court directing that the jury be impaneled to try the charge of careless and reckless driving before the jury was passed by the State and the defendant.

Assignment of error No. 14 is to the impaneling of the jury three different times during the course of the presentation of the State's evidence.

It does not appear from the record proper that the defendant entered any plea to the count charging him with careless and reckless driving or to the count charging him with speeding. Furthermore, there is nothing to indicate that the defendant was given an opportunity to pass upon the impartiality of the jury upon the speeding charge. We shall consider these three assignments of error together.

The State points out in its brief that in the statement of the case on appeal the following appears: "When the cases were called for trial, the Assistant Solicitor stated that the defendant was being tried on bills of indictment numbered 6408 and 6409 and moved that the cases be consolidated for trial. The defendant made no objection to the consolidation. The defendant entered a plea of not guilty to each case."

There is nothing in the record to support this statement. On the other hand, the record is to the effect that when the cases were called, the Assistant Solicitor moved for the consolidation of the charges of hit-and-run and resisting arrest. The court allowed the motion and the defendant entered a plea of not guilty to these two counts.

Moreover, when the State concluded its evidence and the defendant moved for judgment of nonsuit on the speeding count, the court found as a fact that the jury had not been selected and impaneled to try the speeding charge and that it was not before the jury for disposition.

The State contends that the consolidation of the charge of careless and reckless driving with the charges of hit-and-run and resisting an officer was seasonably brought to the attention of the court and

that the defendant was not prejudiced by the consolidation. Furthermore, the State takes the position that when the defendant did not object to having the speeding charge disposed of at the close of the State's evidence, there was no question of consolidation but a new charge; that the court having found that this charge was not before it, at the close of the State's evidence, the defendant by not objecting to the jury being re-impaneled to try the speeding charge, waived all objections to the procedure.

It will be noted that there is nothing in the record to indicate that the Assistant Solicitor moved for the consolidation of the speeding count with the other counts for trial, or that the court ordered a consolidation. It appears that the court simply ordered the jury impaneled for the purpose of trying the charge of speeding, and the evidence was offered on the question of speeding, which count was submitted to the jury as though there had been a consolidation of all four counts.

In the case of *S. v. Rice,* 202 N.C. 411, 163 S.E. 112, the defendant was indicted in two separate bills: (1) murder; and (2) assault with a deadly weapon, with intent to kill. The defendant was placed on trial on the first bill and pleaded not guilty. The jury was selected and impaneled. Near the conclusion of the testimony of the first witness for the State, the trial judge announced that he was consolidating the two bills for trial at the same time. The defendant was convicted of manslaughter and assault with a deadly weapon, with intent to kill. On appeal this Court ordered a new trial. *Brodgen, J.,* speaking for the Court, said: "Without debating the question as to whether the indictments could have properly been consolidated at the beginning of the trial, it is obvious that the consolidation thereof, pending the taking of testimony on the indictment for murder, was prejudicial to the defendant. He was afforded no opportunity to pass upon the impartiality of the jury upon the assault charge, nor had he been permitted to plead to such charge. These principles are fundamental and the failure to apply them in the case at bar entitles the defendant to a new trial. *S. v. Jackson,* 82 N.C. 565; *S. v. Cunningham,* 94 N.C. 824."

In *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232, three separate bills of indictment were returned against the defendant, charging him with three homicides. During the examination of the State's first witness, the defendant moved that the three indictments be consolidated and tried together. Overruled. On appeal this Court found no error. *Stacy, C.J.,* speaking for the Court, said: "First, in respect of the defendant's motion to consolidate the three indictments for trial, it is to be observed that this came during the progress of the hearing. Had the motion been made *in limine,* a different situation might have arisen, as

the court observed at the time. C.S., 4622 (now G.S. 15-152). However, after the jury had been impaneled and the prosecution had begun to offer its evidence, the court regarded the motion as too late and remarked that it could only be granted by ordering a mistrial and selecting another jury to try the three consolidated cases. The jury had been impaneled to try the issue between the State and the accused on the indictment charging the defendant with the murder of Mrs. E. A. Bill, and none other. No motion for a mistrial was lodged by the defendant. * * *

"True it is provided by C.S., 4622 (now G.S. 15-152) that where there are several charges against any person for the same act or for two or more transactions connected together, or for two or more transactions of the same class of offenses, which may be properly joined, the court will order them to be consolidated. *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248; *S. v. Lewis,* 185 N.C. 640, 116 S.E. 259. This means, however, that the order of consolidation will be made in such cases when seasonably brought to the court's attention, and not at a time when the validity of the whole trial might seriously be threatened by the consolidation. *S. v. Rice, supra.* * * *"

In view of the unsatisfactory condition of the record on this appeal and our inability to ascertain therefrom just what did occur in the course of the trial below, and in light of the authorities cited herein, we have concluded that the defendant was not given a trial in conformity with the orderly and well established criminal procedure to which a defendant is entitled. There is nothing in the record to justify the piecemeal steps taken by the Assistant Solicitor in the prosecution of these charges against the defendant.

Therefore, since the verdicts on the three counts upon which the defendant was convicted were consolidated for judgment, the judgment is arrested on the count charging the defendant with resisting an officer. The Solicitor may procure a proper bill on this count if so advised. A new trial is granted on the charges of careless and reckless driving and speeding.

On charge of resisting an officer:

Judgment arrested.

On charges of careless and reckless driving and speeding:

New trial.

EASTERN CAROLINA TASTEE-FREEZ, INC. v. CITY OF RALEIGH.

(Filed 12 January, 1962.)

1. Municipal Corporations § 4—

A municipal corporation is a creature of the General Assembly and has only such powers as are expressly conferred upon it by statute or such as are necessarily implied from those expressly conferred.

2. Municipal Corporations § 24—

Where a peddler of ice cream and similar products from a mobile freezer unit along the streets and highways has procured from the State a license to carry on such business within territory which includes a municipality, G.S. 105-53(d), the municipality has no authority by provision attached to its license ordinance, to prevent such licensee from peddling his products along the city streets. Whether the municipality has the power, in the interest of public safety, to prohibit the peddling of merchandise from mobile units along its streets and whether a municipal ordinance may be tested by procedure under the Declaratory Judgment Act, *quaere?*

APPEAL by plaintiff from *Copeland, Special Judge,* August 1961 Special Term of WAKE.

Plaintiff's action, instituted under the Declaratory Judgment Act (G.S. 1-253 *et seq.*), is to declare invalid and to enjoin the enforcement, insofar as it prohibits the peddling of ice milk or ice cream by mobile units, this portion of Section 105, Chapter 14, of the City Code of Raleigh, to wit:

"No ice cream shall be peddled along the streets and/or sidewalks of the city from push carts or other vehicles or in any other manner."

Plaintiff is a North Carolina Corporation with principal office in Raleigh. Its business includes the sale of ice milk (in the form of cones, sandwiches, milk shakes, sundaes and in packages) from mobile freezer units along the streets and highways of North Carolina. On or about May 11, 1961, plaintiff, desiring to sell and dispense said products to the public from such freezer unit along the streets of Raleigh, applied to the City Collector of Revenue for a peddler's license and tendered the prescribed fee. The City Collector refused to issue such license. Thereafter, on May 15, 1961, plaintiff presented its request to the City Council. The City Council, based solely on the quoted portion of Section 105, Chapter 14, of the City Code, denied plaintiff's request and refused to order the issuance of such license.

In the pleadings, plaintiff attacked the quoted ordinance provision as unauthorized and unconstitutional, and defendant asserted its validity as an authorized and constitutional exercise of the police power.

The parties waived jury trial. G.S. 1-184.

Plaintiff offered evidence describing its one-ton Chevrolet mobile units; the manner in which it now operates thirty-seven such units in its franchise area; the precautions taken to prevent injury, such as construction so that customers can be served only on the right-hand or curb side, the display of caution signs and careful operation at slow speed; and its record of safe operations.

Defendant's evidence consisted of the testimony of witnesses who had observed the operation of similar mobile units (but not those of plaintiff) in other towns and communities. In substance, this testimony was to the effect that the approach of such mobile unit, announced by the ringing of bells or other signal, causes young children to become excited and (absent advance arrangement) press their parents for money to make purchases; that children hurry to (crossing streets) and congregate about the place where such mobile unit is parked; and that the approach of such mobile unit and its special appeal to small children in the manner indicated creates a hazard to them and to other persons and traffic lawfully using the street.

After hearing the evidence, the court made findings of fact, conclusions of law and entered judgment as follows:

"FINDINGS OF FACT

"1. That the operation of mobile ice cream dispensing units attracts children into the public streets and constitutes a menace to the public safety.

"2. That assembly of people in the public streets for the purpose of purchasing products dispensed by mobile ice cream units impedes or tends to impede motor vehicle traffic upon the public streets.

"3. That the ordinance attacked by the plaintiff in this action does not discriminate against persons in the same class.

"4. That the ordinance prohibiting the peddling of ice cream on the streets of Raleigh has a substantial relation to the preservation of the public safety but not to the public health.

"CONCLUSIONS OF LAW

"Upon the foregoing findings of fact, the Court makes the following Conclusions of Law:

"1. That the ordinance does not violate any constitutional provision and is a valid exercise of the legislative powers conferred upon the City of Raleigh.

"JUDGMENT

"Upon the foregoing findings of fact and conclusions of law, it is considered, ordered and adjudged that the ordinance which is the subject of this action is a valid ordinance, and this action is dismissed at the cost to the Plaintiff."

Plaintiff, based on its exceptions to each finding of fact and to the conclusion of law, excepted to the judgment and appealed.

Blanchard & Farmer for plaintiff appellant.
Paul F. Smith for defendant appellee.

BOBBITT, J. A State license tax is imposed on peddlers by G.S. 105-53. Under authority conferred by G.S. 105-53(g), the City of Raleigh, by Section 145, Chapter 14, of its City Code, imposed a city license tax on peddlers. Neither the authority of the City of Raleigh to impose such license tax nor the amount thereof is challenged by plaintiff.

Chapter 14 of the City Code of Raleigh is entitled, "The License Tax Ordinance of the City of Raleigh." Section 145 thereof imposes a license tax on peddlers of "any goods, wares or merchandise." Plaintiff applied for such license and tendered payment of the prescribed license tax. No specific reference to ice cream or ice milk appears in said Section 145 or in G.S. 105-53.

G.S. 105-33(a) provides that State license taxes are imposed "for the privilege of carrying on the business, exercising the privilege, or doing the act named." G.S. 105-33(d) provides that the State license issued under G.S. 105-53, that is, on "(a)ny person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same," (the statutory definition of peddler), "*shall be and constitute a personal privilege to conduct the profession or business named in the State license,* shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this article or schedule." (Our italics)

It is noted that G.S. 105-33(a) provides, in part, that "the obtaining of a license required by this article shall not of itself authorize the practice of a profession, business, or trade for which *a State qualification license* is required." (Our italics)

Provisions for the regulation of traffic on the streets are set forth

in Chapter 21 of the City Code of Raleigh, designated "Traffic Code of the City of Raleigh."

Section 105 of Chapter 14 of the City Code of Raleigh is captioned, "Ice cream manufacturers." Paragraph (a) prescribes the license tax required of manufacturers and wholesale distributors of ice cream. Paragraph (b) provides that the words "ice cream," as used in said section, "shall apply to ice cream, frozen custards, sherbets, water ices, or similar products." Paragraph (c) prescribes the license tax required of certain retail dealers. *Then follows, in a separate and final paragraph without special designation by letter or number, the ordinance provision now attacked by plaintiff.* It is noted that G.S. 105-97, captioned "Manufacturers of ice cream," which imposes a State license tax, is in substantially the same phraseology as Section 105 of Chapter 14 of the City Code of Raleigh, with these exceptions: (1) The amount of license tax imposed is different, and (2) G.S. 105-97 does not contain any provision similar to the ordinance provision now attacked by plaintiff.

The provision that "(n)o ice cream shall be peddled along the streets and/or sidewalks of the city from push carts or other vehicles or in any other manner," now the final paragraph and sentence of Section 105 of Chapter 14 of the City Code of Raleigh, was adopted on some (undisclosed) date prior to 1950. Its direct reference to "push carts" suggests it was adopted at least as far back as the horse and buggy era. It purports to prohibit peddling of ice cream in any manner along the streets or sidewalks of Raleigh. Was the peddling of ice cream prohibited as a health measure at a time when present methods of refrigeration were unknown? Suffice to say, there is no legislative declaration or evidence as to when or why this ordinance provision was adopted.

We interpret the ordinance provision attacked by plaintiff as an absolute prohibition of the peddling of ice cream in any manner along the streets or sidewalks of Raleigh. Thus, it purports *to prohibit* a person, firm or corporation from exercising the privilege granted by the State license.

A municipal corporation is a creature of the General Assembly. Municipal corporations have no inherent powers but can exercise only such powers as are expressly conferred by the General Assembly or such as are necessarily implied from those expressly conferred. *Davis v. Charlotte,* 242 N.C. 670, 89 S.E. 2d 406; *S. v. Scoggin,* 236 N.C. 1, 8, 72 S.E. 2d 97.

As stated above, a State license issued under G.S. 105-53 authorizes the licensee (G.S. 105-33(d)) to engage in the business of peddling. These other statutory provisions are noted. G.S. 112-35, in part, pro-

vides: "All ex-Confederate soldiers who are without means of support other than their manual labor, and who are incapacitated to perform manual labor for any reason other than by their vicious habits, and now citizens of this State, shall be allowed to peddle drugs, goods, wares, and merchandise in any of the counties of this State without a license therefor." G.S. 14-238, in part, provides: "No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it." G.S. 81-10 provides for the inspection, under the direction of the State Superintendent of Weights and Measures, of products offered for sale by peddlers.

The conclusion reached is that the City of Raleigh cannot, by ordinance, *prohibit* conduct that is legalized and sanctioned by the General Assembly. Hence, the ordinance provision attacked by plaintiff must be and is declared invalid on the ground it is in conflict with the general State law. *Davis v. Charlotte, supra,* and cases cited.

Whether the City Council of Raleigh, under the powers conferred by general statutes or by the Charter of the City of Raleigh, *has authority to enact* an ordinance prohibiting or regulating, based on considerations of public safety, the use of its streets by mobile units for the sale of ice cream or other products is not considered or determined. Such an ordinance is not before us. Hence, we do not discuss constitutional questions to be considered in passing upon the validity of such an ordinance. In this connection, see decisions cited in Annotations, "Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose," 105 A.L.R. 1051, 163 A.L.R. 1334, and decisions supplemental thereto.

It is noted that the violation of a (valid) municipal ordinance is a misdemeanor. G.S. 14-4; *S. v. Barrett,* 243 N.C. 686, 91 S.E. 2d 917, and cases cited. There is no evidence plaintiff has engaged in any act violative of the ordinance provision now in controversy. Plaintiff's action is for a declaratory judgment to ascertain whether *what it proposes to do* would be an illegal act. While defendant makes no contention that plaintiff is not entitled, by an action under the Declaratory Judgment Act, to an adjudication as to the validity of the ordinance provision now in controversy, it is appropriate to say that consideration of the question as to whether an action under the Declaratory Judgment Act is an appropriate procedure in circumstances such as those here considered is deferred until directly presented for decision.

Being of the opinion, for the reasons stated, that the ordinance provision here considered, to wit, the last paragraph and sentence of Section 105 of Chapter 14 of the City Code of Raleigh is invalid, the judgment of the court below is reversed.

Reversed.

WAYNE McCRAW v. H. H. LLEWELLYN, ADMINISTRATOR OF THE ESTATE OF MINNIE LYNCH HIGGINS.

(Filed 12 January, 1962.)

1. Quasi-Contracts § 1; Executors and Administrators § 24a; Wills § 2—

Where a party declares upon a special contract to devise and bequeath property in consideration of personal services, and his evidence fails to establish a valid special contract but does tend to show that he rendered personal services under circumstances from which the jury might infer that the services were rendered and received upon expectation that compensation would be paid therefor, such party is entitled to have the issue of an implied contract submitted to the jury.

2. Wills § 2; Frauds, Statute of § 6b—

A contract to devise property consisting of both personalty and realty comes within the statute of frauds, G.S. 22-2, and may not be established by parol.

3. Same; Frauds, Statute of § 2—

The execution of a will devising and bequeathing all of the estate to plaintiff, the will being revoked by the subsequent marriage of testatrix, cannot constitute a memorandum of an asserted special contract of deceased to devise and bequeath all of her property to plaintiff in consideration of services rendered, since the mere disposing of the estate does not tend to show that such disposition was made in consideration of services rendered.

4. Appeal and Error § 54—

A new trial will be awarded when a cause has been submitted to the jury upon an erroneous theory of liability.

APPEAL by defendant from *Sink, E.J.*, 1961 Civil Term of SURRY.

Plaintiff seeks damages for breach of an asserted contract with Minnie Lynch Higgins, defendant's intestate, hereafter referred to merely as Minnie.

To support his claim he alleges these facts: Minnie was first married to Ernest Lynch. He died in May 1957. Plaintiff knew Ernest Lynch

and his wife Minnie from plaintiff's infancy until their deaths, a period of 37 years. During this period "there developed a relationship between the plaintiff and Earnest and Minnie Lynch that was as close as that of parent and child . . ." Plaintiff for many years rendered services to Minnie subsequent to the death of her husband Ernest. "(A)ll of these valuable personal services were rendered at the request of Minnie Lynch Higgins, then Minnie Lynch, and that Minnie Lynch Higgins, agreed that she would compensate the plaintiff by willing him her home and all of her personal property at her death; that the said Minnie Lynch Higgins, immediately after the death of Earnest Lynch, entered into this agreement with the plaintiff, and has reaffirmed this agreement on many occasions since the death of Earnest Lynch." Plaintiff relied on the promise so made. Minnie, complying with her promise, in fact executed a will dated 30 December 1958 devising and bequeathing to plaintiff all of her property remaining after the payment of her debts. Minnie, in April 1959, married James Higgins. She died 17 June 1959, leaving real and personal property valued at $26,580.17. The will dated 30 December 1958 was probated 22 June 1959, but the order admitting the will to probate was vacated 24 June 1959. He prays for damages in a sum equal to the value of the estate.

Defendant admitted Minnie executed the will of 30 December 1958 and her subsequent marriage. He denied Minnie was under any contractual obligation to plaintiff. The record states: "The case was tried and submitted to the jury on the theory of special contract and not quantum meruit. Verdict for the plaintiff and the defendant appeals."

J. C. Barefoot, Jr. and Benjamin D. Haines for plaintiff appellee.
Woltz and Faw for defendant appellant.

RODMAN, J. Plaintiff does not claim as a beneficiary under the will. He recognizes Minnie's marriage subsequent to 30 December 1958 constituted a revocation of her will. G.S. 31-5.3; *In re Will of Tenner*, 248 N.C. 72, 102 S.E. 2d 391. He predicates his right to recover for breach of an express contract.

Defendant's denial of the special contract placed the burden of proving the asserted contract on plaintiff. If he offered any evidence sufficient to support his allegation and to require compliance with the contract, he was entitled to have that issue submitted to the jury. If he failed to offer such evidence, but offered evidence of services rendered from which a jury could infer they were rendered and received upon the expectation that compensation would be paid because not gratuitously rendered, plaintiff would be entitled to recover the

fair value of the services rendered. As said by *Stacy, C.J.*, in *Ray v. Robinson,* 216 N.C. 430, 5 S.E. 2d 127: "It is established by a number of decisions, that in the absence of some express or implied gratuity, usually arising out of family relationship or mutual interdependence, services rendered by one person to or for another, which are knowingly and voluntarily received, are presumed to be given and accepted in expectation of being paid for, and the law will imply a promise to pay what they are reasonably worth." But this promise which the law implies is not expanded to imply a promise to pay at death and by will. If the time for payment is to be extended to the death of the recipient of the services, there must be agreement to that effect. *Hodge v. Perry,* 255 N.C. 695; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760; *Edwards v. Matthews,* 196 N.C. 39, 144 S.E. 300; *Brown v. Williams,* 196 N.C. 247, 145 S.E. 233; *Miller v. Lash,* 85 N.C. 51.

Plaintiff's parol evidence amply supports his allegation of the close and affectionate relationship existing between him and Minnie. Several witnesses testified to declarations by Minnie of her affectionate regard for plaintiff and her desire that plaintiff should, upon her death, have all of her property. No witness testified to a declaration by Minnie that she had by contract obligated herself to devise and bequeath her property to plaintiff. There was evidence that plaintiff, who resided in Greensboro, went to Surry County when Minnie's first husband died and assisted her in making funeral arrangements, that he visited her on several subsequent occasions, and rendered her other services. Whether plaintiff is entitled to recover on an implied contract to pay for the services rendered (not gratuitously furnished) need not now be determined. Defendant, maintaining that plaintiff's sole remedy, if any he had, was on an implied contract, tendered issues determinative of questions arising on such a theory. The court declined to submit the issues so tendered. It submitted issues relating to a specific contract to devise. Defendant's exception to the issues submitted and to the refusal to submit the issues tendered and the assignments of error based on these exceptions present for determination the correctness of the theory of the trial adopted by the court.

Minnie's estate consisted of both real and personal property. A contract to dispose of such estate by will is a contract controlled by our statute of frauds which provides: "All contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . ." G.S. 22-2; *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524; *Jamerson v. Logan,* 228 N.C. 540, 46 S.E. 2d 561. A denial of the alleged contract suffices to require compliance with the statute if plaintiff is to recover on the contract alleged. *Humphrey v. Faison,*

supra; Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331; *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196; *Chason v. Marley,* 224 N.C. 844, 32 S.E. 2d 652; *Embler v. Embler,* 224 N.C. 811, 32 S.E. 2d 619.

Minnie's will dated 30 December 1958, by Item One directs her executor to pay her debts, place a monument at her grave, and provide for the care of her cemetery lot. Items Two and Three read as follows:

"Item Two

"I will, devise and bequeath to Wayne McCraw all of my property of every sort, kind and description, both real and personal, consisting of everything of every nature, which is left over after carrying out the provisions of Item One.

"Item Three

"I hearby authorize and direct my executor hereinafter named to sell all of my property, both real and personal, in such manner, and at such prices and upon such terms as he may deem proper or do any act which in his opinion is for the best interest of estate and after carrying out the provisions in Item One distribute remainder to Wayne McCraw."

Item Four, the remaining item of the will, named defendant as executor with "authority to sell any property or do any act which in his opinion is for best interest of estate."

This will was deposited with plaintiff for safekeeping. There is evidence from which the jury could find that James Higgins knew of the will prior to his marriage to Minnie, and both before and subsequent to Minnie's death expressed his approval of the provisions of the will. He died prior to the institution of this action.

The crucial question then for decision is: Does the will dated 30 December 1958 suffice as a memorandum or note of a contract by Minnie to will her property to plaintiff? The answer, unless we depart from well-established legal principles, must be in the negative.

The statute of frauds deals with contracts to convey lands, not with rights to dispose of property by will as provided by G.S. 31-1. "A contract is an agreement between two or more persons upon sufficient consideration to do or to refrain from doing a particular act." *Belk's Dept. Store v. Ins. Co.,* 208 N.C. 267, 180 S.E. 63; *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672; *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594.

" 'One of the essential elements of every contract is mutuality of agreement.' *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735. And 'mutuality of promises means that the promises to be enforceable must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other.' " *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322; *Smith v. Barnes,* 236 N.C. 176, 72 S.E.

2d 216; *Brown v. Williams, supra; Dodds v. Trust Co.*, 205 N.C. 153, 170 S.E. 652.

The mere exercise of the statutory right to dispose of one's property at death is not of itself evidence that the disposition directed is compelled by a contractual obligation.

The writing must show the promise or obligation which the complaining party seeks to enforce. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820; *Deaton v. Coble*, 245 N.C. 190, 95 S.E. 2d 569; *Burriss v. Starr*, 165 N.C. 657, 81 S.E. 929.

"An aggrieved party may recover for the breach of a contract, made upon sufficient consideration, that the promisor will make him the beneficiary of a bequest or devise in his will, but such a contract must be established by the mode of proof legally permissible in establishing other contracts." *Halsey v. Snell*, 214 N.C. 209, 198 S.E. 633.

"The agreement must adequately express the intent *and obligation* of the parties. Parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." (Emphasis added.) *Chason v. Marley, supra; Keith v. Bailey*, 185 N.C. 262, 116 S.E. 729; *Hathaway v. Jones*, 194 N.E. 37; *Holsz v. Stephens*, 200 N.E. 601; 106 A.L.R. 737; *White v. McKnight*, 143 S.E. 552; *Brought v. Howard*, 249 P. 76, 48 A.L.R. 1347; 37 C.J.S. 680; 49 Am. Jur. 636.

In *Luders v. Security Trust & Savings Bank*, 9 P. 2d 271, the will recited the property was willed to appellant "for her faithful service to me." There, as here, the will was subsequently revoked. The court, in answering the argument that the quoted language sufficed to meet the requirement of the statute of frauds, said: "A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest."

Plaintiff has failed to establish an enforceable contract to devise as alleged in the complaint. The erroneous theory adhered to over defendant's objection requires a new trial. The parties may, at that time, present such evidence as they may have relating to an implied promise to pay for services rendered.

New trial.

VAN R. WHITE, R. A. WILKINSON, W. R. HUPMAN, TALMADGE M. JOBE, T. E. PENDER, J. M. McINTYRE, ARTHUR A. BRADLEY, W. B. JAMES, JR., W. S. HARRIS, F. M. SOUTHERLAND v. NEAL SMITH AND FIRST SAVINGS AND LOAN ASSOCIATION.

(Filed 12 January, 1962.)

Building and Loan Associations § 1; Corporations § 49; Mandamus § 1—

Both under the common law and provisions of statute stockholders have a right to know the names of their associates for the purpose of conducting an effective campaign in preparation for a stockholders' meeting. G.S. 55-37(a) (3), G.S. 55-64, which right extends to the shareholders of a building and loan association, G.S. 55-3(a), and mandamus is expressly authorized to compel compliance, G.S. 55-37(b).

APPEAL by defendants from *Clark, J.*, June 1961 Civil Term of ALAMANCE.

Plaintiffs, shareholders in defendant association, instituted this action to obtain a writ of mandamus requiring defendants to provide plaintiffs an opportunity to inspect the records of the association to ascertain the names, addresses, and number of shares held by each shareholder so that plaintiffs might solicit proxies for use at shareholders' meetings.

Defendants denied plaintiffs' right to the information sought, insisting the records were confidential.

The facts found, which we summarize, are:

The association was organized pursuant to the provisions of subchapter 1, c. 54, of the General Statutes. It had, in February 1961, 3053 shareholders. Its charter provides: "The affairs of the Association shall be managed by a Board of not less than five nor more than fifteen directors, to be elected at each annual meeting of the shareholders for a term of one year . . ." The bylaws provide for both special and annual meetings of the shareholders. Special shareholders' meetings may be called by the president or a majority of the directors or by twenty-five members. Twenty-five shareholders suffice to constitute a quorum at shareholders' meetings. Anyone designated as a proxy must be a shareholder. Written authority of the proxy must be filed with the secretary not less than forty-eight hours before the meeting. Members of the association are those who hold one or more of its shares, "and each member shall be entitled to one vote in its meetings of shareholders, regardless of the number of shares held by him." except at meetings called to consider amendments to the charter when "a majority of the stock at any meeting for said purpose shall be sufficient to adopt such amendments."

Defendant Smith is the executive vice president and secretary of

the association and as such has custody of the books and records of the association. At the annual shareholders' meeting in February 1961 not more than 56 members were present personally. Attendance at the last seven annual meetings has been between 26 and 56. At that meeting a resolution was adopted reducing the number of directors from eleven to nine. Although a majority of those present in person voted against the resolution, it was carried by defendant Smith, casting the votes of 98 members for whom he had been designated as proxy.

In addition to the foregoing summarized statement of facts, the court specifically found: "That the plaintiffs seek the aforesaid information as to the record of shareholders for the purpose and in order to call upon, discuss with, campaign among and solicit proxies from other shareholders in preparation for shareholders' meetings whether called by them or others wherein changes in the charter and by-laws and composition of the Board of Directors may be voted upon and is for no purpose other than proper interest in the organization, management and policies of the defendant Association."

On the findings made the court held that plaintiffs were entitled to know the names and addresses of the shareholders of the association, which information could be furnished by defendants, or if they declined to do so, then plaintiffs could inspect the books for the purpose of ascertaining the names and addresses of shareholders. Defendants appealed.

Dalton, Long & Latham for plaintiff, appellees.
L. J. Phipps and Howard Manning for defendant, appellants.

RODMAN, J. Appellants state as the single question for determination: "The question involved in this case is the right, if any, of one or more members or shareholders of a savings and loan association to obtain a list of the names and addresses of the members of the association for the purpose of discussing with, campaigning among, and soliciting proxies from other members or shareholders in preparation for a shareholders' meeting."

The answer to the question propounded requires a determination of the public policy of this State ascertained by a consideration of the common law and legislative enactments modifying that law.

At common law stockholders in private corporations have the right to make reasonable inspection of a corporation's books to assure themselves of efficient management. *Respess v. Spinning Co.*, 191 N.C. 809, 133 S.E. 391; 13 Am. Jur. 482.

Chapter 2, P.L. 1901, is entitled "An act to revise the Corporation Law of North Carolina." Sec. 38 of that Act required every domestic

corporation to keep at its principal office a stock book "which shall contain the names and addresses of the stockholders, the number of shares held by them respectively, which shall at all times during the usual hours for business be open to the examination of every stockholder . . ." The books so required to be kept are determinative of a challenged right to vote.

Manifestly this statutory provision was intended to provide each shareholder of a domestic corporation with adequate information to campaign among and solicit proxies from other members or shareholders in preparation for a shareholders' meeting.

The quoted provision of the 1901 Act was incorporated in each subsequent codification of our statutory law. See Revisal, s. 1180; C.S. 1170; G.S. 55-107 (1943 ed.). It remained in force until 1 July 1957 when c. 1371, S.L. 1955, took effect. That Act, entitled "Business Corporation Act," is c. 55 of the 1960 edition of the General Statutes. The 1955 Act contains two sections relating to records which must be kept to show stock ownership. G.S. 55-37(a) (3) requires corporations to keep "a record of its shareholders, giving the names and addresses of all shareholders and the number and class of shares held by each." This section does not specifically provide for an inspection of the record by the shareholders, but it does provide: "Any shareholder may apply for a writ of mandamus to compel a corporation and its officers and directors to comply with this section." But section 37(a) (3) is supplemented by 55-64, which requires an alphabetical list of the shareholders with their addresses and number of shares held by each. This alphabetical list must be kept open and subject to shareholders' inspection for at least ten days before each stockholders' meeting.

The explanatory comment accompanying the bill which became the Business Corporation Act makes it clear that the right of a shareholder to know his associates and the extent of their holdings was not abridged but enlarged. The comment under sec. 64 says: "Purpose: To provide vital information as to shareholdings for the benefit of any shareholder. Present N. C. counterparts: G.S. 55-107 does not require a voting list such as this, but does make the stock and transfer books available to the shareholder."

If these statutory provisions are applicable to building and loan associations, plaintiffs have an undoubted right to know in time to wage an effective campaign for the election of directors the names of the other shareholders.

Do these provisions apply to building and loan associations? We think clear legislative history demands an affirmative answer. The Legislature of 1903 appointed a commission "to compile, collate, revise, and digest all the Public Statute Laws of this State, now in force

. . ." See c. 314, P.L. 1903. Sec. 3 of that Act provided: "The Commissioners shall designate such statutes or parts of statutes . . . as shall seem to them necessary to improve and perfect the whole." The commission was directed to file its report not later than 15 November 1904. In its codification of the laws relating to building and loan associations it exercised the discretionary power given it by sec. 3 of the Act of 1903 and inserted what is now G.S. 54-7. The 1905 Legislature approved the work of the commission appointed in 1903 and enacted a codification known as the Revisal of 1905. The commission's recommendation that building and loan associations should be subject to the laws relating to private corporations became sec. 3882 of the Revisal of 1905 and has been a part of our law since that date.

Appellants, in support of their contention that the record of shareholders is confidential and not subject to inspection by stockholders generally, rely on *Daurelle v. Traders Federal Savings & Loan Ass'n,* 104 S.E. 2d 320. There, plaintiff, a shareholder, sought to obtain a list of the shareholders and their addresses. The corporation declined to permit him to make an examination. He sought a writ of mandamus to compel the association to permit inspection. Prior to the hearing defendant association, over plaintiff's protest, but as authorized by statute, called and redeemed his shares. The lower court denied the writ. This ruling was affirmed on appeal. The appellate court based its ruling on two grounds: First, under the statutes of West Virginia, a shareholder of a building and loan association had no right to inspect its records. It said: "Comparison with and consideration of the provisions of the earlier statutes, which have been omitted from the present statute and the Code of 1931, and the provisions of the present statute, clearly indicate that in enacting the present statute the Legislature intended to deprive the stockholder of his common-law right to inspect the books and records of the corporation and to give him instead only such rights of that nature as are expressly mentioned in the statute. To give the statute any other meaning or effect would emasculate the statute and defeat the purpose of the Legislature in enacting it." As an additional reason for affirming the ruling of the lower court, the appellate court held that the association was acting in its lawful rights when it called and redeemed plaintiff's stock, and since he had ceased to be a shareholder, he could in no event have the right to inspect.

Ulmar v. Falmouth Loan & Building Ass'n, 45 A. 32, *State v. Italo-American Homestead Ass'n,* 149 So. 449, and *State v. Home Mut. Building & Loan Ass'n,* 265 N.W. 701, which deny a shareholder of a building and loan association the right to inspect books in general are

based on interpretations of the statutes of those States. Each State, of course, must decide for itself its public policy.

As we interpret our statutes, our Legislature has declared a different public policy. The right to inspect stock books in banks is specifically given. G.S. 53-85. As previously noted, specific provision is made for inspection of books of private corporations. Mandamus is expressly declared the appropriate means of compelling compliance. G.S. 55-37(b). The Business Corporation Act is applicable "to every corporation for profit, and, so far as appropriate, to every corporation not for profit having a capital stock . . ." G.S. 55-3(a). Building and loan associations do have, by express statutory provision, a capital stock. G.S. 54-5.

We perceive no sound reason why stockholders in private corporations should be permitted to know the names of their associates and thereby conduct an effective campaign for the election of those they deem most competent to conduct the affairs of the corporation, but this right should be denied to those who invest in shares of building and loan associations. *Henzel v. Patterson Building & Loan Ass'n No. 2,* 194 A. 683, supports the conclusion here reached.

The judgment circumscribes and limits the right of inspection in such manner as to prevent an inspection for an improper purpose.

Affirmed.

K. G. JEFFREYS, ADMINISTRATOR OF THE ESTATE OF SHERRY LEE JEFFREYS, DECEASED v. CITY OF BURLINGTON, A MUNICIPAL CORPORATION.

(Filed 12 January, 1962.)

1. Parent and Child § 2a—

The doctrine that where the parents have employed a custodian for their child, the negligence of such custodian will be imputed to the parents, cannot apply unless such custodian is negligent, and such negligence will not be presumed from the mere fact of injury to the child while in the custodian's care.

2. Same; Negligence § 17— Evidence held insufficient to show negligence in leaving child in custody of aunt or negligence on part of custodian.

Evidence that the mother of a four-year old child left the child in the custody of the child's fourteen-year old aunt, that the aunt had been given custody of the child on many previous occasions and had proved reliable, and that shortly after the mother left home during the afternoon the clothes of the child caught fire from the flame of a flambeau

placed at a barricade around a part of the street under repair, *is held* insufficient to show negligence on the part of the parents in leaving the child in custody of her aunt or negligence on the part of the custodian which could be imputed to the parents.

APPEAL by plaintiff from *Clark, J.*, February Civil Term 1961 of ALAMANCE.

This is a civil action to recover for the wrongful death of Sherry Lee Jeffreys, a child, lacking only 28 days of being four years of age at the time of her death. Her death was allegedly caused by the negligence of the City of Burlington in creating a dangerous condition on Sherwood Drive, a residential street in the City of Burlington.

Plaintiff's complaint alleges that on Monday, 27 July 1959, the City of Burlington had caused to be torn up certain concrete pavement in front of the Jeffreys' home on Sherwood Drive, and on the following day, Tuesday, 28 July 1959, the City of Burlington had refilled the excavation in said pavement which had been torn up, and poured concrete preparatory to placing asphalt as a topping over said concrete base after the same had dried. That about 3:30 p.m. on 28 July 1959, after the agents and servants of the City of Burlington had poured said concrete, they placed around said concrete flare pots, and after having lighted them they placed adjacent to the wet concrete two or more wooden barricades, and left, leaving the flares burning.

It is further alleged that about 4:00 p.m. on 28 July 1959, the plaintiff's intestate, while playing in or near said street, came in contact with the flame from one of the aforesaid flares, setting fire to her clothing, and as a result thereof she received burns resulting in her death.

The defendant answered and alleged that the repair work on Sherwood Drive necessitated the excavating of an area approximately 30 feet long and 10 feet wide on the east side of said street next to the curb and gutter. That the asphalt was removed, the excavation made, and a new concrete foundation poured. That it was necessary to allow the concrete to set before the asphalt could be applied and the repair work completed. That in order to provide notice to the public of the hazardous condition existing in said street pending the completion of the repair work, as well as to prevent damage to the concrete base while it was setting up, the defendant, through its servants and agents, caused five wooden barricades to be placed around such area, completely enclosing the same from the traveled area on said street. That in order to advise the public, specifically the operators of motor vehicles on said street, of the existing condition and danger during the interim period, and especially during the nighttime, the

servants and agents of the defendant, upon completion of the work about 4:00 p.m. on Tuesday, 28 July 1959, caused smudge pots or flares to be placed in the street area adjacent to the said wooden barricades and caused the same to be lighted. That at the time the servants and agents left the area of the repairs there were no persons in the immediate area thereof.

The defendant denied any negligence on its part in connection with the death of plaintiff's intestate, but alleged that if the defendant was negligent in any respect, the parents of plaintiff's intestate were guilty of contributory negligence in failing to properly supervise their child.

The plaintiff's evidence tends to show that about 3:25 p.m. on the day of the accident, the mother of the child left home and went to a Laundromat; that plaintiffs' intestate and her older brother were left in the care of the mother's sister, Arlene Hurlocker, who was nearly fourteen years of age. The mother testified that she had been using this sister as a babysitter time and time again for at least one and a half years. Flares and barricades had been placed in the street around the area that was being repaired the night before plaintiff's intestate was burned. The mother had warned a neighbor child on the morning of the accident not to play with the flares. She had also stopped her own son from carrying water from the house to pour on the flares. The mother denied that the flares were in the street when she left to go to the Laundromat.

The defendant's evidence tended to show that the barricades were placed in the street by the employees of the City around 3:30 p.m. on 28 July 1959 and that a colored man was sent back to the scene about 3:50 p.m. to place and light the flares.

Issues of negligence, contributory negligence and damages were submitted to the jury. The first issue as to the negligence of the defendant was answered in the affirmative. Separate issues as to the contributory negligence of the father and mother of plaintiff's intestate were both answered in the affirmative.

Judgment was entered on the verdict and the plaintiff appeals, assigning error.

Clarence Ross and Thomas C. Carter for plaintiff appellant.
W. D. Madry; Dalton, Long & Latham for defendant appellee.

DENNY, J. The plaintiff's assignments of error Nos. 3 and 4 are to the submission of the second and third issues on contributory negligence, and assignments of error Nos. 11 and 12 are directed to the following portions of the court's charge to the jury on said issues: "So here if you find from the evidence and by its greater weight that there

was negligence on the part of the custodian and that this negligence on the part of the custodian of the infant child was the proximate cause or one of the proximate causes contributing to her fatal injury by burning, and you are further so satisfied that the father K. G. Jeffreys consented and agreed to the appointment of this custodian, then you should answer that second issue 'Yes' in favor of the defendant, the City of Burlington." (Exception No. 11) "(A)nd likewise, as to the third issue, if you are satisfied by the evidence and by its greater weight that the mother was negligent in leaving the child as she did under the circumstances, all the circumstances you find them to have been and that her negligence constituted want of due care and was one of the proximate causes of the death and fatal injury of the child, or that the custodian of the child was employed by her and that the custodian was negligent in the care of the child and failed to exercise ordinary prudence by keeping the child away from dangers which she knew, or in the exercise of due care should have known was reasonably likely to produce injury to the child, and this negligence on the part of the custodian was one of the proximate causes of the fatal injury to the child, then answer the third issue in favor of the defendant, City of Burlington, 'Yes.'" (Exception No. 12)

The mere fact that the plaintiff's intestate suffered an accident which resulted in her death, standing alone, is insufficient to establish negligence against the custodian of plaintiff's intestate. Negligence is not to be presumed from the mere fact of injury. *Etheridge v. Etheridge,* 222 N.C. 616, 24 S.E. 2d 477; *Robbins v. Crawford,* 246 N.C. 622, 99 S.E. 2d 852; *Williams v. McSwain,* 248 N.C. 13, 102 S.E. 2d 464; *Williamson v. Randall,* 248 N.C. 20, 102 S.E. 2d 381; *Sloan v. Light Co.,* 248 N.C. 125, 102 S.E. 2d 822. Therefore, where there is no evidence tending to establish negligence on the part of the custodian of a child, there is no negligence to impute to the parents of the child.

In 67 C.J.S., Parent and Child, section 46, page 749, *et seq.*, it is said: "Contributory negligence on the part of the parent ordinarily will preclude a recovery by him for an injury to the child. Similarly, contributory negligence on the part of the custodian of the child, where imputed to the parent in accordance with the rules discussed in Negligence § 163, will bar recovery by the parent.

"The ordinary rules of the law of negligence apply in determining the parent's contributory negligence. It is the duty of a parent or other person having the care, custody, and control of a child to exercise ordinary care for its safety, and, where failure to do so contributes proximately with the negligence of third persons to cause injury to the child, such parent, or other custodian, is guilty of contributory negligence. * * *

"Ordinary care on the part of a parent or other custodian of a child is such care as a person of ordinary prudence would exercise for the child's safety under the same or similar circumstances. * * * (A) parent may be free from contributory negligence where the child escapes into a place of danger in the street or highway while temporarily left alone or while the parent's attention is momentarily diverted from the child, * * * citing *Brown McClain Transfer Co. v. Major's Adm'r.,* 251 Ky. 741, 65 S.W. 2d 992; *Smith v. City of Baton Rouge,* 166 La. 472, 117 So. 559; s.c., 9 La. App. 19, 119 So. 98.

In 65 C.J.S., Negligence, section 163, page 805, *et seq.,* it is said: "Where a child sustains injury as the result of the concurrent negligence of a third person and one in whose charge he has been placed by a parent, the negligence of the custodian may be imputed to the parent. Where, however, the relation of master and servant or principal and agent with respect to the care, custody, and control of the child does not exist between the parent and the custodian, the negligence of the latter is not imputed to the parent, * * *" citing *Seaboard Air Line Ry. Co. v. Sarman,* 38 Ga. App. 637, 144 S.E. 810. See also *Ferrell v. Cotton Mills,* 157 N.C. 528, 73 S.E. 142, 37 L.R.A. (N.S.) 64, and *Comer v. Winston-Salem,* 178 N.C. 383, 100 S.E. 619.

There is no evidence offered in the trial below tending to show that the relation of master and servant existed between Arlene Hurlocker, the custodian, and the parents of plaintiff's intestate or that the parents of the child had any reason to believe that the sister of the child's mother was not a reliable custodian of the children. The evidence of the mother of the plaintiff's intestate and sister of the custodian on this point was as follows: "I left Sherry and my son with my sister, and they had been left with her time and time again, and I felt they were safe with her because she had always proven to be capable. * * * When I left, Sherry wanted to go outside and I asked Arlene if she would help her get her rocking chair on the front porch, she wanted to sit out there with her doll. When I left home Arlene was in the process of getting her settled and the little boy was inside, he wanted to watch television."

Where was the custodian when the little girl went into the street? She may have been engaged in a legitimate errand, consonant with her duties as custodian of the children left in her care. The evidence is silent in this respect.

A careful examination of the evidence adduced in the trial below leads us to the conclusion that it is insufficient to support the issues of contributory negligence submitted to the jury as to the respective parents of plaintiff's intestate. Neither do we think the evidence tends to support the view that the parents of plaintiff's intestate were negli-

gent in leaving their children at the home in the custody of Arlene Hurlocker.

In our opinion, the evidence offered in the trial below did not warrant the instruction given on the issues of contributory negligence to which the plaintiff excepted and assigns as error, and we so hold.

These assignments of error are upheld.

Since the verdict below was in favor of the defendant on the second and third issues, the City did not appeal. Hence, the question as to whether or not the defendant is entitled to a nonsuit on the evidence presented on this record is not before us for consideration.

A new trial is awarded the plaintiff.

New trial.

MRS. ADDIE BABSON v. CLAIROL, INC., AND JACKSON BEAUTY SUPPLY COMPANY.

(Filed 12 January, 1962.)

1. Process § 13—

A foreign corporation which has no process agent in this State may be served by service on the Secretary of State when it has carried on in this State regularly and systematically some of the functions or activities for which it was created. G.S. 55-145(c).

2. Same—

Evidence that a corporation manufacturing cosmetics regularly and systematically used agents in this State for the purpose of demonstration and promotion of its sales is sufficient to support a finding that it was doing business in this State so as to be amenable to service by service upon the Secretary of State.

APPEAL by defendant Clairol, Inc., from *McKinnon, J.*, July 1961 Term, ROBESON Superior Court.

The plaintiff instituted this civil action against Clairol, Inc., the manufacturer, and Jackson Beauty Supply Company, the distributor, to recover damages allegedly resulting from her use of Clairol Hair Dressing Cosmetics, warranted as safe for such use when in fact they contained deleterious and poisonous substances which, when she applied them, caused irritation to her scalp, face and eyes, loss of hair, impairment of her vision, and loss of time and income.

The distributor, Jackson Beauty Supply Company, is a North Carolina corporation. Its principal office is in Greensboro. The manu-

facturer, Clairol, Inc., is a foreign corporation. Its manufacturing plant is located in Stamford, Connecticut, its principal office in New York City. The appellant does not have a certificate of authority to do business in North Carolina. It does not have any agent in this State upon whom process may be served. The plaintiff sought to make it a party defendant in this case by service upon the North Carolina Secretary of State.

The appellant entered a special appearance and moved to vacate the service and dismiss the action upon the ground Clairol, Inc., is a foreign corporation, does not do business in North Carolina, does not own property, does not maintain any office or place of business here. It does not have any officer, director, or managing agent in this State. Its products are manufactured in Connecticut where they are delivered to common carriers in interstate commerce. All its office activities are carried on in the City of New York. It attached to the motion affidavits tending to support its contentions.

In opposition to the motion to vacate the service, the plaintiff filed three affidavits. Beatrice Kinlaw testified:

> "2. That she operates a beauty shop in the City of Lumberton, North Carolina.
>
> "3. That on various occasions various representatives of Clairol, Inc., have called on me at my place of business and represented themselves to be 'Dye Technicians' of Clairol, Inc., and traveling throughout the State of North Carolina promoting the sales of Clairol products to me and to other persons in similar business as myself; that such 'Dye Technicians' of Clairol, Inc., have on various occasions provided me with up-to-date knowledge of Clairol products and with free advertising and promotional material designed to encourage the general public to make more use of Clairol products, and particularly to encourage beauty shops to make a greater use of Clairol products and this has been regularly done over a period of the last two years."

Addie Babson, the plaintiff, testified:

> "That she owns and operates Addie's Beauty Shop in Bladenboro, North Carolina, and is now working as a beautician in said shop. That she received her training as a beautician at Fayetteville Beauty College, Fayetteville, North Carolina, during or about the year 1951. That while attending said Beauty College and at said schools Clairol technicians would demonstrate how to use Clairol products. That at said schools said technicians represented that they were employees of Clairol, Inc., and said technicians did

represent that the products used and demonstrated were products of Clairol, Inc. That said Clairol demonstrations schools were usually of one day duration and that during the demonstrations said technicians did 'puff' the qualities of Clairol products. That said schools were attended by students at the Fayetteville Beauty College and by beauticians throughout the immediate area. That since attending Fayetteville Beauty College said affiant has attended other Clairol demonstration schools held at Fayetteville Beauty College and that technicians or demonstrators at said schools represented that they were employees of Clairol, Inc., and that said technicians and demonstrators represented that the products used and demonstrated were the products of Clairol. Inc. That since attending Fayetteville Beauty College during or about 1951 said Clairol demonstrations schools have been held at Fayetteville Beauty College at least once a year and that said schools have been attended by students at the Fayetteville Beauty College and also beauticians and beauty parlor operators throughout the immediate area."

Bobbie Schmidt testified in part:

"That she is trained as a beautician and is now working as a beautician in the Town of Bladenboro. That she was trained as a beautician in the Fayetteville Beauty College, Fayetteville, North Carolina, and has worked as a beautician for several years. That she attended the Carolina Beauty and Harvest Festival at the Hotel Charlotte, Charlotte, North Carolina, on October 4, 5, 6, 1959, and that said Carolina Beauty and Harvest Festival was a convention for the promotion of beauty aid products produced by several companies including Clairol, Inc., and said convention had the further purpose of demonstrating new techniques using beauty aid products produced by several companies including Clairol, Inc. That said convention was attended by hundreds of beauticians and beauty parlor operators from all parts of the State of North Carolina, and that Clairol, Inc., was represented by several technicians and representatives at said convention. That Clairol, Inc., maintained a Clairol demonstration headquarters located in the Hotel Charlotte at said convention, and that in said demonstration headquarters Clairol technicians and representatives demonstrated the coloring, setting, and cutting of the hair and how the Clairol products would enhance the business of beauticians and beauty parlor operators. That said representatives and technicians employed by Clairol, Inc., would take orders and make sales of Clairol products in said Clairol

demonstration headquarters, and that said representatives did take orders and make sales of said Clairol products. That said representatives and technicians employed by Clairol, Inc., sold Clairol products at the said convention at a price cheaper than the normal price for beauticians and beauty parlor operators to encourage the sale of said products at said convention; that said representatives and technicians would first make their talks and demonstrations 'puffing' the qualities of Clairol products and would then make sales and take orders, thereby gaining maximum sales."

The court made detailed findings that Clairol, Inc., had engaged in business activities in North Carolina, substantially in the manner described in the plaintiff's affidavits. Upon the findings, the court concluded:

"(1) Service of process was had upon the defendant Clairol, Inc., in this case in full compliance with the procedural requirements of G.S. 55-146, as authorized by G.S. 55-145(c).

"(3) The activities which Clairol, Inc., has carried on in this State through its employees and agents have been throughout the period in question, regular, systematic and continuous and have resulted in a large volume of interstate business between said company and persons and concerns in this State.

"(5) The activities of Clairol, Inc., carried on in North Carolina as above stated establish such direct, substantial and uninterrupted contacts by that company with this State as to make it reasonable and just for this Court to exercise its jurisdiction over said company in this case as authorized by G.S. 55-145 and 146.

"(6) Under all of the facts contained in the record before this Court, no right of Clairol, Inc., under the 14th Amendment of the United States Constitution or under Article I, Section 17, of the North Carolina Constitution will be violated by this Court's exercise of the jurisdiction conferred upon it by G.S. 55-145 over said company."

From the order denying the motion to dismiss and requiring the defendant to answer in thirty days, Clairol, Inc., appealed.

Hackett & Weinstein; McLean & Stacy, William S. McLean of Counsel for plaintiff appellee.

Everett L. Henry, Henry & Henry for defendant Clairol, Inc., appellant.

HIGGINS, J. Clairol, Inc., is a foreign corporation engaged in the manufacture, sale, and distribution of hair dressing cosmetics. The products are manufactured in Connecticut. Sales are directed from the general office in New York City. These products are widely used by beauticians and are sold to the public by drug stores throughout North Carolina. As far as the evidence discloses, deliveries are made here through the channels of interstate commerce. The plaintiff alleges the other defendant is a distributor, but the nature of its relationship with the appellant is otherwise undisclosed.

The appellant contends the evidence is insufficient to support the finding and conclusion that it is doing business in North Carolina to the extent necessary to enable the courts here to take jurisdiction and enter an *in personam* judgment. It contends the order denying its motion to vacate the service and require it to submit to the jurisdiction violates its Due Process rights under the 14th Amendment to the Constitution of the United States. *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E. 2d 445; *Heath v. Mfg. Co.*, 242 N.C. 215, 87 S.E. 2d 300; *Lambert v. Schell*, 235 N.C. 21, 69 S.E. 2d 11.

Service on the Secretary of State is sufficient to bring into court a foreign corporation if it does not have a process agent and is doing business in this State. "Doing business in this State means doing some of the things or exercising some of the functions in this State for which the corporation was created." *Harrington v. Steel Products, Inc.*, 244 N.C. 675, 94 S.E. 2d 803; *Radio Station v. McCullough*, 232 N.C. 287, 59 S.E. 2d 779. "Presence in this State in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also gave rise to the liabilities sued on even though no consent to be sued or authorization to . . . accept service has been given." *International Shoe Co. v. Washington*, 326 U.S. 310; *International Harvester Co. v. Kentucky*, 234 U.S. 407; *Harrison v. Corley*, 226 N.C. 184, 37 S.E. 2d 489.

The appellant's business is cosmetics. The ultimate object is sale to the consumer. Without demand there would be no sale; and without the sale the appellant would be out of business. Consequently, the creation of the demand for the product and the sale to meet the demand are mud sills to successful operation. Appellant's demonstrational and promotional activities in North Carolina, to this end, (as shown by the affidavits) are so varied, extensive, and so directly tied to the purposes for which the company was created as to leave no serious question but that the appellant is and has been doing business here. The court so found. The evidence supports the findings. While each case must be decided on its own facts, nevertheless the cases cited lay down the rules for decision.

Other questions raised on the appeal are immaterial. Service upon the Secretary of State was effective to bring the appellant into court and require it to answer or otherwise plead. The order entered in the superior court is

Affirmed.

STATE v. WILLIAM WOODROW TERRELL.

(Filed 12 January, 1962.)

1. **Conspiracy §§ 3, 6—**

Since the agreement to do an unlawful act constitutes the offense of conspiracy, where the evidence tends to establish an agreement to commit larceny by trick from a named person, the fact that the evidence may tend to show that the title and the constructive possession of the property was in another when the conspiracy was consumated, does not warrant nonsuit for variance.

2. **Conspiracy § 3—**

Conspiracy to commit a felony is a felony, and where the evidence discloses a conspiracy to commit larceny by trick, with nothing to indicate that the conspirators intended to stop before the value of the property passed $100.00, the fact that the evidence may fail to disclose that the value of the property actually taken pursuant to the conspiracy exceeded the value of $100.00, does not reduce the conspiracy to commit the offense to a misdemeanor.

3. **Criminal Law § 101—**

The unsupported testimony of an accomplice is sufficient to support conviction in this State if it satisfies the jury of guilt beyond a reasonable doubt.

4. **Embezzlement § 1; Larceny § 1—**

The fact that the agent of the owner of property participated in a conspiracy to commit larceny of the property by trick does not change the purpose of the conspiracy from larceny to embezzlement or false pretense.

APPEAL by defendant William Woodrow Terrell from *Sharp, S.J.*, April 1961 Term, WAKE Superior Court.

This criminal prosecution was tried upon a bill of indictment which charged that on October 1, 1959, "James Donald Mealer and William Woodrow Terrell, and others by name to these jurors unknown, . . . did unlawfully, wilfully and feloniously combine, confederate, agree, and conspire together to unlawfully, wilfully and feloniously take,

steal and carry away leaf tobacco of the value of several hundred dollars, the property of Monk-Henderson Tobacco Company . . ." In addition to the count charging the conspiracy, the indictment contained eight counts charging James Donald Mealer and William Woodrow Terrell with the larceny of different lots of tobacco, the property of Monk-Henderson Tobacco Company. The value of each lot was separately fixed, ranging from $70.00 to $300.00. The bill specified the exact poundage of each lot and fixed the date of the taking: one lot on October 19, 1959; three lots on September 19, 1960; and four lots on September 25, 1960.

At a prior term of court the defendant Mealer entered a plea of guilty to all counts in the bill. The court imposed a prison sentence of not less than four nor more than six years. He was brought from the State's prison and testified as a State's witness. His evidence tended to show the following: In 1957 he was office manager of Monk-Henderson Tobacco Company at Wendell. During the 1957 market Jack Simmons introduced Mealer and the defendant Terrell who at that time was a pinhooker — that is, an independent buyer who attended sales, bid off certain lots of tobacco which he hoped to recondition and resell at a profit.

As a result of talks between Jack Simmons and Mealer, the latter called Terrell at his home in Wendell: "I told him (Terrell) that at that particular time, like I had explained to Jack Simmons, that Monk-Henderson Tobacco Warehouse or the Wendell market were not buying a sufficient amount of tobacco that any operation could be carried on there. He said he understood that. I told Terrell that if anything developed at a later day I would let him know . . . I next saw him in 1958 after he came back from the burley market in Kentucky. . . . I told him I still did not know anything about the tobacco situation — that the men had not come back from Europe yet.

" . . . I saw the defendant Terrell during the tobacco season in Wendell in 1959 . . . He asked me had I found out anything about the coming season . . . whether we (Monk-Henderson) were going to buy tobacco in quantity. . . . I told him I thought we were . . . A few days later after the market opened . . . told him it looked like the volume of tobacco there would be enough to justify that we could do business there that year. I asked him was he sure he understood how the operation was supposed to work and he said he thought he did." The arrangement was: "That after the tobacco was sold on the warehouse and knocked out to Monk-Henderson, . . . and the clip man had come along behind the sellers and recorded on the farmer's sheet the price the tobacco is sold for and the name of the company to whom it was sold, etc."

The plan contemplated taking advantage of the market practice which was known to the parties. In the usual course, tickets in triplicate sheets are made out in advance showing the grade, the weight, and the name of the grower. These tickets are placed on each lot or basket of tobacco in the line of sale. Entries on the top sheet are reproduced on the other sheets. When the tobacco is sold, the price and the name of the purchaser are entered. The top sheet goes to the warehouse; the second sheet to the purchaser, and the bottom sheet to the grower. The tobacco goes to the purchaser who pays the warehouse, which in turn pays the grower. If, however, the grower refused to sell at the price bid, no further entries are made on the tickets, but the grower turns them upside down on the lot, repossesses, and withdraws the tobacco from the sale.

The method of carrying out the plan involved substantially this variation from the regular marketing procedure: When Monk-Henderson was the successful bidder, the tickets were made out in the usual way — one copy for the warehouse, one for Monk-Henderson, and the third for the grower. Terrell, however, was to place a bogus set of tickets upside down, indicating the lot was unsold. He was to remove it, sell it and split with Mealer. According to the intended result, Monk-Henderson would pay the warehouse for the tobacco according to its bid. The grower would collect from the warehouse, but Terrell rather than the purchaser (Monk-Henderson) would surreptitiously remove the tobacco and sell it. For fear of detection, the purpose was to take a limited amount from Monk-Henderson's purchases when the volume was heavy. Mealer testified he received approximately $380.00 as his part of the take.

There was much evidence both by the State and the defendant relating to the individual lots of tobacco involved in the substantive offenses charged in the indictment. The defendant offered evidence of his good character, though he did not testify. At the close of all the evidence the court directed a verdict of not guilty to counts 8 and 9 in the indictment and overruled the motion to dismiss the other counts. The jury returned a verdict of guilty on the conspiracy count and not guilty on the six counts submitted charging substantive offenses. From the judgment of imprisonment of not less than three nor more than five years, the defendant appealed, assigning numerous errors.

T. W. Bruton, Attorney General, G. A. Jones, Asst. Attorney General for the State.

Thomas A. Banks, Philip R. Whitley, Hill Yarborough, John F. Matthews for defendant appellant.

HIGGINS, J. On this appeal we are concerned with assignments of error relating to the formation of the conspiracy — the making of the plan charged in the indictment. "As soon as the union of wills for the unlawful purpose is perfected the offense of conspiracy is completed." *State v. Knotts,* 168 N.C. 173, 83 S.E. 972. "The conspiracy is the crime and not its execution." *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. Efforts, successful or otherwise, of the parties to carry out their unlawful agreement involve only substantive offenses. Any error with respect thereto in this case was rendered harmless by the verdict.

The defendant urges the conviction on the conspiracy count should be set aside and the judgment based thereon should be reversed because of a fatal variance between the charge and the proof. He argues in his brief, "To make out a case the State had to prove that these circumstances (evidence relating to the manipulation of the tickets at the sale) placed ownership and possession in the named company before Terrell moved the tobacco. Otherwise his act would disturb possession of the warehouse or the farmer — not the named company — and the case would fail for a variance between the indictment and the proof." He argued at length, citing many cases as to when in auction sales title passes and whether at any particular step in the sales procedure the taking of the property would constitute larceny, false pretense, or embezzlement. ". . . (That) the court erred in failing to instruct the jury the burden (was) on the State of proving beyond a reasonable doubt that the value of the tobacco intended to be stolen would amount to more than $100 at the time of the taking, otherwise the evidence would show only a misdemeanor."

The argument fails to distinguish between the making of the plan and its execution. "It is not necessary for the indictment for conspiracy to describe the subject crime with legal and technical accuracy." *State v. Blanton,* 227 N.C. 517, 42 S.E. 2d 663. The conspiracy in this case was prospective. It was a part of the plan that the parties were to wait for a favorable opportunity to carry it out.

The conspirators knew Monk-Henderson Tobacco Company would buy a substantial amount of tobacco on the Wendell market. How much they would be able to pilfer by manipulating the sales tickets they, of course, did not know. Certainly there is nothing to indicate they intended to stop before the value passed $100.00 and keep the larceny within the misdemeanor class. A conspiracy to commit a felony is a felony. *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25.

The hub of the State's case was the testimony of Mealer. Other bits of supporting evidence tend to add to the picture's dark overtone. The defendant did not testify. However, he introduced rather impressive evidence of his good character. Jack Simmons, in on the preliminaries

and now serving time for "tobacco trouble" in Robeson County, did not testify. The State's principal witness was an admitted accomplice. Some jurisdictions require corroboration of such evidence in order to support a conviction. This Court, however, follows the rule that such evidence, even if unsupported, is sufficient if it satisfies the jury of guilt beyond a reasonable doubt. *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876; *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473.

We have quoted such facts and discussed such legal questions only as relate to the count in the bill upon which the defendant was convicted. The evidence was sufficient to show that Mealer and Terrell formed a conspiracy to steal tobacco by switching tickets enabling them to take and remove as unsold tobacco sold to Monk-Henderson Tobacco Company. The scheme contemplated larceny by trick. The participation of the owner's agent did not change the purpose from larceny to embezzlement or false pretense. The exceptive assignments relating to the conspiracy charge are not sustained on this record. In the trial and judgment below, we find

No error.

STATE v. ERVIN V. KING.

(Filed 12 January, 1962.)

1. Indictment and Warrant § 2; Criminal Law § 121—

Where an indictment which has been quashed is amended so as to correct the defect therein and is then sent back to the grand jury in its amended form as a separate or new bill and is then returned a true bill, the amended bill is not rendered invalid because of the former quashal, and such procedure will not support a motion in arrest of judgment.

2. Indictment and Warrant § 17; Criminal Law § 101—

The fact that a six-year old child, the victim of the offense charged, is uncertain in his testimony as to the time or particular day the offense charged was committed, goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed, there being sufficient evidence that defendant committed each essential act of the offense.

3. Criminal Law § 112—

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party.

4. Same; Criminal Law § 108—

While the statement of contentions by the court will not be held for error as containing an expression of opinion on the evidence merely because the court necessarily takes more time in stating the contentions of one party than the other, when the court gives the State's contentions in detail and then points out the evidence which the State contends supported its contentions, but gives the defendant's contentions only in brief, general terms and completely ignores the defendant's evidence upon which defendant's contentions were based, defendant's exception to the charge must be sustained. G.S. 1-180.

APPEAL by defendant from *Williams, J.*, August Criminal Term 1961 of ALAMANCE.

This is a criminal prosecution on a bill of indictment charging the defendant with having on 2 February 1961 committed the abominable and detestable crime against nature by forcing Tommy Dawson, a six-year-old child, to have unnatural sexual relations with him. (Details of the alleged act are not essential to a disposition of this appeal.)

The defendant entered a plea of not guilty. The State introduced evidence tending to show that the defendant committed the alleged crime. The child's statements made prior to the trial to his grandmother and to the officers who testified in behalf of the State, varied substantially as to where and when the alleged crime took place.

The defendant testified in his own behalf and denied that he had ever mistreated his stepson in the manner alleged or otherwise. Testimony was offered by the defendant tending to show that the child involved was living with his grandmother who was hostile towards her son-in-law, the defendant; that she had been trying to get her daughter to leave the defendant.

Defendant moved for judgment as of nonsuit at the close of the State's evidence and renewed the motion at the close of all the evidence. Motion denied. The jury returned a verdict of guilty as charged. The court gave the defendant a sentence of not less than twenty nor more than twenty-five years in the State's prison at hard labor.

From the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General G. A. Jones, Jr., for the State.

Clarence Ross; Dalton, Long & Latham for defendant.

DENNY, J. The defendant assigns as error the refusal of the court below to quash the bill of indictment on the grounds hereinafter discussed.

It appears that at the March Term 1961 of the Superior Court of

Alamance County a typewritten bill was sent to the grand jury charging that the defendant unlawfully, wilfully, and feloniously did commit the abominable and detestable crime against nature. A true bill was returned by the grand jury. The bill was quashed during the course of the defendant's trial at the March Term 1961. It is admitted that such bill of indictment would not have supported a verdict in the form submitted and returned. Later, the word "March" in the bill was stricken out and the word "May" inserted in lieu thereof by hand. There was also added in handwriting to the bill a description of the nature of the crime alleged. This bill on its face purports to have been returned by the grand jury as a true bill at the May Term 1961 of the Superior Court of Alamance County. It is without defect with respect to form and content as to the crime charged.

The court below heard the motion to quash. The minutes for the May Criminal Term 1961 of the Superior Court of Alamance County were introduced in evidence, and the secretary of the grand jury, at the March and May Terms 1961, was sworn and testified that, the bill as amended was sent to the grand jury at the May Term 1961 as a separate bill; that it had a new number on it, and that it was considered by the grand jury and returned to the court as a true bill, although no entry was actually made on the bill noting its return in open court. The court below held that the failure to make such notation on the bill did not affect its validity. The court found as a fact: "(T)hat the bill was presented at the March 1961 Term, withdrawn and subsequently presented to the succeeding May 1961 Term for the trial of criminal cases and for consideration, and after hearing evidence the Grand Jury acted on it and returned a True Bill as it now appears in the record."

The foregoing finding is supported by competent evidence. Even so, the defendant contends that when the bill was quashed it became a nullity and could not be made valid by amendment. It would perhaps have been better to have sent a new bill to the grand jury. But when a quashed bill is amended so as to cure the defect therein and is sent back to the grand jury in its amended form as a separate or new bill and the grand jury acts upon it as it would upon a new bill and returns it as a true bill, it may not be quashed because of the procedure followed.

This Court has held that where "the grand jury, having once acted upon a bill and returned it publicly into Court not a true bill, and a record has been made of its finding, it is a final disposition of that bill." *S. v. Brown,* 81 N.C. 568; *S. v. Ewing,* 127 N.C. 555, 37 S.E. 332: *S. v. Ledford,* 203 N.C. 724, 166 S.E. 917

It was further said in *S. v. Brown, supra:* "We are aware that the

practice has obtained in some, if not all, of the districts of the State, when a bill has been presented by the grand jury 'A true bill,' and has been found to be defective, for the Solicitor to amend it and send it back to the jury to be acted upon a second time, and upon its being returned again 'A true bill,' no objection has been taken to its informality; for the reason, we suppose, that in such a case there is no inconsistence in the record of the findings of the grand jury. * * *"

This assignment of error is overruled as well as the motion in arrest of judgment interposed in this Court.

The defendant assigns as error the refusal of the court below to allow his motion for judgment as of nonsuit, interposed at the close of the State's evidence and renewed at the close of all the evidence.

The defendant contends that his motion should have been granted, not because of variance between the date laid in the indictment and some other date shown by the evidence, but he contends that the State's evidence fails to fix any definite time at all tending to show when the alleged crime was committed. It must be conceded that the evidence of Tommy Dawson was vague as to the time the alleged crime was committed by the defendant. We think, however, the vagueness of this child's testimony goes to its weight rather than to its admissibility. Upon consideration of all the State's evidence, we have concluded that it was sufficient to withstand the motion for judgment as of nonsuit. This assignment of error is likewise overruled.

The defendant's most serious assignment of error is to the failure of the court below to give equal stress to the contentions of the State and the defendant as required by G.S. 1-180.

We have repeatedly held that a trial judge is not required by law to state the contentions of the litigants to the jury. *S. v. Kluckhohn,* 243 N.C. 306, 90 S.E. 2d 768; *Brannon v. Ellis,* 240 N.C. 81, 81 S.E. 2d 196; *S. v. Colson,* 222 N.C. 28, 21 S.E. 2d 808; *Trust Co. v. Ins. Co.,* 204 N.C. 282, 167 S.E. 854. When, however, a judge undertakes to state the contentions of one party, he must also give the equally pertinent contentions of the opposing party. *S. v. Colson, supra.*

The equal stress which the statute requires to be given to contentions of the State and the defendant in a criminal action does not mean that the statement of the contentions of the State and of the defendant must be equal in length. *S. v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668. For instance, in a trial where the evidence for the defendant is short, or where he may have chosen not to offer any evidence at all, his contentions will naturally be very few in contrast with those of the State where it may have introduced a great volume of testimony. *Brannon v. Ellis,* supra.

In the charge under consideration, the court below not only gave an

exhaustive array of the State's evidence, but gave the State's contentions in detail and then pointed out the evidence which the State contended supported its contentions. On the other hand, the court gave the defendant's contentions in very brief, general terms, consisting of only three short sentences which in no sense were based on the defendant's evidence, but as though the defendant had offered no evidence at all. The pertinent contentions arising from the defendant's evidence were completely ignored. Such a charge does not meet the requirements of G.S. 1-180 as interpreted and applied in our decisions. *S. v. Kluckhohn, supra.*

The defendant is entitled to a new trial and it is so ordered.

There are many other assignments of error, some of which are not without merit. However, since these may not recur upon another trial, we deem it unnecessary to discuss them.

New trial.

STATE v. ROSS ALLISON.

(Filed 12 January, 1962.)

1. Criminal Law § 32—

The burden of proving an alibi does not rest upon defendant, but evidence of an alibi is to be considered by the jury only in determining whether from all of the evidence the jury is satisfied of defendant's guilt beyond a reasonable doubt.

2. Criminal Law § 106—

An instruction placing the burden upon defendant to prove an alibi must be held for prejudicial error notwithstanding that in other portions of the charge the correct rule is given that defendant does not have the burden of proving an alibi but that evidence of an alibi should be considered by the jury in determining whether the jury is convinced of the fact of guilt beyond a reasonable doubt from all of the evidence in the case. It is also error to charge that evidence of an alibi be "consistent" with all the other evidence instead of "considered" with all the other evidence.

3. Criminal Law § 151—

The Supreme Court is bound by the record as certified.

APPEAL by defendant from *Williams, J.*, August Term 1961 of ORANGE.

Criminal prosecution upon an indictment charging the defendant

with the felony of an assault with intent to commit rape upon Clannies Strayhorn, a female. G.S. 14-22.

Plea: Not Guilty. Verdict: Guilty as charged.

From a judgment of imprisonment, defendant appeals.

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

Robert L. Satterfield and Lee W. Settle for defendant appellant.

PARKER, J. The State's evidence is amply sufficient to carry the case to the jury on the charge in the indictment of an assault on Clannies Strayhorn, a female 78 years of age, with intent to commit rape, by Ross Allison, 52-year-old husband of her niece. Defendant makes no contention to the contrary.

The State's evidence tends to show that the criminal assault charged in the indictment was made by defendant on Clannies Strayhorn in her home after dark and after she had eaten supper on Sunday, 22 January 1961.

Defendant's defense is an alibi. His evidence tends to show that on Sunday, 22 January 1961, he was at the Naha Club from 3:00 o'clock P.M. to 6:00 o'clock P.M., that he left the Naha Club after 6:00 o'clock P.M. in a pickup truck driven by Jackson Tennin, and went to Daniel Corbett's home. He left Daniel Corbett's home, went to Clyde's home, stayed there a few minutes, and then returned to Daniel Corbett's home, where he and others watched television until about 7:45 P.M. o'clock. He then went to his home not far away, was in bed there at five minutes to 8:00 P.M. o'clock, and did not leave his home thereafter that night.

In respect to defendant's defense of an alibi, the court charged the jury as follows:

> "I instruct you an alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed, and therefore he could not have committed it. All the evidence bearing upon that should be carefully considered by you and if the evidence on this subject consistent with all that other testimony, is sufficient to raise a reasonable doubt as to the guilt of the accused, you should acquit him. The accused is not required to prove an alibi beyond a reasonable doubt, nor by the greater weight of the evidence, that is the preponderance. It is sufficient to justify an acquittal if the evidence on that point raises and supports a reasonable doubt of his presence at the time and place when the crime was charged to have been committed, if

you find a crime was committed. (You understand also an attempt to prove an alibi does not shift the burden of proof from the State to the defendant, the burden is still upon the defendant)."

Defendant assigns as error the last sentence, which is enclosed in parentheses.

The trial court's charge in this respect, with the exception of the last sentence, approximates a verbatim repetition of a charge in respect to an alibi approved by us in *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844, as in accord with our precedents in *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867, and *S. v. Jaynes,* 78 N.C. 504.

The last two sentences of the approved charge in the *Minton* case are:

"It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you should find that a crime was committed, and you will understand also that the attempt of the accused to prove an alibi does not shift the burden of proof to the defendant. The burden remains on the state to prove the defendant's guilt beyond a reasonable doubt."

This Court said in the *Minton* case: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty."

We said as early as 1878 in *S. v. Jaynes, supra:* "The burden of proving an *alibi* did not rest upon the prisoner. The burden remained upon the State to satisfy the jury upon the whole evidence of the guilt of the prisoner."

In *S. v. Josey,* 64 N.C. 56, the defense was an alibi. " 'His Honor charged the jury that the burden of proof to show the guilt of the prisoner was upon the State, but that when the State had made out a *prima facie* case, and the prisoner attempted to set up an *alibi,* the burden of proof was shifted, and that if the defense failed to establish the *alibi* to the satisfaction of the jury, they must find the prisoner guilty.' " The charge was held erroneous, and a *venire de novo* was ordered.

Applying the doctrine of contextual interpretation, we have upheld inexact charges on an alibi in *S. v. Jaynes, supra; S. v. Starnes,* 94 N.C. 973; *S. v. Freeman,* 100 N.C., 429, 5 S.E. 921; *S. v. Rochelle,* 156 N.C. 641, 72 S.E. 481; *S. v. Sheffield,* 206 N.C. 374, 174 S.E. 105. However, in none of these cases, with the exception of the *Freeman* case, was the burden of proof of showing an alibi placed as unequivocally and as clearly upon the defendant, as in the instant case. In the *Sheffield* case,

the trial judge charged in part on an alibi: "The burden of proving an alibi, however, does not rest upon the prisoner." In all of these cases the Court expressly or substantially states that the burden of proving an alibi does not rest upon the defendant.

Whether the challenged part of the charge here is read contextually or not, this interpretation of it is imperative: the trial court placed upon the defendant the burden of proving his defense of an alibi. Such a charge is erroneous, according to all of our decisions on the subject.

In other parts of the charge the court placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that the defendant is guilty.

"The burden of proof being a substantial right, an erroneous placing of the burden of proof, or conflicting instructions thereon, . . . , is prejudicial." Strong's N. C. Index, Vol. I, Appeal and Error, p. 126, where many of our cases are cited. The Court said in *Templeton v. Kelley,* 217 N.C. 164, 7 S.E. 2d 380: "The members of the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly."

Here the jury was given conflicting instructions on the burden of proof, and the burden of proof of establishing an alibi was pinpointed as being upon the defendant. By no contextual reading of the charge can this manifest, prejudicial error be upheld, as cured by other parts of the charge. We have consistently held that conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury. *S. v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143; *S. v. Stroupe,* 238 N.C. 34, 76 S.E. 2d 313; *S. v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685; *S. v. Isley,* 221 N.C. 213, 19 S.E. 2d 875; *S. v. Morgan,* 136 N.C. 628, 48 S.E. 670; Strong's N. C. Index, Vol. IV, Trial, p. 334.

Other assignments of error to the charge are not without merit, but need no discussion since they will probably not recur upon a new trial.

In justice to the learned and experienced trial judge, we deem it appropriate to say that it seems that the use of the words "the burden is still upon the defendant" in the challenged part of the charge, instead of the burden is still upon the State, is an error in taking and transcribing the charge, or is "one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit." *S. v. Simpson,* 233 N.C. 438, 442, 64 S.E. 2d 568, 571. However the mistake occurred, the error appears in the record, and we are bound by it as it comes to us. *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463. Further, in the part of the charge quoted appear these words: "consistent

with all that other testimony." This is plain error. The words should be considered with all that other testimony. *S. v. Minton, supra.*

The exception and assignment of error to the charge is well taken, and a new trial is ordered.

New trial.

STATE v. GLENN WHITE.

(Filed 12 January, 1962.)

1. Criminal Law § 87—

Where there is but a single defendant charged in separate indictments with crimes of the same class, it is not necessary to the discretionary power of the court to consolidate the indictments for trial that all the evidence of guilt of one of the offenses be competent as to each of the others, and upon consolidation the separate bills will be treated as separate counts in one bill.

2. Same—

In exercising its discretion to consolidate separate indictments against the same defendant for trial the court should consider whether the offenses are so separate in time and place and so distinct in circumstance as to render a consolidation unjust and prejudicial, and the court should not exercise its discretionary power solely for the purpose of saving time.

3. Same—

Defendant was charged in four separate indictments with receiving stolen goods of a value of more than $100.00, knowing them to have been stolen, there being little more than a year between the first and fourth occasions but only 51 days between the third and fourth occasions, and the goods having been received from the same person on the first three occasions. All four offenses were uncovered by a single investigation. *Held:* There was no abuse of discretion in consolidating the indictments for trial.

PARKER, J., concurs in result.

APPEAL by defendant from *Pless, J.*, February 1961 Term of BURKE.

This is a criminal action. Defendant is charged with receiving stolen goods, knowing them to have been stolen. The charges are made in four separate bills of indictment which were consolidated for the purpose of trial. The jury returned a verdict of guilty on all counts.

On each count the judgment imposed a prison sentence, the sentences to run consecutively. On one count the sentence was active, but on the other three counts sentences were suspended.

Defendant appealed.

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

H. J. Hatcher and Anglin & Bailey for defendant.

MOORE, J. Defendant's first assignment of error is based on exception to the order of the court consolidating the bills of indictment for trial.

Each bill charged a felony of the same nature — receiving stolen goods of the value of more than one hundred dollars, knowing them to have been stolen. G.S. 14-71. The indictments allege separate offenses, two occurring on December 1, 1959, one on October 17, 1960, and one on December 7, 1960. The goods received belonged to four different persons, a different person on each occasion. The State's evidence tends to show that on the first three occasions the goods were stolen and delivered to defendant by Oscar Draughan, and on the last occasion by Jimmy Roper.

The solicitor moved that the indictments be consolidated "for the purpose of saving time." The motion was allowed. Defendant contends that this was error. He says that the offenses were separate and distinct transactions, not connected in time or place, and that "evidence at the trial of one of the indictments would not be admissible at the trial of each of the others." Defendant strongly insists that in trying the cases together the State's evidence on each of the charges tended to corroborate and strengthen the evidence on each of the others to his prejudice.

G.S. 15-152 (Ch. 168, P.L. 1917) provides, in part, that "When there are several charges against any person for the same act or transaction *or* for two or more acts or transactions connected together, *or* for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated." (Emphasis ours.)

"Where separate indictments against the same defendant are consolidated, the counts in the separate bills will be treated as separate counts in one bill." 1 Strong: N.C. Index, Criminal Law, s. 87, p. 757; *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895.

Defendant seems to rely upon the following language in *State v. Combs,* 200 N.C. 671, 674, 158 S.E. 252: "The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time

or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others." Defendant interprets this to mean that two or more indictments may not be consolidated for trial, in any event, unless all of the evidence to be adduced be relevant and competent as to the charges in all of the indictments. We do not agree that the rule stated in *Combs* is so inclusive. It must be interpreted in the light of the situations in which it has been applied. It has been applied in determining whether indictments should be consolidated when two or more defendants are involved. *State v. Cruse,* 253 N.C. 456, 117 S.E. 2d 49; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301; *State v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460. It has also been applied where one defendant was involved and several distinct offenses of the same or different grades or classes grew out of the same act or transaction or acts or transactions connected together. *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *State v. Malpass,* 189 N.C. 349, 127 S.E. 248.

In *Combs* two defendants were involved, and they were charged jointly in two indictments, it being alleged that they, acting together, broke and entered separate buildings, owned by different persons, on the same day and stole property from each. In our opinion the rule quoted above was invoked only because two defendants were involved. As to each defendant, considered alone, the case was somewhat analagous to the one at bar, and the court approved the consolidation. The offenses were of the same class and identical in character, but were separate offenses. Some of the evidence of the acts constituting one of the offenses would not have been relevant, competent and admissible upon a separate trial of the other unless, perhaps, to show scienter, "knowledge, intent, motive, plan or design, and identity. . . ." Stansbury: North Carolina Evidence, s. 91, p. 174. It is true that defendants failed to object at the time of the order of consolidation, but the decision seems to have been based both on the failure to object and on the legal principles involved. There were circumstances connecting the two offenses. They were closely related in time, were committed by the same defendants, and the clothing stolen from one building was found in the automobile stolen from the other. Yet, had the offenses been tried separately, some of the evidence as to one would have been inadmissible as to the other.

In *State v. McNeill,* 93 N.C. 552, 555 (1855) it was stated that "distinct felonies of the same nature may be charged in the same indictment. . . ." This was before the passage of G.S. 15-152.

In *State v. Waters,* 208 N.C. 769, 182 S.E. 483 (1935) the defendant

was charged in separate warrants with two assaults with deadly weapons upon different persons on different occasions, fifteen days apart. The defendant did not object in apt time, but the court upheld consolidation on legal principles and stated: "Since the two transactions delineated in the two warrants are of the 'same class of crimes,' the consolidation of the two cases for the purpose of trial rested in the sound discretion of the trial judge." Consolidation was upheld in a case involving two distinct violations of the prohibition law by a defendant on different dates, more than eight months apart. *State v. Harvell,* 199 N.C. 599, 155 S.E. 257. Likewise, it was held that three charges of receiving stolen goods on separate occasions on the same night were properly joined in separate counts in the bill of indictment. *State v. Charles,* 195 N.C. 868, 142 S.E. 486.

Where a defendant is indicted in separate bills "for two or more transactions of the same class of crimes or offenses" the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider whether the offenses alleged are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant. To save the time of the court is not, taken alone, sufficient predicate for consolidation.

In the instant case each of the charges was for receiving stolen goods of a value of more than one hundred dollars, knowing them to have been stolen. A single defendant was involved. In the first three of the alleged offenses the goods were received, in each instance, from the same person, Oscar Draughan, who testified for the State, relating his transactions with defendant and stating that as to two of the offenses the defendant told him where the goods were located and induced him to steal them. In the last offense, in point of time, the goods were received from Jimmy Roper, fifty-one days following the next preceding offense. All four offenses were uncovered by a single investigation by law enforcement officers. Goods involved in three of the offenses, including the last, were found by the officers in defendant's possession. It was disclosed that the property involved in the other offense had been in his possession.

There was no abuse of discretion in consolidating the indictments for trial.

Defendant made fifty assignments of error and argued twenty-two of them in his brief. Upon careful consideration we find them without sufficient merit to warrant a new trial.

In the trial below we find

No error.

PARKER, J., concurs in result.

FLORA DALE R. AMMONS AND CARLTON E. AMMONS, ADMINISTRATORS OF GWENDOLYN FAYE AMMONS, DECEASED, v. MARY WADDELL BRITT.

(Filed 12 January, 1962.)

1. Appeal and Error § 51—

Where defendant introduces evidence, only the motion to nonsuit made at the close of all the evidence will be considered.

2. Trial § 21—

Where defendant introduces evidence and renews his motion to nonsuit, the court must consider all of the evidence, whether offered by plaintiff or defendant, in the light most favorable to plaintiff, but even so, only that evidence offered by defendant that tends to clarify or explain plaintiff's evidence and is not in conflict therewith may be considered, and defendant's evidence which tends to establish another or different state of facts or which tends to contradict or impeach plaintiff's testimony should not be considered, the credibility of defendant's evidence being a question for the jury.

3. Automobiles § 41m—

Plaintiff's evidence that their intestate, a six-year old child, was standing on the shoulder of the road waiting to cross immediately prior to the accident and that at such point the child could have been seen by a motorist some five hundred yards away, *is held* to take the issue of negligence to the jury upon the question whether defendant, in the exercise of due care, could and should have seen the child in a perilous position at a time when she could and should have taken steps to avoid the injury, notwithstanding testimony of a witness for defendant that the child ran into the street without stopping and collided with the right side of defendant's vehicle.

APPEAL by plaintiffs from *McKinnon, J.*, July Civil Term 1961 of ROBESON.

Administrators' action to recover damages for the wrongful death of their intestate, a six-year old girl, allegedly caused by the negligence of defendant.

It was stipulated that the intestate, Gwendolyn Faye Ammons, "came to her death on August 30, 1960, as a result of a collision between her person and the automobile driven by Mary Waddell Britt."

The collision occurred in a residential district of Lumberton, on Carolina Avenue, a short distance south of its intersection with B Avenue. Carolina Avenue runs generally north-south. It is straight, level and paved to a width of approximately twenty feet, with dirt shoulders. There are no sidewalks.

Prior to and at the time of the collision, defendant was operating a 1952 Ford automobile south on Carolina Avenue.

Mrs. Caulder's residence was on the southeast corner of said intersection and the Buck Webb residence was on the southwest corner. Both fronted on Carolina Avenue and were on opposite sides of and directly across the street from each other. A hedge was along the front of the Buck Webb premises. A break in this hedge was in line with the approach from Carolina Avenue to the steps and porch of the Buck Webb residence. In back of the Buck Webb residence, fronting towards B Avenue and ten feet back (south) therefrom was the Buck Webb store. There was no sidewalk along the south side of B Avenue. A dirt path extended from the area in front of the store, near and approximately parallel with the side of the residence, to the southwest corner of said intersection.

Additional pertinent facts will be stated in the opinion.

Plaintiffs alleged, *inter alia,* that defendant, by the exercise of due care, could and should have observed their intestate on or near Carolina Avenue, and by sounding her horn, reducing her speed, or stopping, could and should have avoided the collision and the intestate's death, and that her failure to do so constituted actionable negligence.

Defendant, by answer, denied plaintiffs' allegations as to her negligence.

Evidence was offered by plaintiffs and by defendant.

At the close of all the evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Varser, McIntyre & Hedgpeth and Hackett & Weinstein for plaintiffs appellants.

Johnson, Biggs & Britt for defendant appellee.

BOBBITT, J. Evidence offered by plaintiffs, when considered in the light most favorable to them, tends to show these facts: Shortly before 8:00 o'clock, on the morning of August 30, 1960, Gwendolyn's mother took her to the Caulder residence. Mrs. Caulder, as theretofore, was to care for Gwendolyn while her mother was at work. Before leaving, Gwendolyn's mother gave her permission "to go to the store that morning." The collision occurred about 1:50 p.m. "(A) short time" —"not too long"—prior to the collision, Jewel Parker, from the living room of the Caulder residence, saw Gwendolyn. She was then in front of the Buck Webb residence, standing still, near the west edge of the paved portion of Carolina Avenue, with a pepsi-cola in one hand and a coca-cola in the other. (This dirt shoulder extended approximately

six feet from the Buck Webb hedge to the west edge of the paved portion of Carolina Avenue.) After hearing a noise, "like she (Gwendolyn) dropped a bottle," Jewel Parker went out and saw Gwendolyn lying on the paved portion of Carolina Avenue, "on the side next to Buck Webb's." Gwendolyn was then "lying sort of slanting," with her head "toward Buck Webb's" and her feet some three feet onto the paved portion of Carolina Avenue. The area where Gwendolyn was standing could be seen by motorists traveling south on Carolina Avenue for a distance of five hundred yards.

Evidence offered by defendant included the following:

Defendant testified she "was driving around thirty-five"; that she did not see Gwendolyn until "she was right in front of (her) car"; that "it happened so quick" she could not say "whether or not the child was running, walking or standing still when (she) first saw her"; that she tried to turn to her left but it was too late to avoid striking the child; that, as a result of the collision, her right front parking light was broken; and that she did not remember seeing a truck coming towards her on Carolina Avenue.

The investigating officer, a witness for defendant, testified he found "a spot of blood" on the paved portion of Carolina Avenue approximately six feet south "of the walkway up to Buck Webb's house" and "approximately two feet from the (west) edge of the paved portion."

Walters, a witness for defendant, testified he was driving a truck north on Carolina Avenue; that he, when one hundred yards therefrom, saw the collision; that he saw the child before he saw defendant's car; that the child came out of the walkway to the Buck Webb residence, "between two hedges," running. He testified he "wondered if the child was going to stop when she got to the street"; that "(b)y this time (he) had seen the car coming"; that when he saw the child running defendant "was right on the child"; that defendant was "pretty close to where the child was when (he) first saw her"; and that the child did not stop on the shoulder but ran "into this lady's car," striking "the round part" on the right front fender.

We deem it unnecessary to review the evidence in greater detail.

It is noted that Gwendolyn, a six-year old child, was incapable of contributory negligence as a matter of law. *Walston v. Greene*, 247 N.C. 693, 102 S.E. 2d 124. Our sole inquiry is to determine whether, upon application of well established rules, the evidence was sufficient for submission to the jury as to whether the collision and Gwendolyn's death were proximately caused by negligence on the part of defendant.

The only motion for judgment of nonsuit to be considered is that made at the close of all the evidence. G.S. 1-183. In determining its sufficiency for submission to the jury, the evidence, whether offered by

plaintiffs or by defendant, must be considered in the light most favorable to plaintiffs. *Murray v. Wyatt,* 245 N.C. 123, 128, 95 S.E. 2d 541; *Eason v. Grimsley,* 255 N.C. 494, 496, 121 S.E. 2d 885. True, the court may consider evidence offered by defendant that "tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. (Citations) Otherwise, consideration would not be in the light most favorable to plaintiff. (Citations)" *Watters v. Parrish,* 252 N.C. 787, 795, 115 S.E. 2d 1.

Defendant contends the testimony of Jewel Parker "is not connected in point of time with the defendant's approach to the intersection" and therefore her testimony is not inconsistent or in conflict with that of Walters. Defendant suggests that Gwendolyn might have gone into the Buck Webb yard after Jewel Parker saw her. True, Jewel Parker testified she did not see the collision and that she was watching television when she heard the noise that attracted her attention. But she testified she heard the noise "a short time"—"not too long"—after she saw Gwendolyn.

When the evidence is considered in the light most favorable to plaintiffs, the inference is permissible that Gwendolyn, with a bottle in each hand, was on her way back to the Caulder residence from the store and upon reaching the place where Jewel Parker observed her stood on or near the west edge of the pavement awaiting an opportunity to cross the street to the Caulder residence. Moreover, the credibility of Walters' testimony was for jury determination. Defendant, according to her testimony, did not see Gwendolyn until the moment of impact although she was much closer to her than Walters. Indeed, defendant testified she did not remember seeing Walters' truck. Walters, according to his testimony, was a hundred yards away when the impact occurred. According to Walters, the child ran into the side (right front fender) of defendant's car. Defendant testified she saw the child right in front of her at the moment of impact and that her right front parking light was broken as a result of the collision.

Whether defendant, in driving 35 miles per hour, was negligent in respect of speed depends largely on whether in the exercise of due care she could and should have seen Gwendolyn in a perilous position at a time when she could by decreasing speed have avoided the collision. *Cassetta v. Compton, ante,* 71, 123 S.E. 2d 222.

Applying the applicable well settled rules, we are of opinion, and so decide, that the evidence was sufficient for submission to the jury on the issues raised by the pleadings. Hence, the judgment of involuntary nonsuit is reversed.

Reversed.

J. S. CORUM, ADMINISTRATOR OF THE ESTATE OF ROBERT M. CORUM, DECEASED; MARY M. CORUM, ADMINISTRATRIX D.B.N. OF ESTATE OF ROBERT M. CORUM, DECEASED, SUBSTITUTE PLAINTIFF *v.* JOHN WILLIAM COMER, CLYDE THOMAS GILLEY AND HARDIN LEE GILLEY.

(Filed 12 January, 1962.)

1. Evidence § 15—

In order to be relevant, evidence must have some tendency to prove or disprove a fact in issue, and evidence which is merely conjectural or remote, or has no tendency except to invite prejudice, ought not to be admitted and thus distract the attention of the jury from the material matters involved.

2. Evidence § 16; Automobiles §§ 37, 38—

Evidence that a defendant drove at an unlawful speed or engaged in a speed competition at a different time and place than the occasion in suit, in order to be admissible must be accompanied by evidence from which the jury may reasonably infer that the speed or race continued to the scene of the accident, nor may the admission of such evidence be upheld as tending to show identity, proximity, or knowledge when there is no controversy as to the identity of the drivers or the place of the accident.

APPEAL by John William Comer and Clyde Thomas Gilley from *Sink, E.J.*, April 1961 Term, ROCKINGHAM Superior Court.

The plaintiff alleged her intestate, Robert M. Corum, was killed in a rear-end automobile collision on the night of September 20, 1958, near Reidsville. The intestate, a guest passenger in a 1957 Ford automobile driven north by the defendant Clyde Thomas Gilley, sustained fatal injuries when the Ford crashed into the rear of a 1956 Oldsmobile, also driven north by the defendant John William Comer. At the time of the collision Comer slowed down, attempting to cross the west traffic lane and enter a private driveway into his home. The plaintiff alleged the defendant Comer was negligent by driving at a dangerous speed and by applying his brakes, causing his vehicle to slow down or stop suddenly, without giving any sign or warning of his intention to reduce speed or to cross to his left. The defendant Gilley was negligent by driving too fast and following too closely behind the Oldsmobile, and without having his Ford under proper control; that the joint and concurrent negligence of both drivers was the proximate cause of the fatal accident.

The plaintiff also alleged Clyde Thomas Gilley was operating the Ford as the agent of Hardin Lee Gilley, the owner. However, the jury answered the issue of agency against the plaintiff's contention. From the judgment dismissing the action as to Hardin Lee Gilley, there was no appeal.

The defendants filed separate answers. Comer admitted he was driving the Oldsmobile and Gilley admitted he was driving the Ford at the time the collision occurred. However, each for himself denied negligence and by affirmative defense alleged the other's negligence was the sole proximate cause of the accident. Each alleged a cross action for contribution against the other. Only the evidence pertinent to the question raised on this appeal will be discussed in the opinion.

The jury found both defendants negligent and assessed damages at $18,000. From judgment on the verdict, the defendants appealed.

Gwyn & Gwyn, By Julius J. Gwyn for plaintiff appellee.

Sapp & Sapp, By Armistead W. Sapp, Jr., for defendant Clyde Thomas Gilley, appellant.

Brown, Scurry, McMichael & Griffin, By Claude S. Scurry, Jule McMichael for defendant Comer, appellant.

HIGGINS, J. The evidence disclosed the accident occurred about 12:35 a.m., three miles north of Reidsville on Highway 87. The appellant Comer left Big Oaks Restaurant to go to his home, a distance of about 1,500 feet, to secure hunting equipment for use the following day. Appellant Gilley, with plaintiff's intestate as a guest passenger, followed. A distance of approximately 250 feet separated the vehicles at the time Gilley left the parking place at the restaurant. The two vehicles and both drivers had been at the restaurant for approximately 20 minutes before Comer started home.

The plaintiff offered, and the court admitted, over objection, evidence tending to show a racing contest at a speed estimated at 60 miles per hour between the vehicles operated by the defendants prior to the time they stopped at the restaurant. If a contest took place, it was concluded at least 20 minutes before Comer left for home. In offering the testimony with respect to racing, plaintiff's counsel stated: "This evidence is not offered as evidence of how fast they were traveling at the time, or in the manner in which operated, but for the purpose of establishing identity, proximity, and knowledge."

Apparently referring to the foregoing evidence, the court charged: "The plaintiff alleges that on this occasion the two automobiles left the vicinity of Reidsville traveling westward (northward) and left in a manner, the plaintiff alleges, that should cause you to find by the greater weight of the evidence that they were racing." Apparently the court, in saying, "the plaintiff alleges," meant to say, "the plaintiff contends." The complaint does not contain any allegation the defendants were racing.

The evidence of racing was inadmissible as too remote. The charge

served to emphasize its harmful effect. The plaintiff based her cause of action on the following tortious conduct: (1) Comer's stopping, or attempting to stop without giving Gilley notice in time to avoid the collision; and (2) Gilley's following too closely and so speedily that he could not stop in the reaction time allowed.

As a general rule, evidence, to be admissible, must have some bearing on the issues involved. It must tend to prove or disprove some fact material to the cause of action alleged, or to the defense interposed. This is so for very sound reason. " . . . such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters." *Pettiford v. Mayo,* 117 N.C. 27, 23 S.E. 252. "All the authorities are agreed that if the evidence is merely conjectural or is remote, or has no tendency except to excite prejudice, it should be rejected, because the reception of such evidence would unduly prolong the trial of causes, and would probably confuse and mislead the jury, . . ." *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6; *Godfrey v. Power Co.,* 190 N.C. 24, 128 S.E. 485; *Connor v. Manufacturing Co.,* 197 N.C. 66, 147 S.E. 672; *Wilson v. Ervin,* 227 N.C. 396, 42 S.E. 2d 468; *Glass v. Ice Cream Co.,* 214 Iowa 825, 243 N.W. 352; *Whitfield v. Loveless,* 1 Tenn. App. 377. The rule is succinctly stated in *Ramp v. Osborne,* 115 Ore. 672, 239 P. 112: "The question is the negligence of the offending party at the time and place of the accident. It does not necessarily follow that a defendant is negligent at a particular time and place because he was negligent at some other place and at a different time."

The cases generally hold that to be admissible, evidence of speed at a former time and at a different place from the scene of the accident must be accompanied by evidence from which the jury may reasonably infer the speed or race continued to the scene of the accident. *Brown v. Thayer,* 212 Mass. 392, 99 N.E. 237; *Jones v. Northwestern Auto Supply Co.,* 93 Mont. 224, 18 P. 2d 305; *Barnes v. Teer,* 218 N.C. 122, 10 S.E. 2d 614, and on rehearing, 219 N.C. 823, 15 S.E. 2d 379: *Queen City Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Charnock v. Refrigerating Co.,* 202 N.C. 105, 161 S.E. 707.

Plaintiff's counsel, realizing the evidence of racing might present a foreign issue, sought to limit the purpose to "identity, proximity, and knowledge." Neither was an issue in the case. Each appellant admitted, by answer, he was the driver of one of the vehicles involved. The place of the accident was not in dispute. The investigating officer testified to the point of impact, the debris, the skidmarks, the damage to the vehicles, and their position at the scene. Both defendants lived nearby. They were familiar with the road. The evidence of racing injected a collateral issue not raised by the pleadings.

Racing on the highway is highly dangerous. It is condemned both by statute and by public opinion. So general and pronounced is this view that any evidence of racing, though disassociated from the accident, is calculated to have prejudicial effect. For the error in admitting such evidence in this case, the defendants are awarded a New trial.

STATE v. ORA CHANEY.

(Filed 12 January, 1962.)

Perjury §§ 1, 5—

That the false testimony be material to an issue or point in question is essential to constitute such false testimony the basis of a prosecution for perjury, and therefore proof that in a prosecution of her son for larceny defendant falsely swore that she, her son, and a third person were together at a time prior to and at a time subsequent to the time the theft was committed, is insufficient to support a prosecution for perjury when the State admits that such testimony did not tend to establish an alibi.

APPEAL by defendant from *Hooks, Special Judge,* 13 February 1961 Criminal Term of GUILFORD, High Point Division.

This is a criminal prosecution upon a bill of indictment charging the defendant, Ora Chaney, with perjury in connection with her testimony as a witness at the trial of her son, Bennie Raeford Chaney, on 21 July 1960, in the Superior Court of Guilford County, High Point Division. At that trial, Bennie Raeford Chaney was charged with the theft of two fender skirts from an automobile parked beside the plant of the Marsh Furniture Company on Kearns Street in High Point on 23 June 1960.

It was alleged in the bill of indictment that Ora Chaney falsely asserted under oath that "one Bobby Ray Beeson came to her house at about the hour of 12:30 P.M. on the 23rd day of June, 1960, and that the said Bobby Ray Beeson together with her son, Bennie Raeford Chaney, took her to the Arcade Beauty Shop in High Point, North Carolina and that the said Bobby Ray Beeson and Benny Raeford Chaney together and in the company of each other met her at the Yellow Top Cab Stand at about the hour of 2:00 P.M. on the 23rd day of June, 1960, and from the said Yellow Top Cab Stand the three of them, together and in the company of each other took the said Bobby Ray Beeson to his home on Fairfield Avenue in High Point, North

Carolina, which statements were material to the issue then and there being tried in the aforesaid court, and Ora Chaney well knew said statements to be false, or was ignorant whether or not said statements were true * * *."

The State offered in evidence a transcript of the defendant's testimony in the trial of her son. The portion of her testimony in the former trial, upon which the State relies in this action to support its charge of perjury, was essentially as follows: That on 23 June 1960, Bennie Raeford Chaney, her son, and Bobby Ray Beeson, came to her home driving the defendant's 1951 Buick automobile about 12:30 p.m. and took her to the Arcade Beauty Shop and that they later picked her up between 2:00 and 2:15 p.m. at the Yellow Top Cab Stand; that it was understood that if the two boys were not at the beauty shop when she got out she would wait for them at the Yellow Top Cab Stand; that the cab stand was about two and one half blocks from the beauty shop; that they went directly from her home to the beauty shop, and after she was picked up they went straight home. She further testified that they let Bobby Ray Beeson out at his home; that he lives right above her house.

The State offered evidence tending to show that Bobby Ray Beeson was not with Ora Chaney and her son at the time indicated by the defendant's testimony at her son's trial. Rather, the State's evidence tended to show that Bobby Ray Beeson was working in the shipping department of the Carrick Turning Works in High Point from 12:15 p.m. to 5:00 p.m. on the afternoon of 23 June 1960.

The defendant interposed a motion for judgment as of nonsuit at the close of the State's evidence. The motion was denied. The defendant rested without offering any evidence and renewed her motion for judgment as of nonsuit which was again denied. The jury returned a verdict of guilty as charged in the bill of indictment.

From the judgment imposed on the verdict the defendant appeals, assigning error.

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

Haworth, Riggs, Kuhn & Haworth for defendant.

DENNY, J. The defendant assigns as error the failure of the trial court to sustain her motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

The assignment of error is based on the contention that the testi-

mony of this defendant given at the trial of her son was not material to the issue then and there being tried.

G.S. 14-209 reads as follows: "If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending *(sic)* in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or State's prison not less than four months nor more than ten years."

It is well established that one of the essential elements of the crime of perjury is that the false statement must be material to an issue or point in question. *S. v. Cline,* 150 N.C. 854, 64 S.E. 591; *S. v. Hill,* 224 N.C. 782, 32 S.E. 2d 268; *S. v. Smith,* 230 N.C. 198, 52 S.E. 2d 348; *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401; *S. v. Arthur,* 244 N.C. 582, 94 S.E. 2d 646; *S. v. Lucas,* 247 N.C. 208, 100 S.E. 2d 366.

In *S. v. Smith, supra, Devin, J.,* later *C.J.,* said: "In accord with the common law definition and the statutes extending its application, it has been uniformly held that the elements essential to constitute perjury are substantially these: a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question (citing numerous authorities). To constitute materiality essential to sustain a charge of perjury the false testimony must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. * * *"

Applying this rule to the facts revealed by the record in this case, we do not think the evidence relied upon by the State to support its charge of perjury was material to the issue for decision in the former trial. The State concedes in its brief that the defendant's testimony set forth in the indictment would not have the effect of providing an alibi for her son. Furthermore, the State's evidence fixed the time of her son's theft at "close to 1:30 P.M." on 23 June 1960. The defendant in her testimony fixed the time her son picked her up at the cab stand as being between 2:00 and 2:15 p.m. The State's evidence fixed the driving time from the plant of Marsh Furniture Company on Kearns Street to the Yellow Top Cab Stand as an easy drive of about five minutes. The further fact that the State's evidence tended to disprove the presence of Bobby Ray Beeson with Bennie Raeford Chaney

in the defendant's Buick automobile at any time during the afternoon of 23 June 1960, had no material bearing on the question at issue in the larceny trial of Bennie Raeford Chaney.

We hold that the defendant was entitled to have her motion for nonsuit allowed, and, accordingly, the judgment is

Reversed.

P. L. LORBACHER, JR. v. WALTER T. TALLEY T/A TALLEY'S FRUIT AND PRODUCE COMPANY.

(Filed 12 January, 1962.)

Evidence § 55—

While evidence of good character of a party is not ordinarily competent as substantive evidence in a civil action, where a party has testified as a witness, evidence of his good character is competent for the purpose of sustaining his credibility as a witness, and exclusion of character evidence offered for this purpose is prejudicial.

APPEAL by plaintiff from *Williams, J.*, May Term 1961 of DURHAM.

Plaintiff's action is to recover damages for personal injuries allegedly caused by the negligence of defendant.

On the morning of July 26, 1958, about 9:30, plaintiff, a retailer, as on previous occasions, entered the place of business of defendant, a wholesaler, to buy produce. Plaintiff alleges he suffered an injury to his back while defendant's customer and in defendant's place of business on said occasion.

In brief summary, plaintiff alleges defendant, in person, opened the door to a refrigerated room or cooler at or near the back of defendant's premises; that, as defendant held open this door, an employee of defendant entered the cooler to bring out produce for inspection by plaintiff who was standing on the main floor, some eight inches below the level of the floor of the cooler, facing the interior of the cooler; that defendant negligently, without warning to plaintiff, released the heavy door and walked away; and that, as the heavy door closed, plaintiff was struck by a knob on the end of "a long stem handle" (for unlatching the door from inside the cooler), which protruded some six to eight inches out from the back (inside) of the cooler door.

Defendant, by answer, denied all allegations as to his negligence; and, as further answers and defenses, pleaded (1) that plaintiff was a trespasser in respect of *this portion* of defendant's premises, and

(2) that plaintiff was contributorily negligent. In brief summary, defendant asserted that, notwithstanding defendant's repeated requests that plaintiff remain in the front portion of defendant's premises and there inspect the produce when brought from the cooler by defendant's employee, plaintiff persisted in going with defendant's employee back to the cooler; that he (defendant) did not at any time on this occasion hold open the cooler door; that after defendant's employee entered the cooler plaintiff stepped up onto the threshold thereof and held (propped) the door open with the heel of his right foot; and that plaintiff was not injured on this occasion by the cooler door or any part thereof.

Evidence was offered by plaintiff and defendant in support of their respective (conflicting) allegations.

Issues of negligence, contributory negligence and damages, raised by the pleadings, were submitted. The jury answered the first (negligence) issue, "No," and did not reach the second and third issues. From judgment that plaintiff "have and recover nothing of the defendant," plaintiff excepted and appealed, assigning errors.

Everett, Everett & Everett for plaintiff appellant.
Bryant, Lipton, Strayhorn & Bryant for defendant appellee.

BOBBITT, J. At trial, plaintiff testified in support of his allegations. Defendant, on cross-examination of plaintiff and by evidence in direct contradition of plaintiff's testimony, sought to impeach plaintiff and thereby discredit plaintiff's testimony. Indeed, the testimony of one witness for defendant was to the effect plaintiff attempted by bribe to induce him to testify in plaintiff's favor.

In rebuttal, plaintiff offered witnesses who, if permitted, would have testified that plaintiff's general reputation in the community was good. Two such witnesses were called to so testify. The court sustained defendant's objections to such testimony. The court, having ruled such testimony incompetent, refused to permit plaintiff to call other witnesses to give testimony of like import. Plaintiff excepted to said rulings.

Defendant contends the court's said rulings were correct, citing *Norris v. Stewart*, 105 N.C. 455, 10 S.E. 912. There the plaintiff alleged that Stewart, the original defendant, by false and fraudulent representations, obtained the signature of the father of the *feme* plaintiff to a deed of conveyance. Prior to trial, Stewart died and his heirs were made parties defendant in his stead. It was held the court properly excluded testimony, offered by defendant as substantive evidence, that Stewart's general character (reputation) was good. *Norris*

v. Stewart, supra, is in accordance with the rule that, subject to exceptions, evidence of the good or bad character of a party is inadmissible as substantive evidence. Stansbury, North Carolina Evidence § 103.

In *Lumber Co. v. Atkinson,* 162 N.C. 298, 78 S.E. 212, the defendant Rabb, charged with fraud, testified as a witness in his own behalf. Thereafter, he offered witnesses who testified to his good general character. The trial judge instructed the jury that the evidence as to Rabb's good general character should be considered "as substantive as well as corroborative evidence in passing on the issue of fraud." Citing *Norris v. Stewart, supra,* this Court held the said character evidence was not competent as substantive evidence and a new trial was awarded on account of the erroneous instruction. But, as stated by *Walker J.:* "It was competent to prove his good character so far as necessary to sustain his credibility as a witness."

Where a party testifies, it is competent to show his general reputation as bearing on his credibility as a witness. *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443; *Morgan v. Coach Co.,* 228 N.C. 280, 45 S.E. 2d 339; *Kirkpatrick v. Crutchfield,* 178 N.C. 348, 351, 100 S.E. 602.

As stated by *Smith, C.J.,* in *Jones v. Jones,* 80 N.C. 246, 250: "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony." *Bowman v. Blankenship,* 165 N.C. 519, 81 S.E. 2d 746; *Brown v. Loftis,* 226 N.C. 762, 764, 40 S.E. 2d 421; Stansbury, *op. cit.* § 50. Where a party testifies and the credibility of his testimony is challenged, testimony that his general character is good is competent and proper evidence for consideration as bearing upon the truthfulness of his testimony.

Here, the excluded testimony was not offered as substantive evidence bearing upon what occurred on July 26, 1958, in defendant's place of business, but as bearing upon plaintiff's credibility *as a witness* at the time of trial. See *Stansbury, op. cit.* § 116. It was competent and should have been admitted for this limited purpose. The exclusion thereof was prejudicial error and entitles plaintiff to a new trial.

There is merit in the assignments of error directed by plaintiff to designated portions of the charge relating to the duty owed by defendant to (1) a trespasser, (2) a licensee and (3) an invitee. Since a new trial is awarded on another ground, it is deemed unnecessary to discuss these assignments. However, it seems appropriate to call attention to the fact that plaintiff bases his action solely on the alleged *personal* negligence of defendant, not on any defective condition of defendant's premises.

New trial.

C. W. BLACKMAN, ADMINISTRATOR OF H. M. BLACKMAN, DECEASED; AVIS McKEE BLACKMAN, WIDOW OF H. M. BLACKMAN, DECEASED; HILTON REGISTER AND WIFE, NETTIE REGISTER; MAXINE BLACKMAN KING; CAROLYN BLACKMAN GORE, MINOR; IDA LEE BLACKMAN, MINOR; MARLENE BLACKMAN, MINOR; AND GAYLE BLACKMAN, MINOR, SAID MINORS APPEARING BY THEIR NEXT FRIEND AVIS McKEE BLACKMAN v. LIBERTY LIFE INSURANCE COMPANY, PEOPLES SAVINGS & LOAN ASSOCIATION, WHITEVILLE, N. C. AND F. M. SMITH.

(Filed 12 January, 1962.)

Insurance § 8—

Demurrer is properly sustained in an action against a loan company and an insurance company alleging negligent failure to deliver a policy of insurance on the life of a borrower, but plaintiff may amend, if he so desires, to allege an action *ex contractu* for breach of agreement to procure or execute and deliver such policy, or on the policy upon allegation of delivery of the policy as security for the loan to the agent of the loan company.

APPEAL by plaintiffs from *Hobgood, J.*, September-October 1961 Term, COLUMBUS Superior Court.

This civil action was instituted by the plaintiffs to recover from the defendants the sum of $5,000 for "and on account of the negligent and wrongful acts and omissions of the said defendants Liberty Life Insurance Company, Peoples Savings & Loan Association, and F. M. Smith, jointly and concurrently," in failing to deliver a policy of mortgage redemption insurance on the life of H. M. Blackman.

The complaint consists of 32 paragraphs and six subparagraphs alleging in substance: In June, 1959, H. M. Blackman and wife applied to Peoples Savings & Loan Association for a loan in the amount of $5,000. The Loan Association prepared the note and deed of trust conveying to F. M. Smith, Trustee, certain lands as security for the note. On June 15, 1959, the Blackmans delivered the deed of trust, duly executed, which the Association immediately recorded.

As further security for the loan, the Savings Association required of Mr. Blackman a policy of mortgage redemption insurance on his life, to be issued by Liberty Life Insurance Company. Throughout the transaction F. M. Smith was secretary-treasurer and general manager of the Association. He was also local agent for Liberty Life Insurance Company. He prepared the application for the insurance, had Mr. Blackman sign it, and he transmitted it to the insurance company. The application was duly approved and on July 2, 1959, Liberty Life Insurance Company sent the policy to Mr. Smith. In the meantime, the Loan Association set up to the credit of Mr. Blackman $5,000 designated "loan in process." However, from this account the Savings

Association deducted items totaling $55.00 for certain expenditures in connection with the loan, leaving to Mr. Blackman's credit the sum of $4,945.00.

The note and recorded deed of trust on the Blackman home were in the possession of the Savings & Loan Association. Completion of the transaction awaited only the delivery of the $5,000 insurance policy. The Association was designated in the policy as the primary beneficiary, the estate of Mr. Blackman the secondary beneficiary. Under the loan arrangement the borrower was to pay the interest and the insurance premiums to the Savings & Loan Association.

On July 10, 1959, several days after Mr. Smith received the policy, the insured, H. M. Blackman, was killed in an accident. The insurance company refused to pay the policy and the Savings & Loan Association refused to give Mr. Blackman's estate any credit on the note. The foregoing is the substance of the plaintiffs' allegations viewed in the light favorable to them.

Each defendant filed a demurrer upon the ground the complaint did not state a cause of action in tort for the negligent failure to deliver the policy. The court sustained the demurrers but did not dismiss the action. The plaintiffs appealed.

Edward L. Williamson for plaintiffs appellants.

D. Jack Hooks, Proctor & Proctor, Poisson, Marshall, Barnhill & Williams, By Lonnie B. Williams for defendants appellees.

HIGGINS, J. The court properly sustained the demurrers for failure of the complaint to state a cause of action in tort based on the negligent failure to deliver the insurance policy. The cause, however, is still pending. The plaintiffs may amend, and allege and prove, if they can, a cause of action in contract upon the ground the policy of mortgage redemption insurance was duly applied for, issued, and delivered to the Peoples Savings & Loan Association. The Association directed the amount, the type, and the terms of the policy. It selected the insurer with which it had a working arrangement permitting the secretary-treasurer and general manager of the Association to act as a local agent of the insurance company. Both the Association and insurance company may be charged with notice of a possible conflict of interests. When the insurance company sent the policy to Mr. Smith, may either of the defendants be permitted to say Smith received it as local agent but did not receive it as secretary-treasurer and general manager of the Association?

The Savings Association had charge of the Blackman account "in process" from which it had already deducted certain expenses incident

to the loan. The policy provided for payment of the insurance premium along with the interest to the Savings Association. There may or may not be reason why it could not and should not deduct the premium due on the insurance policy in the same manner it had deducted other expenses. The manager of the Savings Association had physical possession of the policy and had access to the Blackman account. Decision on these questions must await the filing of proper pleadings and a hearing on them in the superior court. The plaintiffs may amend if so advised. However, the judgment sustaining the demurrers to the complaint is

Affirmed.

WESLEY C. GUNTER v. WILLIAM R. WINDERS, GUARDIAN AD LITEM FOR BILLY RAY ALLEN, ORAN J. COTTLE, HORACE JUNIOR EFRID, AND MILLER MOTOR EXPRESS, INC.

(Filed 12 January, 1962.)

1. Negligence § 10—

The doctrine of last clear chance is predicated upon a new act of negligence in failing to avoid danger after the negligence of plaintiff and the contributory negligence of defendant have canceled each other, and the doctrine may not be predicated upon the original negligence of the defendant.

2. Pleadings § 29—

Allegation alone cannot raise an issue for the determination of the jury, it being required that there be both allegation and proof.

3. Automobiles § 45—

Evidence that plaintiff, confronted with an oncoming vehicle while attempting to pass a line of traffic, cut in between two of the vehicles in the line of traffic and in doing so lost control, crossed to the right shoulder, then cut back to the left, at which time the truck driven by defendant struck the rear of his vehicle, causing it to veer again to the left and into the path of the oncoming vehicle, *is held* not to raise the issue of last clear chance, since an act cannot be relied on both as constituting negligence and as constituting the basis for the doctrine of last clear chance.

APPEAL by plaintiff from *Williams, J.*, May 1961 Civil Term, DURHAM Superior Court.

Civil action to recover for personal injury and property damages alleged to have been caused by the actionable negligence of the de-

fendants. The pleadings are as summarized on the former appeal reported in 253 N.C. 782, 117 S.E. 2d 787.

The pleadings raise issues of: (1) defendants' negligence, (2) plaintiff's contributory negligence, (3) defendants' last clear chance to avoid the accident after discovering the plaintiff's perilous position.

The evidence disclosed the accident occurred "a little before dark" on November 30, 1958, near the Durham-Orange County line on Route 70. The defendant Allen, driving the defendant Cottle's truck, was proceeding west. Immediately in front was another truck owned by Cottle and driven by one Strickland, also proceeding west. The Cottle trucks were in the rear of a line of vehicles, all proceeding in the same direction. The front vehicle in their traffic lane slowed down to make a left turn. The following vehicles in order began to reduce speed. At this time the plaintiff, driving his 1950 Ford, passed the truck driven by Allen but as he attempted to pass the truck driven by Strickland, the truck of Miller Motor Express, driven by Efrid, confronted him. The plaintiff attempted to cut to the right and get in line between the Cottle trucks. In doing so he lost control, crossed to the right shoulder, then cut back to the left, at which time the truck driven by Allen struck the rear of the Ford, causing it to veer again to the left where it collided with the east-bound truck of Miller Motor Express being driven by Horace Junior Efrid. In the collision the plaintiff was injured.

At the conclusion of the evidence the court entered judgment of nonsuit against Miller Motor Express and Horace Junior Efrid. From that judgment there was no appeal.

The court, without objection, tendered issues of negligence, contributory negligence, and damages. The jury found the defendants negligent and the plaintiff contributorily negligent. From the judgment dismissing the action, the plaintiff appealed.

Daniel K. Edwards for plaintiff appellant.

Bryant, Lipton, Strayhorn & Bryant, By Victor S. Bryant, Jr., for defendants William R. Winders, Guardian Ad Litem for Billy Ray Allen, and Oran J. Cottle, appellees.

HIGGINS, J. The plaintiff assigns as error the failure of the court (1) to submit an issue of last clear chance and (2) to charge correctly with respect to the causal relationship between the plaintiff's contributory negligence and his own injury. Actually the two propositions involve the same legal concept of liability — the proximate cause of the injury.

The last clear chance doctrine is applicable when, notwithstanding the defendant's prior negligence and the plaintiff's contributory negligence, the defendant by the exercise of due care is afforded an opportunity to avoid the injury and negligently fails to take advantage of that opportunity. "Liability under the last clear chance, or discovered peril doctrine, is predicated not on any original negligence of the defendant but upon his opportunity to avoid the injury after discovering the perilous position in which another has placed himself. Defendant's liability is based upon a new act of negligence arising after negligence and contributory negligence have canceled each other. . . . Liability on the new act arises after the defendant has had sufficient opportunity in the exercise of due care to discover and appreciate the plaintiff's perilous position in time to avoid injuring him." *Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315, citing many cases.

The plaintiff pleaded last clear chance. However, the evidence was insufficient to permit any inference favorable to the plaintiff on that issue. The evidence discloses the negligence and contributory negligence were active in their harmful effects and continued to the accident and injury. To justify the submission of an issue it must not only arise on the pleadings, but it must be supported by competent evidence. *Cathey v. Shope*, 238 N.C. 345, 78 S.E. 2d 135. The exceptions to the charge and to the failure of the court to submit an issue on last clear chance are without merit. The record presents

No error.

GEORGE WOODROW RODGERS v. WILLIAM ALONZO THOMPSON AND JOHN EARL GREGORY, JR.

(Filed 2 February, 1962.)

1. Automobiles § 41d—

The evidence viewed in the light most favorable to plaintiff tended to show that plaintiff gave plainly visible signals of his intention to turn left from the highway into a private driveway and that notwithstanding such signals the following vehicle attempted to pass after plaintiff had already started his turn, resulting in the collision which set fire to the truck plaintiff was driving, and that plaintiff was badly burned in the fire. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendants' negligence.

2. Same; Damages § 7— Evidence held to show that plaintiff's injuries were the proximate result of defendants' negligence.

The evidence tended to show that plaintiff was driving a truck trans-

porting liquid petroleum gas, that defendants' vehicle sideswiped plaintiff's truck, immediately resulting in a fire under the meter box on the left side, that plaintiff stopped his truck and ran to the rear to close the valve under the truck in order to prevent an explosion, and that while he was closing the valve the entire truck was engulfed in flaming gas and plaintiff was severely burned. The evidence further tended to show that plaintiff might have run from the truck and escaped injury. *Held:* Plaintiff's act in closing the valve in order to prevent an explosion which would have destroyed the truck and also endangered plaintiff's life and the lives of possible bystanders was a normal response to the stimulus of an extremely dangerous situation created by defendants' negligence, and therefore plaintiff's injuries were proximately caused by defendants' negligence, and nonsuit was correctly denied.

3. Negligence §§ 11, 21—

Contributory negligence is an affirmative defense and must be alleged and proved by defendant.

4. Same; Negligence § 20—

The violation of G.S. 119-49 by the driver of a truck transporting liquid petroleum gas cannot be asserted as contributory negligence on the part of such driver in his action to recover for burns received as a result of a collision when defendants do not plead a violation of the statute or the applicable safety regulations.

5. Negligence § 26— Evidence held not to disclose contributory negligence as matter of law on part of plaintiff confronted with emergency.

The evidence considered in the light most favorable to plaintiff tended to show that plaintiff was driving a truck transporting liquid petroleum gas, that, as a result of a collision brought about by defendants' negligence, fire immediately broke out under the meter box on the side of the truck, that plaintiff, confronted with the emergency to which he did not contribute in whole or in part, stopped the truck and ran to the rear and was turning off the valve sealing the tank of the truck when the truck was enveloped in flame, badly burning plaintiff, and that the possibility of an explosion, endangering plaintiff's own life and safety, was imminent and real. *Held:* The evidence does not establish contributory negligence on the part of plaintiff as a matter of law in attempting to turn off the valve, even though he might have run away and avoided injury, it being a question for the jury whether plaintiff acted in the emergency as an ordinarily prudent man would have acted under the same or like circumstances.

6. Negligence § 14—

Where defendants' negligence brings about a sudden emergency, and plaintiff's acts do not contribute in causing the emergency, either in whole or in part, plaintiff, while under duty to exercise ordinary care for his own safety, is not held to the standard of selecting the wisest course of conduct, but is required only to act as a reasonably prudent man would have acted under the same or similar circumstances.

7. Negligence § 11—

"Contributory negligence" *ex vi termini* implies negligence on the part of defendant.

8. Negligence § 26—

Nonsuit may not be granted on the ground of contributory negligence unless plaintiff's own evidence establishes this defense as the sole reasonable conclusion.

9. Negligence §§ 14, 28—

Where plaintiff's evidence is to the effect that his acts did not contribute in whole or in part to the creation of the emergency, but defendants' allegations and evidence tend to show that the emergency was caused or contributed to by plaintiff's contributory negligence, the failure of the court to charge the jury that the doctrine of emergency does not apply if the emergency was caused or contributed to by plaintiff or was occasioned by the concurrent negligence of plaintiff and defendants, must be held for prejudicial error.

10. Same—

Plaintiff may rely upon the doctrine of sudden emergency either if there is a real danger or the circumstances are such as to create the apprehension of danger in the mind of an ordinarily prudent person, but an instruction which permits plaintiff to rely upon the doctrine solely upon his own belief that an emergency existed, is error.

11. Negligence § 3—

A party is not entitled to the benefit of the doctrine of sudden emergency if he himself contributes to the creation of the emergency in whole or in part.

12. Trial § 33—

The court is required to declare the law and apply the evidence thereto in regard to each substantial and essential feature of the case without any request for special instructions.

13. Negligence §§ 11, 28—

Contributory negligence bars recovery if it is one of the proximate causes of the injury, and an instruction which repeatedly charges the jury to answer the issue in the affirmative if it found that negligence on the part of plaintiff was "the" proximate cause of the injury must be held prejudicial notwithstanding that in other portions of the charge the court used the words "a proximate cause."

14. Appeal and Error § 42—

Incorrect instructions upon a material aspect of the case must be held for prejudicial error notwithstanding that in other portions of the charge the principle is correctly stated, since the jury could not know which of the conflicting instructions is correct.

APPEAL by defendants from *Mintz, J.*, January-February 1961 Term of WAYNE.

Civil action to recover damages for personal injuries, allegedly caused by the actionable negligence of defendants. Defendants in their joint answer deny any negligence on their part, and further allege as a bar to plaintiff's action contributory negligence of plaintiff.

The parties stipulated that on 30 June 1959 John Earl Gregory, Jr., was operating a Chevrolet truck owned by William Alonzo Thompson, and at the time he was an agent, servant, or employee of Thompson and acting within the scope and course of his employment.

Plaintiff has proof to this effect:

On 30 June 1959, a clear and very hot day with temperature of 103 degrees, he, an employee of Suburban Rulane Gas Company, was operating his employer's 1956 International tank truck filled with about 550 gallons of liquefied petroleum gas under pressure north along U. S. Highway 117 between Goldsboro and Fremont. The truck had an over-all length of about 25 feet, and was equipped with mechanical devices to signal turns, stopping, and stops, which were in good working order. Two gas lines were attached to the truck's tank. He testified: "One line was attached to the big two-inch valve, went into the pumper into the meter to the back of the truck, or to a 100-foot hose you drag out to fill the customer's tank. Then you have another small line 3/8 copper tubing coming out of the bottom of the tank going into the front of the truck. . . . At the time of this collision there was liquid gas in those two lines. . . . When you cut off the two-inch valves the gas in those lines could not get back into the tank. Conversely, no gas could get from the tank into the lines." The two-inch valve was located underneath the truck about two feet from its back. Delivery of gas into a person's home is controlled by a valve at the end of the hose. Normally the two-inch valve is not cut off until the last delivery. Gas remains in the line from the valve to the pump to the meter to the line going back to the rear of the truck and then into the 100 feet of hose all the time the truck is normally operated on the road, and that was the condition on the day of the collision. He knew the gas was dangerous and explosive.

When he left Goldsboro's city limits travelling north towards Fremont, he saw the Thompson Chevrolet two-ton truck driven by Gregory travelling behind him. He saw it continuously following him from then until the collision some ten or twelve miles further north. It tried to pass him several times, but it couldn't get clearance. He was driving at a speed of 45 miles an hour. When he reached an overhead bridge over the tracks of the A. C. L. Railroad between Pikeville and Fremont, some ten or twelve miles north of Goldsboro, he intended to cross the bridge and enter a driveway on his left leading to his brother-in-law's house. This driveway is 700 to 900 feet from the rail of the over-

head bridge. On the northern exit of this overhead bridge there are double solid yellow lines on the highway, which end at the point the so-called Aycock Memorial Road intersects the U. S. Highway from the east, and almost opposite this Road is a private dirt road leading west from the highway to private residences. Two hundred fifty feet north there is another dirt road on the west of the highway leading to his brother-in-law's house, which he intended to enter.

When he was crossing the bridge and going down from it, he applied his brakes to slow down, and also to signal behind him he was reducing speed. He looked in his rearview mirror to see if the Gregory truck was behind him and what it was doing. He saw it directly behind in its right-hand lane of traffic. When he was 300 to 400 feet from his brother-in-law's driveway, he turned on his electrical signal to indicate he was going to make a left turn, and also gave a signal with his left arm by extending his arm and pointing his finger to indicate the same thing. He was constantly looking in his rearview mirror to see if the Gregory truck was in its proper lane, or if it was attempting to pass. He looked north to make sure he had clearance to turn left. After he passed the intersection some two hundred fifty feet south of his brother-in-law's driveway, and after he saw the Gregory truck was not attempting to pass him, he began to angle his truck to the left. At a point 125 to 150 feet from the driveway with his truck almost halfway across the broken white line in the center of the highway, he looked again and the Gregory truck was still behind him. He was constantly maintaining his signals and pressure on his brakes. When he was almost at the driveway and almost off the highway on his left, the Gregory truck without blowing its horn and without giving any signals started to pass him on his left. He was trying to turn right to avoid a collision, when the Gregory truck sideswiped his truck, ripping the meter box at the left rear of his cab off of the truck. The meter box is on the left side of the truck directly behind the cab. His truck was immediately set on fire under the meter box. He applied his brakes, and brought his truck to a complete stop.

He jumped out of his truck, ran to its rear, and closed the main two-inch valve coming out of the bottom of the gas tank. The fire was immediately underneath the cab and meter box. There was no fire at the rear of the truck at that time. When he was closing the two-inch valve, the entire truck was engulfed in flaming gas, and he was severely burned.

He didn't run away from the truck, because he feared an explosion, and his purpose in staying there to turn off the valve was to prevent, if possible, an explosion. He thought that probably he might be saving his own life as well as onlookers who might gather at the scene,

and also save the truck and property nearby. He testified on cross-examination there is a possibility he could have run from the truck, and not have been burned. It is possible that in ten seconds he could have run about 100 yards from the truck.

Defendants have offered evidence to this effect: When Gregory reached the bottom of the overhead bridge and passed the road to the right, he saw his way clear, sounded his horn, pulled on his left-turn signal, and got in the left lane. He got up beside Rodgers' truck, and noticed the light on its left front fender. He saw no hand signals. He sounded his horn again. At that time he was about even with his cab. Plaintiff turned on his left-turn signal, and started to turn. It was too late to do anything but try to miss him. He swerved to the left across the driveway up into the curve. When he went by his right front fender smashed Rodgers' left front fender. He stopped, got out, went back, and the truck was in flames. Gregory knew he was following a gas truck.

The jury found by its verdict that plaintiff was injured by the negligence of the defendants, as alleged; that plaintiff was not guilty of contributory negligence, as alleged in the answer; and awarded Rodgers damages in the sum of $30,860.95.

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

Dees, Dees & Smith, By William A. Dees, Jr., and White & Aycock, By Charles B. Aycock, Attorneys for defendants appellants.

Lucas, Rand and Rose, and Taylor, Allen and Warren, Attorneys for plaintiff appellee.

PARKER, J. Defendants assign as error the denial of their motion for judgment of involuntary nonsuit made at the close of all the evidence.

Defendants' first contention is that the plaintiff has failed to make out a case of negligence against them. Plaintiff's evidence, including the stipulation of the parties, considered in the light most favorable to him and giving him the benefit of every legitimate inference to be drawn therefrom, (*Hutchens v. Southard*, 254 N.C. 428, 119 S.E. 2d 205), tends to show that the collision between the truck driven by plaintiff and the defendants' truck, and the immediately resulting fire on plaintiff's truck under the meter box, were caused by the negligence of the defendants in the operation of their truck, and notwithstanding plaintiff's intervening act in immediately stopping his truck, jumping out, and running to the rear to close the valve to seal the 550 gallons of liquefied petroleum gas in the tank of his truck in order to prevent an explosion, which probably might take his life and destroy

the truck, and when he was closing the valve the entire truck was engulfed in flaming gas and he was severely burned, defendants' negligence continued to be efficiently, actively, and potently operative to produce the injuries he suffered from the fire, and that the intervening act of plaintiff was a normal response to the stimulus of an extremely dangerous situation created by the defendants' negligent operation of their truck.

According to the American Law Institute Restatement, Torts (Negligence), Vol. 2, sec. 443, Comment a, in order for proximate causation to exist "it is not necessary that an act which is done by the person harmed or by a third person should be 'reasonable'; that is, that the act should be one which a reasonable man would regard as not involving an unreasonable risk to himself or others. It is enough that the act is a normal response to the stimulus of the situation created by the actor's negligence. If it be done by the person who is harmed and is unreasonable in the sense above stated, it may amount to contributory negligence which as such prevents him from recovering . . . , but the actor's negligent conduct [that is, in automobile cases, the negligence causing the accident] is nonetheless the legal cause of the harm." Plaintiff's acts in running to the rear of his truck to cut off the valve and seal the 550 gallons of liquefied petroleum gas in the tank to prevent an explosion, and in closing the valve, were of such a character as to be naturally called forth by defendants' negligence—to borrow the expression of Justice Cardozo they were the "child of the occasion." *Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437, 19 A.L.R. 1.

Plaintiff's evidence, considered in the light most favorable to him and giving to him every legitimate inference to be drawn therefrom, tends to show negligence on defendants' part, foreseeable injury, and proximate causation of his injuries in such ample manner as to require neither further discussion nor citation of authority. "There can rarely be much doubt as to the proximate causation where the injured person was engaged in escaping threatened injury to himself." 166 A.L.R., Anno., p. 754. There is no merit to defendants' contentions that plaintiff failed to make out a case of actionable negligence against them.

Defendants further contend that plaintiff was guilty of contributory negligence as a matter of law in violating the provisions of G.S. 119-49, minimum standards of safety in transporting liquefied petroleum gases, and in violating the provisions of the pamphlets referred to in the statute. This contention is without merit, for the very simple reason that defendants in their answer have not pleaded a violation of this statute, and of the pamphlets therein referred to, by plaintiff as contributory negligence. The plea of contributory negligence is an affirma-

tive defense, and when relied upon as a defense, it must be set up in the answer and proved on the trial. G.S. 1-139; *James v. R.R.*, 233 N.C. 591, 65 S.E. 2d 214. This Court speaking by *Ervin, J.*, accurately said in *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326: "The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant."

In addition, defendants contend that plaintiff was guilty of contributory negligence as a matter of law, for that his own evidence clearly shows he knew the liquefied petroleum gas he was transporting was dangerous and explosive, that "by his own negligence in leaving the valve open a dangerous situation of which he was cognizant" was created, that after the collision he saw his truck was on fire, and notwithstanding such knowledge he went to the rear of the truck to cut off the valve "to save his employer's property," thereby rashly exposing himself to obvious danger, when there was a possibility he could have run from the truck and not have been burned, and that there was no "person or any other property in the vicinity of the plaintiff's truck immediately after the collision."

Plaintiff's evidence shows he was in the truck immediately after the collision and immediate resulting fire under the meter box, and at that time there was no fire at the rear of the truck. He testified his purpose in running to the rear of the truck to turn off the valve to seal the 550 gallons of liquefied petroleum gas in the tank of the truck was to prevent, if possible, an explosion; he thought that probably he might thereby be saving his own life, as well as onlookers who might gather at the scene, and also save the truck and property nearby. His evidence on cross-examination is that he could possibly have run from the truck, and not have been burned. When he was closing the two-inch valve at the rear of the truck, the entire truck was engulfed in flames, and he was severely burned.

Plaintiff's evidence tends to show negligence on the defendants' part in bringing about the extremely dangerous situation in which he was placed, and that no negligence on his part in whole or in part caused or contributed to his extremely dangerous situation and the sudden emergency confronting him. His evidence further tends to show that the peril of an explosion and of an engulfing fire that would thereby follow threatening his own life and safety was imminent and real and not merely imaginary or speculative, unless he cut off the valve at the rear of the truck, and sealed the 550 gallons of liquefied petroleum gas

in the tank of the truck. In addition, his evidence tends to show he was required to act instantaneously in a sudden emergency caused by defendants' negligence, when he was free from negligence in bringing it about or contributing to it, in the presence of, or under a reasonably well-founded apprehension of, impending and deadly peril, such as is calculated to produce fright, excitement, or bewilderment, and affect the judgment.

The rule is well established with us, and elsewhere in the various jurisdictions, that when a plaintiff is required to act suddenly and in the face of real, or under a reasonably well-founded apprehension of, impending and imminent danger to himself caused by defendants' negligence, when he was free from any negligence in bringing it about or contributing to it in whole or in part, he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties. Ordinary care to avoid injury is all that is required, but ordinary care is required; a sudden peril or emergency does not relieve him of the duty of exercising ordinary care for his own safety. The test is, did he act as a reasonably prudent man would have acted under the same or similar circumstances. *Cockman v. Powers,* 248 N.C. 403, 103 S.E. 2d 710; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593; *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562; 65 C.J.S., Negligence, sec. 123; 38 Am. Jur., Negligence, secs. 194, 195, 206.

"When a person exercises the care and caution in an emergency [which he did not cause or bring about in whole or material part, and which was caused by the negligence of another] which an ordinarily prudent person would have used under the same or similar circumstances, he is not negligent merely because he fails to exercise his best judgment, or does not take the safest course, or does not take every precaution which from a careful review of the circumstances it appears he might have taken, or, in attempting to escape the danger under such circumstances, puts himself in a more dangerous position." 65 C.J.S., Negligence, pp. 734-5.

"One who is required to act in an emergency is not held by the 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, supra.*

This is not a case where one sees a person in imminent and serious peril through the negligence of another, and attempts a rescue, as in *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788, and *Norris v. R. R.,* 152 N.C. 505, 67 S.E. 1017. *Pegram v. R. R.,* 139 N.C. 303, 51 S.E. 975, relied on by defendants, is easily distinguishable in that, *inter alia,* plaintiff's intestate Wilson was in a place of safety and voluntarily

went back into the burning building to save his employer's property.

The term "contributory negligence" *ex vi termini* implies or presupposes negligence on the part of the defendant. *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360. The rule is firmly embedded in our adjective law that a defendant may not avail himself of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under G.S. 1-183, unless the facts necessary to show contributory negligence are established so clearly by plaintiff's own evidence that no other conclusion can be reasonably drawn therefrom. *Pruett v. Inman, supra; Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Daughtry v. Cline,* 224 N.C. 381, 30 S.E. 2d 322, 154 A.L.R. 789; *Elder v. R. R.,* 194 N.C. 617, 140 S.E. 298.

"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.

In *Jay v. Walla Walla College,* 53 Wash. 2d 590, 335 p. 2d 458, while plaintiff, a third-year chemistry student at the college, was conducting an authorized experiment in the analytical laboratory in the basement of the college chemistry building, he heard the sound of a small explosion in the organic laboratory across the hall. He entered that laboratory and saw two students attempting to quench the flames of a fire with a fire extinguisher. He picked up an extinguisher lying on the floor in the hallway, re-entered the room, and attempted to use it on the fire, but it was empty. While he was attempting to use it, a violent explosion from the materials used in the experiment occurred directly in front of him. The three persons in the room were injured by flying fragments of glass. Jay's retina of his left eye was punctured, and required surgery. Jay brought this action for damages suffered as a result of the explosion. The court held, *inter alia,* questions whether an emergency existed, whether fire endangered all of the occupants of the building, and whether Jay acted as a reasonably prudent person in attempting to put out the fire rather than fleeing from the premises were for the jury. A verdict for plaintiff in the amount of $27,303.00 was affirmed.

In *Legan & McClure Lumber Co. v. Fairchild,* 155 Miss. 271, 124 So. 336, the Court held: In action for death of employee injured while attempting to stop engine in sawmill after belt broke and before explosion, evidence warranted jury in finding that failure of employee to attempt to have steam shut off at power plant, rather than to reach engine throttle, was not such want of reasonable care on his part as would defeat recovery for his injury and death.

Plaintiff's evidence does not show so clearly that no other con-

clusion can be drawn therefrom that he did not act as a reasonably prudent man would have acted under the factual situation of deadly, imminent and real peril confronting him in going to the rear of the truck to close the valve and seal the 550 gallons of liquefied petroleum gas in the tank of the truck to prevent, if possible, an explosion by which act probably he might be saving his own life, as well as the truck of his employer. For the trial judge to have held that the plaintiff was guilty of contributory negligence as a matter of law would have been error.

The trial court properly overruled defendants' motion for judgment of compulsory nonsuit made at the close of all the evidence.

The court in its charge on conduct in emergencies did not state to the jury that the doctrine does not apply if the peril or emergency was caused or contributed to by plaintiff's negligence or was occasioned by concurrent negligence of the plaintiff and defendants. *Watts v. Watts,* 252 N.C. 352, 113 S.E. 2d 720; *Cockman v. Powers, supra; Hoke v. Greyhound Corp., supra;* Strong's N. C. Index, Vol. 3, Negligence, sec. 14; 65 C.J.S., Negligence, pp. 735-6.

On the second issue defendants have *allegata* and *probata* tending to show that the peril or emergency in which plaintiff was placed was caused or contributed to by his negligence or was occasioned by concurrent negligence of plaintiff and themselves.

Defendants assign as error this part of the charge on the second issue of contributory negligence, we quote in large part and summarize in small part: "In cases where a special hazard exists the court instructs you that the prudent man rule and due care rule still applies. However, one in the exercise of due care, where a special hazard exists, is not required to weigh in fine balance whether his particular plans in taking a risk will be safer for himself than some other course, for the law recognizes that men under pressure when a special hazard exists, either actual, or belief, will be motivated and influenced by many factors which do not appear in an average situation, such as personal safety," and other things of like import. This charge is prejudicial error, *inter alia,* in that it does not state that the doctrine of sudden emergency does not apply if it was caused or contributed to by plaintiff's negligence, or was occasioned by concurrent negligence of plaintiff and defendants, and further in that the court charged "when a special hazard exists, either actual, or belief," because "in order to relieve a person from the consequences of his own acts on the ground that they were done suddenly and under impending danger, there must be either a real danger or the circumstances must be such as might create apprehension of danger in the mind of an ordinarily prudent person." 65 C.J.S., Negligence, p. 735.

Defendants assign as error this part of the charge: "If the plaintiff negligently failed to proceed with due caution and circumspection in his effort to turn to the left across the highway, or that the plaintiff in the exercise of reasonable care for his own safety and the safety of others, including the defendant Gregory and his passenger, Hurst, travelers on the highway, property on the highway or adjacent thereto, stayed with the burning vehicle, or attempted to operate a mechanism thereon he delayed his safe departure, whereas a reasonably prudent man would have departed the burning vehicle, or that a reasonably prudent man would have concluded that no such action was necessary for the protection of himself and others, and if you should find that such negligence on the part of the plaintiff was the proximate cause of the collision and controversy, as defendants alleged, then you would answer the second issue yes." The second issue is the issue of contributory negligence. This part of the charge is prejudicial error to defendants, in that, *inter alia*, the court assumed as a fact, and so charged the jury in effect, that plaintiff was entitled to the benefit of the doctrine of sudden emergency, when defendants had evidence tending to show that the imminent and real peril from an explosion and ensuing engulfing fire was caused or contributed to by plaintiff's negligence, or was occasioned by concurrent negligence of plaintiff and defendants. A party is not entitled to the benefit of the doctrine of sudden emergency, if he himself contributes to its creation in whole or in part.

In *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196, the Court said: "In both civil and criminal cases, it is imperative, in the charge to the jury, that the law be declared, explained and applied to the evidence bearing on the substantial and essential features of the case without any request for special instructions."

Defendants further assign as error that the court instructed the jury that in order to show contributory negligence on plaintiff's part, the burden of proof was on defendants to prove by the greater weight of the evidence that plaintiff was negligent, and such negligence was *the* proximate cause of his injuries. Defendants also assign as error that the court in attempting to apply the law to the facts charged: "and if you should find that such negligence on the part of the plaintiff was *the* proximate cause of the collision and controversy, as defendants alleged, then you would answer the second issue yes." At several other places in the charge in the same connection the court used the words "*the* proximate cause." This was placing too heavy a burden on defendants because the negligence, if any, of plaintiff to bar recovery need not be the sole proximate cause of his injury; it suffices, if it contributed to his injury as a proximate cause, or one of them. *Tew*

v. Runnels, 249 N.C. 1, 105 S.E. 2d 108; *Blevins v. France,* 244 N.C. 334, 93 S.E. 2d 549; *Tyson v. Ford,* 228 N.C. 778, 47 S. E. 2d 251. The fact that the court elsewhere in its charge on contributory negligence several times used the words "a proximate cause" cannot be held to have cured the repeated use of the words "the proximate cause," because under such circumstances the jury could not possibly have known which was correct.

Plaintiff alleges in his complaint that his truck after the collision "was almost immediately engulfed in a flame of burning gas." And then "the plaintiff Rodgers, as the truck was engulfed in flame and while he was endeavoring to prevent a catastrophic explosion of Propane gas, was severely and painfully burned." That does not strictly conform to his proof, which is that immediately after the collision there was fire under the meter box, and no fire at the rear of the truck. He has no allegation as to why he went to the rear of the truck. Whether this is a material variance between *allegata* and *probata* is a question not without difficulty. However, defendants on this appeal have not argued the question, and the variance has apparently not misled them. We do not deem it proper to nonsuit the case for variance *sua sponte,* particularly when defendants raise no question in respect to it. Doubtless, in the lower court the complaint will be amended to avoid a variance. As to variance see Strong's N. C. Index, Vol. 4, Trial, sec. 26, Nonsuit for Variance, for a clear statement of the applicable law.

For error in the charge defendants are entitled to a new trial, and it is so ordered.

New trial.

C. C. T. EQUIPMENT CO., A NORTH CAROLINA CORPORATION, v. THE HERTZ CORPORATION, A DELAWARE CORPORATION; IVEY'S INCORPORATED, A NORTH CAROLINA CORPORATION; J. B. IVEY'S AND CO., A NORTH CAROLINA CORPORATION, AND FRANK LOUIS FOSTER.

AND

DAVIE CONTRACTORS, INC., A NORTH CAROLINA CORPORATION, v. THE HERTZ CORPORATION, A DELAWARE CORPORATION; IVEY'S, INCORPORATED, A NORTH CAROLINA CORPORATION; J. B. IVEY'S AND COMPANY, A NORTH CAROLINA CORPORATION, AND FRANK LOUIS FOSTER.

(Filed 2 February, 1962.)

1. Highways § 1—

The State Highway Commission is an administrative agency of the State to which the State has delegated the police power to establish, main-

tain, and improve the State and county highways, and the Commission has the powers specifically delegated and such powers as are reasonably necessary for the effective discharge of such duties. G.S. 136-1, G.S. 136-18(1).

2. Highways § 7—

While the Highway Commission may not prescribe for its contractor a different standard of care than that imposed by the common law in regard to the traveling public, the Commission does have the power, in the construction of an overpass, to authorize its contractor to place a dirt ramp across the highway for the protection of the highway from heavy equipment hauling dirt for the overpass, and to authorize its contractor to place warning signs along the highway and to station flagmen at the ramp to stop traffic along the highway and close that portion when in use by earth moving equipment. G.S. 136-26.

3. Automobiles § 52; Trial § 19—

Where the evidence discloses that the agent of one defendant was driving its truck for the transportation of its goods to another defendant, the mere fact that such other defendant was the intended recipient of the goods is insufficient to be submitted to the jury upon such other defendant's liability for the driver's negligence under the doctrine of *respondeat superior*, and such other defendant's motion to nonsuit must be sustained on appeal notwithstanding that the motion to nonsuit was not prosecuted on the ground of the insufficiency of the evidence of agency.

4. Appeal and Error § 35—

The Supreme Court is bound by the record and may not indulge in speculation as to matters or stipulations *dehors* the record.

5. Automobiles § 7—

A red flag properly displayed during the daylight hours is a recognized method of giving warning of danger to travelers along a highway.

6. Highways § 7— Evidence held for jury on question of negligence of motorist in failing to stop in obedience to signals at point where highway under construction was closed.

Plaintiff's evidence tending to show that defendant-driver in approaching a dirt ramp placed across a highway incident to the construction of an overpass, was confronted by a series of signs warning that the road was under construction, that at the ramp a flagman was waving a red flag to stop traffic along the highway, and that defendant-driver failed to stop and was hit by an earth mover entering the highway down a cut in a 75 foot bank, resulting in damage to the earth mover and temporary loss of its use, *is held* sufficient to be submitted to the jury on the issue of defendant-driver's negligence, but, upon defendants' evidence in conflict on material aspects, does not show contributory negligence as a matter of law on the part of defendant-driver.

7. Same—

In an action to recover damages to an earth mover resulting from a collision between it and a vehicle on a highway under construction, upon evidence tending to show that the highway was temporarily closed to

traffic by a flagman waving a red flag, G.S. 136-26 authorizing the Highway Commission and its appropriate employees to close a highway under construction is relevant and properly admitted in evidence.

8. Evidence § 24—

A statute which is relevant to the action may be read in evidence from the printed statute book, G.S. 8-1.

9. Highways § 7—

Where, by the display of proper signals, a highway had been temporarily closed to the traveling public incident to highway construction, G.S. 20-156(a) has no application to earth moving equipment entering and crossing the highway in the progress of the work.

10. Trial § 33—

"Public highways" and "private driveways" are non-technical terms which the court is not required to define in the absence of specific request for instructions.

11. Highways § 7— Drivers of contractor's equipment remain under duty to exercise due care for safety of motorists even though highway has been temporarily closed.

Notwithstanding that a contractor's road building equipment has the right-of-way in entering and crossing a highway under construction when the highway has been temporarily closed to traffic by a flagman, the operator of such equipment is not entitled to rely entirely upon the acts of the flagman but must stop to avoid collision with a vehicle whose driver negligently disregards the flagman's signal and continues along the highway if the operator of the equipment, in the exercise of a proper lookout, sees or should see the vehicle in time to avoid collision, and the admission of testimony of a supervisor to the effect that the operator of the equipment had no duty to stop for anything on the road at any time, is error.

11. Trial § 15—

A party does not lose his exception to the admission of testimony by failing to renew objection to a question when it is rephrased.

APPEAL by defendants from *Crissman, J.*, July 31, 1961 Mixed Term of DAVIE.

These are civil actions in which plaintiffs seek to recover damages allegedly caused by the actionable negligence of defendants.

C. C. T. Equipment Co. and Davie Contractors, Inc. (herein called Contractor), are North Carolina corporations with principal offices at Mocksville, N. C. The same persons own all of the stock of both corporations. Contractor is engaged in highway construction and leases equipment and machinery from Equipment Co. For the purposes of these suits the agents and employees of Contractor are also the agents and employees of Equipment Co. It was so stipulated.

On 22 September 1958 Contractor, pursuant to a subcontract with

the prime contractor, was engaged in grading operations for the North Carolina Highway Commission in connection with the construction of Interstate Highway 40, at a point 4 miles south of Marion, N. C., where the right-of-way of Interstate 40 crosses North Carolina Highway 26. At this point Highway 26 runs north and south. Contractor was moving dirt from west to east across Highway 26 in large earth movers. It had placed a ramp of dirt, about 14 inches deep and 14 to 20 feet wide, across the hardsurfaced portion of Highway 26, and the earth movers crossed the highway on this ramp to protect the highway surface. On the west side of Highway 26 at this point was a high bank covered with bushes and trees. The earth movers loaded west of the bank, came over the bank and down a cut and onto and across the ramp, and unloaded at places east of the highway. Two flagmen were stationed at the ramp to stop traffic on the highway when the earth movers were crossing; one flagman was on the south side of the ramp facing northbound traffic, the other was on the north side facing southbound traffic. The approach to the dirt ramp from the north along Highway 26 is downhill and straight for about 800 feet. Along this approach were warning signs located at the distances from the dirt ramp, and containing words and figures, as follows: 800 feet, "Road Work, Heavy Equip. 20 M. P. H."; 450 feet, "Danger, Road under Construction"; 150 feet, "Road Work, 25."

Ivey's Incorporated and J. B. Ivey's and Co. are North Carolina corporations with their principal offices at Asheville and Charlotte, respectively. On 22 September 1958 Frank Louis Foster was driving a Chevrolet truck, which had been leased from The Hertz Corporation, and was conveying goods from the place of business of Ivey's Incorporated in Asheville to the store of J. B. Ivey's and Co. in Charlotte. About 9:45 A.M., while going southwardly and crossing the aforesaid dirt ramp, the truck was struck on its right side by a loaded earth mover which was proceeding eastwardly across the ramp. Both vehicles were damaged.

Equipment Co. and Contractor sue in separate actions, the former for damage to the earth mover, the latter for loss of its use. Hertz, Ivey's Incorporated, J. B. Ivey's and Co., and Foster are sued jointly in each action.

Plaintiffs allege that defendants were negligent in that Foster at the time of and immediately preceding the collision (1) was violating provisions of the reckless driving statute (G.S. 20-140), (2) was driving at a speed greater than was reasonable and prudent under the circumstances, (3) failed to keep the truck under reasonable control, (4) failed to heed and obey warning signs and signals, (5) failed to decrease speed, (6) failed to keep a proper lookout, and (7) failed to yield the right-of-way.

Hertz's demurrer to the complaint was sustained, and the action was dismissed as to it. There was no appeal from this ruling.

The other defendants, answering, deny plaintiffs' allegations of negligence and allege specific acts and omissions on the part of the employees of plaintiffs as contributory negligence.

The two actions were consolidated for trial. Plaintiffs and defendants offered evidence. Their respective versions of the occurrence are in direct conflict.

Plaintiffs' version: In the center of the highway and near the ramp was a sign, facing north, worded "Obey Flagman." As the truck came down the hill it looked like it was not slowing down. The flagman who was facing north was standing at the center of the highway holding the red flag straight out to his left. He then began to wave the flag over his head from side to side crosswise the road. When the truck was within about ten feet of him, he jumped away. In the meantime the other flagman observed the approach of the truck, and ran onto the ramp and waved his red flag over his head in an effort to stop the truck. The truck ran onto the ramp where it was struck by the earth mover. The driver of the earth mover was about half way down the bank (it is 75 feet from the top of the bank to the highway) when he first saw the truck. The flagman was waving, but the truck did not stop. Brakes were applied to the earth mover but it was too late to avoid collision.

Defendants' version: The truck approached the ramp at 15 to 20 miles per hour. The driver saw the warning signs. The flagman was standing at the center line of the highway motioning to the truck, waving the flag north and south parallel to the highway, not crosswise. He was waving the truck through. He stepped aside. There was heavy equipment in the open space east of the highway, but none near the ramp. Foster put the truck in second gear and drove onto the ramp and was struck. He did not see the approach of the earth mover. It had been traveling in a deep cut in the bank obscured by bushes and trees.

The jury answered the issues as to negligence and contributory negligence in favor of plaintiffs and awarded damages to both.

Judgment was entered in accordance with the verdict.

Defendants appeal.

Martin and Martin for plaintiffs.

Deal, Hutchins and Minor for defendants.

MOORE, J. Defendants make a general contention which underlies all of their assignments of error. They insist that neither the State

Highway Commission nor the contractor had power and authority under conditions disclosed by this record to supervise and control the use of Highway 26 by the traveling public so as to give to the contractor's equipment and machinery a dominant status, and that in the use of the highway, as between the contractor and the traveling public, the ordinary rules of the road obtained as if no construction work affecting the highway was being done. It is therefore essential that we first review generally the principles of law relevant and applicable to facts and circumstances such as those existing here.

"The establishment of highways is embraced within the police power of the state and is a matter which is primarily under the jurisdiction and control of the legislature. Such power may be exercised by the state directly or delegated to municipalities and other subordinate agencies. . . ." 25 Am. Jur., Highways, s. 19, p. 350. "The improvement, maintenance and care of highways are matters under the control of the state in its sovereign capacity, as represented by the legislature, and it is the state's duty to provide for their construction and maintenance. . . . Subject to constitutional limitations, the state has full power to construct and maintain highways, or to provide for their construction and maintenance, to choose the means and methods it will employ to accomplish these purposes, and to control the work necessary to their accomplishment, whatsoever the agency employed in carrying out such work." *ibid*, s. 55, pp. 369, 370.

In North Carolina the Legislature has created a State Highway Commission. G.S. 136-1. It is a state agency or instrumentality, and as such exercises various governmental functions, including that of supervising the construction and maintenance of state and county public roads. *Moore v. Clark*, 235 N.C. 364, 70 S.E. 2d 182. "The general purpose of the laws creating the State Highway Commission is that said Commission shall take over, establish, construct, and maintain a state-wide system of hard-surfaced and other dependable highways. . . ." G.S. 136-45. The Commission is given "general supervision over all matters relating to the construction of the State highway. . . ." G.S. 136-18(1). The Commission is the state agency created for the purpose of constructing and maintaining our highways. All other powers it possesses are incidental to the purpose for which it was created. *DeBruhl v. Highway Commission*, 245 N.C. 139, 95 S.E. 2d 553.

The Legislature has not set out in detail every incidental power belonging to and which may be exercised by the Commission. As a practical matter the Legislature could not foresee all the problems incidental to the effective carrying out of the duties and responsibilities of the Commission. Of necessity it provided for those matters in general terms. Where a course of action is reasonably necessary for the

effective prosecution of the Commission's obligation to supervise the construction, repair and maintenance of public highways, the power to take such action must be implied from the general authority given and the duty imposed. *Mosteller v. R. R.*, 220 N.C. 275, 280, 17 S.E. 2d 133. "Administrative boards, commissions and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. . . . In determining whether a board or commission has a certain power, the authority given should be liberally construed in the light of the purposes for which it was created and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of power, it is a general principle of law that where the end is required the appropriate means are given. . . . However, powers should not be extended by implication beyond what may be necessary for their just and reasonable execution." 42 Am. Jur., Public Administrative Law, s. 26, pp. 316-318.

The power and authority of the Commission to provide for and supervise the construction of Interstate Highway 40, to have it cross over other highways, to acquire and grade a right-of-way for that purpose, and to control and supervise the prosecution of the work, cannot be questioned. But defendants contend that the Commission, with respect to the use of Highway 26 by the contractor in the prosecution of grading work, was without authority to bring into play any duties and responsibilities, as between the contractor and the traveling public, other than those which obtained in the normal use of the highway.

It is true that the Commission cannot by contract or by supervisory instructions prescribe for contractors a different standard of care from that imposed by the common law in a given situation, as it affects third parties. *Pinnix v. Toomey,* 242 N.C. 358, 363, 365, 87 S.E. 2d 893. But in its use of and authority over a highway, for purposes of construction, repair or maintenance, it may create circumstances which bring into play rules of conduct which would not apply if such purposes were not involved.

G.S. 136-26 provides: "If it shall appear necessary to the State Highway Commission, its officers, or appropriate employees, to close any road or highway coming under its jurisdiction so as to permit proper completion of work which is being performed, such commission, its officers or employees, may close, or cause to be closed, the whole or any portion of such road or highway deemed necessary to be excluded from public travel. While any such road or highway, or portion thereof, is so closed, or while such road or highway, or portion thereof, is

in process of construction or maintenance, such commission, its officers or appropriate employees, or its contractor, under authority from such commission, may erect, or cause to be erected, suitable barriers or obstruction thereon; may post, or cause to be posted, conspicious notices to the effect that the road or highway, or portion thereof, is closed; and may place warning signs, lights and lanterns on such road or highway, or portions thereof." This statute, together with the general powers of the Commission already discussed, authorized the Commission directly or by implication, in the prosecution of the grading work in question, to direct and permit soil to be conveyed across Highway 26, the dirt ramp to be placed on the highway for its protection from injury by heavy equipment, the placing of warning signs along Highway 26, the stationing of flagmen at the ramp to stop traffic along Highway 26 and close that portion of the road when in use by earth movers, and its grade inspector to give supervision and instruction to the contractor and its employees in carrying out the grading work.

"Public travel on a street or other highway may be temporarily suspended for a necessary or proper purpose, as for example . . . to permit repairs or reconstruction." 25 Am. Jur., Highways, s. 116, p. 414. "The contractor doing the work . . . is there for a lawful purpose and is not obliged to stop the work . . . every time a traveller drives along. But while the traveller . . . assumes certain risks, he is still a traveller on a public way, and the contractor still owes him due care, and is liable for injuries suffered by him as a result of negligence in the performance of the work." *ibid*, s. 400, p. 698.

When a contractor undertakes to perform work under contract with the State Highway Commission, the positive legal duty devolves on him to exercise ordinary care for the safety of the general public traveling over the road on which he is working. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 475, 64 S.E. 2d 551; *White v. Dickerson, Inc.*, 248 N.C. 723, 105 S.E. 2d 51. Contractors must exercise ordinary care in providing and maintaining reasonable warnings and safeguards against conditions existent at the time and place. *Gold v. Kiker*, 216 N.C. 511, 5 S.E. 2d 548; *Hughes v. Lassiter*, 193 N.C. 651, 137 S.E. 806. "Actual notice of every special obstruction or defect in a . . . highway is not required to be given to a traveler nor need the way be so barricaded as to preclude all possibility of injury, but it is sufficient if a plain warning of danger is given, and the traveler has notice or knowledge of facts sufficient to put him on inquiry. The test of the sufficiency of the warning . . . is whether the means employed, whatever they may be, are reasonably sufficient for the purpose." 25 Am. Jur., Highways, s. 413, p. 708. When a highway is under construction or repair, to the knowledge of a traveler, he may not assume that it is in safe condition. *Presley v. Allen & Co.*, 234 N.C. 181, 66 S.E. 2d 789.

One who operates an automobile on a public highway which is under construction or repair, or in use for such purposes, cannot assume that there are no obstructions, defects or dangers ahead. In such instances it is the duty of the motorist, in the exercise of due care, to keep his vehicle under such control that it can be stopped within the distance within which a proper barrier or obstruction, or an obvious danger, can be seen. *Chesson v. Teer Co.*, 236 N.C. 203, 72 S.E. 2d 407. When extraordinary conditions exist on a highway by reason of construction or repair operations, the motorist is required by law to take notice of them. The traveler's care must be commensurate with the obvious danger. *Kellogg v. Thomas,* 244 N.C. 722, 94 S.E. 2d 903.

In the light of the foregoing principles we now consider the assignments of error.

(1) Defendants assign as error the refusal of the court to grant their motions for nonsuit.

It is our opinion that the motion of J. B. Ivey's and Co. should have been allowed. There is no showing in the record, by way of admission, stipulation, evidence or otherwise, that the Chevrolet truck was leased by or under the control of J. B. Ivey's and Co., or that the driver, Foster, was in the employ or about the business of that company. It affirmatively appears that the truck was leased by Ivey's Incorporated of Asheville, Foster was an employee of Ivey's Incorporated and his mission was to deliver goods to J. B. Ivey's and Co., at Charlotte. The mere fact that Foster was on his way to Charlotte for the purpose of delivering goods to J. B. Ivey's and Co., nothing else appearing, is not a *prima facie* showing that he was its agent. It is true that no issue of agency was submitted to the jury, and the agency question is not raised in the brief. But motion for nonsuit is directed to the sufficiency of the evidence. We are bound by the record. Perhaps there was an understanding or stipulation *dehors* the record. But we may not indulge in speculation. On this record J. B. Ivey's and Co. is entitled to dismissal.

As to Ivey's Incorporated and Foster the motion was properly overruled. The facts heretofore summarized, when taken in the light most favorable to plaintiffs, are sufficient to justify the conclusion that the collision was proximately caused by Foster's disregard of warnings and signals, his failure to stop at the ramp and yield the right-of-way to the earth mover, and other acts and omissions by him involving speed, lookout and control, amounting to negligence as alleged. We have said that a red light is recognized by common usage as a method of giving warning of danger during hours of darkness, and a driver seeing a red light ahead in the highway is required in the exercise of due care to heed its warning. *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d

533. The same is equally true of a red flag in daylight hours when properly displayed. For example, see G.S. 20-117.1(h). In the instant case contributory negligence does not appear as a matter of law. It is for the jury.

(2) G.S. 136-26 was admitted in evidence, over defendants' objection, and read to the jury.

If relevant, it was admissible. "All statutes . . . passed by the General Assembly may be read in evidence from the printed statute books. . . ." G.S. 8-1.

We think it is relevant. The pertinent part is quoted above: it deals with the closing of highways and posting of warnings. It tends to show, in part at least, as already indicated, the authority under which the conditions were created which gave rise to the respective duties and responsibilities of the parties in these cases, the legal permissibility of which conditions was seriously challenged by defendants. It is not only relevant but essential to plaintiffs' causes of action.

(3) Defendants contend that the court erred in failing to charge on applicable statutory definitions, G.S. 20-38(cc) and G.S. 20-38(w), and in failing to apply G.S. 20-156(a) to the facts in these cases.

G.S. 20-156(a) provides: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway." In order to comply with this statute, a driver entering a public highway from a private drive is required to look for vehicles approaching on such highway, to look at a time when the precaution may be effective, to yield the right-of-way to vehicles traveling on the highway, and to defer entry until the movement may be made in safety. *Gantt v. Hobson*, 240 N.C. 426, 82 S.E. 2d 384; *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111.

Under the conditions and circumstances here presented G.S. 20-156(a) is applicable at such times as the ramp is open for public travel, but it does not apply at such times as the ramp is closed by the flagmen. At the times when the ramp is closed public travelers have no right to use it, but must stop and yield the right-of-way to contractor's machinery. The flagmen's signal to stop is at least equivalent to a legally established stop sign or stop light at an intersection. Defendants' contention that G.S. 20-156(a) applies at all times and under all circumstances is rejected.

The situation here presented graphically illustrates the reason for and wisdom of the control and supervision given the Highway Commission relative to the use of highways while under construction or repair or while affected by such operations. The closing or temporary closing of highways or portions thereof during construction and repair

operations is designed to avoid interruptions and delays in the prosecution of the work. If the earth movers in the instant cases were required to stop and yield the right-of-way to travelers on the highway, the expense of construction and the time required to complete the project would be greatly increased. The rental rate of the earth mover involved in the collision was $315.00 per day. The cost to the State was much more. It is unreasonable to suppose that the Commission does not have, at least by implication of law, such control of the highways under the circumstances herein as to prevent such machinery from standing idly by the road while travelers pass at will.

We, of course, are not to be understood as holding that the operators of earth movers or other machinery under such circumstances are under no duty of care. Notwithstanding their favored status when the road is temporarily closed, they are required to use due care, and must keep a proper lookout and keep their vehicles under reasonable control. If a motorist disregards a flagman's signal and negligently enters the closed area, the operator of the contractor's machinery must stop and avoid collision, if in the exercise of reasonable care he can do so.

The court did not err in failing to give statutory definitions of "public highway" and "private driveway", G.S. 20-38(w) and G.S. 20-38(cc). There were no specific requests for such instructions. Moreover, these are non-technical terms and are commonly understood.

(4) The grade inspector for the Highway Commission was called as a witness for plaintiffs, and testified on direct examination that he gave instructions for placing warning signs, for stationing flagmen, and for moving equipment back and forth across the highway.

Then the following transpired:

> "Q. In what fashion did you authorize them to move it?
>
> "MR. MINOR: Objection, if the Court pleases. I don't know what the answer would be but I presume any vehicular traffic is governed by the laws of the State of North Carolina, not by any authority of the inspector on the job."

Objection overruled. Exception for defendants.

> "Q. In what fashion did you authorize them to move these dirt-moving machines across the highway there from west to east?
>
> "A. Well, with the supervision of the flagmen, they could go and come at their own free will, without stopping or anything at the road. The flagmen were supposed to stop traffic for the vehicles, stop the vehicular traffic."
>
> "MR. MINOR: Objection — overruled."

In failing to strike the answer and instruct the jury to disregard it,

the court fell into error. The inspector, acting on behalf of the State Highway Commission, had authority to instruct and supervise the contractor and his employees in the prosecution of the work, but he had no authority to prescribe a different standard of care for the equipment operators from that imposed by rule of common law. *Pinnix v. Toomey, supra.* From this testimony the jury may well have understood that the machinery operators were relieved of all duty of care, and could rely entirely on the actions of the flagmen. But, as already indicated, they are charged with the duty of exercising reasonable care under the circumstances in which they are placed.

Plaintiffs contend that defendants failed to preserve the exception in that they did not object when the question was rephrased. This contention is not sustained. See *Jamerson v. Logan,* 228 N.C. 540, 543, 46 S.E. 2d 561.

As to defendant, J. B. Ivey's and Co., the judgment below is

Reversed.

As to defendants, Ivey's Incorporated and Frank Louis Foster, there will be a

New trial.

STATE v. ROBERT FRANKLIN BURELL.

(Filed 2 February 1962.)

1. Appeal and Error § 22—

A notation in the notice of appeal that appellant excepts to each finding of fact and conclusion of law in conflict with his contentions is a broadside exception and does not bring up for review the findings of fact or the evidence upon which they are based.

2. Criminal Law § 17—

Where the United States Government has not accepted jurisdiction over lands acquired by it for a housing project for military and civilian personnel near a military base by filing a notice of such acceptance with the Governor of the State, 40 U.S.C.A. § 255, the Federal Courts have no jurisdiction to try a defendant for an offense committed within such area, there being no other manner prescribed by the laws of the State by which the Federal Government might accept jurisdiction.

3. Statutes § 5—

Where a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded.

STATE *v.* BURELL.

4. Criminal Law § 17—

Where the Federal Government has not accepted jurisdiction over crimes committed on lands acquired by it for a housing project for its military and civilian personnel connected with a military base, G.S. 104-7 will not be interpreted as ousting the jurisdiction of the State courts to try offenses committed within such area when the exercise of jurisdiction by the State court does not interfere with the operation of the Federal project, since such construction would lead to the absurd result of creating a *hiatus* and an unwarranted diminution of the State's sovereignty in contravention of public policy.

5. Criminal Law § 173—

Where a defendant in a post-conviction hearing attacks the validity of his conviction on two separate grounds, and, after remand of a favorable determination for defendant upon one of the grounds, advises the court through his counsel that he had abandoned the other ground, which had been determined adversely to him on the prior hearing, the judgment on the second hearing, affirmed on appeal, is conclusive as to both grounds, since a party will not be allowed to try a cause or proceeding piecemeal.

On writ of *certiorari*, granted upon motion of defendant, G.S. 15-222, to review a judgment entered by *Cowper, J.*, in a Post-Conviction Hearing, authorized by G.S. 15-217 *et seq.*, denying defendant any relief, at May 1961 Term of CRAVEN.

This is the third time this case has been before the Court. At the November Term 1959 of Craven County Superior Court defendant was convicted by a jury of the felony of an assault with intent to commit rape upon Emma Estelle Harrison, the wife of a staff sergeant stationed at the Marine Corps Air Station at Cherry Point, North Carolina. Defendant was a staff sergeant stationed at the same place. The trial court entered judgment that defendant be confined in the State's Prison for fifteen years, and he appealed to this Court. We found no error in the trial, and the case is reported in 252 N.C. 115, 113 S.E. 2d 16.

After we found no error in the trial, defendant through his counsel instituted a proceeding under our Post-Conviction Hearing Act to review the constitutionality of his trial. In his petition he alleged that his constitutional rights were violated in that the offense of which he was convicted was committed within an area over which the United States Courts had exclusive jurisdiction, and the State Court had no jurisdiction, and second, that the State withheld or failed to disclose evidence which it had favorable to him. This proceeding came on to be heard at 18 November 1960 Term of Craven County Superior Court by Judge Morris. Judge Morris, after hearing the evidence offered and argument of counsel for defendant and for the State, found facts to this effect: Jurisdiction over the felony charged against defendant was vested in the United States District Court for the Eastern District of North Carolina, and the State Court had no jurisdiction, and second,

the contention of defendant that his constitutional rights had been denied him by the State withholding or suppressing evidence favorable to him was without foundation or merit. Whereupon Judge Morris ordered that the case in the State Court against defendant be dismissed, and that defendant be delivered to the proper officials of the United States Government for the Eastern District of North Carolina. Appearance bond was fixed at $50,000.00. We allowed the State's petition for a writ of *certiorari*. We remanded the proceeding to the lower court for the reason that Judge Morris' findings of fact were insufficient for us accurately and safely to pass upon his conclusion of law. *S. v. Burell,* 254 N.C. 317, 119 S.E. 2d 3.

The proceeding came on to be heard again by Judge Cowper at the term above shown. At the beginning of the hearing defendant through his counsel advised the court that he is not now pursuing his contention that at the trial his constitutional right was violated by the State withholding or failing to disclose evidence it had favorable to him, but was relying upon his contention that the State Court had no jurisdiction to try him upon the indictment. Judge Cowper, after considering the pleadings, the evidence offered by defendant and the State, made elaborate findings of fact. We summarize his findings of fact relevant to a determination of the proceeding before us, except when we quote:

The felony, for which defendant was convicted at the November 1959 Term of Craven County Superior Court, occurred at No. 16 Rosebay Court, which is a part of a federal housing project known as Slocum Village, situate at Havelock, Craven County, North Carolina, adjacent to the United States Marine Corps Air Station at Cherry Point, North Carolina. Slocum Village Housing area is the property of the United States by virtue of a judgment rendered on 31 May 1958 in the District Court of the United States for the Eastern District of North Carolina in an action entitled *"United States of America v. 337.01 acres of land, more or less, in Craven County, North Carolina, Hancock Village, et al."* A declaration of taking in this action was filed on 26 May 1958 on behalf of the United States by F. A. Bantz, assistant secretary of the Navy, and in part states: "And I do further declare that the public use to which said lands are to be put is for the housing of military and civilian naval personnel stationed or employed at the U. S. Marine Corps Air Station, Cherry Point, North Carolina." The part of the judgment which Judge Cowper quotes provides in effect that the United States shall have immediate and absolute possession, custody, and control of the lands taken.

The felony for which defendant was convicted was committed on lands which were acquired by the United States in the action above set forth.

The area known as Slocum Village, including Rosebay Court, is used for housing of military personnel, civilian personnel employed at Cherry Point Air Station, and other persons not directly or indirectly connected with the Cherry Point Marine Corps Air Station.

"7. Neither the Secretary of the Department of the Navy, nor any other authorized person or agency, accepted or assumed criminal jurisdiction for the United States over the lands on which the crime was committed by Robert Franklin Burell.

"8. Neither the Secretary of the Department of the Navy, nor any other authorized person or agency, has indicated acceptance of criminal jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of the State of North Carolina, nor in any other manner as provided in Title 40, Section 255, United States Code.

"9. There has been no communication from the Secretary of the Department of the Navy, or any federal department or agency indicating acceptance of criminal jurisdiction of the property in question in accordance with Title 40, Section 255, United States Code, with the Governor of the State of North Carolina.

"10. Neither the Department of the Navy, nor any other authorized persons or agency, has assumed or exercised criminal jurisdiction over the area known as Slocum Village, including No. 16, Rosebay Court, where the crime in question was committed by Robert Franklin Burell.

"11. The United States has not accepted criminal jurisdiction over the lands known as Slocum Village, including No. 16, Rosebay Court, where the crime in question was committed, as provided by 40 United States Code, Section 255."

Based on his findings of fact Judge Cowper made the following conclusions of law, which we summarize, except when we quote:

One. The United States did not acquire criminal jurisdiction over the Slocum Village Housing area, including No. 16 Rosebay Court apartment, the situs of the crime, by virtue of the judgment in the condemnation action above set forth, or by virtue of the filing of taking in the action.

Two. The United States having failed to accept or assume criminal jurisdiction over the Slocum Village Housing area, including No. 16 Rosebay Court, the situs of the crime, by filing a notice of such acceptance with the Governor of North Carolina, "as provided by 40 United States Code, Section 255, or by other means provided by law," it is now conclusively presumed that no criminal jurisdiction has been acquired by the United States.

Three. "The court finds that although the State of North Carolina, by virtue of the provisions of General Statute 104-7, has agreed to relinguish and cede criminal jurisdiction over the lands condemned by the United States of America, including No. 16 Rosebay Court, the situs of the crime, in the absence of a clear acceptance of such criminal jurisdiction on the part of the United States of America, the State of North Carolina, still retains and maintains criminal jurisdiction over the area."

Four. The Superior Court of Craven County had exclusive jurisdiction to try defendant for the felony charged against him in the indictment.

Five. "That the petitioning defendant having advised the court through counsel that he is no longer pursuing the contention of denial of his constitutional rights on the grounds of evidence being withheld by the State, and no evidence having been offered of same, said defense is deemed to [be] waived and abandoned."

Six. The trial of defendant at the November 1959 Term of Craven County Superior Court was valid and constitutional, and no constitutional rights of his were violated.

Whereupon, Judge Cowper ordered that defendant serve the sentence imposed upon him at the November 1959 Term of Craven County Superior Court.

We allowed defendant's petition for a writ of *certiorari*.

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

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

PARKER, J. The case on appeal has no assignments of error and no grouping of exceptions. In his appeal entries defendant "excepts to each finding of fact and conclusion of law in conflict with his contentions of innocence of the crime for which he was convicted and his contention that the Superior Court of Craven County was without jurisdiction to try him and pass sentence upon him." No exception appears in the record to any finding of fact or conclusion of law, except as noted in the notice of appeal above quoted.

Under our Rules of Practice and our decisions, defendant's above quoted exception is a broadside exception, and presents nothing for our consideration except the question whether the facts found by Judge Cowper support his conclusions of law and judgment. *Hicks v. Russell*, 256 N.C. 34, 123 S.E. 2d 214; *Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209; *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445; *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242.

This Court has consistently held that an "exception must be made to a particular finding of fact and point out specifically the alleged error, and an exception to the findings of fact and the conclusions of law based thereon, is a broadside exception and ineffectual." Strong's N. C. Index, Vol. 1, Appeal and Error, sec. 22, where many cases are cited.

A broadside exception to the findings of fact "does not bring up for review the findings of fact or the evidence on which the findings are based." *Merrell v. Jenkins, supra.* However, a study of the record shows that Judge Cowper's findings of fact are supported by competent legal evidence.

The ultimate question is whether Rosebay Court apartment, the situs of the crime, was at the time of the commission of the crime on 16 August 1959 within the federal criminal jurisdiction, and if not, was it within the State criminal jurisdiction.

The Act of 9 October 1940, 40 U.S.C.A., sec. 255, enacted prior to the acquisition by the United States on 31 May 1958 of the land on which Rosebay Court apartment is located, provides: *"The obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required;* but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable *and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."* Emphasis ours. The findings of fact by Judge Cowper clearly show that the United States Government has not given notice of acceptance of jurisdiction over the area in which Rosebay Court apartment is situate at the time of the alleged offense.

Defense counsel contends that notice of acceptance of jurisdiction on behalf of the United States is not limited to "filing a notice of such acceptance with the Governor of such State," but acceptance may be "in such other manner as may be prescribed by the laws of the State where such lands are situated." A search on our part shows that the State of North Carolina has no laws prescribing how or in what manner acceptance of jurisdiction by the United States Government may

be done, and counsel for defendant has not pointed out any such laws to us. There is no merit to this contention of defendant's counsel.

G.S. 104-7, which was enacted in 1907, seems to be in conflict with G.S. 104-1, which was enacted earlier. *S. v. DeBerry,* 224 N.C. 834, 32 S.E. 2d 617. G.S. 104-7 states: "The consent of the State is hereby given, . . . , to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the State required for the sites for custom houses, courthouses, . . . , or for any other purposes of the government. Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

The United States Supreme Court has said with reference to the transfer of jurisdiction, in the case of *Silas Mason Co. v. Tax Commission of Washington,* 302 U.S. 186, 82 L. Ed. 187: "As such a transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. The mere fact that the Government needs title to property within the boundaries of a State, which may be acquired irrespective of the consent of the State (*Kohl v. United States,* 91 U.S. 367, 371, 372, 23 L. Ed. 449, 451), does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction." To the same effect 91 C.J.S., United States, p. 22; 54 Am. Jur., United States, p. 601.

Upon the facts found by Judge Cowper the decision in *Adams v. United States,* 319 U.S. 312, 87 L. Ed. 1421, is directly in point and controlling in this respect, since the United States Government has not accepted jurisdiction in the manner required by the Federal Act above quoted, the Federal Court has no jurisdiction to try the defendant for the offense with which he is charged in the indictment here.

In the *Adams* case the three defendants were soldiers, and were convicted under 18 U.S.C.A., sections 451, 457, 7 F.C.A., title 18, sections 451, 457, in the Federal District Court for the Western District of Louisiana for the rape of a civilian woman. The alleged offense occurred within the confines of Camp Claiborne, Louisiana, a government military camp on land to which the government had acquired title at the time of the crime. The ultimate question for the Court to decide

was whether the camp was, at the time of the crime, within the federal criminal jurisdiction. The Court in its opinion summarized in part, and quoted in part, the provisions of 40 U.S.C.A., sec. 255, which we have quoted above, and then said:

"Since the Government had not given the notice required by the 1940 Act, it clearly did not have either 'exclusive or partial' jurisdiction over the camp area. The only possible reason suggested as to why the 1940 Act is inapplicable is that it does not require the government to give notice of acceptance of 'concurrent jurisdiction.' This suggestion rests on the assumption that the term 'partial jurisdiction' as used in the Act does not include 'concurrent jurisdiction.'

"The legislation followed our decisions in *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A.L.R. 318; *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 82 L. ed. 187, 58 S. Ct. 233; and *Collins v. Yosemite Park & C. Co.*, 304 U.S. 518, 82 L. ed. 1502, 58 S. Ct. 1009. These cases arose from controversies concerning the relation of federal and state powers over government property and had pointed the way to practical adjustments. The bill resulted from a cooperative study by government officials, and was aimed at giving broad discretion to the various agencies in order that they might obtain only the necessary jurisdiction. The Act created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'

"Both the Judge Advocate General of the Army and the Solicitor of the Department of Agriculture have construed the 1940 Act as requiring that notice of acceptance be filed if the government is to obtain concurrent jurisdiction. The Department of Justice has abandoned the view of jurisdiction which prompted the institution of this proceeding, and now advises us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the act. These agencies co-operated in developing the act, and their views are entitled to great weight in its interpretation. *Cf. Bowen v. Johnston*, 306 U.S. 19, 29, 30, 83 L. ed. 455, 462, 463, 59 S. Ct. 442. Besides, we can think of no other rational meaning for the phrase 'jurisdiction, exclusive or partial' than that which the administrative construction gives it.

"Since the government had not accepted jurisdiction in the manner required by the Act, the federal court had no jurisdiction of this proceeding. In this view it is immaterial that Louisiana statutes authorized the government to take jurisdiction, since at the critical time the jurisdiction had not been taken."

We are now confronted with the question whether the State of North

Carolina by G.S. 104-7 has relinquished sovereignty over the land here acquired by the United States Government on 31 May 1958, on which Rosebay Court apartment, the situs of the crime, is situate, to the extent that the State has no jurisdiction to try the defendant on the indictment here, when the United States Government has not accepted jurisdiction over this area.

The question involved relates to the basic questions of state sovereignty and the cession of sovereign jurisdiction. This is not a controversy between the State and Federal governments over jurisdiction. In essence it is a conflict between the State of North Carolina and one of its residents or citizens, who asserts an immunity from trial in the State Court, asserting that exclusive jurisdiction to try him for the offense charged in the indictment is vested in the Federal Court. It is the positive duty of the State towards its citizens to survive and to survive without unnecessary diminution of its powers. In *Ryan v. State,* 188 Wash. 115, 130, 61 P. 2d 1276, 1283, the question was the interpretation of the ceding Act adopted by the Washington State Legislature relative to the Grand Coulee project. In that case the Court said: "But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the State has relinquished its sovereignty."

The Supreme Court of Montana said in *Valley County v. Thomas,* 109 Mont. 345, 374, 97 P. 2d 345, 360: "A ceding Act must not be so construed as to make possible a no-man's land within the boundaries of the state."

In *United States v. Unzeuta,* 281 U.S. 138, 74 L. Ed. 761, the Court said: "No sovereign power which the community has an interest in preserving undiminished will be held to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken."

This is said in *Haggar Co. v. Helvering,* 308 U.S. 389, 84 L. Ed. 340: "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."

This Court said in *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505: ". . . It is further and fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded."

In *Atkinson v. State Tax Commission of Oregon,* 303 U.S. 20,

82 L. Ed. 621, the Court on appeal from the Supreme Court of Oregon quoted with approval this language of the State Court: "The mere fact that there may be on the statute books of the state a general law, such as section 60-1303, Oregon Code 1930, consenting to the purchase of land by the United States and granting to the national government the right to exercise exclusive jurisdiction thereover, does not imply that over all lands purchased by the national government in the state after the enactment of such law the state is divested *ipso facto* of sovereignty, and exclusive control over the acquired area is assumed by the federal government." In that case, the exclusive jurisdiction had been offered by the State but not assumed. The Supreme Court of the United States further on in this opinion states: "If, however, exclusive jurisdiction, although offered, was not accepted by the United States, there is no warrant for the conclusion that the State did not retain its territorial jurisdiction over the area in question so far as its exercise involved no interference with the carrying out of the federal project."

G.S. 104-7 cedes exclusive jurisdiction to the United States over the land acquired by the United States Government on 31 May 1958, on which land Rosebay Court apartment is situate, but the statute and the State of North Carolina cannot compel the United States to accept such jurisdiction over this area, and it has not done so. The only reasonable interpretation and application of G.S. 104-7, consistent with its words and legislative purpose, when the United States Government has not accepted the exclusive jurisdiction over the area ceded by the statute, is that the statute is not applicable and the State retains "its territorial jurisdiction over the area in question so far as its exercise involved no interference with the carrying out of the federal project," and the trial, conviction and judgment imposed upon defendant by the State Court for the felony of assault with intent to commit rape upon Emma Estelle Harrison is no such interference. To hold that G.S. 104-7 has divested the State Court of jurisdiction in this case, when the United States has not accepted jurisdiction, as it has the power to do, would create a no-man's land within the boundaries of Craven County, in which area persons could commit crimes with immunity, because neither the Federal nor State Courts would have any jurisdiction to try them for their crimes committed within this area. Such an interpretation of the statute would be absurd and ridiculous, and inimical to the public welfare. The State Court had jurisdiction to try defendant on the indictment here, and upon his conviction to impose imprisonment upon him.

Defendant in his petition under our Post-Conviction Hearing Act to review the constitutionality of his trial alleged that his constitution-

al right had been violated because the State withheld or failed to disclose evidence which it had favorable to him. When this proceeding was heard by Judge Morris, he found as a fact that this contention of defendant was without foundation or merit. When the proceeding came on to be heard before Judge Cowper, defendant through his counsel advised Judge Cowper that he is not now pursuing such contention, but was relying upon his contention that the State Court had no jurisdiction. Judge Cowper concluded as a matter of law "that the petitioning defendant having advised the court through counsel that he is no longer pursuing the contention of denial of his constitutional rights on the grounds of evidence being withheld by the State, and no evidence having been offered of same, said defense is deemed to [be] waived and abandoned."

Parties cannot try their cases or proceedings piecemeal. There must be an end of litigation, and where a party has an opportunity to present his case or his defense, and neglects to do so, the law requires that he take the consequences. The law with us is well settled that "a judgment is *res judicata* and bars a subsequent action between the same parties as to all matters actually litigated and determined therein and also as to all matters which properly could have been litigated and determined." Strong's N. C. Index, Vol. 3, Judgments, p. 48, where many of our cases are cited.

The findings of fact support the conclusions of law and the judgment, therefore, the order of Judge Cowper below is

Affirmed.

SALEM REALTY COMPANY, INC. v. W. K. BATSON, TRADING AS W. K. BATSON COMPANY, AND EQUITABLE FIRE AND MARINE INSURANCE COMPANY.

(Filed 2 February 1962.)

1. Evidence § 9—

The burden of proving an affirmative defense rests upon defendant.

2. Trial § 27—

Nonsuit upon an affirmative defense may not be allowed unless plaintiff's own evidence establishes such defense.

3. Contracts § 21; Principal and Surety § 9—

The fact that a contractor performs the contract for the construction of water, sanitary and storm sewer lines in accordance with the specifications and grades designated by the contractee's engineers does not

estop the contractee from recovering against the contractor and the surety on its bond for defective conditions in the underground work caused by faulty construction and workmanship, nor is the contractor or surety entitled to nonsuit on the ground that the contractee's inspector could have discovered the defects in the exercise of due diligence when the ability of the inspector to have thus discovered such defects is not established by plaintiff's evidence, or otherwise.

4. Same—

The fact that the contractee accepts the work in the honest but mistaken belief that the contractor had satisfactorily performed his contract and advised the surety that the work had been satisfactorily completed, does not estop the contractee from asserting claim for damages for a latent defect in workmanship and construction.

5. Principal and Surety § 9—

The bond and the construction contract it is given to secure will be construed together.

6. Same—

The obligation of a surety is primary, and he is equally bound with the principal.

7. Contracts § 12—

The primary purpose in construing a contract is to ascertain the intention of the parties.

8. Same—

Ambiguity in a written contract is to be construed against the party who prepared the writing.

9. Principal and Surety § 9—

Where a contract for the construction of water, sanitary, and storm sewer lines provides that the work should be done according to the written specifications and in accordance with the standards and workmanship required by the municipality, the surety may be held liable for loss resulting from failure of the work to meet the municipality's requirements because of defects in the construction and workmanship.

10. Same—

The failure of the contractee to retain the full amount specified in the contract to be retained from payment to the contractor does not entitle the surety to a credit *pro tanto* when the payments have been made by the contractee under the honest but mistaken belief that the contractor had satisfactorily completed the work, the defects being latent, and the surety's motion for nonsuit on the affirmative defense of such overpayment is properly denied when the contractee's evidence does not establish as a matter of law that it was negligent in failing to discover the defects before accepting the work and paying the contractor without retaining the percentage of the contract price specified.

11. Same—

Where the contract for the construction of water, sanitary, and storm

sewer lines for a development stipulates that the work should be done in accordance with the standards prescribed by a specified municipality, a printed pamphlet released by the city and containing its specifications for such construction, is material and properly admitted in evidence, irrespective of whether the contractor and the contractee had examined or read the booklet prior to executing the agreement.

APPEAL by Equitable Fire and Marine Insurance Company from *Crissman, J.*, January 23, 1961 Term of FORSYTH.

Civil action to recover for breach of contract and of bond executed for the faithful performance thereof.

Plans and specifications for a real estate development on plaintiff's property in Winston-Salem were prepared for plaintiff by Mr. Burns, a private engineer, and approved by the proper Winston-Salem authorities. Thereafter, under date of March 19, 1957, defendant Batson entered into a contract with plaintiff for the installation of water and sewer lines in plaintiff's said development. Under date of March 29, 1957, Batson, as principal, and Equitable Fire and Marine Insurance Company (hereinafter called Equitable), as surety, executed and delivered to plaintiff a bond in the amount of $46,536.35, conditioned on Batson's faithful performance of said contract.

The said contract, in which Batson is designated "Contractor" and plaintiff is designated "Owner," provides:

> "Section 1. The Contractor agrees to perform all work as described in Section 2 hereof for Project Development — Utilities for Salem Realty Co., Inc. hereinafter called the Owner, at Winston-Salem, North Carolina, in accordance with the General Conditions of the Contract and in accordance with the drawings and the Specifications, approved by the City of Winston-Salem, N. C., hereinafter called the Architect, all of which General Conditions, Drawings and Specifications signed by the parties thereto or identified by the Architect, form a part of a Contract between the Contractor and the Owner, and hereby become a part of this Contract.
>
> "Section 2. The Contractor and the Owner agree that the work to be done by the Contractor is:
>
> "Furnish all labor, equipment and services necessary to complete all water, sanitary and storm sewer lines, as shown on Owner's drawing, and in accordance with the standards and workmanship required by the City of Winston-Salem, N. C. The Owner shall furnish all grades and engineering required for the completion of the work."

Section 3 contains a schedule of unit prices plaintiff agreed to pay

Batson for work installed. It was agreed that plaintiff was to pay for all materials.

"Section 4. The Owner and Contractor agree to be bound by the terms of the Agreement, the General Conditions, Drawings and Specifications as far as applicable to this contract, and also by the following provisions:

"The Contractor agrees:

"(a) To furnish the Owner a performance bond and insurance certificates to cover the work on this contract.

"The Owner agrees:

"(a) To pay the Contractor periodical monthly estimates on work in place to the extent of 90% of the value of said work. Said payments to be made by the 10th of the month following completion of work.

"(b) To pay all retainages and final estimates on the 10th of the month after completion and acceptance of work by the engineers.

"(c) To allow the contractor to approve all material purchases."

Plaintiff alleged that, when inspected by the proper authorities of the City of Winston-Salem, defects in Batson's work were detected; that, although Batson and Equitable were notified thereof, they refused to correct the defective work; and that plaintiff had spent $5,942.69 in correcting certain of said defects and estimated at least $5,000.00 more would be required to complete the correction of all defects.

Plaintiff alleged that, with the exception of $500.00, it had paid Batson the full amount called for by said contract; and that it was entitled to recover actual damages in the amount of $10,942.69 and special damages (resulting from the delay caused by Batson's alleged defective work) of not less than $10,000.00, its recovery to be reduced by said sum of $500.00.

Batson, answering, denied he had breached his contract with plaintiff; and, as a counterclaim, alleged he was entitled to recover from plaintiff said balance of $500.00.

Equitable, answering, denied Batson had breached his contract with plaintiff and alleged the further defenses considered in the opinion.

The court submitted and the jury answered the following issues:

"1. Did the defendant W. K. Batson fail to perform his contract with the plaintiff, as alleged in the Complaint? ANSWER: Yes.

"2. What amount, if any, is the plaintiff entitled to recover from the defendants? ANSWER: $5,000.00.

"3. What amount, if any, is the defendant W. K. Batson entitled to recover on his Counterclaim? ANSWER: $500.00."

After setting forth the verdict, the judgment provides:

"It was stipulated by counsel that the amount, if any, found by the jury to be due the defendant W. K. Batson under the third issue should be subtracted by the Court from the amount, if any, found by the jury to be due the plaintiff under the second issue.

"It was further stipulated by counsel that, without submitting an issue to the jury thereon, the Court should determine as a matter of law, subject to the right of any party to except to the Court's conclusion, what amount, if any, should be subtracted from the jury's answer to the second issue in rendering judgment against the defendant Equitable Fire and Marine Insurance Company on account of the provision in Section 4 of the contract relating to the portion of the contract price to be retained by the plaintiff under the completion and acceptance of the work by the engineers, the undisputed evidence being that the total payments due to the defendant Batson for full performance of the contract were $19,-116.48. The Court concluded, as a matter of law, that the amount to be so subtracted from the answer of the jury to the second issue is 10% of the total payments to be made under the contract, which, including the said $500.00 retained by the plaintiff amounts to $1,911.65.

"IT IS THEREFORE ORDERED AND ADJUDGED:

"(1) That the plaintiff have and recover of the defendant W. K. Batson the sum of $4,500.00 with interest thereon at six per cent per annum from the date of this judgment;

"(2) That the plaintiff have and recover of the defendant Equitable Fire and Marine Insurance Company the sum of $3,-088.35 with interest thereon at six per cent per annum from the date of this judgment;

"(3) That the total to be recovered by the plaintiff from both defendants under the terms of this judgment is $4,500.00 with interest thereon at six per cent from the date of this judgment, for which total sum the defendant W. K. Batson, as principal, is primarily liable and the defendant Equitable Fire and Marine Insurance Company, as surety, is secondarily liable, to the extent of $3,088.35, with interest, and no more, and upon payment by the defendant Equitable Fire and Marine Insurance Company to the plaintiff of the amount herein adjudged to be recoverable by the plaintiff from it, it shall have and recover the amount of such payment from the defendant W. K. Batson and, to the extent of

such payment by it, it shall succeed to and have all of the rights of the plaintiff against the defendant W. K. Batson under this judgment, subject, however, to the prior right of the plaintiff to recover the remainder of the total sum of $4,500.00 with interest from the defendant W. K. Batson;

"(4) The defendants shall pay the costs of this action to be taxed by the Clerk."

Equitable excepted and appealed, assigning errors.

Wood & Stone for plaintiff appelle.

Fletcher, Lake & Boyce for defendant Equitable Fire & Marine Insurance Company, appellant.

BOBBITT, J. Equitable contends the court erred (1) in overruling its motion for judgment of nonsuit, and (2) in rulings relating to certain evidence.

The original contours of the land had been leveled by "cuts" and "filling in," and the streets had been rough-graded but not paved, when Batson's work began.

R. W. Clayton, plaintiff's secretary and general manager, executed said contract in plaintiff's behalf and acted for plaintiff in its dealings with Batson. Clayton testified Batson began work "the latter part of April or in May, 1957, and . . . stopped the actual machine work, the covering up and all in the latter part of June or July, 1957." Batson testified he began work on April 7, 1957, or on April 9, 1957, and "finished up" on June 19, 1957, and moved his equipment away; that, after the curbs and gutters had been put in, he went back "for a couple of days" to adjust the water meters on the service lines and sewer stacks; that these adjustments were made "in July, or the first of August, of 1957"; and that, immediately after these adjustments were made, he received from plaintiff (August 6, 1957) a payment of $6,000.00.

At first Burns, the engineer who had prepared plaintiff's overall plans, and later Jones, did the surveying, laid out the lines and furnished the grades from the drawings covering this job.

Batson testified he submitted two estimates. The first, payable May 10, 1957, was for $10,215.00. The second (final), submitted June 22, 1957, was for $19,166.48, which included the $10,215.00. (Note: It was stipulated that $19,116.48 was the correct total amount due Batson.)

Clayton testified plaintiff paid Batson as follows: $8,000.00 on May 14, 1957; $2,500.00 on July 1, 1957; $6,000.00 on August 6, 1957; $1,000.00 on September 17, 1957; $666.48 on December 10, 1957; and

$500.00 on April 7, 1958. (Note: Plaintiff admitted it owed Batson a balance of $500.00. The record contains no explanation as to why this amount was not paid to Batson.)

Equitable offered in evidence a paper writing entitled "CONTRACT STATUS INQUIRY," bearing date of September 6, 1957. This inquiry, addressed by Equitable to plaintiff, requested information relevant to the bond executed by Equitable as Batson's surety. Questions thereon and the answers thereto (executed in plaintiff's behalf by Clayton) are as follows: "Has work been completed and accepted (yes or no) Yes. If not completed approximate percentage done . . . Approximate amount paid contractor to date ..... Amount of retained percentage $2,666.48. Has work progressed satisfactorily to date: Yes. So far as you know are labor and material bills paid to date: Materials furnished by owner."

With reference to said paper writing, Clayton testified: "On September 6, 1957, I signed and returned to Mr. Batson a paper stating that the job had been completed and I accepted it. When Mr. Batson brought me this paper here, stating that the work had been finished, and so far as he knew in good shape, and I didn't know at that time that it wasn't in good shape, I agreed with him; I was satisfied that it was in good shape. It seems that at that time my company held $2,666.48 due to Mr. Batson by the terms of the contract; I so stated in that paper."

No defects in Batson's work were reported to Clayton by Burns or by Jones. There is no evidence that either Burns or Jones had knowledge of any faulty construction or workmanship. Plaintiff testified that Jones, plaintiff's engineer, reported to him "that the work had been done"; and that he made said payments to Batson "(i)n reliance upon what Mr. Jones had told (him)." Clayton was not advised of any defects until the City refused to approve the paving of the streets, approximately a year after Batson had finished his work.

In June or July of 1958, to determine whether plaintiff would be permitted to proceed with the paving of the streets, an inspection was made by Berrier, Street Superintendent of Winston-Salem, and by Pettit, an Inspector for Berrier. By this inspection, according to their testimony, they discovered defects in the underground work installed by Batson (storm sewer lines, manholes and catch basins); and that Batson's work, in enumerated particulars, was not "in accordance with the standards and workmanship required by the City of Winston-Salem, N. C."

Batson, at Berrier's request, met Berrier at the work site. Berrier pointed out the conditions he considered defective. According to Berrier, Batson (whose place of business was in Charlotte) stated he

had brought only one man with him; that he did not anticipate the work to be done was so extensive; and that he would come back the next week and make adequate corrections. Berrier testified further that Batson later telephoned him and then stated he had decided not to come back and do the work; and that Batson gave as a reason for this decision his inability to collect from plaintiff the $500.00 balance due him under the contract. Berrier and Pettit testified in detail as to the defective conditions plaintiff was required to have corrected before it could go forward with the paving of the streets. Plaintiff's evidence tends to show it expended $6,925.09 to have made the corrections pointed out by Berrier and Pettit.

Batson contended and offered evidence tending to show: (1) that all work was done in strict accordance with instructions received from Burns and Jones, plaintiff's engineers; (2) that certain of the changes required by the City officials related to the elimination of curves in pipelines laid in accordance with instructions of plaintiff's engineers and to the re-laying of pipelines at depths different from those designated by plaintiff's engineers; and (3) that certain of the work required by the City officials related to matters not covered by the plans furnished by plaintiff to Batson. Even so, there was ample evidence to support findings that, in certain respects, Batson's construction and workmanship were faulty. While Batson's said contentions are noted, the questions presented by Equitable on this appeal do not relate to whether Batson breached his contract in respect of designated particulars. Rather, the question now presented is whether Equitable's motion for judgment of involuntary nonsuit should have been allowed.

Batson's breach of said contract and plaintiff's damages are established by the verdict. Equitable, to support its motion for judgment of nonsuit, must rely upon matters alleged in its further defenses. In this connection, it is noted that the burden of proof rests upon Equitable to establish one or more of its alleged affirmative defenses. *Aldridge Motors, Inc., v. Alexander,* 217 N.C. 750, 756, 9 S.E. 2d 469. Since no issue was submitted or tendered with reference thereto, the question, in respect of nonsuit, is whether plaintiff's evidence establishes any of Equitable's affirmative defenses.

In its answer, Equitable alleged that Batson had fully performed said contract and that plaintiff had advised Equitable in writing on September 6, 1957, "that the work had been completed and accepted and had progressed satisfactorily." As a further defense, Equitable alleged: Batson laid the pipe in accordance with the lines and grades designated by plaintiff's engineers and plaintiff is estopped to assert any claim on account thereof.

Equitable, apparently after verdict, moved for leave to amend its

complaint by alleging: (1) As a second further defense: Plaintiff, by its reply on September 6, 1957, to Equitable's "CONTRACT STATUS INQUIRY," is estopped to assert a claim against Equitable on account of Batson's alleged failure to perform said contract. (2) As a third further defense: Plaintiff accepted Batson's work as complete and satisfactory and paid Batson, with the exception of $500.00, the balance due according to the final estimate; and, by reason of plaintiff's said payments to Batson in disregard of its duty to retain these amounts until Batson had satisfactorily completed the work, Equitable is entitled to a credit of $9,922.98 against any claim plaintiff might have against Batson. (Note: Equitable's *alleged* credit of $9,922.98 consists of $1,021.50, 10% of the first estimate, plus $8,901.48, the amount due for the work covered by the final estimate.)

The record contains no order or ruling allowing or disallowing Equitable's said motion. However, Equitable's exceptions include an exception to the court's denial of its motion "for permission to amend its answer as appears in the record." Equitable contends the amendment merely conforms its pleading to the proof and should have been allowed and in its brief moves that this Court now allow its said motion.

For present purposes, we shall treat the amendment as allowed and consider the evidence in relation to Equitable's alleged further defenses, including the second and third further defenses alleged in said amendment.

In respect of Equitable's first further defense, Batson's evidence tends to show the installations *were located* as laid out by plaintiff's said engineers. However, even if this were established, it would not relieve Batson from liability for defective conditions in the underground work caused by faulty construction and workmanship. Jones identified his vocation as "land surveyor." Equitable suggests that Jones, after all the pipe was covered, could have discovered defective conditions, as detected later by Berrier and Pettit, "by visual inspection through simply getting into the manholes and catch basins, looking at them and looking through the pipelines entering them by means of flashlight and mirror." Certainly, the ability of Jones to detect defective conditions in the underground work by such so-called simple means is not established by plaintiff's evidence or otherwise.

In respect of Equitable's second further defense, it is noted that plaintiff had made all payments to Batson, except as to $2,666.48, when plaintiff received and answered Equitable's "CONTRACT STATUS INQUIRY." In our view, plaintiff's answers to this inquiry simply confirmed the admitted fact that plaintiff, based on the as-

surances of Batson and of Jones, acted in the honest (but mistaken) belief that Batson had satisfactorily performed his contract.

We consider now Equitable's third further defense.

It is well settled that, where a bond is given to secure the faithful performance of a construction contract, the contract and the bond must be construed together. *Builders Corp. v. Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155, and cases cited; *Edgewood Knoll Apartments v. Braswell*, 239 N.C. 560, 572, 80 S.E. 2d 653, rehearing denied, 240 N.C. 760, 83 S.E. 2d 797.

Equitable contends that plaintiff had the right, and that its duty to the surety required, that plaintiff withhold payment of the $9,922.98 "until completion and acceptance of the work by the engineers." Equitable cites *Ins. Co. v. Durham County*, 190 N.C. 58, 128 S.E. 469; *Mfg. Co. v. Blalock*, 192 N.C. 407, 135 S.E. 136, and *Crouse v. Stanley*, 199 N.C. 186, 154 S.E. 40. In the cases cited, the contractor defaulted and abandoned the job and the surety was called upon to complete the job. In such cases, it is held the surety has a substantial right in contractual provisions authorizing the owner to retain certain percentages of the amount due as progress payments for completed work. In short, the surety is held entitled to a credit to the extent the owner makes *premature* payments, that is, payments in excess of the amount the contractor is entitled to receive as progress payments on account of completed work. In our view, these decisions are not controlling. Here, no question arises as to the quantity of work done by Batson. Rather, the defects relate to faulty construction and workmanship.

"The obligation of a surety is primary, and the surety becomes bound as an original debtor is bound. He is directly and equally bound with his principal." *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413, 53 A.L.R. 2d 517, and cases cited; *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323.

In *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906, *Stacy, C.J.*, says: "The heart of a contract is the intention of the parties." Again: "It is also a rule of construction that an ambiguity in a written contract is to be inclined against the party who prepared the writing. *Wilkie v. Ins. Co.*, 146 N.C. 513, 60 S.E. 427."

Batson prepared the contract. In Section 2, it is expressly provided that the water, sanitary and storm sewer lines are to be constructed by Batson, first, "as shown on Owner's drawing," and *second*, "in accordance with the standards and workmanship required by the City of Winston-Salem, N. C." Clearly, it was contemplated that Batson's work was to be performed in accord with the City's requirements.

The crucial question is whether plaintiff's acceptance of Batson's work and payment therefor under the honest (but mistaken) belief

that Batson had fully performed his contract, released the surety *pro tanto,* that is, to the extent of the amount plaintiff was entitled to retain prior to completion and acceptance of Batson's work.

"Where work is accepted with knowledge that it has not been done according to the contract or under such circumstances that knowledge of its imperfect performance may be imputed the acceptance will generally be deemed a waiver of the defective performance. But this rule does not apply to latent defects. The acceptance of work which has been defectively done, the defects being unknown and not discoverable by inspection, does not amount to a waiver of the imperfect performance." 12 Am. Jur., Contracts § 355. Annotation: 109 A.L.R. 625, *628.* In *City of Seaside v. Randles* (Oregon), 180 P. 319, it is stated: "An acceptance of work done under a construction contract does not constitute a waiver of latent defects of which the owner was ignorant at the time, or which may appear thereafter." In the cited Oregon case, defects in a sewer system were held latent defects.

Consideration of the evidence leads to the conclusion that the defects referred to in the evidence may properly be considered latent defects. It may be that Berrier or Pettit or other qualified inspectors could have discovered all or certain of such defects if they had been called upon to make such inspection immediately after Batson had completed his work and before acceptance by plaintiff and plaintiff's payments to Batson. Equitable contends that plaintiff should have required such inspection before such acceptance and payments. Hindsight suggests that this should have been done. However, plaintiff's evidence does not establish as a matter of law that it was negligent in this respect.

In *Mayor, etc., City of Newark v. New Jersey Asphalt Co.* (N.J.), 53 A. 294, referring to the defendants' plea that they (the contractor and surety) were discharged on account of acceptance and payment by the City of Newark, the court said: "The plea, to be a complete bar, must go further, and allege that the plaintiff accepted and paid for such work before suit brought, with knowledge of the facts alleged as breaches in the declaration. A surety on such a bond as the one here sued upon can be released only by some positive act done by the plaintiff to the prejudice of the surety, as acceptance and payment with knowledge would be, or some negligent act which will imply connivance amounting to fraud. The payment by a city on work accepted by it under an honest belief that it was done in the manner required by the contract will not release a surety. Prejudicial action or fraud will not be inferred where no facts appear to justify it."

The conclusion reached is that plaintiff's evidence does not establish as a matter of law any of Equitable's said further defenses. Hence, Equitable's motion for judgment of nonsuit was properly overruled.

The second question presented by Equitable is based on its exception to the court's denial of its motion to strike from the evidence plaintiff's Exhibit 2. Plaintiff's Exhibit 2 consists of pages 23 and 24 of a booklet captioned, "CITY OF WINSTON-SALEM, N. C., DEPARTMENT OF PUBLIC WORKS STANDARD SPECIFICATIONS FOR PUBLIC WORKS CONSTRUCTION, 1954." Plaintiff's Exhibit 2 was admitted, without objection, when identified by Berrier as the City's standard specifications "for the construction of a storm sewer or drain pipes in street construction." Equitable's motion to strike was made after Clayton had testified he did not know whether he and Batson had or discussed Exhibit 2 at the time the contract was executed. Be that as it may, to determine whether Batson had performed his work "in accordance with the standards and workmanship required by the City of Winston-Salem, N. C.," the standard specifications of the City of Winston-Salem for such work were material and competent. In our view, the court properly denied Equitable's said motion.

It is noted that the judgment against Equitable is for $3,088.35, the court having allowed a credit of $1,911.65. Plaintiff did not except or appeal. Suffice to say, the allowance of this credit of $1,911.65 was not unfavorable to Equitable.

No error.

BESSIE LEE REYNOLDS v. J. C. CRITCHER, INC., AND ASHEVILLE CONTRACTING CO., INC., AND NELLO L. TEER CO.

AND

MICHAEL G. REYNOLDS v. J. C. CRITCHER, INC. AND ASHEVILLE CONTRACTING CO., INC., AND NELLO L. TEER CO.

(Filed 2 February, 1962.)

Highways § 7—

A contractor barricading that portion of a highway under construction and placing a sign pointing to another road as a detour may not be held liable for injury to motorists resulting from a defect in a secondary road, used as a detour, which is under the exclusive supervision and control of the State Highway Commission. G.S. 136-51, G.S. 136-25.

APPEAL by plaintiffs from *Campbell, J.*, May Term 1961 of BUNCOMBE.

These actions were consolidated for trial without objection. The actions arose out of an accident which occurred on Dark Ridge Road in Jackson County, North Carolina, on 24 July 1957.

Bessie Lee Reynolds, plaintiff in one of the actions, was the driver of a 1956 Oldsmobile involved in the accident. Her husband, Michael G. Reynolds, plaintiff in the other action, was the owner of the Oldsmobile and a passenger therein at the time of the accident.

The defendants are road construction contractors. At the time of the accident they were engaged in relocating and rebuilding U. S. Highway 19A-23 between Balsam Gap and Sylva in Jackson County, North Carolina. The contract of the defendant Nello L. Teer Co., subcontracted to the Asheville Contracting Co., Inc., began at a point in Sylva and extended 6.95 miles in an easterly direction to a point 1.2 miles northeast of Willets. The contract of the defendant J. C. Critcher, Inc., began at that point and extended 2.95 miles in an easterly direction to a point 774 feet west of the Jackson-Haywood County line.

The complaints are identical in their material allegations. It is alleged in essence that plaintiffs, out-of-State tourists, were traveling in a westerly direction on U. S. Highway 19A-23; that when they reached the easternmost point of the road construction work being done by the defendants, they were halted by a barricade placed across the road by the defendants, and directed to Dark Ridge Road as a detour; that Dark Ridge Road was a dangerously narrow winding dirt road cut into the side of a mountain; that the plaintiffs had never before traveled over this road and were unfamiliar with its dangers; that at one particularly unsafe place, plaintiff Bessie Lee Reynolds, while driving on the side of the road away from the mountain, brought her car to a stop, or almost to a stop, with the right wheels approximately two feet from the outer edge of the road, in order to allow a car coming in the opposite direction to pass; that the outer edge of the road gave way under the right rear wheel and the car rolled down the mountainside landing on railroad tracks 50 feet below, resulting in serious injuries to both plaintiffs and damages to the automobile.

The plaintiffs seek to hold the defendants liable on the theory that the defendants were under a duty, imposed by the terms of their contracts with the State Highway Commission, as well as the provisions of G.S. 136-25, to select and maintain detours around the construction work, to give explicit directions to the traveling public concerning the use of such detours, erect barricades, danger signs, etc., and other warnings, and to remove hazardous conditions from the detours. It was alleged that the negligent breach of such duties was the proximate cause of plaintiffs' injuries.

The plaintiffs' evidence tends to show that plaintiffs left Asheville on the morning of 24 July 1957 with the intention of going to Cherokee.

They proceeded on U. S. Highway 19-23. Near Lake Junaluska, U. S. Highway 19 goes to the right and 19A-23 to the left into Waynesville. There was a sign in the forks of the road, placed there by the State Highway Commission, which read: "U. S. 19 A AND 23 CLOSED BETWEEN BALSAM GAP AND SYLVA. DETOUR TO SYLVA AND ATLANTA, GA. VIA CHEROKEE U. S. 19 AND 441. 39 MILES PAVED." There was an arrow on the sign, pointing to the right. A similar sign was placed in Waynesville. The plaintiffs did not take the detour, but proceeded on 19A-23 through Waynesville to Balsam Gap until they came upon a barricade placed across the road just west of the junction of 19A-23 and Balsam Road. The barricade prevented traffic from entering the road under construction by the defendant J. C. Critcher, Inc. There was an arrow on the barricade pointing to the left towards Balsam Road. The plaintiffs proceeded up this road for a short distance before turning onto the Dark Ridge Road, directed by a sign with the word "Sylva" written on it. The accident occurred on Dark Ridge Road. The plaintiffs introduced evidence tending to show that a portion of the outer edge of the road along which the plaintiffs were traveling gave way, which was the cause of the accident.

It further appears from the plaintiffs' evidence that Dark Ridge Road runs roughly parallel to U. S. Highway 19A-23 for a distance of approximately four miles before intersecting the State Highway just east of Willets. It was stipulated by the parties that Dark Ridge Road is a part of the State's secondary road system and was maintained by the Highway Commission prior to and during the construction work on 19A-23 by the defendants, and has been so maintained since the completion of that work.

At the close of plaintiffs' evidence, defendants interposed motions for judgments as of nonsuit as to each action and the motions were granted. The plaintiffs excepted to said judgments and appeal, assigning error.

Buckmaster, White, Mindel & Clarke; Samuel D. Hill; Coward & Coward; Styles & Styles for plaintiffs.

Uzzell & DuMont for appellee J. C. Critcher, Inc.

Williams, Williams & Morris for appellee Asheville Contracting Co., Inc.

Ward & Bennett for appellee Nello L. Teer Co.

DENNY, J. The crucial question to be determined on this appeal is whether the defendants, or any of them, were under a duty, imposed by the terms of their contracts with the State Highway Commission,

or by statutory or other legal provision, to maintain Dark Ridge Road in a safe condition at the time of the plaintiffs' accident.

It is provided in Article Two of the contracts of both Nello L. Teer Company and J. C. Critcher, Inc. with the State Highway Commission, that: "It is understood and agreed by and between the parties hereto that all the construction and work included in this contract is to be done in accordance with the Specifications contained in published volume entitled 'North Carolina State Highway and Public Works Commission, Raleigh, Standard Specifications for Roads and Structures, October 1, 1952,' and supplements thereto, except as herein modified and under the directions of the Engineer of the Commission and that his decision as to the true construction and meaning of the said proposal, plans and specifications, shall be final. * * *"

North Carolina State Highway and Public Works Commission, Raleigh, Standard Specifications for Roads and Structures, October 1, 1952, contains, at page 19, the following provisions relative to the maintenance of traffic during construction: "Section 4.5. The existing road included in the project shall be kept open to public traffic at all times by the contractor while undergoing construction, unless otherwise stated in special provisions.

"The contractor shall, at his own expense, build and maintain in a safe condition temporary approaches, crossings over pavements, intersections with roads, trails, etc., *and such necessary detours to properly care for both local and through traffic during the construction of the project.* He shall also provide and place such explicits *(sic)* directions, or signs that traffic may be properly informed at all times. (Emphasis added.)

"Where so provided on the plans or in special provisions, through traffic will be detoured over approved routes when it is impossible to keep the project open because of construction operations. *Such detours will be maintained by the Commission unless otherwise provided in special provisions.* (Emphasis added.)

"The contractor shall bear all expense of constructing and maintaining in safe, passable, and convenient condition such part or parts of existing roads as are being so used between extreme limits of the work under contract during the entire time from the date working days begin or from the time the contractor moves in on the project, whichever is first, until the final acceptance of the work hereunder, and all such existing road and parts thereof and structures thereon shall be under the jurisdiction of the contractor and he shall be liable therefor. * * *"

The contract of Nello L. Teer Company with the State Highway Commission contains the following special provisions: "MAINTE-

NANCE OF TRAFFIC: The Contractor will be required to take care of highway traffic at the beginning and end of this project and at all road crossings and local traffic on the project in accordance with Section 4.5 of the specifications. He shall place and maintain such signs, danger lights and furnish watchmen or flagmen to direct traffic, as in the opinion of the Engineer may be necessary. The Contractor shall indemnify and save harmless the Commission and all its officials, agents and employees, from all suits, actions or claims of any character, name or description brought for or on account of any injuries or damages received or sustained in consequence of any neglect in maintaining traffic as specified."

The contract of J. C. Critcher, Inc. with the Commission contains the following special provision: "MAINTENANCE OF TRAFFIC: Through traffic on this project will be detoured. The contractor will be required to take care of local traffic."

The clear import of both contracts is that the contractor is relieved of all responsibility for the maintenance of traffic beyond the extreme limits of the work under construction. The State Highway Commission assumed responsibility for detouring traffic around the project. The contractors were responsible for the maintenance of local traffic. Local traffic includes those vehicles which are required to enter on the project itself or to use road crossings on the project in order to reach their destination.

The plaintiffs rely upon G.S. 136-25 and the case of *Hughes v. Lassiter*, 193 N.C. 651, 137 S.E. 806, decided pursuant thereto, as authority for their contentions.

G.S. 136-25 provides: "It shall be mandatory upon the State Highway Commission, its officers and employees, or any contractor or subcontractor employed by the said Commission, to select, lay out, maintain and keep in as good repair as possible suitable detours by the most practical route while said highways or roads are being improved or constructed, and it shall be mandatory upon the said Commission and its employees or contractors to place or cause to be placed explicit directions to the traveling public during repair of said highway or road under the process of construction. All expense of laying out and maintaining said detours shall be paid out of the State Highway Fund."

In *Hughes v. Lassiter, supra,* the defendant contractor was constructing a hard-surface road between Aberdeen and Pinehurst. The plaintiff, on his way from Parkton to a village near Albemarle, passed through Aberdeen and proceeded about three miles down the road under construction before being stopped by an employee of the defendant. He was directed to turn around, and take a detour some 200 yards up

the road. In taking this detour, the plaintiff had to cross a railroad. On the return trip that afternoon, the plaintiff undertook to make the same detour. In crossing the railroad, the wheels of his automobile fell into ruts cut in the sand by vehicles passing during the day, causing the engine to fall from his automobile, breaking it to pieces. The plaintiff's evidence was to the effect that he saw no detour signs at either end of the construction project, and further, that other cars were using the route pointed out to him as a detour. The evidence also indicated that the site of the accident was a temporary crossing used by the defendant in connection with the work being done on the hard-surface road. The lower court found the defendant liable for negligent failure to maintain the crossing in reasonable repair, and awarded damages to the plaintiff. This Court affirmed, holding that the plaintiff's evidence was sufficient to withstand defendant's motion to nonsuit. *Clarkson, J.*, speaking for the Court, said: "The statute (C.S. 3846, now G.S. 136-25) made it the duty of both the State Highway Commission and the contractors, when the public highways of the State are being improved and constructed, to select, lay out, maintain and keep in as good repair as possible *suitable detours* by the most practical route. The further duty of both to place or cause to be placed *explicit directions to the traveling public.* * * *

"In compliance with this positive legislation, the State Highway Commission required defendants, in its contract for improving the road, as it should do, to provide, erect, maintain and illuminate (and finally remove same) barricades, danger and detour signs, *necessary to properly protect and direct* traffic. Defendants by contract assumed this vital and important duty to the traveling public. At the mouth, or forks of the road, and nowhere in the public highway that was to be improved, the distance of some three miles, were there any barricades put up to warn or stop travelers on this public highway. For them the door was wide open and they were invited to come in, and they went in. * * *

"This road, contended by plaintiff as a *detour road,* was in plain view of all the agents and employees connected with the work being done by the defendants, contractors. According to the evidence of plaintiff, it was being used constantly by the public with automobiles, trucks, etc. It crossed the railroad, a place made for the purpose, but no timbers or planks were placed to keep the wheels of automobiles or vehicles from falling between the cross-ties. * * *

"Under the general State law, as well as the express contract entered into by the defendants with the State Highway Commission, it was the defendants' duty to use due or ordinary care to keep the railroad crossing, under all the facts and circumstances of this case, in a reasonably safe condition. * * *"

In *Hughes v. Lassiter, supra,* the accident occurred at a temporary railroad crossing used in connection with the construction project. The detour which the plaintiff was directed to use was not under the supervision of the State Highway Commission or any other public agency. The only party charged with the maintenance of that detour was the contractor who was doing the road construction work. Moreover, it was not a detour around the construction project, but intersected the road under construction some three miles from the point where the construction work began.

In the consolidated cases now before us, the accident occurred on a secondary road which was under the exclusive control and maintenance of the State Highway Commission. G.S. 136-51 reads in pertinent part as follows: "From and after July first, one thousand nine hundred and thirty-one, the exclusive control and management and responsibility for all public roads in the several counties shall be vested in the State Highway Commission * * *."

The plaintiffs never entered upon that portion of U. S. Highway 19A-23 that was under construction. U. S. Highway 19A-23 had a barricade across it just west of the junction of that highway and Balsam Road. The barricade prevented traffic from entering upon that part of the road under construction by defendant J. C. Critcher, Inc. There was an arrow on the barricade pointing towards Balsam Road which connects with the Dark Ridge Road.

The State Highway Commission by special provision in its contract with the defendants relieved them of any responsibility for the handling of through traffic. Furthermore, the only responsibility these defendants had in connection with any traffic was to detour it at the point where the project began and to handle local traffic when required to enter on the project itself, or to use the road crossings on the project.

It clearly appears from the evidence that defendant J. C. Critcher, Inc. did not have to construct any detour from the point where its project began, but merely had to place a barricade across U. S. Highway 19A-23 just west of the junction of that highway and direct the traffic over Balsam Road.

The State Highway Commission had placed adequate signs at Lake Junaluska and Waynesville, notifying the public that U. S. Highway 19A-23 was closed between Balsam Gap and Sylva, and directed that traffic to Sylva and Atlanta, Georgia, go via Cherokee on U. S. Highway 19 and 441. The evidence further reveals that plaintiffs were on their way from Asheville to Cherokee. Cherokee was only 25 miles from Lake Junaluska over U. S. Highway 19, the detour designated by the State Highway Commission. On the other hand, if U. S. High-

way 19A-23 had not been closed between Balsam Gap and Sylva, the distance from Lake Junaluska to Cherokee by Balsam Gap and Sylva over 19A-23 and Highway 441 was 40 miles.

In *Romney v. Lynch,* 58 Utah 479, 199 P. 974, the defendant under contract with the State Road Commission was constructing a hard-surface roadbed over and along the Clearfield-Sunset Highway in Utah. The contract provided that if it became impossible to maintain the highway in condition for traffic during construction, the defendant should maintain a detour and keep it in good condition at his own expense. It became necessary during the progress of the work to close to traffic a two-mile portion of the highway. The defendant erected a barricade, and directed traffic over a public road under the management and control of the county commissioners of Davis County. The plaintiff, traveling on the Clearfield-Sunset Highway, took the detour according to the defendant's directions. While attempting to pass another vehicle on a narrow portion of the county road, he was precipitated into a ravine, due, as alleged in his complaint, to a defect in the road. The lower court dismissed the plaintiff's complaint, and the Supreme Court of Utah affirmed, holding that the defendant was under no duty to keep in good repair the county road in question, notwithstanding the provisions of his contract with the State Road Commission. The Court said: "It is conceded, as it must be, that the defendant had the right to close that highway for the purpose of making repairs or resurfacing it. * * * What he did do after closing the state road was to give notice or direction to the traveling public that it might detour or pass over the Davis county road, which was under the direction and supervision of the county commissioners of that county. The Davis county road was open to the public, and all who traveled or used it had the right to assume that it was in a reasonably safe condition. In and of itself, the closing of the Clearfield-Sunset Highway had no causal connection with the plaintiff's accident on the Davis county road. That passageway was open and available for travel. The defendant and the plaintiff alike had the right to presume it was properly maintained and reasonably safe. The defendant's contractural relations with respect to the highways were wholly connected with the Clearfield-Sunset Highway. If any legal duty, express or implied, under the facts pleaded in plaintiff's complaint, rested upon the defendant to maintain the Davis county road reasonably safe for travel, then we have indeed entered upon a new field of personal liabilities for judicial investigation and determination. * * *

"Let it be conceded * * * that defendant by his acts in closing the Clearfield-Sunset Highway and directing travel to the Davis county road thereby adopted the latter as a detour, then as a matter of law

we think defendant had a right to use it for that purpose without assuming the responsibilities that rested upon the county commissioners of Davis County of properly maintaining it. If the public highways of this state are open and presumed to be reasonably safe for the legitimate use of all citizens alike, then what good reason can be assigned why a contractor may not properly and rightfully avail himself of their use as a detour for the traveling public while he is engaged in the performance of work, such as the defendant here was undertaking to do, without having visited upon him the results occasioned by the negligence of the officials whose plain statutory duty it was to properly maintain them?"

In the case of *Hendrickson v. Brooks,* 40 N. Mex. 50, 53 P. 2d 646, the defendant contractor diverted traffic over an old highway from a new highway which he was "oil surfacing." It was admitted that before and during the time the appellant's work was in progress on the new highway, and after it was completed, the old highway was maintained by the State Highway Department. It was held that the defendant, contractor, was under no duty to erect and maintain caution signs on the old highway at the point where the accident occurred. The Court said: "(Defendant) had neither power nor authority to abate the condition which it is alleged made travel on the old highway dangerous. It is not even suggested that it was his duty to control the conduct of the State Highway Department, or its employees, with reference to the standard of maintenance of the old highway. If it was not a part of (defendant's) duty to maintain the old highway, so as to render it reasonably safe for ordinary travel, we are unable to see why he should be subjected to liability for failure to put up warning signs adequate to enable the traveling public to avoid injury.

"We therefore hold that a contractor working upon a highway, who has a right to and does divert traffic onto another state highway being maintained by the State Highway Commission, is not liable for injuries received in accidents due to defects in said state highway." (Emphasis added.)

It is said in 40 C.J.S., Highways, section 255, page 300: "A highway contractor may not be held responsible for damages resulting from a defect or obstruction in a road not under his supervision," citing *Romney v. Lynch, supra.* See also 25 Am. Jur., Highways, section 361, page 653, and Anno: Highway Contractors- Detours, 29 A.L.R. 2d 876, *et seq.*

The defendants in these consolidated cases had no contractual or statutory duty to maintain Dark Ridge Road. The maintenance of that road before, during, and after the completion of the construction work on U. S. Highway 19A-23 by these defendants, was exclusively vested in the State Highway Commission.

If these defendants failed in any particular to carry out the special provisions contained in their respective contracts which involved the handling of vehicular traffic, it has not been pointed out.

The judgments entered by the court below will be upheld.

Affirmed.

KATHERINE ROOMY v. ALLSTATE INSURANCE COMPANY.

(Filed 2 February, 1962.)

1. Courts § 20; Insurance § 3—

Where a contract of insurance is negotiated and executed in the state in which insured is a resident, such policy will be construed in accordance with the laws of that state in an action in this State on a claim arising here, since the *lex loci* governs the substantive provisions of the agreement.

2. Insurance § 58—

The laws of the State in which the liability policy in suit was issued provided that no policy should cover liability of insured to his or her spouse unless the policy expressly so provided, and the policy in suit contained no such provision. *Held:* The policy may not be construed to cover insured's liability for injuries to his wife resulting from an accident occurring in this State.

HIGGINS, J., dissents.

APPEAL by plaintiff from *McConnell, S.J.*, at August 28, 1961 non-jury Civil Term of GUILFORD.

Civil action to recover on automobile liability insurance contract.

The case was heard by the trial judge upon the following stipulations of fact:

STIPULATIONS OF FACT

"The attorneys for the plaintiff and the attorneys for the defendant stipulate that the material facts pertinent to a decision in this case are as follows:

"I. At all times mentioned in the complaint the plaintiff Katherine Roomy was a citizen and resident of the State of New York.

"II. At all times mentioned in the complaint George Roomy was the husband of Katherine Roomy and was a citizen and resident of the State of New York.

"III. At all times mentioned in the complaint the defendant All-

state Insurance Company was admitted and authorized to do business in the State of North Carolina under the provisions of Chapter 58 of the North Carolina Statutes.

"IV. On August 19, 1957, George Roomy was the owner of a 1949 Chevrolet automobile which was registered in the State of New York and was principally garaged in the State of New York.

"V. Allstate Insurance Company issued a policy of automobile liability insurance to George Roomy covering the aforesaid 1949 Chevrolet automobile. The policy number was 43 204 520-6-25-M and covered the Chevrolet automobile from June 25, 1957, to June 25, 1958. Premiums for the policy had been paid by George Roomy. The limits of liability in the policy were $10,000.00 for each person and $40,000.00 for each occurrence and $5,000.00 property damage liability. A copy of the policy designated as Exhibit 1, together with all endorsements and declarations, is attached to plaintiff's complaint.

"VI. The aforesaid insurance policy was issued and delivered to George Roomy in the State of New York.

"VII. At all times mentioned in the complaint the following statute was in force and effect in the State of New York; Subdivision 3 of Section 167 of the New York Insurance Laws, Consol. Laws, c. 28, provides:

'No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy.'

"VIII. There was no endorsement or other provision in the policy providing that the policy insured against any liability because of death or injuries to the insured's spouse.

"IX. On August 19, 1957, the plaintiff Katherine Roomy was a passenger in her husband's 1949 Chevrolet automobile which was being operated by her husband, George Roomy, in Greensboro, North Carolina, when a wreck occurred in which the plaintiff Katherine Roomy sustained severe personal injuries. The accident occurred while the Roomys were visiting relatives in Greensboro.

"X. On or about August 26, 1957, George Roomy notified Allstate Insurance Company of the accident and of the fact that his wife, Katherine Roomy was injured. He also notified Allstate that he and his wife were residents of New York and his policy was issued to him in New York. George Roomy has otherwise complied with the terms of the policy.

"XI. Allstate Insurance Company has at all times denied coverage

under the aforesaid policy to George Roomy and Katherine Roomy for the injuries sustained by Katherine Roomy in said accident.

"XII. On September 9, 1957, George Roomy filed a report (SR-1), properly filled out with Form SR-21 attached, with the North Carolina Commissioner of Motor Vehicles advising that he was insured by Allstate Insurance Company under automobile liability insurance policy No. 43 204 520-6-25-M, that the policy period was from June 25, 1957, to June 25, 1958, that he and his wife were residents of the State of New York, that his wife received injuries in the accident, and that he was owner and operator of the 1949 Chevrolet involved. The report (SR-1) also gave the other pertinent information concerning the accident. The report (SR-1) was filed pursuant to the provisions of G.S. 20-279.4. A photostatic copy of the SR-1 filed by Mr. Roomy is attached hereto and marked as Exhibit 2.

"XIII. The Commissioner of Motor Vehicles mailed Form SR-21 to Allstate Insurance Company in accordance with Allstate's standing request, to its office in Charlotte, North Carolina. The SR-21 was received by Allstate on September 28, 1957. The SR-21 gave the date and location of the accident, make and motor number of vehicle, policy number, name and address of the operator and owner, and name and address of the policy holder. The operator, owner and policy holder was George Roomy, and his address was Brooklyn, New York. On the reverse side of the SR-21 are items which may be checked by the insurance company to indicate to the Department of Motor Vehicles the status of the coverage. A photostatic copy of the SR-21 mailed to Allstate is attached hereto marked as Exhibit 3. Allstate did not return the SR-21 form to the Commissioner of Motor Vehicles, and has not filed any statement with the Commissioner admitting or denying coverage for the injuries sustained by Katherine Roomy.

"XIV. On June 29, 1960, Katherine instituted a civil action against her husband, George Roomy, for damages for personal injuries received in the accident of August 19, 1957. Said suit was instituted in the Superior Court of Guilford County, Greensboro Division, North Carolina. Service of process was properly obtained on George Roomy through the North Carolina Commissioner of Motor Vehicles.

"XV. George Roomy immediately forwarded to Allstate Insurance Company a copy of the summons and complaint served on him in the action by his wife. Allstate denied coverage for the injuries sustained by Katherine Roomy and declined to defend the action on behalf of Mr. Roomy.

"XVI. George Roomy did not file an answer, demurrer or other defensive pleadings to the suit instituted by his wife, Katherine Roomy, and on September 9, 1960, judgment by default and inquiry was en-

tered against George Roomy in the Superior Court of Guilford County, North Carolina.

"XVII. At the October 10, 1960, Civil Term of Superior Court of Guilford County, Greensboro Division, an issue as to the damages sustained by Katherine Roomy was submitted to and answered by a jury, and a judgment was rendered on the verdict of the jury awarding Katherine Roomy $64,187.46 for her personal injuries received in the accident of August 19, 1957, plus Court costs. The judgment was dated October 12, 1960, and was signed by the Honorable Robert M. Gambill, Judge Presiding, at the October 10, 1960, Civil Term.

"XVIII. The plaintiff Katherine Roomy, made demand upon her husband, George Roomy for the payment of the judgment obtained in the Guilford County Superior Court, but said George Roomy has refused to pay said judgment or any part thereof.

"XIX. On November 30, 1960, execution was issued on the judgment obtained by Katherine Roomy against her husband to the Sheriff of Guilford County, N. C., but said execution was returned with the notation that after due and diligent search no property of George Roomy was to be found to satisfy the judgment or any part thereof.

"XX. The North Carolina driving privileges of George Roomy have not been suspended by the Commissioner of Motor Vehicles and George Roomy has not been required to file proof of financial responsibility to continue driving in North Carolina.

"XXI. The plaintiff, Katherine Roomy, has made demand upon the defendant, Allstate Insurance Company, for payment of the judgment against George Roomy, to the extent of the limits of liability set forth in the policy, but said Allstate Insurance Company has refused to pay any part of said judgment under the automobile liability insurance policy and has denied that there is any coverage for the injuries received by Katherine Roomy under said policy.

"XXII. Katherine Roomy instituted this suit against Allstate Insurance Company on January 16, 1961. Allstate filed an answer denying coverage for the injuries received by Mrs. Roomy in the accident of August 19, 1957, and plead the provisions of Subdivision 3 of Section 167 of the New York Insurance Laws, Consol. Laws, c. 28. The conditions precedent set out in the policy for the bringing of this action against Allstate have been complied with by Katherine Roomy."

Upon consideration of the foregoing stipulations of fact and upon consideration of the briefs and arguments of counsel, the trial judge was of the opinion that "as a matter of law, there is no coverage under the Allstate Insurance Company automobile liability insurance policy (No. 43 204 520-6-25-M) issued to George Roomy for the injuries sustained by the plaintiff, Katherine Roomy, in the accident of August 19, 1957."

Therefore, the court ordered, adjudged and decreed that the plaintiff recover nothing of the defendant, and that the action be dismissed.

From the signing of the judgment, plaintiff excepts and appeals therefrom to Supreme Court of North Carolina, and assigns error.

Stern & Rendleman for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter for defendant appellee.

WINBORNE, C.J. The pivotal question on this appeal is this: Should the automobile liability insurance contract in question be interpreted in accordance with the laws of the State of New York wherein the contract was made and delivered, in spite of the fact that the liability of the insured arose out of a collision occurring in North Carolina? The answer is Yes.

The applicable rule, as stated by *Connor, J.*, in *Cannaday v. R.R.*, 143 N.C. 439, 55 S.E. 836, is as follows: "It is settled that 'Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.' *Scudder v. Bank,* 91 U.S. 406. 'The interpretation of a contract and rights and obligations under it, of the parties thereto, are to be determined in accordance with the proper law of the contract. *Prima facie* the proper law of the contract is to be presumed to be the law of the country where it is made.' Dicey Conft. Law, 563. *Bowen, L.J.* in *Jacobs v. Credit Lyonnais,* 12 Q.B. 589, says: 'It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention.' 9 Cyc. 667." See, to the same effect, *Satterthwaite v. Doughty,* 44 N.C. 314; *Hall v. Tel. Co.*, 139 N.C. 369, 52 S.E. 50; *Keesler v. Ins. Co.*, 177 N.C. 394, 99 S.E. 97; *Tieffenbrun v. Flannery,* 198 N.C. 397, 151 S.E. 857; *Ins. Co. v. Skurkay,* 204 N.C. 227, 167 S.E. 802.

In *Myers v. Ocean Accident & Guaranty Corp.*, 99 F. 2d 485 (4th Cir., 1938), the insured, a citizen and resident of North Carolina, had an automobile liability insurance policy which was countersigned and delivered in Ohio. An automobile accident involving the insured occurred in Georgia. The insurance carrier brought a declaratory judgment action in the U. S. District Court for the Middle District of North Carolina against the insured seeking to avoid liability under the policy because the automobile covered was being used to carry persons for hire in violation of an exclusionary clause in the policy. Holding that there was no coverage, the court said: "Under the general doctrine, the interpretation of an insurance contract depends on the

law of the place where the policy is delivered. *Mutual Life Ins. Co. v. Johnson,* 293 U.S. 335, at page 339, 55 S. Ct. 154, 156, 79 L. Ed. 398. * * * Both by the Federal and North Carolina decisions it is clear that the policy should be interpreted in accordance with the law of the State of Ohio. *Mutual Life Ins. Co. v. Johnson, supra; Northwestern Mutual Life Ins. Co. v. McCue,* 223 U.S. 234, 32 S. Ct. 220, 56 L. Ed. 419, 38 L.R.A., N.S. 57; Beale, Conflict of Laws, Vol. 2, s. 332.40; *Keesler v. Mutual Life Ins. Co. (supra); Dixie Fire Ins. Co. v. American Bonding Co.,* 162 N.C. 384, 78 S.E. 430; *Connecticut Gen. Life Ins. Co. v. Skurkay, (supra); Cannaday v. Atlantic Coast Line R.R. Co. (supra); Wilson v. Supreme Conclave,* 174 N.C. 628, 94 S.E. 443."

We see no reason, in the instant case, to depart from this well established principle. The parties agreed upon the terms of a contract of insurance in the State of New York. The insured paid a specific premium and received in return the promise of defendant to provide specific liability insurance coverage. To interpret the contract according to the laws of New York would be neither more nor less than to enforce the contract according to the original intention of the parties.

As stipulated, Subdivision 3 of section 167 of the New York Insurance Law, Consol. Laws, c. 28, provides in pertinent part that, "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse * * * unless express provision relating specifically thereto is included in the policy."

The leading New York case construing this statute is *New Amsterdam Casualty Co. v. Stecker,* 3 N.Y. 2d 1, 143 N.E. 2d 357. This case involved an automobile accident occurring in Connecticut, wherein a husband received injuries while a passenger in an automobile owned and operated by his wife. The husband instituted suit for personal injuries against his wife in Connecticut. Both husband and wife were residents of New York at the time of the accident, and the wife had an automobile liability insurance policy which was made and delivered in New York. The insurance carrier brought a declaratory judgment action against the wife in New York seeking to avoid liability under the policy because of the provisions of the above quoted statute. Holding that the policy did not provide coverage for the husband's injuries, the New York Court of Appeals had this to say: "Subdivision 3 of section 167 governs all automobile liability insurance policies issued in this State without regard to where the accident occurs. It is mandated into and made a part of every policy of automobile liability insurance issued in this State.

" * * * The manifest purpose of subdivision 3 of Section 167 was to

protect insurance carriers from collusive actions between spouses arising out of automobile accidents. Surely the Legislature recognized that the possibility of fraud and collusion is the same no matter where the accident occurs. * * * It is that possibility which the statute was intended to guard against, and the language of subdivision 3 of Section 167, if literally applied, will accomplish that result. There is not the slightest difference in the fraud potential between accidents occurring in New York and those occurring elsewhere."

For these reasons, the judgment of the court below is

Affirmed.

HIGGINS, J., dissents.

CENTRAL NATIONAL BANK OF RICHMOND, VIRGINIA, AND R. M. SMITHERS, TRUSTEE v. WILLIAM MADISON RICH.

(Filed 2 February, 1962.)

1. Payment § 1; Sales § 3—

A purchaser who gives a worthless check in payment for merchandise does not acquire title even though the merchandise is then delivered, and the seller may regain his property even against a *bona fide* purchaser in the absence of estoppel.

2. Automobiles § 4; Courts § 20—

The title to an automobile purchased from a dealer in this State must be determined by the laws of this State.

3. Estoppel § 5—

The estoppel of a party whose conduct induces another to act to his detriment does not bind a stranger without notice of the facts constituting the basis for the estoppel.

4. Same; Automobiles § 4; Payment § 1; Sales § 3—

Where a dealer gives a nonresident purchaser an application for title for the automobile purchased, but reacquires possession of the car from the nonresident upon notice of dishonor of the check given in payment, and thereafter sells the car to a resident, any estoppel of the dealer to claim the vehicle free from the lien of a mortgage executed in reliance on the certificate of title issued to the nonresident pursuant to the application for title, would not bind the resident if he is an innocent purchaser for value without notice, and, upon his evidence that he was such an innocent purchaser, the court should charge the jury as to his rights.

5. Same; Chattel Mortgages and Conditional Sales §§ 9, 11— Where vehicle is returned to this State prior to registration of lien in another state our registration laws govern.

A nonresident gave a worthless check to a dealer in this State for an automobile which he took to the state of his residence and had certificate of title issued showing that the vehicle was free from liens. Thereafter he transferred the title to his brother who procured a loan secured by a chattel mortgage. The car was returned to the dealer in this State upon demand, and the dealer thereafter sold it to a resident purchaser for value without notice. Title was thereafter issued to the brother showing the lien, which constituted registration under the laws of such other state. Va. code 46-70; 46-71. *Held:* Upon the return of the vehicle to this State it became subject to our laws requiring registration of liens, and the resident purchaser acquired title free from the lien which was not then registered in such other state.

6. Chattel Mortgages and Conditional Sales § 8—

A nonresident gave a worthless check to a dealer in this State in payment of an automobile and took the vehicle to the state of his residence. Thereafter the vehicle was returned to the dealer in this State upon his demand, and the dealer then sold it to a resident purchaser without notice. *Held:* The resident purchaser is afforded protection under G.S. 44-38.1, and the contention that he was not protected by the statute because he was not a grantor, mortgagor, or conditional sales vendee from the nonresident purchaser, is untenable.

PARKER, J., concurs in result.

APPEAL by defendant from *Sink, E.J.*, March 1961 Civil Term of DURHAM.

This action was begun on 16 September 1958 to obtain possession of a Buick automobile for the purpose of selling the same to provide funds to pay a note for $3000 given by Walter W. Hubbard to plaintiff bank, payment of which note was secured by chattel deed of trust to plaintiff Smithers. Plaintiffs allege the deed of trust had priority over any claims of defendant. They ask that the rights of the parties be adjudged and the amount of the debt owing to the bank be determined.

Defendant denied, for want of knowledge or information, plaintiffs' allegation with respect to the note and deed of trust. As an additional defense he alleged he purchased the automobile on 10 September 1957 from C & B Buick, paying full value and without notice of any claim asserted by plaintiffs.

From a verdict and judgment in favor of plaintiffs defendant appealed.

Spears & Spears by Marshall T. Spears, Jr. and Alexander H. Barnes for plaintiff appellee.

Bryant, Lipton, Strayhorn & Bryant by Victor S. Bryant and F. Gordon Battle for defendant appellant.

RODMAN, J. Defendant assigns as error the court's charge as given and the failure of the judge to apply the law to the facts. The record does not disclose any real conflict with respect to the facts. The disagreement arises with respect to the law applicable to the facts.

The factual situation to which it was the duty of the court to declare the law may be summarized thus: C & B Buick Company (hereafter C & B) was, in 1957, a licensed automobile dealer at Louisburg, N. C., selling Buick automobiles. On 27 August 1957 C & B sold the automobile in question to Samuel R. Hubbard, Jr. His brother, Walter Hubbard, was present when the purchase was made. The purchase price was $3319.83. It was paid by check drawn on a bank in Richmond, where the Hubbards lived. Samuel was there engaged in selling used cars. Walter was a partner or employee of Samuel.

C & B executed a North Carolina "DEALER'S APPLICATION FOR CERTIFICATE OF TITLE FOR NEW MOTOR VEHICLE" showing sale of the vehicle to Samuel, free of liens. The Hubbards took the automobile and the forms executed by C & B to Richmond where Samuel applied to the Virginia Division of Motor Vehicles for a certificate of title. That department, on 28 August 1957, issued a certificate showing Samuel Raleigh Hubbard, Jr. owned the vehicle free of encumbrances.

On 27 August 1957 Walter Hubbard applied to plaintiff bank (hereafter designated as plaintiff) for a loan to be secured by deed of trust on the Buick purchased by Samuel from C & B. Plaintiff agreed to make the loan when title had been issued to Walter showing that he was the owner, free of encumbrances. On 28 August 1957 Samuel Hubbard assigned his certificate of title to his brother Walter, who on that date signed an application for a new certificate. This application stated the vehicle was subject to the lien of a deed of trust to plaintiff Smithers dated 27 August 1957 securing the sum of $3000 owing plaintiff. The certificate issued to Samuel with the assignment to Walter and his application for a new certificate were left with the bank with the note and deed of trust executed by Walter. This was done in order that the bank might secure a new certificate of title showing Walter the owner subject to lien of its deed of trust. On 11 September 1957 the Division of Motor Vehicles issued a certificate of title to Walter. This certificate stated the vehicle was subject to the lien of the deed of trust securing plaintiff bank in the sum of $3000. The certificate disclosed no other lien or claim against the vehicle.

Samuel Hubbard's check to C & B for the purchase price of the

automobile was taken to Richmond and presented for payment on 28 August at the bank on which it was drawn. The bank declined to honor it. The holder then returned to Louisburg and deposited the check with a bank in Louisburg for collection. In due course the check was presented and again dishonored. C & B then communicated with the Hubbards, demanding the return of the motor vehicle, asserting that no title passed because of nonpayment of check given for the purchase price. On 4 or 5 September the Hubbards agreed that they would return the motor vehicle to C & B who would thereupon surrender the worthless check which Samuel had given for the purchase price. Pursuant to the agreement the parties, Samuel and Walter Hubbard, and a representative of C & B, met at South Hill, Va., where the motor vehicle was delivered to C & B, and Samuel's check for $3,319.83 for the purchase price was surrendered. The car was immediately returned to Louisburg.

On 10 September 1957 defendant Rich purchased the automobile from C & B for the sum of $4,444. Rich paid $2300 cash and was allowed $2144 for a 1953 Buick which he then owned. C & B on that date executed a North Carolina dealer's application for certificate of title for a new motor vehicle showing the sale to defendant Rich of the motor vehicle which it had purchased and received from Buick Motor Division on 25 June 1957. This application showed that the vehicle was subject to a lien in the sum of $2530 owing to Mechanics & Farmers Bank, executed by defendant Rich. On 8 October 1957 the North Carolina Department of Motor Vehicles issued a certificate of title to defendant Rich showing that he owned the vehicle in question subject to the lien of his mortgage to Mechanics & Farmers Bank in the sum of $2530. That lien was paid and discharged in September 1959.

Statutes of Virginia which must be considered are quoted or summarized as follows: Va. Code 46-84 directs one transferring title to an automobile registered under its laws to "endorse an assignment and warranty of title upon the reverse side of the certificate of title of the motor vehicle, trailer or semi-trailer to the purchaser thereof, with a statement of all liens or encumbrances thereon . . ."

The Supreme Court of Appeals of Virginia, called upon to interpret this statute, said: "(W)e have held that in order to complete the sale upon his part it is essential that the seller conform to the statutory requirement by delivering to the purchaser a proper assignment of title. *Thomas v. Mullins,* 153 Va. 383, 391, 149 S.E. 494. See also *United States v. One Hudson Hornet Sedan,* D.C., 110 F. Supp. 41." *Nationwide Insurance Company v. Storm,* 106 S.E. 2d 588.

The Division of Motor Vehicles is required, when it receives an ap-

plication for a certificate of title, to "show upon the face of the certificate of title all liens or encumbrances disclosed by such application. All such liens or encumbrances shall be shown in the order of their priority, such priority being according to the information contained in such application." Va. Code 46-69. Liens created subsequent to the issuance of the certificate must be shown on the certificate. It is the duty of the holder to notify the Division of such liens. Va. Code 46-70.

"Such certificate of title, when issued by the Division showing a lien or encumbrance, shall be deemed adequate notice to the Commonwealth, creditors and purchasers that a lien against the motor vehicle exists and the recording of such reservation of title, lien or encumbrance in the county or city wherein the purchaser or debtor resides or elsewhere is not necessary and shall not be required." Va. Code 46-71.

"If application for the registration or recordation of a lien or encumbrance to be placed upon a motor vehicle, trailer or semi-trailer be filed in the office of the Division in the city of Richmond, Virginia, within ten days from the date of such applicant's purchase of such motor vehicle, trailer, or semi-trailer, it shall be as valid as to all persons, whomsoever, including the Commonwealth, as if such registration had been done on the day such lien or encumbrance was acquired." Va. Code 46-72. The person who has the first lien on the vehicle is required to hold the certificate of title. Va. Code 46-74. A levy made by virtue of an execution on a motor vehicle for which a certificate of title has been issued constitutes a lien subsequent to liens theretofore recorded by the Division. Va. Code 46-77.

Plaintiff contends that since a certificate of title had issued showing its lien on the motor vehicle registered in the name of Walter Hubbard, no sale or other act by him or Samuel Hubbard could defeat its lien. *Nationwide Insurance Co. v. Storm, supra.*

The evidence does not necessarily lead to the conclusion that the parties contemplated a sale to C & B at South Hill. The evidence is fairly susceptible of the interpretation that the parties, recognizing that Samuel Hubbard acquired no title when he gave his worthless check at Louisburg and since Walter Hubbard knew Samuel had no title, they surrendered the car to C & B without requiring C & B, the owner, to reclaim its property by judicial process.

It is settled law in this State that a purchaser who gives a worthless check for purchase of merchandise does not acquire title thereto even though the purchased article is then delivered. The seller may retake his property. *Carrow v. Weston,* 247 N.C. 735, 102 S.E. 2d 134; *Wilson v. Finance Co.,* 239 N.C. 349, 79 S.E. 2d 908; *Motor Co. v. Wood,* 237 N.C. 318, 75 S.E. 2d 312; *Weddington v. Boshamer,* 237

N.C. 556, 75 S.E. 2d 530. The law as declared in our decisions is not peculiar to North Carolina. *Young v. Harris-Cortner Co.*, 54 A.L.R.; 516; Annotations 31 A.L.R. 578; 46 Am. Jur. 613.

Hubbard's title must be determined by the laws of this State. *Motor Co. v. Wood, supra; Price v. Goodman*, 226 N.C. 223, 37 S.E. 2d 592; *Holt Motors v. Casto*, 67 S.E. 2d 432.

It is equally well settled that an owner who parts with possession of personalty and invests the possessor with indicia of ownership may, as against those who in good faith rely on such evidence of title, be estopped to assert his rightful ownership. *Wilson v. Finance Co., supra; General Motors Acceptance Corp. v. Davis*, 18 A.L.R. 2d 808; *Superior Finance Co. v. American Security Co.*, 25 N.E. 2d 256.

C & B, when it delivered possession of the automobile to Hubbard, also gave him an authorization to obtain a certificate of title free of encumbrances. Possession of the motor vehicle, accompanied by these documents, was, we think, sufficient to justify one without knowledge of Hubbard's defective title because of purported payment by worthless check, to make a loan to Hubbard secured by mortgage on the automobile. C & B would be estopped to contest validity of such a lien.

There is evidence in the record that C & B notified the Division of Motor Vehicles of its asserted rights. There is also evidence that only a portion of the amount claimed by plaintiff represented a current loan to Hubbard. Plaintiff had the burden of showing facts sufficient to estop C & B, but the fact that C & B might be estopped is not, we think, necessarily determinative of the rights of defendant Rich. He, of course, has the burden of proving that he is innocent purchaser for value without notice of the estoppel which plaintiff could assert against C & B. The evidence sufficed to impose a duty on the judge to inform the jury as to Rich's rights, if in fact he was an innocent purchaser for value.

Would Rich, a purchaser for value without notice of facts which estopped C & B to deny plaintiff's lien, be bound by that estoppel? The answer is no. The estoppel is limited to the party whose conduct induces a third party to act to his detriment. It does not bind strangers.

Remarkably similar to the facts in this case is the English case of *Richards v. Johnston*, 157 Eng. Rep. 1000. There one Martin, owner of household furniture, informed Richards that the furniture was the property of Hord. Relying on the assurance so given, Richards made a loan to Hord and took a bill of sale to secure the advance so made. Thereafter Johnston, who had sold the furniture to Martin, obtained a judgment against Martin. Execution issued on the judgment. A levy was made on the furniture. The question for decision was: Who had the superior title, Richards, who relied on Martin's assurance that Hord

was the owner, or the judgment creditor claiming under the levy against Martin? The court adjudged the lien of the levy had priority. *Pollock,* C.B., said: "(A) sheriff who comes to seize the goods of a debtor armed with a writ of execution in favor of a creditor, is not bound by estoppels which might have prevented the debtor himself from claiming the goods." *Thornton v. Ferguson,* 67 S.E. 97; *Thornburg v. Burden,* 113 N.E. 2d 683; *Inter-Mountain Coal & Lumber Co. v. Lewis,* 197 S.W. 2d 438; *Benson v. Morse,* 109 N.Y.S. 2d 57; 19 Am. Jur. 815; 31 C.J.S. 401; 3 Pomeroy, Equity Jurisprudence, 5th ed., sec. 813.

Had the automobile remained in Virginia, a levy on 10 September 1957, the date Rich purchased, pursuant to an execution against Walter Hubbard would have taken priority over plaintiff's mortgage because it was not then recorded as required by Va. Code 46-72, 77. *Maryland Credit F. Corp. v. Franklin Credit F. Corp.* (Va.), 180 S.E. 408; *C.I.T. Corp. v. W. J. Crosby & Co.* (Va.), 7 S.E. 2d 107; *Finance Corp. v. Hodges,* 230 N.C. 580, 55 S.E. 2d 201.

But the automobile did not rest in Virginia. It was brought back to North Carolina for sale and use here. When so returned it became subject to our laws requiring registration of liens. *C.I.T. Corp. v. W. J. Crosby & Co., supra; Finance Co. v. O'Daniel,* 237 N.C. 286, 74 S.E. 2d 717; *Bank v. Ramsey,* 252 N.C. 339, 113 S.E. 2d 723.

To afford purchasers of personal property in this State protection against liens created in some other State, the Legislature enacted what is now G.S. 44-38.1. That statute provides in part:

"(b) When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State from another and acquires a situs in this State, such encumbrance is valid prior to registration in this State as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only upon fulfilling all of the following conditions:

"(1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and . . .

"(3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State."

If defendant's evidence is true the automobile was returned to North Carolina on 5 or 6 September. Plaintiff's evidence established its lien had not then been recorded in Virginia. It has never been recorded in North Carolina.

Plaintiff asserts statute (44-38.1) could afford no protection to a purchaser for value from C & B because it was not plaintiff's "grantor,

mortgagor or conditional sale vendee" and only those who purchased or claimed immediately from Hubbard as mortgagor could be protected. Such a construction of the statute would, in our opinion, unreasonably restrict the language used and thwart legislative intent.

Because of the failure of the court to properly instruct the jury with respect to the rights of the defendant Rich, there must be a

New trial.

PARKER, J., concurs in result.

NELSON O. DOUB AND WIFE, ANNIE FULTZ DOUB v. JOHN A. HAUSER.

(Filed 2 February, 1962.)

1. Contracts § 26; Quasi-Contracts § 2—

Although evidence of the making of a contract with one person is ordinarily incompetent to prove the making of a contract with another, where plaintiffs' evidence is to the effect that defendant was in poor health and asked plaintiffs to live with him and look after him upon his promise to devise them property by will, evidence of a third person to the effect that defendant made a like agreement with him for like reasons is competent for the purpose of corroborating plaintiffs' evidence that defendant was in poor health and wanted someone to live with him.

2. Trial § 17—

Where evidence is competent for a restricted purpose, its general admission will not be held for error in the absence of a request at the time that its admission be restricted.

3. Executors and Administrators § 24d; Quasi-Contracts § 2—

Where services are rendered with the parol understanding that compensation was to be made in the will of the recipient by devise of real estate, or of real estate and personal property, the measure of damages, upon failure of compensation is the value of the services rendered, less benefits received, and evidence of the value of recipient's estate is not competent on the issue of damages.

4. Same; Executors and Administrators § 24a—

In this action to recover the value of personal services rendered defendant in reliance of defendant's promise to devise plaintiffs property, which contract was abandoned when defendant ordered plaintiffs off his property, evidence that defendant received a large sum in compensation for a part of his lands taken by eminent domain a short time before he ordered plaintiffs from his property, is competent as tending to show that defendant ordered plaintiffs off his property not because of failure

on their part to keep the agreement, but because he no longer needed them, there being evidence that defendant was without funds at the time the agreement was made.

5. Evidence § 15—

In order to be relevant, it is not required that evidence bear directly on the issue, and evidence is relevant if it relates to a circumstance surrounding the parties which is necessary to understand their conduct or motives or weigh their contentions.

6. Same; Executors and Administrators § 24a; Quasi-Contracts § 2—

Evidence that defendant sold a quantity of his lands after plaintiffs had made demand for compensation for services rendered is competent as permitting an inference that defendant was seeking to avoid payment of a legal obligation.

7. Executors and Administrators § 24b; Quasi-Contracts § 2—

A cause of action to recover compensation for services rendered under an implied contract arises as the services are rendered when the agreement is for indefinite and continuous service without any definite arrangement as to time for compensation; where the agreement is that compensation should be provided in the will of the recipient, the cause of action accrues when the recipient dies without having made the agreed testamentary provision; when such agreement is abandoned, the cause of action accrues at the time of the abandonment of the contract.

8. Same—

Where plaintiffs' evidence is to the effect that they rendered personal services over a number of years in reliance upon the recipient's agreement to compensate them by devising property to them, the action is not barred if brought within three years of the abandonment of the contract, and if defendant wishes to challenge the sufficiency of the evidence as to the agreement to make testamentary provision for compensation, he must in apt time request the submission of an issue as to whether the services were rendered without any definite arrangement as to time for payment.

9. Appeal and Error § 1—

The theory of trial in the lower court must prevail in considering the appeal.

10. Quasi-Contracts § 2—

In an action to recover the reasonable value of personal services rendered upon implied contract to pay for same, a separate issue as to special benefits received is not necessary, but the court may properly instruct the jury to offset any amount which they should find to be the reasonable value of the services with the value of benefits received by plaintiffs and their families from the recipient of the services.

APPEAL by defendant from *Crissman, J.*, May 29, 1961 Term of FORSYTH.

This is a civil action to recover for services rendered under a parol contract which was abandoned.

Plaintiffs, husband and wife, allege:

Defendant stated to plaintiffs that he was alone, had insufficient food and needed someone to care for him. There was a parol agreement that if they would "move to his farm and take care of defendant during the remainder of his life he would give them his share of the farm." They sold their home, *feme* plaintiff quit her job at a knitting mill, and they moved to defendant's farm on 7 March 1952. They resided with him in his home on the farm until 9 September 1959, caring for his personal needs, nursing him in his many illnesses, helping to grow food for him, cooking and serving his meals, washing his clothes, cleaning his house, helping to work his fields, improving and furnishing his house and farm, paying his household bills, buying his food and otherwise devoting their time and energy in his behalf. Defendant drank excessively and care of him was onerous and burdensome. Defendant made a will in August 1952 leaving male plaintiff all his personal property and all real estate except two acres, but defendant later revoked the will. In September 1959 defendant, without just cause, demanded that plaintiffs leave and threatened to evict them if they refused. In consequence they moved out. They demanded compensation for services rendered and improvements made, but defendant refused to compensate them. The reasonable value of the services and improvements is $20,000.00.

Defendant, answering, says:

There was no agreement as alleged in the complaint and plaintiffs are entitled to no compensation. If there was an agreement, it was not in writing as required by the statute of frauds and is void. If plaintiffs have a cause of action against defendant, more than three years have elapsed since it accrued and it is barred by the three years statute of limitations. Plaintiffs told defendant they were selling their home and had nowhere to live and asked that he let them move to his farm. He agreed on condition they would cultivate the farm and provide therefrom foodstuffs for him and them. About a year prior thereto *feme* plaintiff had quit her job to take care of her invalid mother. Plaintiffs, a foster child and the invalid mother moved into defendant's home about 7 March 1952. All lived there for seven years, except the invalid mother, who died there. Plaintiffs did not cultivate the farm nor provide foodstuffs therefrom. Defendant fed himself and provided fuel and food products from the farm for all. Male plaintiff continued on his job at public works. Such improvements as plaintiffs made were mainly for their own benefit, and defendant helped with these. Male plaintiff borrowed $300.00 from defendant and gave his promissory note, and has paid nothing thereon except that defendant credited the note with $203.00 for a well and pump installed by male

plaintiff. *Feme* plaintiff refused to do defendant's cooking and washing. Plaintiffs insisted that defendant make a deed or will in their favor, and he "finally decided to will most of his property to plaintiffs, but on condition that they remain with him and take care of him as long as he lived." As soon as the will was executed plaintiffs began to make his condition intolerable. There was a total failure of consideration on the part of plaintiffs. Plaintiffs are indebted to defendant at the rate of $75.00 per month for the time they occupied the residence and had use of the farm, outbuildings and farm machinery — total indebtedness $6300.00.

At the trial plaintiffs and defendant offered evidence, and issues were submitted to and answered by the jury as follows:

"1. Did the defendant, John H. Hauser, enter into an agreement with the plaintiffs, Nelson and Annie Doub, as alleged in the complaint? Answer: Yes.

"2. If so, did the plaintiffs, Mr. and Mrs. Doub, render services to the defendant and make improvements on the property in accord with the agreement as alleged in the complaint? Answer: Yes.

"3. What is the reasonable value of the services and improvements provided to the defendant by the plaintiffs between 7 March 1952 and 9 September 1959? Answer: $7,500.00."

Judgment was entered in accordance with the verdict.

Defendant appeals.

Buford T. Henderson and Clyde C. Randolph, Jr., for defendant appellant.

Craige, Brawley, Lucas & Hendrix and Hamilton C. Horton, Jr., for plaintiffs appellees.

MOORE, J. . Defendant makes fourteen assignments of error based on forty-three exceptions. We discuss several which we consider decisive.

(1) Plaintiffs' witness, W. D. Dalton, testified on direct examination that he lived with defendant in 1949, and, over objection, stated: "Mr. Hauser was sick. . . . I got to going over there to see him; and he got after me to move in and take care of him and look after him; he didn't want to live by himself. . . . I told him . . . I'd move in with him. And he said if I did he'd give me his part of his estate there, his land. . . . (h)e said a time or two afterwards he was going to fix up some papers; but he never did do it." On cross-examination Dalton stated that he left on his own accord because of family obligations and was still on good terms with defendant. Defendant on cross-examination testified, over objection, that he made a will at one time leaving his

property to Mr. Strupe. In the charge the court recapitulated these items of testimony.

Defendant contends that the evidence was incompetent and prejudicial to him for that it "was entered by plaintiffs in order to characterize the defendant as an individual who goes around cheating people by promiscuously promising to leave his property to them if they will work for him."

It does not appear from the record that plaintiffs allege or contend that defendant was guilty of any fraud. Had fraud on the part of defendant been at issue the evidence of prior dealings of a similar nature would have been competent to show intent. *Insurance Co. v. Knight,* 160 N.C. 592, 76 S.E. 623. We do not agree that the inference suggested by defendant could be reasonably drawn from the testimony in question. Dalton did not accuse defendant of any unfair dealing, but explained that he left of his own accord; the court repeated this explanation in the charge. There was no testimony as to what the dealings were between defendant and Strupe other than the bare statement that defendant at one time made a will leaving his property to Strupe.

Ordinarily evidence of the making of a contract with one person is incompetent to prove the making of a contract with another. *Guano Co. v. Mercantile Co.,* 168 N.C. 223, 84 S.E. 272. The challenged testimony was not competent to prove the existence of a contract between the parties, but in our opinion it was competent for corroborative purposes. *Koonce v. Motor Lines, Inc.,* 249 N.C. 390, 106 S.E. 2d 576. The testimony in question tends to corroborate plaintiffs' evidence that defendant was in poor health, did not want to live alone, and wished to have someone live in the home with him. Where evidence is admissible for some purposes, but not for all, its admission will not be held for error unless appellant requested at the time of admission that its purpose be restricted. *State v. Corl,* 250 N.C. 252, 108 S.E. 2d 608. Here there was no request to restrict the purpose of the testimony.

(2) Defendant assigns as error the admission of testimony of plaintiffs on direct examination and defendant on cross-examination that about ten acres of defendant's land was taken by the State Highway Commission about 1958, for which defendant received between $3050.00 and $7550.00, and that defendant sold twenty acres of his land in 1960 after plaintiffs had demanded compensation for their services. The court, in charging the jury, gave plaintiffs' contention "that defendant was willing to go along until he got some money from the Highway Commission and felt like he could go it himself, using some of that."

Defendant contends that the evidence and instruction were prejudicial for the reason that the measure of damages is the value of serv-

ices rendered, not the value of defendant's property, and evidence of the sales had a tendency to influence the amount of the verdict.

It was stated in *Grantham v. Grantham,* 205 N.C. 363, 171 S.E. 331, that the value of the estate, the price agreed on in the contract, is some evidence of what services were worth, "it being in the nature of an admission or declaration of the parties as to the value, and having no more effect as evidence." But the better rule is that when services are rendered with the parol understanding that compensation is to be made in the will of the recipient by devise of real estate, or of real estate and personal property, the measure of damages, upon failure of compensation in accordance with the understanding, is the value of the services rendered, less benefits received, and evidence of the value of recipient's estate is not competent on the issue of damages. *Gales v. Smith,* 251 N.C. 692, 111 S.E. 2d 854; *Stewart v. Wyrick,* 228 N.C. 429, 45 S.E. 2d 764. ". . . (T)he value of a given service does not depend upon the ability of the party charged to make payment." *Sawyer v. Weskett,* 201 N.C. 500, 160 S.E. 575; 65 A.L.R. 2d, Anno: Evidence-Services to decedent — Value, p. 948.

Nevertheless, we think the evidence in question was admissible. The evidence did not purport to place a value on defendant's holdings. From defendant's own testimony it appears that he had no income of consequence before plaintiffs came to live with him, he had to raise food on his farm because he had no money to buy it with, and that his neighbors helped him on occasion. Plaintiffs' evidence tends to show that they paid his household expenses, bought food and other necessaries. In 1958 he received a "windfall" of several thousand dollars, and a few months later ordered plaintiff away. From these circumstances the jury might reasonably infer that defendant ordered plaintiffs to leave not because of any failure on their part to keep the agreement, but because he no longer needed them. "It is not required that the evidence should bear directly on the issue, but it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Henley v. Holt,* 214 N.C. 384, 388, 199 S.E. 383; *Bank v. Stack,* 179 N.C. 514, 103 S.E. 6.

As to the evidence of the sale by defendant of twenty acres of his land after plaintiffs had demanded compensation, it was clearly competent. In *State v. Kincaid,* 142 N.C. 657, 55 S.E. 647, it was held competent to ask defendant on cross-examination if he had not transferred his property to avoid the result of indictment. ". . . (T)he conveyance of property during litigation or just prior to it, may be evidence of the transferor's consciousness that he ought to lose. . . ." Wigmore on

Evidence (3d Ed.) Vol. 2, s. 282, p. 132. See also Annotations, 65 A.L.R. 1307.

(3) Defendant maintains that the court erred in failing to submit an issue as to the three years statute of limitations and in failing to instruct the jury that in an action for services rendered under an implied contract to pay therefor the statute bars recovery for all services except those rendered within three years of the institution of the action if there is no agreement as to the time when payment is to be made.

For recovery of compensation upon implied contract or *quantum meruit* for services rendered, the cause of action accrues according to circumstances as follows: (a) For indefinite and continuous service, without any definite arrangement as to time for compensation, payment may be required *toties quoties*. "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 are beyond the prescribed limitation." *Miller v. Lash,* 85 N.C. 51. See also: *Hodge v. Perry,* 255 N.C. 695, 122 S.E. 2d 677; *Grady v. Faison,* 224 N.C. 567, 31 S.E. 2d 760. (b) Where it is agreed that compensation is to be provided in the will of recipient, the cause of action accrues *when the recipient dies* without having made the agreed testamentary provision. *Stewart v. Wyrick, supra; Lipe v. Trust Co.,* 207 N.C. 794, 178 S.E. 665; *Helsabeck v. Doub,* 167 N.C. 205, 85 S.E. 241; *Freeman v. Brown,* 151 N.C. 111, 65 S.E. 743. (c) Where it is agreed that services are to be rendered during the life of recipient and compensation is to be provided in the will of recipient, and the contract has been abandoned, the cause of action accrues *at the time of abandonment* of the contract. *Gales v. Smith,* 251 N.C. 692, 111 S.E. 2d 854; s.c., 249 N.C. 263, 106 S.E. 2d 164; *Harrison v. Sluder,* 197 N.C. 76, 147 S.E. 684; *Shore v. Holt,* 185 N.C. 312, 117 S.E. 165; *McCurry v. Purgason,* 170 N.C. 463, 87 S.E. 244.

The instant case falls within (c) above. The action was instituted within three years of the abandonment of the agreement. The three years statute of limitations does not apply.

Where it is alleged that there was an agreement to provide compensation by will for services rendered and there is proof that services were rendered, but claimant fails to satisfy the jury by the greater weight of the evidence that there was an agreement to make testamentary provision for compensation, claimant may still recover upon a *quantum meruit* for services rendered. But request must be made in apt time that the case be submitted to the jury on this alternative, and in such alternative situation the statute of limitation applies as in (a) above. *Grady v. Faison, supra.* In the case at bar the jury verdict

established that there was an agreement for compensation by will. Moreover, neither plaintiffs nor defendant requested, in the pleadings or at the trial, that the case be submitted to the jury so as to present this alternative. Defendant tendered issues, but did not tender an issue involving the three years statute of limitation. The theory of trial in the lower court must prevail in considering the appeal. *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222. Defendant's assignment of error appears to have been an after-thought.

(4) Defendant contends that the court erred in refusing "to submit an issue as to the reasonable value of benefits conferred upon plaintiffs by defendant."

The contention is untenable. In *Gales v. Smith, supra,* we said: "*On the issue of damages* the court should have charged the jury that the amount found to be the reasonable value of the services rendered should be offset by the reasonable value of the benefits the plaintiffs and their children received from the defendant, including the use of his home and farm." (Emphasis added.) In the instant case the court charged the jury, on the third issue, in substantial compliance with the rule laid down in the *Gales* case. There was no need for a separate issue as to benefits. The issues submitted here are in substantial compliance with those in *Gales.* See also: *Lipe v. Trust Co., supra; McCurry v. Purgason, supra.* Defendant offered no evidence in support of his counterclaim for rent. There are numerous exceptions based on portions of the charge, and on failures to charge in certain respects. The charge, considered contextually, fairly presents the case to the jury.

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

No error.

JOE HALFORD KELLY v. MELVIN WASHINGTON ASHBURN.

(Filed 2 February, 1962.)

1. Automobiles § 17—

Under G.S. 20-158(a) the erection of stop signs on an intersecting highway or street is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield the right of way.

2. Same—

Where a stop sign has been erected at a street or highway intersection,

there is a rebuttable presumption of fact that such sign had been erected purusant to lawful authority.

3. Same—

The right of a motorist to rely upon the assumption that traffic approaching along an intersecting street will yield the right of way when he knows that a stop sign had been erected upon the intersecting street is not lost because such sign had been removed prior to the accident when such motorist has neither actual nor constructive notice that the sign had been removed, and when the evidence is sufficient to present this question, an instruction predicating his rights solely upon the law governing the right of way at an intersection at which no stop sign had been erected, is error.

4. Same—

Where a motorist who is unfamiliar with an intersection approaches it along a street upon which a stop sign had been erected but had been removed, his rights in entering the intersection must be judged by the rule of care of an ordinarily prudent man under the circumstances confronting him, unaffected by the fact that a stop sign had been erected upon the street upon which he was traveling.

BOBBITT, J., dissenting.

APPEAL by plaintiff from *Craven, S.J.*, May 1961 Term, LEE Superior Court.

Civil action instituted by Joe Halford Kelly to recover $900.00 damages to his 1957 Mercury automobile alleged to have been caused by the actionable negligence of the defendant, Melvin Washington Ashburn. The defendant denied negligence, filed a counterclaim against the plaintiff for $350.00 damages to his 1954 Ford and $2,500.00 for his personal injury.

The accident occurred about eight o'clock on the morning of February 27, 1957, at the intersection of Woodland Avenue and Hughes Street within the corporate limits of Sanford. Woodland is the north-south street, paved by the State several years ago. Hughes is the east-west street, constructed by the city two years before the accident. It intersects Woodland at right angles. The collision occurred in the northeast quadrant of the intersection as the plaintiff was driving north on Woodland and the defendant was driving west on Hughes.

The plaintiff testified in substance: He was familiar with the intersection. After the completion of Hughes Street, stop signs were erected at its east and west entrances into Woodland. He knew these signs had been at the intersection for the previous two years. At the time of the accident, however, he had no notice the stop sign at the eastern approach on Hughes was down. Immediately after the accident he discovered for the first time the sign was not in place. As he approached

the intersection he reduced speed to about 20 miles, applied his brakes when he saw the defendant "was not going to stop." The front of plaintiff's Mercury struck the left side of defendant's Ford. The Mercury stopped at the point of impact. The Ford crossed the street to the curb on the northwest corner of the intersection. There was evidence of the amount of damages to both vehicles and the extent of the defendant's personal injury.

The defendant testified in substance he was not familiar with the intersection, did not know stop signs were erected thereon. He approached the intersection from the east, stopped, saw the plaintiff to his left on Woodland, thought he had time to cross but was hit before he completed his intended movement through the intersection. "I don't know who entered the intersection first. I thought I could make it all right." On cross-examination, he testified: "I knew I was supposed to stop there. Certainly I stopped."

The court charged the jury:

> "I charge you that all of the evidence in this case, both plaintiff's and defendant's all of the evidence tends to show that there wasn't any stop sign located on that northeast corner of Woodland and Hughes; that is to say, there wasn't any stop sign facing Mr. Ashburn as he drove along Hughes Street. And I charge you that under the statutory law of North Carolina that, if you find that there wasn't any stop sign there, as all the evidence tends to show, that Ashburn would have been approaching that intersection with Kelly on his left, and Kelly was approaching with Ashburn on his right — and under the law of North Carolina, under those facts and circumstances Ashburn had the right of way. And I charge you peremptorily that if you find that there wasn't a stop sign there and that these motor vehicles approached this intersection, the two of them, at approximately the same time, which I shall define to you in a moment, — and if Kelly failed to yield the right of way to Ashburn, he would have been guilty of negligence under our law."

The jury found the defendant was negligent and the plaintiff was contributorily negligent. From the judgment on the verdict, the plaintiff appealed.

Bailey and Dixon, by Wright T. Dixon, Jr., for plaintiff appellant.
Gavin, Jackson & Williams, by E. L. Gavin for defendant appellee.

HIGGINS, J. The State law, G. S. 20-158(a), provides: "The State Highway Commission, with reference to State Highways, and local

authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways *by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway. . . .*" (emphasis added)

By the terms of the statute the erection of stop signs on an intersecting highway or street is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield. Stop signs at intersections are in such general use and their function so well known that a motorist, in the absence of notice to the contrary, may presume they were erected by lawful authority. *Jackson v. McCoury*, 247 N.C. 502, 101 S.E. 2d 377; *Smith v. Buie*, 243 N.C. 209, 90 S.E. 2d 514; *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658. The presumption is one of fact and, like other presumptions of fact, is rebuttable.

In this case the evidence permits the inference the plaintiff knew Woodland was surfaced by the State through the City of Sanford. Hughes was built by the city as an intersecting street on which stop signs were erected. The plaintiff testified he knew of these signs and relied on them as giving him the right of way. At the time of the accident, and unknown to him, the sign on the eastern approach was not in place. It was, however, restored after the accident.

This evidence is sufficient to present the question whether as to the intersection on the occasion of the accident the plaintiff had the right to assume that traffic from the east on Hughes would yield. Plaintiff's conduct is to be judged by the rule of the prudent man: that is, by that which a man of ordinary prudence would do under the same or similar circumstances when charged with like duty. These questions arise on the issue of negligence.

If the jury should find the stop signs were erected on Hughes Street by proper authority and the plaintiff had neither actual nor constructive notice the one on the eastern approach was not in place, its absence would not take away his right to treat Woodland as the preferred street. "A motorist proceeding along a favored highway is entitled to assume that traffic on an intersecting secondary highway will yield him the right of way, and the effect of his right to rely on this assumption is not lost because warning signs have been misplaced or removed, . . ." 162 A.L.R. 927; 58 A.L.R. 1197; 81 A.L.R. 185; 60 C.J.S., Motor Vehicles, § 350, p. 832; *Bell v Crook*, 168 Neb. 685, 97 N.W. 2d 352; *Schmit v. Jansen*, 247 Wis. 648, 20 N.W. 2d 542; *Lyle v. Fiorito*, 187 Wash. 537, 60 P. 2d 709; *Jones v. McCullough*, 148 Kan. 561, 83 P. 2d 669; *Titus v. Braidfoot*, 226 Ala. 21, 145 So. 423; *Welch v. Canton City Lines*, 142 O.St. 166; *King v. Gold*, 224 Iowa 890; *Austinson v. Kil-*

patrick, 105 N.W. 2d 258 (N.D. 1960); *Seyfer v. Gateway Baking Co.,* 159 Fed. Sup. 177.

What is said here relates to the plaintiff's rights, duties, and liabilities in traversing the intersection. The defendant was not familiar with the intersection. He was on the plaintiff's right and was not confronted by stop sign notice that Woodland was the preferred street. His conduct likewise must be judged by the rule of the prudent man, by that which a man of ordinary prudence would do under the same or similar circumstances, when charged with like duty. Each party's responsibility is to be judged in the light of conditions confronting him.

The rule with respect to the rights of motorists to rely on stop signs is stated in Blashfield 2, Perm. Ed., Cyclopedia of Automobile Law and Practice, § 998, p. 242:

> "That the usual marker or sign erected to inform travelers of the superior character of an intersecting road is temporarily removed or destroyed does not change the character of the road nor affect the usual incidents appropriate to such road, such as its conferring the right of way upon traffic flowing along it as against that on intersecting roads, although in a case where a motorist, approaching an arterial highway from the right, did not see the stop sign because the edge had been turned toward him, it was held that a person proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar and which is not properly marked with a lawful stop sign.
>
> "Conversely, where signs or markers have been posted by the proper authorities to the effect that a particular road is of superior classification, it will be regarded as being such so far as concerns the question of right of way, even though not legally established as a road within that particular classification. A driver has the right to assume, unless he knew otherwise, that a sign has been erected by the proper authority."

After all, responsibility for an accident must be determined upon the basis of the particular facts of each case. One party, or both, or neither, may have acted in accordance with the rule of the prudent man. Consequently, a collision at an intersection where a stop sign has been erected and then removed or defaced may result from the negligence of one party, or both, or neither. The court's charge in this case was a peremptory instruction to find the plaintiff was negligent by reason of his failure to yield to the defendant on his right.

The court's charge was an amplification of what this Court said in *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637. The rule herein stated is recognized in that case; however, decision was based upon the premise the evidence affirmatively showed the sign to have been erected by the city engineer on account of a special hazard and not by either the State Highway Commission or the local authorities (the governing board of the city) as specified in G.S. 20-158(a), leaving G.S. 20-155(a) applicable. In *Tucker v. Moorefield,* the Court said: "The mere fact that the city traffic engineer determined that a special hazard existed at this particular intersection did not convert North Smith Street or the portion thereof within the intersection into a through street. A driver on North Smith Street had no preferential rights because of the city traffic engineer's said determination."

In the case before us the evidence was sufficient to present the question whether the plaintiff, under the circumstances that confronted him, was warranted in assuming he had the right of way through the intersection. The peremptory instruction to the contrary was prejudicial error for which we order a

New trial.

BOBBITT, J., dissenting. In approaching and entering the intersection, plaintiff was driving north on Woodland and defendant was driving west on Hughes. Hence, defendant approached and entered the intersection from plaintiff's right.

It was the duty of the presiding judge to instruct the jury as to the relative rights of plaintiff and defendant in respect of right of way with reference to this intersection at the time of the collision.

G.S. 20-155(a) provides: "When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left *shall yield the right-of-way to the vehicle on the right* except as otherwise provided in § 20-156 and except where the vehicle on the right is required to stop *by a sign erected pursuant to the provisions of § 20-158* and except where the vehicle on the right is required to yield the right-of-way by a sign erected pursuant to the provisions of § 20-158.1." (My italics) G.S. 20-156 and G.S. 20-158.1 are not pertinent to the present factual situation.

When the collision occurred, no stop sign "erected pursuant to the provisions of § 20-158," faced westbound traffic on Hughes Street. Nor was there evidence defendant knew a stop sign *had been* there.

The judge instructed the jury, if plaintiff and defendant approached and entered the intersection at approximately the same time, it was plaintiff's duty, by reason of the quoted statutory provision, to yield the right of way to the vehicle approaching from his right. Under the

evidence, this instruction, in my opinion, was in accord with our decision and opinion in *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637.

A police officer testified that Woodland and Hughes were paved streets; that Woodland was "22 feet wide at that point"; that he did not know whether Hughes was "narrower or wider than Woodland"; that Woodland had been paved "a long time"; and that Hughes had been "recently paved." The city clerk testified: "Hughes Street from Lee Avenue up to Woodland was paved by the City and assessed. Woodland Avenue *as best I remember* was paved by the State." (My italics) Apart from the officer's testimony that Hughes had been "recently paved," I find no evidence as to when Hughes was paved. Nor do I find evidence that stop signs were erected *after* Hughes was paved.

There was evidence that stop signs *had been* erected, facing eastbound and westbound traffic on Hughes Street. When they were erected does not appear. Plaintiff testified he had observed these signs; that he had been riding up and down Woodland ever since he had been driving; that he was twenty-six years old and got his license when he was sixteen. He testified: "As to how long the sign had been there before it was taken down, it had been on the east side of Hughes Street for a couple or a number of years." (Note: I assume plaintiff intended to say there had been a stop sign on the north side of Hughes, facing westbound traffic thereon.) Again: "As I approached the intersection I thought there was a stop sign on Hughes Street."

There was no evidence as to when or by whom the stop sign that had faced westbound traffic on Hughes was removed. Nor was there evidence as to when such stop sign was last observed by plaintiff or anyone else.

During the trial, plaintiff moved for leave to amend his complaint by pleading portions of an ordinance of the City of Sanford, identified by the city clerk, referred to as follows:

> "Section 6.2. This is entitled 'STOP, BEFORE ENTERING CERTAIN STREET INTERSECTIONS. Those intersections described in Schedule 10, attached hereto and made a part hereof, are hereby declared to be stop intersections when entered from the streets first named, and when stop signs are placed, erected or installed at such intersections every driver of a vehicle or street car shall stop in obedience to such sign before entering the intersection, and shall not proceed into or across the through street until he has first determined that no conflict with traffic will be involved.' "
>
> "Section 10, entitled 'INTERSECTION AT WHICH STOP

IS REQUIRED BEFORE ENTERING' — it says 'Hughes at Woodland.' "

Plaintiff's said motion for leave to amend was denied. However, it is noted that this ordinance does not purport to designate Woodland as a boulevard, through street or arterial highway. It relates to a single intersection. It does not appear when this ordinance was adopted.

Under the rule adopted by the court for determination as to whether plaintiff was negligent in failing to yield the right of way, the burden of proof, in my opinion, is on plaintiff to establish that he believed, and had reasonable grounds to believe, that there was a stop sign facing westbound traffic on Hughes on the occasion of the collision. Absent evidence as to when plaintiff had last seen the sign and as to how long before the collision the sign had been removed, plaintiff's evidence, in my opinion, is insufficient to entitle him to the benefit of the rule adopted by the Court. In my opinion, the fact there *had been* a stop sign facing westbound traffic on Hughes and plaintiff *had seen it*, is, standing alone, insufficient to support a finding that plaintiff had reasonable grounds to believe it was there on the occasion of the collision.

In *Tucker v. Moorefield, supra,* the sign had been removed at least two months before the date of the collision; and Tucker, a route salesman, traveled North Smith Street two or three times a week.

Had plaintiff, traveling on Woodland, passed this intersection many times after the stop sign had been removed? It is noteworthy that a licensed motorist must be able to identify a standard stop sign by its octagonal shape; and, absent unusual conditions, a motorist can see whether a stop sign faces traffic approaching an intersection from his right.

SOUTHEASTERN FIRE INSURANCE COMPANY v. LEWIS POTEAT WALTON AND JAMES NICKLOS.

(Filed 2 February, 1962.)

1. Trial § 45—

A verdict is incomplete until it has been accepted by the court for record.

2. Trial § 29—

The rule that a party may, as a matter of right, take a voluntary nonsuit at any time before verdict when no counterclaim or affirmative relief is

demanded against him, obtains up to the time the verdict is accepted by the court or made known to any person other than members of the jury, the trial court, or a court official acting in the presence of the judge and under his direction with respect to the verdict, and a party's act in taking a voluntary nonsuit while a court official was taking the verdict from the jury to deliver it to the judge, is not reviewable.

3. Judgments § 6—

A judgment is *in fieri* during the term, and the court has authority as a matter of law to vacate the judgment during the term and may do so on its own motion.

4. Trial § 48; Appeal and Error § 3—

The action of the court in setting aside the verdict for error of law committed during the trial is reviewable, but where plaintiff has taken a voluntary nonsuit prior to acceptance of the verdict by the court, the act of the court in setting aside the verdict is without error, since, in such instance the court had no authority to accept or implement the purported verdict.

APPEAL by defendant from *Carr, J.*, June 1961 (second) Civil Term of WAKE.

This action was instituted 22 April 1960 to recover damages to an automobile allegedly caused by defendants' negligence.

Plaintiff insurer paid the owner the damages, took a subrogation assignment, and sued in its own behalf. Defendants, answering, denied plaintiff's allegations of negligence and pleaded contributory negligence.

At the trial plaintiff and defendants offered evidence, the judge charged the jury, and the jury retired and answered the issues as follows:

"1. Did the plaintiff insure the automobile of L. T. Woodlief against loss by collision as alleged in the complaint? Answer: Yes.

"2. Was the automobile of L. T. Woodlief damaged by the negligence of the defendants as alleged in the complaint? Answer: No.

"3. If so, was Gladys Woodlief, as agent of L. T. Woodlief, guilty of negligence which contributed to such damage as alleged in the answer? Answer: _____.

"4. What amount, if any, is plaintiff entitled to recover of the defendants? Answer: $_____."

"The jury . . . returned to the courtroom, handed the issues to the Deputy Sheriff, and the Clerk at that time being absent from the courtroom, the Deputy Sheriff started to the Judge's bench to deliver the issues to the Judge. Thereupon the following proceedings took place.

"'THE COURT: Let the record show that as the jury filed into the courtroom to render its verdict and after the jury had delivered

the issues to the Deputy Sheriff and the Deputy Sheriff was on the way to the Judge's bench to deliver the issues to the Judge Plaintiff's attorney arose and moved that he be permitted to take a voluntary nonsuit. Take the verdict, please. You answer the 1st issue Yes and the 2nd issue No, that is your verdict so say you all?

"'JUROR: Yes, sir.

"'MR. DIXON: (Plaintiff's attorney) I except to the verdict as taken and move to set it aside as being contrary to the weight of the evidence, your honor.

"'THE COURT: Motion denied. Plaintiff excepts.'"

The judge signed a judgment decreeing that "plaintiff is not entitled to recover of defendants," and assessing costs. Plaintiff excepted and gave notice of appeal.

Thereafter and at the same term the judge entered the following order:

"Upon the Court's own motion, for good cause shown, and in the discretion of the Court, the judgment entered in this action at this term of court is hereby vacated, and the motion of the plaintiff that the verdict be set aside is allowed, for that plaintiff, through its counsel, moved for judgment of voluntary nonsuit before the verdict of the jury was rendered.

"IT IS, THEREFORE, ORDERED that the verdict of the jury be set aside and it is further ordered that the motion of the plaintiff for judgment of voluntary nonsuit be allowed and that this action be dismissed as in case of voluntary nonsuit and the plaintiff be taxed with the costs."

Defendants excepted and appealed.

Dupree, Weaver, Horton & Cockman and Jerry S. Alvis for defendants appellants.

Bailey and Dixon for plaintiff appellee.

MOORE, J. The rule is uniformly observed in this State that a plaintiff, in an ordinary civil action, against whom no counterclaim is asserted and no affirmative relief is demanded, may as a matter of right, take a voluntary nonsuit and get out of court at any time before verdict, and his action in so doing is not reviewable, and it is error for the court to refuse to permit him to take the voluntary nonsuit. 4 Strong: N. C. Index, Trial, s. 29, p. 325; *Hoover v. Odom*, 250 N.C. 235, 108 S.E. 2d 426; *Everett v. Yopp*, 247 N.C. 38, 100 S.E. 2d 221; *Sink v. Hire*, 210 N.C. 402, 186 S.E. 494; *Oil Co. v. Shore*, 171 N.C. 51, 87 S.E. 938; *Graham v. Tate*, 77 N.C. 120. Conversely, a nonsuit is not allowed after verdict. "In actions where a verdict *passes* against

the plaintiff, judgment shall be entered against him." (Emphasis added.) G.S. 1-224; *Sharpe v. Sowers,* 152 N.C. 379, 67 S.E. 1003.

In the instant case the jury agreed upon a verdict, answered the written issues, returned to the courtroom, and handed the written verdict to a deputy sheriff. While the deputy sheriff was on the way to the judge's bench to deliver the verdict to the judge, plaintiff requested that it be permitted to take a voluntary nonsuit. The judge refused to permit it to do so. We must therefore determine, initially, whether or not the request was made *before* the verdict *passed.* If so, it was error for the judge to accept the verdict and enter judgment based thereon.

In this jurisdiction the general rule has been repeatedly and consistently stated and applied, under widely differing circumstances, that before a verdict returned into open court is complete, it must be accepted by the court for record. *State v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880; *Edwards v. Motor Co.,* 235 N.C. 269, 69 S.E. 2d 550; *Queen v. DeHart,* 209 N.C. 414, 184 S.E. 7; *Baird v. Ball,* 204 N.C. 469, 168 S.E. 667; *Allen v. Yarborough,* 201 N.C. 568, 160 S.E. 833; *State v. Bagley,* 158 N.C. 608, 73 S.E. 995; *State v. McKay,* 150 N.C. 813, 63 S.E. 1059; *State v. Godwin,* 138 N.C. 582, 50 S.E. 277; *State v. Arrington,* 7 N.C. 571. Acceptance by the trial judge is a prerequisite for a complete, valid and binding verdict. It is the duty of the judge to examine the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records. For that purpose the court can, at any time while the jury is before it and under its control, see that the jury amend its verdict in form so as to meet the requirements of the law. When the jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be given further instructions by the court and directed to retire and reconsider the matter and bring in a verdict in proper form. *State v. Gatlin, supra; Edwards v. Motor Co., supra; Queen v. DeHart, supra; Baird v. Ball, supra.* But the power of the trial court to accept or reject a verdict is restricted to the exercise of a limited legal discretion, and if the verdict is determinative of the issues involved the court is without authority to reject it, provided the court at the time of the coming in of the verdict has authority to proceed with the trial. *Edwards v. Motor Co., supra; Allen v. Yarborough, supra;* Of course, the court cannot amend or change the substance of a verdict without the consent of the jury, and cannot amend or change it in any way after it has been accepted and recorded. *State v. Snipes,* 185 N.C. 743, 117 S.E. 500.

In *Cahoon v. Brinkley,* 168 N.C. 257, 84 S.E. 263, the right of plaintiff to take a voluntary nonsuit is involved. The jury returned to the courtroom at the instance of the judge, stated that they had not

reached a verdict, but, upon inquiry by the judge as to progress made, said they could agree upon an answer to the first issue within a few minutes. The judge directed the jury to retire for further deliberation. "They started toward the jury room and the counsel for plaintiff arose and said the plaintiff would take a nonsuit." The court refused to permit the plaintiff to do so. On appeal, this Court reversed the ruling and stated: "It is to be noted that the jury in this case had not agreed on any one issue, and no verdict had been rendered on either issue. Under such circumstances it is well settled, in the absence of a properly pleaded counterclaim, that plaintiff had a right to submit to a nonsuit and go out of court." In *Oil Co. v. Shore, supra,* seven of eleven issues had been answered, and the identity of the answered issues was known to the parties. At the direction of the court the jury retired to further consider the issues. Plaintiff's counsel announced that plaintiff would take a nonsuit, but the court would not permit it to do so. This ruling was reversed on appeal. "The jury had delivered no verdict, and the court had not *accepted* what had been done as a verdict. . . ." (Emphasis added.) In a case in which the verdict had been accepted by the judge and the jury had retired at the court's direction to correct a mere informality in the verdict, the plaintiff had no right to take a voluntary nonsuit. *Strause v. Sawyer,* 133 N.C. 64, 45 S.E. 346.

"A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit'. . . . (A)ccording to the course of the court the plaintiff is at liberty to take a nonsuit by announcing his purpose to absent himself even after the judge has charged the jury and their verdict is made up; provided he does so before the verdict is *made known.*" (Emphasis ours.) *Graham v. Tate, supra.*

"When the jury appear in court, the judge directs the clerk to take the verdict: he inquires if they have agreed, and the foreman responds that they have, and hands the issues with the answers to the clerk. These are then read, so that the judge may determine whether or not they are in proper form, and the clerk inquires whether all the jurors consent, 'so say you all,' to show that it is unanimous, and to give each juror an opportunity to express his dissent." McIntosh: North Carolina Practice and Procedure, (2d Ed.) Vol. 2, s. 1471, p. 79.

We conclude that a verdict "passes," when it has been accepted by the trial judge for record. And a plaintiff may take a voluntary nonsuit at any time before the verdict is accepted and before it is "made known." A verdict is accepted by the judge when he has inspected it and finds, or should as a matter of law find, that it is determinative of the issues involved. A verdict is "made known" when its contents have been seen or heard by any person or persons other than the jury serving on the case, the trial judge, and a court official or court of-

ficials acting in the presence of the judge and under his direction with respect to the verdict. It is our opinion, and we so hold, that plaintiff in the case at bar acted in apt time to withdraw his suit and had right to do so.

The judge entered judgment on the purported verdict in this case. Thereafter and at the same term he vacated the judgment. This he had authority to do as a matter of law. "A judgment is *in fieri* during the term at which it is rendered and the judge *non constat* notice of appeal, may modify, amend or set it aside at any time during the term." *Hoke v. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E. 2d 407; *State v. Godwin*, 210 N.C. 447, 187 S.E. 560; *Cook v. Telegraph Co.*, 150 N.C. 428, 64 S.E. 204. And in so doing the court may act on its own motion. *Shaver v. Shaver*, 248 N.C. 113, 118, 102 S.E. 2d 791.

Next, the court set aside the verdict. "The judge . . . may, in his discretion, entertain a motion . . . to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had." G.S. 1-207. "If the motion is based upon exceptions taken during the trial, or upon circumstances which involve the legal validity of the verdict, or the ruling is based upon the existence or nonexistence of legal authority to make it, the action of the court is subject to review." McIntosh: North Carolina Practice and Procedure (2d Ed.), Vol. 2, s. 1594, p. 93; *Ward v. Cruse*, 234 N.C. 388, 67 S.E. 2d 257. We think the order setting aside the verdict is subject to review since the reason assigned therefor is that plaintiff "moved for judgment of voluntary nonsuit before the verdict of the jury was rendered." *Roberts v. Hill*, 240 N.C. 373, 82 S.E. 2d 373. But no error was committed in setting aside the verdict for plaintiff had taken a nonsuit before the verdict was rendered, the case was at an end, and the court had no authority to accept or implement the purported verdict.

The voluntary nonsuit of plaintiff was properly entered. It has been said "that a trial judge may dismiss an action after verdict rendered only on two grounds: (1) want of jurisdiction, or (2) failure of the complaint to state a cause of action." *Ward v. Cruse, supra.* This rule has no application here. In the first place the verdict was improperly accepted, and is a nullity. In the second place, the taking of the voluntary nonsuit was the act of the plaintiff and not of the court. The court's order merely notes the act of plaintiff in withdrawing his suit. Assuming that it was necessary in this case to set aside the verdict, once it was set aside the status of the case upon the docket was the same as if it had never been tried. Thereupon, the plaintiff

had the right to enter its voluntary nonsuit. "A voluntary nonsuit is the act of the party and is not subject to review." McIntosh: North Carolina Practice and Procedure (2d Ed.), Vol. 2, s. 1782(1), p. 205.

The order appealed from is

Affirmed.

CLARA C. REDDEN v. MARVIN THOMAS BYNUM AND UNIVERSAL AUTO RENTALS, INC.

(Filed 2 February, 1962.)

1. Trial § 22—

Contradictions and inconsistencies in plaintiff's own testimony do not justify nonsuit but must be resolved in favor of plaintiff.

2. Automobiles § 7—

Traveling at excessive speed, failing to keep a proper lookout, or failing to maintain reasonable control of the vehicle constitutes a violation of G.S. 20-141(c), and is negligence.

3. Automobiles § 25—

Since a motorist must exercise care commensurate with the danger so as to keep his vehicle under control, a speed of 35 to 40 miles per hour on a highway covered with ice and snow may be excessive.

4. Automobiles § 15—

The right of a motorist to assume that a vehicle approaching from the opposite direction will obey the law and yield one-half of the highway is not absolute and may be qualified by the particular circumstances existing at the time, and a motorist may not indulge this assumption when he sees, or by the exercise of due care should see, that the approaching vehicle is out of control.

5. Automobiles § 41c—

Evidence that defendant was driving some 40 miles per hour on a highway covered with ice and snow, that plaintiff's vehicle, in attempting to pull a grade, had skidded to its left so that the front part of plaintiff's vehicle was in defendant's lane of travel, that it was in this position, stationary or barely moving, when defendant was some four hundred feet away, and that defendant did not slacken speed and struck plaintiff's vehicle on its right side, *is held* sufficient to be submitted to the jury on the question of defendant's negligence.

6. Automobiles § 13—

The mere skidding of an automobile does not imply negligence but may form the basis for liability when the skidding results from some fault of the operator amounting to negligence.

7. Automobiles § 42f—

Evidence tending to show that plaintiff was traveling some 10 to 15 miles per hour upon a highway covered with ice and snow, that in attempting to ascend a grade she pressed the accelerator slightly and skidded to the left into defendant's lane of travel, and that her tires, while worn, still had tread on them, *is held* not to disclose contributory negligence as a matter of law.

8. Automobiles § 54f—

Where it is admitted that the corporate defendant is the registered owner of a vehicle described in the complaint but there is no evidence or allegation that the individual defendant was operating this vehicle on the occasion in question or that the individual defendant was the employee or agent of the corporate defendant, nonsuit of the corporate defendant must be allowed.

9. Trial § 19—

Where the evidence on an aspect which is essential to make out a case against a defendant is insufficient to be submitted to the jury, such defendant's motion to nonsuit must be allowed notwithstanding the motion was not prosecuted on this aspect.

10. Appeal and Error § 35—

The Supreme Court must assume that the record is true and complete.

APPEAL by plaintiff from *Olive, J.*, February 27, 1961 Term of GUILFORD (Greensboro Division).

This action was instituted by plaintiff on 5 May 1959 to recover for personal injuries and property damage arising out of a collision of motor vehicles.

Plaintiff alleges:

About 4:15 P.M. on 8 January 1959 plaintiff was driving her pickup truck eastwardly along U. S. Highway 70-A about 3 1/2 miles east of Greensboro. At this point the highway has three lanes, two for eastbound and one for westbound traffic. It was snowing, the highway was slippery, and plaintiff was proceeding in the south lane at 10 miles per hour. As the pickup began to ascend a rather steep incline it started sliding, it skidded sideways to the left and came to rest partially in the center lane and partially in the north lane. A van-type truck operated by the individual defendant (Bynum), employee and agent of W. P. Ballard & Co., Inc. (hereinafter called Ballard & Co.), proceeding westwardly at about 40 miles per hour, collided with plaintiff's pickup, causing injury to plaintiff and her vehicle. The view of Bynum was unobstructed. He did not reduce speed or take precautions to avoid the collision, though he could have seen plaintiff's pickup skidding into his lane of travel when 300 feet away. He was negligent in that he (1) operated the truck at a speed greater than was reasonable and

prudent under the circumstances, (2) failed to decrease speed to avoid collision with plaintiff's pickup, (3) failed to maintain a proper lookout, (4) failed to keep the truck under reasonable control, and (5) violated provisions of the reckless driving statute (G.S. 20-140). This negligence was the proximate cause of plaintiff's injury and damage.

Defendants, answering, deny plaintiff's allegations of negligence and allege that plaintiff was contributorily negligent in that she (1) operated the pickup on icy roads knowing that it was equipped with tires which were worn and slick, (2) failed to keep the pickup under reasonable control, (3) operated the pickup at a speed greater than was reasonable and prudent under prevailing conditions, (4) violated the provisions of the reckless driving statutes, (5) failed to drive on the right half of the highway, (6) failed to pass to the right while meeting defendants' truck, and (7) failed to yield to the meeting truck one-half of the highway.

In reply, plaintiff alleges that notwithstanding any negligence on her part defendants had the last clear chance to avoid the collision.

By stipulation of the parties Ballard & Co. was substituted as defendant in lieu of Universal Auto Rentals, Inc., and adopted the pleadings which had been filed by the latter.

At the close of plaintiff's evidence the court allowed defendants' motion for nonsuit and dismissed the action.

Plaintiff appeals.

Benjamin D. Haines and Thomas Turner for plaintiff appellant.

Jordan, Wright, Henson & Nichols and Karl N. Hill, Jr., for defendants appellees.

MOORE, J. Plaintiff's sole assignment of error is based on her exception to the allowance of defendants' motion for involuntary nonsuit. As to defendant Bynum the exception is well taken.

When considered in the light most favorable to her, plaintiff's evidence makes out a *prima facie* case of actionable negligence against Bynum. It is true that there are discrepancies, contradictions and inconsistencies in plaintiff's testimony, but upon motion for nonsuit these are resolved in favor of plaintiff. *Dinkins v. Carlton,* 255 N.C. 137, 141, 120 S.E. 2d 543; *Cozart v. Hudson,* 239 N.C. 279, 78 S.E. 2d 881. Inasmuch as there must be a retrial we refrain from a detailed discussion of the evidence. In brief summary it tends to show:

It was snowing and sleeting. The highway was covered with snow and ice and was slippery. It was a three-lane highway. Plaintiff was proceeding eastwardly down a slight hill in her righthand lane at ten to fifteen miles per hour. She was almost coasting, didn't have her foot

on the accelerator. She reached the bottom of the hill and started up a rather steep and long incline. It was about seven hundred feet to the top of the incline. As plaintiff started up the hill she pressed the accelerator slightly. The wheels of her pickup began to spin. She saw a van-type truck coming down the hill toward her from the east. Her pickup moved forward about its own length and then skidded to the left at an angle across the center lane with its front in the north lane. As the pickup skidded to the left the approaching truck was four hundred feet away, and was travelling forty to forty-five miles per hour. It did not slacken speed but within a matter of seconds came straight into the pickup. The pickup was entirely on the hard surface, and was practically at a standstill when struck — it could have been moving just slightly. Plaintiff testified: "I knew the truck was there; I had it under observation; I knew he was coming and I was doing all I could under the conditions to take care of my truck, take care of myself. . . . He was under observation all the time." She testified further: "I observed the truck most of the time from the time I first saw it until it collided with my truck." She also stated: "I think I came to a stop here about this point" (indicating on a chart). The right front of the truck struck the pickup at the right-hand door. Plaintiff was rendered unconscious. It took twenty-five minutes to pry the door of the pickup open with the use of crowbars. The pickup was later sold for $200.00 for salvage.

The fact that the speed of a vehicle is less than the maximum limit provided by law "shall not relieve the driver from the duty to decrease speed . . . when special hazard exist with respect to . . . other traffic or by reason of weather conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway . . . in compliance with legal requirements and duty of all persons to use due care." G.S. 20-141(c). Failure to observe this statutory duty renders a motorist negligent, and such negligence may consist of traveling at excessive speed, failure to keep a proper lookout, or failure to maintain reasonable control of vehicle. *Durham v. Trucking Co.*, 247 N.C. 204, 100 S.E. 2d 348; *Brown v. Products Co., Inc.*, 222 N.C. 626, 24 S.E. 2d 334. Speed of thirty-five to forty miles per hour on a highway covered with ice and snow may be excessive; the driver of the vehicle under such conditions must exercise care commensurate with the danger, so as to keep his vehicle under control. *Wise v. Lodge*, 247 N.C. 250, 100 S.E. 2d 677. Failure to use brakes when such use would prevent a collision is negligence. *Clark v. Emerson*, 245 N.C. 387, 95 S.E. 2d 880. See also, *Johnson v. Lewis*, 251 N.C. 797, 112 S.E. 2d 512; *Lamm v. Gardner*, 250 N.C. 540, 108 S.E 2d 847

Assuming that the perilous position of plaintiff's pickup resulted from some negligence on her part, defendant Bynum had the duty to avoid colliding with it if he could do so in the exercise of due care. ". . . (A) person is not bound to anticipate negligent acts or omissions on the part of others; but, in the absence of anything which gives, or should give notice to the contrary, he is entitled to assume and act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person." *Weavil v. Myers,* 243 N.C. 386, 391, 90 S.E. 2d 733. "However, the right of a motorist to assume that a driver of a vehicle coming from the opposite direction will obey the law and yield one-half the highway, or turn in time to avoid collision, and to act on such assumption in determining his own manner of using the road, is not absolute. It may be qualified by the particular circumstances existing at the time, — such as 'the proximity, the position and movement of the other vehicle, and the condition of the road as to usable width, and the like.' " *Hoke v. Greyhound Corp.,* 227 N.C. 412, 418, 42 S.E. 2d 593; *Cox v. Lee,* 230 N.C. 155, 52 S.E. 2d 355. In a case where plaintiff, at night, travelling north, in attempting to reverse her direction on a four-lane highway separated by a median, entered the cross-over at slow speed, and her motor stalled, her brakes failed and her car rolled onto the southbound lanes, and defendant's car, travelling south along the straight highway, was then five hundred feet away with headlights burning, and continued on and struck plaintiff's car, the evidence was held sufficient to be submitted to the jury on the question of whether defendant was negligent in travelling at excessive speed and in failing to keep a proper lookout. *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450. Evidence tending to show that a motorist was driving his car on a bright moonlight night on a straight highway, a mule started walking across the highway when the motorist was one hundred yards away, and the motorist, without decreasing speed, drove on and collided with the mule, was held to disclose contributory negligence on the part of the motorist as a matter of law. *Johnson v. Heath,* 240 N.C. 255, 81 S.E. 2d 657. Evidence that motorist A turned to his left across the highway in the path of motorist B, who was travelling in the opposite direction, and that B was travelling at excessive speed, could have seen A's movement when three hundred feet away, but did not slacken speed or change course until the cars were virtually in contact, was sufficient to support the conclusion that B was driving at an unlawful speed and failed to keep his car under reasonable control. *Jernigan v. Jernigan,* 236 N.C. 430, 72 S.E. 2d 912.

In the case at bar the evidence does not compel the inference that

plaintiff was contributorily negligent as a matter of law. The mere skidding of an automobile does not imply negligence. *Coach Co. v. Burrell,* 241 N.C. 432, 85 S.E. 2d 688; *Winfield v. Smith,* 230 N.C. 392, 53 S.E. 2d 251; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251. But skidding may form the basis for liability when it results from some fault of the operator amounting to negligence on his or her part. *Wise v. Lodge, supra; Durham v. Trucking Co., supra; Hoke v. Greyhound Corp., supra; Williams v. Thomas,* 219 N.C. 727, 14 S.E. 2d 797; *Taylor v. Rierson,* 210 N.C. 185, 185 S.E. 627. Defendants allege that plaintiff negligently operated her pickup on icy roads when, to her knowledge, the pickup was equipped with tires that were worn and slick. Plaintiff testified that the tires were worn, but still had tread on them, that they were not slick. As to whether plaintiff was negligent in the respect alleged was a question for the jury.

Plaintiff alleges that Ballard & Co. on 8 January 1959 "was the registered owner of a certain 1957 Chevrolet truck van which bore N. C. registration number 4822C for the year 1958." This is admitted, but nowhere in the pleadings or record does Ballard & Co. admit that Bynum was operating this particular truck on the occasion in question or that Bynum was its employee or agent. Plaintiff offered no evidence tending to prove either proposition. It is true that Ballard & Co. makes no argument in the brief that there was a lack of showing of agency. But we must assume that the record is true and complete. Since plaintiff failed to make a *prima facie* showing that Bynum was agent of Ballard & Co., the latter was entitled to have its motion for nonsuit sustained.

The judgment below is,

As to the corporate defendant, affirmed,

As to the individual defendant, reversed.

NANCY JOHNSON CREECH v. JAMES OSBORNE CREECH.

(Filed 2 February, 1962.)

1. Pleadings § 10—

An allegation in the answer which does not relate to a counterclaim is deemed controverted without necessity of reply. G.S. 1-159.

2. Divorce and Alimony § 16—

In the wife's action for alimony without divorce, the husband's allegations of adultery on the part of the wife, set up as a defense, are deemed denied without the necessity of a reply.

3. Divorce and Alimony § 18—

Where the husband alleges adultery on the part of his wife as a defense in her action for alimony without divorce, and offers evidence in support thereof upon the hearing of the wife's motion for alimony *pendente lite*, it is error for the court to order alimony *pendente lite* without finding the facts with respect to the alleged adultery. G.S. 50-16.

4. Appeal and Error § 12—

The Superior Court is without authority to modify an order while an appeal therefrom is pending.

APPEAL by defendant from *Cowper, J.*, at Chambers 17 February 1961 in LENOIR.

This action was instituted on 23 January 1961 pursuant to G.S. 50-16 for alimony without divorce and custody of children.

Plaintiff wife alleges *inter alia* that defendant abandoned her without just cause and without fault on her part and refuses to provide adequate support for her and the four minor children of the marriage, and that she is a fit and suitable person to have custody of the children.

Defendant husband, answering, denies, except as to the fact of the marriage and the paternity of the children, the allegations of the complaint, and affirmatively alleges that for several months prior to 11 January 1961 plaintiff engaged in acts of adultery with a named person, that defendant has not cohabited with her since he learned of her adulterous conduct, and that she is not a fit and suitable person to have custody of the children.

Plaintiff moved for alimony *pendente lite* and custody of the children. At the hearing on the motion both parties were present and represented by counsel. The court heard and considered the pleadings, oral testimony and affidavits. Defendant offered evidence tending to support his plea of adultery; plaintiff offered evidence tending to refute it.

The court made no findings with respect to the alleged adultery of plaintiff, but found as a fact that plaintiff and defendant were both fit and suitable persons to have custody of the children, plaintiff is entitled to support, defendant has wilfully abandoned plaintiff and the children of the marriage, and that the acts and conduct of defendant as alleged constitute grounds for divorce *a mensa et thoro*.

On 17 February 1961 the court entered an order that, pending a final determination of the issues involved, plaintiff and defendant each have custody of two of the children, plaintiff have the exclusive use and benefit of the house owned by the parties as tenants by the entireties, and defendant keep up the mortgage payments on the house and pay to plaintiff $160.00 per month for support of herself and the two children in her custody.

Defendant appeals.

Jones, Reed & Griffin for defendant appellant.
J. Harvey Turner for plaintiff appellee.

MOORE, J. The court erred in failing to make findings with respect to the issue of plaintiff's alleged adultery.

G.S. 50-16 provides that in a suit by a wife for alimony without divorce "it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees." An allegation in an answer is deemed controverted without necessity of reply if it does not relate to a counterclaim. G.S. 1-159; *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876. Plaintiff did not reply and expressly deny defendant's allegations of adultery, but these allegations do not relate to a counterclaim. Hence, they are taken as controverted.

On motion for alimony *pendente lite* made in an action by the wife against the husband pursuant to G.S. 50-16, the judge is not required to find the facts as a basis for an award of alimony except when the adultery of the wife is pleaded in bar. *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436. In the instant case defendant expressly pleaded the adultery of plaintiff in bar of her claim to alimony and offered evidence in support of his plea. The order of the court awarding alimony *pendente lite* to plaintiff without finding the facts with respect to this plea ignores the provisions of G.S. 50-16 quoted above. *Williams v. Williams,* 230 N.C. 660, 55 S.E. 2d 195. Defendant is entitled to a rehearing upon plaintiff's motion for alimony *pendente lite.*

Pending this appeal both parties moved for a modification of the order of 17 February 1961, and plaintiff requested that a citation be served on defendant for failure to make the payments in accordance with the order. These motions were continued pending the outcome of the appeal. Our decision herein renders them moot. Furthermore, an order appealed from may not be modified while the appeal is pending for the Superior Court is without authority to enter the subsequent order. *Ragan v. Ragan,* 214 N.C. 36, 197 S.E. 554.

The cause is remanded for rehearing of plaintiff's motion for alimony *pendente lite* and for findings of fact in accordance with the statute and decisions of this Court.

Error and remanded.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1962

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. SOUTHERN RAILWAY COMPANY AND CAROLINA & NORTHWESTERN RAILWAY COMPANY.

(Filed 28 February, 1962.)

1. Carriers § 7—

A carrier is required to provide equality of rights and facilities for shippers of goods who request service under substantially similar circumstances and conditions, and exigencies of competition do not justify discrimination between shippers.

2. Same; Utilities Commission § 8—

It is unlawful for a carrier to refuse to provide reciprocal switching facilities between private or assigned sidings of shippers on the lines of such carrier and the terminal interchange tracks jointly owned with competing carriers when such refusal is predicated upon the percentage of a shipper's freight which is transported by competing line-haul carriers, and an order of the Utilities Commission requiring such carrier to furnish switching facilities to all shippers similarly situated, the cost of the switching operations to be absorbed by the line-haul carrier, is a lawful exercise of authority by the Commission.

3. Utilities Commission § 9—

An order of the Utilities Commission is *prima facie* just and reasonable, and where the findings of the Commmission are supported by competent, material, and substantial evidence, an order which the Commission has authority to enter upon such findings will be affirmed.

APPEAL by defendants from *Walker, Special Judge,* 14 September Term 1961 of GUILFORD (High Point Division). This appeal was docketed in the Supreme Court as Case No. 596 and argued at the Fall Term 1961.

This proceeding was commenced by a complaint filed with the North Carolina Utilities Commission (hereinafter called Commission) on 19 October 1959. The complainants are the Chamber of Commerce of High Point, North Carolina, and the following members thereof engaged in business and industrial activities in High Point: Amos Hosiery Mills, Beeson Hardware Company, Carolina Farnsworth, Inc., Casard Furniture Manufacturing Corp., W. A. Davis Milling Company, High Point Hardware Company, High Point Paper Box Company, Inc., General Steel Products, Inc., Heritage Furniture Company, Logan Porter Mirror Company, Marsden-Slate, Inc., National Food Stores, Inc., Silver Knit Hosiery Mills, Slane Hosiery Mills, Inc., Snow Lumber Company, Inc., and Westwood Lumber Company.

The defendants named in the complaint are the Southern Railway Company (hereinafter referred to as Southern) and its subsidiary, the Carolina & Northwestern Railway (hereinafter referred to as C&NW), and the High Point, Thomasville & Denton Railroad Company (hereinafter referred to as HPT&D), and several connecting lines which participate with the HPT&D in competitive through routes and joint rates to and from High Point.

The complainants seek relief for themselves and their local industries from certain allegedly illegal practices of the defendants in refusing to grant reciprocal switching to all industries within the switching limits of High Point. Reciprocal or connection-terminal switching is called for where the line-haul carrier is one other than the carrier which serves the industry shipping or receiving the freight. In such a case, where reciprocal switching exists, the carrier serving that industry will switch cars from the industrial siding to the tracks of the line-haul carrier, or, in the case of inbound traffic, from the exchange tracks of the line-haul carrier to the private or assigned siding of the consignee. The switching charge is absorbed by the line-haul carrier in order that its rates will be competitive with those of the carrier serving the industry.

The practices complained of, insofar as they relate to intrastate traffic, are subject to the jurisdiction of the Commission.

The complainants allege that for many years it was the established practice of these three defendants to absorb the reciprocal switching charges for some 91 industries in the High Point switching area. It is further alleged that such practice constituted and constitutes a just and reasonable practice and the maintenance of open through com-

petitive routes and joint rates to and from High Point, and that the maintenance of such practice is in the public interest.

The Southern publishes a switching and absorption tariff governing switching and transfer, and provides for absorption of switching and transfer charges, at points named in the tariff, including a list of industries which are open to reciprocal switching. The C&NW participates in the Southern's absorption tariff, while HPT&D publishes its own switching and absorption tariff. Of 106 industries and business establishments located on the Southern and C&NW in the High Point switching area, approximately 40 are listed by the Southern as open to reciprocal switching, and ten are listed as open to reciprocal switching when the lowest rates do not apply over the Southern. Of 73 industries or business establishments located on the HPT&D, approximately 44 are open to reciprocal switching. Of the complainant industries and business establishments, all but one, General Steel Products, Inc., are located on the Southern or C&NW. All of the 15 complainants located on the Southern or the C&NW have been removed from the reciprocal switching tariff of the Southern after they or their predecessor in ownership had been listed for a long period of years, and the Southern has refused to list, relist, or include them in its reciprocal switching tariff, and the complainants allege that this is an unjust and unreasonable practice and results in the collection of unjust and unreasonable charges in addition to the High Point rates.

It is further alleged that Southern's absorption tariff is unduly and unreasonably complex; that it contains many confusing details and specific provisions; that it fails to state the charges plainly, contains copious, complex and confusing exceptions, limitations and restrictions, which result in the assessment of unwarranted charges in addition to the High Point long-haul rate.

The complainants pray that the defendants be required to furnish a simple tariff providing for the absorption of reciprocal switching charges on all present and future industrial services by private or assigned sidings in the established switching area in High Point.

The HPT&D filed answer admitting all material allegations of the complaint and declaring that it was ready to join the railroads serving High Point in publishing a joint reciprocal switching tariff including all industries which had private or assigned sidings. The Southern and the C&NW answered denying any violation of any statute of North Carolina. The C&NW is a wholly owned subsidiary of the Southern and joined it in the publication of Southern's switching tariff and is governed thereby with respect to reciprocal switching.

The Interstate Commmerce Commission held a hearing in High Point on the complaint filed with it. It was stipulated by the parties

that the record made at that hearing be introduced into evidence at the hearing held before the Commission. This was done, and further evidence was also taken at the hearing before the Commission. The Commission issued an order based upon the following findings of fact and conclusions:

"FINDINGS OF FACT

"1. Defendants Southern Railway Company, Carolina & Northwestern Railway Company, and High Point, Thomasville & Denton Railroad Company are common carriers by railroad engaged in the transportation of property between High Point and points in North Carolina subject to the jurisdiction of this Commission.

"2. Carolina & Northwestern Railway Company is a subsidiary of Southern Railway Company and the facilities, terminals, and tracks of these two railroads are operated jointly for the account of both in serving firms located on these lines in High Point.

"3. Defendants in certain instances accord reciprocal switching but in other instances fail to do so.

"4. Failure of defendants to list in their switching tariffs the names of all industries owning and maintaining private sidings in the conduct of their business and failure to accord reciprocal switching to such industries result in an unreasonable practice.

"5. Failure of defendants to list in their switching tariffs the names of all industries which have been assigned sidings for their exclusive use and failure to accord reciprocal switching to such industries result in an unreasonable practice.

"6. The practice of providing reciprocal switching for certain industries and denying such to others under substantially similar circumstances and conditions is unduly preferential of those accorded reciprocal switching and unduly prejudicial to those not accorded reciprocal switching.

"7. Refusal of defendants to provide reciprocal switching and absorption of switching charges on traffic to or from industries or firms utilizing facilities or tracks owned and maintained by defendants other than those assigned is not an unreasonable practice.

"8. Section 3 of Defendant Southern's Switching Tariff No. 16 which prohibits reciprocal switching to or from private tracks of industries or firms that undergo change in type of business is unjust and unreasonable.

"9. Assessment of line-haul rates to or from High Point plus switching charges on non-competitive traffic in excess of charges based on lawful line-haul rates to or from the next more distant point is in violation of G.S. 62-128, and therefore unlawful.

"10. Orders in Dockets No. R-29, Sub 82, and R-29, Sub 84, investigations of reciprocal switching at High Point for account of Amos Hosiery Mills, Inc., High Point Paper Box Company, Inc., Silver Knit Hosiery Mills, Inc., Slane Hosiery Mills, Inc., and W. A. Davis Milling Company are vacated and set aside."

The conclusions in pertinent part read as follows:

"The complaint in this proceeding, having been filed by the High Point Chamber of Commerce and 16 industries or firms in High Point, 15 of which are located on Southern and its subsidiary C&NW and one on HPT&D, was filed also with Interstate Commerce Commission. The complainants seek the same relief from this Commission and the Interstate Commerce Commission. Most of the evidence related to carload traffic moving in interstate commerce. Only a small percentage of traffic to or from High Point originates or terminates at points in North Carolina. Complainants and defendants agree that the same rule governing reciprocal switching and the absorption of switching charges should apply on both interstate and intrastate traffic; otherwise, it is not a good rule.

"Several of the complainants (seven according to the record) are already accorded reciprocal switching on intrastate traffic by reason of two previous investigations by the Commission in Dockets No. R-29, Sub 82, and No. R-29, Sub 84. When orders in these two proceedings were issued, defendant Southern decided to take no further action inasmuch as there were no intrastate movements of any consequence.

"There is evidence that the 15 complainants on Southern (and C&NW) have private or assigned sidings but that most of these industries were cancelled from the switching tariff because, according to Southern, such industries are served by tracks owned by Southern. It is clear from the record that Southern loses considerable revenue by reason of according reciprocal switching to the complainants; thus, the HPT&D receives the line-haul or revenue-haul leaving Southern with only switch-movements producing $13.71 a car; that if Southern received 80 to 85 per cent of the cars moving to or from complainants, reciprocal switching would not be cancelled; and that it decided to cancel reciprocal switching to those complainants who are shipping or receiving their cars via or over competing routes.

"The record might well suggest the following questions:

"1. Should industries or firms having private sidings which are maintained by them be accorded reciprocal switching?

"2. Should industries or firms that have tracks assigned them by defendants be accorded reciprocal switching?

"3. Should industries or firms served by tracks other than assigned

tracks that were constructed and are maintained by defendants be accorded reciprocal switching?

"4. Would denial of reciprocal switching to a firm served by tracks owned and maintained by defendants and the granting of reciprocal switching to a firm having a private track constructed and maintained by it in the same area be prejudicial to the former and preferential of the latter?

"5. If conditions concerning the switching of cars to a private track of one firm are the same as the conditions concerning the switching of cars to another firm located on the same industrial track or in the same area, would the refusal of defendants to accord reciprocal switching to one and not the other create undue preference and prejudice?

"6. Would the routing of 80 to 85 per cent of the cars over the lines of the defendant on which the firms are located and the remaining over a competing line through reciprocal switching justify continued reciprocal switching without other considerations or, stated differently, would the routing of more than 15 to 20 percent of such cars over competing lines justify cancellation of reciprocal switching for that reason alone?

"7. Should a privately owned and maintained track be refused reciprocal switching because such track was transferred or conveyed to another industry or firm which did not engage in the same type of business for which the track had been used even though the transferee or new firm would continue to own and maintain the track?

"8. If so, what would be the criterion that would change the status of such a private track?

"9. In the absence of a change in conditions of switching a private track that has changed ownership and type of business or in which no different service is performed, are defendants justified in refusing to switch cars for the successor firm?

"10. If defendants are permitted to cancel reciprocal switching to or from privately owned tracks as well as to defendant-owned tracks, thereby denying all industries reciprocal switching, would such localize all traffic and thus eliminate competition between rail carriers?

"We believe the record amply supports an affirmative answer to questions 1, 2, 5 and 10 and a negative answer to questions 3, 4. 7 and 9. We believe in answer to question 6 that if a track is classified as being switchable for 80 to 85 per cent of the business routed over the lines of the carrier on which the track is located, it is switchable for any amount. The amount of business given a carrier alone does not determine whether or not reciprocal switching should be accorded or denied.

"It is not in the public interest to deprive firms that have con-

structed tracks on their property at competitive points and are maintaining them at their own expense of the right to select the carrier in the transportation of their products. Conversely, it is unreasonable to require the defendants to accord switching or to open routes via their competitors in the transportation of traffic for account of firms that have elected to use carrier-owned and maintained facilities, except those assigned, rather than to provide and maintain their own properties. Defendants cannot be expected to invest in facilities without sufficient income to warrant such investment.

"We believe the foregoing is not in contravention of the decision of the Interstate Commerce Commission in *Minn. R.R. & Warehouse Com. v. C.G.W. Ry.*, 262 ICC 437, 438, reading:

" 'Right of complainant to prevail in a prayer that carriers be required to establish reciprocal arrangements turns in part upon whether the track upon which the industries are located is a private industry track or a team track. If a team track, which is a carrier's private terminal, maintained by the carrier at its own expense to accommodate patrons of its line-haul service, complainant cannot prevail.'

"In Dockets No. R-29, Sub 82, and No. R-29, Sub 84, Suspension and Investigation of Cancellation by Southern Railway of Switching Arrangements at High Point, wherein Southern undertook to cancel and eliminate reciprocal switching provisions at that point for the firms of Amos Hosiery Mills, Inc., High Point Paper Box Company, Inc., Silver Knit Hosiery Mills, Inc., Slane Hosiery Mills, Inc., and W. A. Davis Milling Company, this Commission refused to permit abandonment of public service which has been so beneficial for so long a time and that considering the record in those proceedings Southern was required to continue switching privileges for such concerns. The current investigation does not change or reverse the decisions in the two foregoing investigations if the tracks of these firms are not carrier-owned and maintained tracks. If, however, such tracks, or any of them, are carrier-owned and maintained (other than assigned tracks) the orders in Dockets R-29, Sub 82, and No. R-29, Sub 84, are reversed. In view of the findings herein, the orders in Dockets No. R-29, Sub 82, and No. R-29, Sub 84, are being vacated and set aside.

"Where tariffs of defendants accord reciprocal switching to firms located on their lines in High Point and the traffic to be switched is non-competitive and, therefore, subject to payment of the switching charge by the firm for whose account switching is accorded, the line-haul rate plus the switching charge should not exceed the through joint line rate, if any, from or to the next more distant point. The assessment of charges in excess of that applicable on movements not origi-

nating or terminating at High Point but routed through High Point is prima facie unreasonable and not approved in this proceeding.

"We will take no action on the request of complainants that Southern simplify its Switching Tariff and Directory. Perhaps improvements can be made but as all common or competitive points on its lines are included we think this investigation is not the proper place to force wholesale changes, if any need be made, to satisfy the complaints relative to High Point situations.

"ORDER

"IT IS ORDERED, That the defendants Southern Railway Company, Carolina & Northwestern Railway Company and High Point, Thomasville & Denton Railroad Company be, and they are hereby required to provide connection-terminal switching for industries or firms having private or assigned sidings on their lines; that the line-haul carrier absorb the switching charges of the switching carrier on competitive traffic of such industries or firms; that the names of the industries or firms be listed in their switching tariffs, and that the Findings of Fact hereinbefore listed otherwise be conformed with.

"IT IS FURTHER ORDERED, That to the extent other allegations of complainants are not covered by the Findings of Fact hereinbefore listed, the complaint as to such is hereby dismissed and this proceeding is discontinued."

The defendants Southern and its subsidiary C&NW appealed to the Superior Court of Guilford County, and the court entered the following order:

" * * * (T)hat the Report and Order of the North Carolina Utilities Commission dated December 20, 1960, * * * be, and the same is hereby approved and affirmed and declared to be in full force and effect; that each and every exception and assignment of error of the appellants is hereby overruled; that the term 'assigned sidings' as employed in the Commission's findings and Order be, and the same is hereby construed and defined as the actual and normal use which has been made of a railroad track and the attitude of interested parties toward it, rather than some exceptional use in the past or the possibility of a physical change in it for the future; and this proceeding in this Court be dismissed. The appellants are assessed with the costs to be set by the clerk.

"This the 14 day of September, 1961."

The defendants Southern and C&NW appeal, assigning error.

J. Knox Walker; J. V. Morgan; F. C. Hillyer (of Jacksonville, Florida) for complainant appellees.

James V. Lovelace for appellee HPT&D.

Joyner, Howison & Mitchell; James A. Bistline (of Washington, D. C.) for appellants Southern and C&NW.

DENNY, J. The Interstate Commerce Commission (hereinafter referred to as ICC), on 28 September 1961, found upon the evidence adduced in the hearing before it, which evidence was admitted by agreement in the hearing before the Commission, that the "defendants' refusal to perform switching service at their interchange in High Point, N. C., is, and for the future will be, unjust and unreasonable; and that defendants' practice of performing reciprocal switching for other industries at High Point and not for the complainant industries on competitive traffic, is, and for the future will be, unjustly discriminatory against and unduly prejudicial to the complainants, and unduly preferential of the favored industries * * *."

Based on its findings, the ICC entered the following order: "*It is ordered,* that the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before January 2, 1962, and thereafter to abstain from practicing the unreasonableness, unjust discrimination, and undue prejudice and preference referred to in the preceding paragraph hereof.

"*It is ordered,* that the defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before, January 2, 1962, upon notice of this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, charges, rules, regulations, and practices which will prevent and avoid the unreasonableness, unjust discrimination, and undue prejudice and preference referred to in the first paragraph hereof."

An order similar to the foregoing order was entered by the ICC in the case of *Seaboard Air Line Rwy. Co. v. United States,* 254 U.S. 57, 65 L. Ed. 129, involving the Seaboard, the Southern and Chesapeake and Ohio Railroads with respect to the absorption of switching charges within the switching limits of Richmond, Virginia. The Court said: " 'Section 2 (of the Act to Regulate Commerce) is primarily directed against discrimination between shippers located in the same community. It is aimed to put all shippers within a switching district upon a substantial equality. It provides that where a carrier receives from any person a greater compensation for any service rendered in the

transportation of passengers or property than it receives from any other person for doing for him a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination," — a discrimination which is prohibited and declared to be unlawful. Under this section it is settled that the *competition of rival carriers as such* does not constitute substantially dissimilar circumstances to justify a difference in treatment.'

"We are of the opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wight v. United States,* 167 U.S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822, and *Interstate Commerce Commission v. Alabama Midland R. Co.,* 168 U.S. 144, 42 L. Ed. 414, 18 Sup. Ct. Rep. 45. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, *and that the exigencies of competition do not justify discrimination against shippers for substantially like services.*" (Emphasis added) See *Pennsylvania Co. v. United States,* 236 U.S. 351, 59 L. Ed. 616, and *Northern P. R. Co. v. United States,* 316 U.S. 346, 86 L. Ed. 1521.

It will be noted that these ICC orders and the decisions upholding them go no further than to compel the offending carrier or carriers to cease and desist from continuing the practice or practices found to be unjust, unreasonable, and discriminatory as between shippers. These orders do not explicitly direct that all shippers be accorded the benefits of reciprocal switching and that the line-haul carrier shall absorb the switching charges, but such orders do make it clear and explicit that shippers similarly situated shall be treated alike.

Therefore, the real question before us is whether or not the court below committed reversible error in affirming the order of the Commission entered in this proceeding on 20 December 1960.

The present situation at High Point with respect to switching practices by the Southern and C&NW is discriminatory as between the fifteen complainants and other industries and business establishments located on the Southern or C&NW which are granted reciprocal switching, and is unjust, unreasonable and, therefore, unlawful.

On one side of this controversy we have the Southern and its wholly owned subsidiary the C&NW, together with other connecting carriers, which makes available to industries in High Point located on the Southern or C&NW a vast system of railways. On the other hand, we have the HPT&D, a locally owned road until recently, which connects with the Winston-Salem Southbound (hereinafter referred to as

WSS) at High Rock, North Carolina. The WSS is jointly owned by the Norfolk & Western Railway Company and the Atlantic Coast Line Railway Company. The WSS has obtained all of the stock of the HPT&D since the institution of this proceeding. The HPT&D with its connection with the WSS, connects with the Norfolk & Western at Winston-Salem, the Norfolk & Southern at Norwood, and the Atlantic Coast Line and Seaboard Air Line Railroads at Wadesboro, which makes available to industries and business establishments located on the HPT&D at High Point or Thomasville these transportation facilities, together with other connecting carriers.

For thirty years or more there was little, if any, difficulty in connection with the switching practices at High Point. Approximately six or eight years ago the Southern decided that too many carloads of freight were being shipped to and from High Point over the HPT&D and its connecting lines — freight that could have been shipped to and from High Point over the Southern at the same cost. Therefore, the Southern began to drop from or refused to list in its reciprocal switching tariff the names of the fifteen complaining industries and business establishments which had private or assigned siding on the Southern or its subsidiary the C&NW.

The status of the fifteen complainants who have been removed from or refused inclusion in the Southern's list which would entitle them to be included in its reciprocal switching tariff, may be illustrated by the following: For example, a carload shipment of lumber is made by a consignor at Wilmington, North Carolina, to Heritage Furniture Company located on the Southern at High Point. The car having originated on the Atlantic Coast Line Railroad, was moved to High Point over the Atlantic Coast Line, the WSS, and the HPT&D, an established through route. On arrival at High Point, the HPT&D tenders the car to the Southern Railway at their jointly owned interchange tracks, a very short distance from the Heritage private industrial track served by the Southern. The Southern *refuses to switch* the car to the Heritage plant. Heritage must accept delivery on an HPT&D team track and dray the lumber to its plant, at extra expense, or have the car shipped by rail through Thomasville, and back over the Southern to High Point, and pay extra line-haul charges.

If, however, Heritage Furniture Company had not been dropped from the list of Southern's reciprocal switching tariff, when the carload of lumber was tendered to the Southern on the interchange track at High Point, the Southern would have promptly placed the car on the private siding of the Heritage Furniture Company, and the HPT&D would have paid the Southern the reciprocal switching charge of $13.71 and would have absorbed such charge.

There is no controversy in this proceeding among the defendants over the reasonableness of the amount of the reciprocal switching charge of $13.71 per car within the High Point switching area.

The evidence on this record reveals the fact that the Southern and other railroads, in former years, obtained agreements from industries and business concerns located on their lines, to the effect that such industries and business concerns would ship all their freight over the line serving them on their private or assigned siding. It is conceded by the Southern that such agreements were and are null and void and under the law could not be enforced. It was further conceded that a shipper has the right to route his traffic. Therefore, it would seem to follow that when a shipper is refused switching service in an effort to force him to ship over the railroad that serves his private or assigned siding, it is an effort to do indirectly what cannot be done legally under a contract directly with the shipper.

We think the evidence in this proceeding supports the conclusion that the removal of the names of the fifteen complainants whose industries or business establishments are located on the Southern or the C&NW from the list of those included in the reciprocal switching tariff, and the refusal to switch cars consigned to these complainants unless the cars are taken to Thomasville and turned over to the Southern there and brought back to High Point over its lines and delivered to the consignee, is the result of a deliberate effort to force the discontinuance of carload shipments to and from High Point over the HPT&D and its affiliates by these complainants.

The evidence is to the effect that the re-routing of a car from High Point to Thomasville and back to High Point over the Southern, costs anywhere from $50.00 to $100.00 per car, depending on the weight, classification, etc.

A member of the Commission propounded to one of the Southern's principal witnesses the following: "You are telling me simply and plainly, it is because you want to make a shipper ship over the Southern without regard to what a shipper wants to do." The witness replied, "In substance, that is what I mean."

There is further evidence tending to show that these complainants were removed from the Southern's reciprocal switching list because the Southern felt that too many cars were being routed to and from these industries and business concerns via the HPT&D and its connecting carriers, when the cars could have been shipped into or from High Point over the Southern at the same cost to the shipper or consignee. The Southern in its explanation of why the complainants were removed from its reciprocal switching tariff, offered testimony to the effect that the HPT&D was owned by local people and, naturally,

they were inclined to favor property in which they had an interest. However, this situation no longer exists, as we have heretofore pointed out.

Further, in the instant proceeding, the Southern in discussing the question as to what it considered its fair share of the line-haul, the witness said: "A fair share is pretty difficult to define. As a rule of thumb, we have not disturbed anyone, generally speaking, where we got as much as 80 to 85 percent of their cars."

In *Northern P. R. Co. v. United States, supra,* it is said: "It was further found that the carriers' absorption practices at the complaining markets were supported neither by revenue considerations nor sound transportation factors, and that the widespread absorption of switching charges on noncompetitive traffic at other important markets *was strong evidence* of the reasonableness of such practice and of the unreasonableness of the carriers' refusal to absorb such charges at the complaining markets. * * *" (Emphasis added).

The Commission's order in this proceeding apparently requires the defendants to do no more than they did voluntarily and without objection for thirty years or more, preceding the last six or eight years. This would seem to be "strong evidence" of the reasonableness of the practice to which they adhered for so many years.

It is provided in G.S. 62-26.10: " * * * Upon any appeal to the superior court, the rates fixed, or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter (Chapter 62, Utilities Commission), shall be prima facie just and reasonable. * * *" *Utilities Commission v. Ray,* 236 N.C. 692, 73 S.E. 2d 870; *Utilities Commission v. Municipal Corporations,* 243 N.C. 193, 90 S.E. 2d 519; *Utilities Commission v. Casey,* 245 N.C. 297, 96 S.E. 2d 8.

As a practical matter, it is difficult to comprehend how the industries and business concerns in High Point may be benefited to any appreciable extent by having competing railroads rather than a single road, unless there is some practical and enforceable arrangement whereby carload shipments going into or out of High Point may be switched to or from industries and business concerns located on private or assigned sidings served by a railroad other than the line-haul carrier.

In our opinion, the findings of the Commission are supported by competent, material and substantial evidence, and the Commission is vested with the authority to enter the challenged order. General Statutes of North Carolina, Ch. 62, Sections 27, 28, 30, 39, 55, 70, 74, 75, 122, 128, 137 and 143. Therefore the order of the court below affirming the order of the Commission entered on 20 December 1960, is

Affirmed.

STATE v. JOHN L. COOPER.

(Filed 28 February, 1962.)

1. Larceny § 3—

The larceny of property of the value in excess of $200.00 is a felony: the larceny of property of the value of $200.00 or less, except in those instances enumerated in the statute in which the statute does not apply, is a misdemeanor. G.S. 14-72, as amended.

2. Receiving Stolen Goods § 1—

The receiving of stolen goods with the knowledge that they had been stolen is a felony when the value of the property received is in excess of $200.00 and is a misdemeanor when the value of the property is $200.00 or less. G.S. 14-71; G.S. 14-72, as amended.

3. Same—

The misdemeanor of larceny is a less degree of the felony of larceny within the meaning of G.S. 15-170.

4. Larceny § 5—

Except in those instances where G.S. 14-72, as amended, does not apply, the burden is upon the State to prove beyond a reasonable doubt that the value of the goods exceeded $200.00 in order to convict the defendant of the felony of larceny.

5. Larceny § 8—

In a prosecution upon an indictment charging the felony of larceny in those instances where G.S. 14-72, as amended, does not apply, the trial court is required to instruct the jury that the burden is upon the State to prove beyond a reasonable doubt that the value of the goods exceeded $200.00 and that if the jury should find beyond a reasonable doubt that defendant is guilty of larceny but failed to find beyond a reasonable doubt from the evidence that the value of the stolen property exceeded $200.00, the jury should return a verdict of guilty of larceny of property of a value not exceeding $200.00.

6. Larceny § 1—

Felonious intent is an essential element of the crime of larceny without regard to the value of the stolen property, the phrase "felonious intent" in the law of larceny not necessarily signifying an intent to commit a felony.

7. Larceny § 5; Criminal Law § 32—

Since a defendant's plea of not guilty puts in issue every essential element of the crime charged, a plea of not guilty to an indictment charging the felony of larceny raises the issue of whether the property alleged to have been stolen is of the value charged in the bill of indictment or of any value.

8. Larceny § 9—

In a prosecution for the felony of larceny it is not required that the

jury fix the precise value of the stolen property but only whether its value exceeds $200.00.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Campbell, J.*, October Term 1961 of TRANSYLVANIA.

Defendant was indicted for the larceny on September 25, 1961, of "Brass and Copper fittings, gears, and other objects made of brass and copper, of the value of more than two hundred ..... Dollars, of the goods, chattels and moneys of one Olin Mathieson Chemical Company, Inc." Defendant pleaded not guilty. Upon trial, the jury returned a verdict of "guilty as charged in the bill of indictment," and the court pronounced judgment imposing a prison sentence "of not less than four nor more than six years." Defendant appealed, assigning errors.

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

Hamlin, Potts, Ramsey & Hudson for defendant appellant.

BOBBITT, J. Defendant was indicted and convicted of the larceny of property of the value of more than $200.00, a felony. There was ample evidence to support the verdict and the verdict supports the judgment. Evidence offered by the State tended to show the value of the property allegedly stolen by defendant was more than $200.00. Defendant offered no evidence as to the value of such property.

The court *failed* to instruct the jury that (1) one of the elements of the crime "charged in the bill of indictment" was that the stolen property must be of a value in excess of $200.00, and (2) if the value of the property taken did not exceed $200.00, the defendant, if guilty at all, would be guilty only of a misdemeanor. Defendant, based on timely exceptions, assigns as error the court's failure to so charge.

Defendant's said assignments raise questions of frequent recurrence in prosecutions for larceny in our superior courts. Consequently, we deem it appropriate to state what we consider and now hold the correct and applicable rules.

At common law, both grand larceny and petit larceny were felonies. If the value of the goods stolen exceeded twelve pence, the felony was grand larceny, punishable by death. If the value was twelve pence or under, the felony was petit larceny, punishable by whipping or some corporal punishment. 32 Am. Jur., Larceny § 3; 52 C.J.S., Larceny § 60; *S. v. Andrews* (1957), 246 N.C. 561, 566, 99 S.E. 2d 745.

The statute now codified as G.S. 14-70 appears as Section 1075 of

the Code of 1883. It was codified as Section 3500 of the Revisal of 1905 and as Section 4249 of the Consolidated Statutes of 1919. This statute abolished the common law distinctions between grand larceny and petit larceny and provided that the offense of "felonious stealing" was punishable as petit larceny. Hence, it was held that "the common law rule that all persons who participate in petit larceny, whether present or absent, are indictable and punishable as principals is established law in North Carolina." *S. v. Bennett,* 237 N.C. 749, 752, 76 S.E. 2d 42, and cases cited.

The statute now codified as G.S. 14-71 appears as now written, except as noted below, as Section 56, Chapter 34 of the Revised Code of 1854. It was codified as Section 1074 of the Code of 1883, as Section 3507 of the Revisal of 1905 and as Section 4250 of the Consolidated Statutes of 1919. The crime defined in G.S. 14-71 (receiving stolen goods), although punishable as larceny, was until the Act of 1949 (S.L. 1949, Chapter 145), denominated a misdemeanor. By the Act of 1949, the words "criminal offense" were inserted in lieu of the word "misdemeanor."

The statutes now codified as G.S. 14-70 and 14-71 were in full force and effect when the Act of 1895 (Public Laws 1895, Chapter 285) was passed. The Act of 1895 is entitled, "An act to limit the punishment in certain cases of larceny," and provides: "SECTION 1. That in all cases of larceny where the value of the property stolen does not exceed twenty dollars, the punishment shall, for the first offense, not exceed imprisonment in the penitentiary, or common jail, for a longer term than one year. SEC. 2. That if the larceny is from the person, or from the dwelling by breaking and entering in the day time, section one of this act shall have no application. SEC. 3. That in all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen." The provisions of the Act of 1895 were codified, without material change, as Section 3506 of the Revisal of 1905.

In *S. v. Harris* (1896), 119 N.C. 811, 26 S.E. 148, the defendant, upon conviction of larceny from the person, was sentenced to imprisonment for a term of two years. On appeal, the defendant challenged the sentence as unlawful on the ground the value of the property stolen was less than $20.00. In affirming the judgment, it was held the Act of 1895 "does not make it necessary that an indictment for the larceny of a sum less than $20 should charge the taking from the person or from a dwelling-house in the daytime. (Citations)" The opinion of *Avery, J.,* includes the following: "The Superior Court has general jurisdiction of larcenies. The presumption is in favor of its jurisdiction, and where a defendant relies upon the fact that the amount stolen was less than $20, and that the taking was neither from the person nor a dwelling-house, the fact that a sum less than $20 was taken neither

from the person nor a dwelling-house is a matter of defense which it is incumbent on him to show in diminution of the sentence. The consequences of the conviction *of the felony* are in all respects the same, except that the law has given him the opportunity to ask for a smaller punishment when certain facts appear. Where there is a dispute about the value of the thing taken, it is likewise incumbent on the defendant to demand a finding on that subject by the jury." (Our italics)

In *S. v. Davidson* (1899), 124 N.C. 839, 32 S.E. 957, the defendant, upon conviction on an indictment charging the larceny of property of the value of $1.00, was sentenced to four years' imprisonment. It was held that, since the larceny was not from the person or from the dwelling by breaking and entering in the daytime and the alleged value of the property did not exceed $20.00, "it was erroneous to pass sentence of imprisonment for more than one year."

In *S. v. Dixon* (1908), 149 N.C. 460, 62 S.E. 615, the defendant was convicted of receiving stolen property and sentenced to imprisonment for a term of *two* years. In upholding the judgment, *Brown, J.*, said: "It is contended that the court could sentence to no longer term than twelve months, as the value of the property was under $20. We fail to discover any such finding in the record or any evidence to sustain such contention. The property stolen consisted of eighteen hams, eleven shoulders and eight sides of meat, and doubtless the quantity of it deterred the defendant from attempting to prove that the meat was worth no more than $20. However that may be, it was matter of defense, and it was incumbent on defendant to prove its value in diminution of sentence. *S. v. Harris*, 119 N.C. 812."

In *S. v. Shuford* (1910), 152 N.C. 809, 67 S.E. 923, the value of the property did not exceed $20.00. This fact was held immaterial where the larceny was from a dwelling house by breaking and entering in the *nighttime;* and a judgment imposing a prison sentence of three years was upheld.

In re Holley (1910), 154 N.C. 163, 69 S.E. 872, was before this Court on *certiorari* to review a judgment entered at a *habeas corpus* hearing. The judgment, which denied the petitioner's application for discharge, was affirmed. The petitioner had been indicted for larceny of property of the value of $10.00 and upon conviction was sentenced to a prison term of five years. In pronouncing judgment, the trial judge found "that the goods stolen were worth between $250 and $300," and that the defendant had been convicted in three other criminal cases, including a case of larceny, at the same term, in which judgment was suspended. Decision was based in part on the proviso in Section 3500 of the Revisal of 1905, the statute now codified as G.S. 14-70. *Hoke, J.* (later *C.J.*), refers to *S. v. Harris, supra,* as holding, *inter alia,* these

propositions: "3. On a trial for larceny in the Superior Court the fact that the amount stolen was less than $20, and that the taking was neither from the person nor a dwelling-house, is a matter of defense which it is incumbent on the defendant to show in diminution of the sentence. 4. Where, in the trial of an indictment for larceny, there is a dispute about the value of a thing taken, it is incumbent on the defendant to demand a finding upon that subject by the jury." The opinion continues: "It will thus appear that the amount or value of the property is not now an essential ingredient of the crime of larceny in this State, nor does the statement of such value in the bill conclude on the question of punishment. It is only a matter in amelioration of the punishment, to be raised and determined at the instance of the defendant and as an issue of fact, and therefore there is no indication on this record and judgment that the sentence was not within the power of the court that imposed it. Apart from this, petit larceny at common law was regarded as infamous and subject to corporal punishment."

In *S. v. Smith* (1911), 157 N.C. 578, 585, 72 S.E. 853, *Walker, J.*, refers to *In re Holley, supra,* and *S. v. Shuford, supra,* as holding "that while the statute graded the punishment of larceny according to the value of the stolen goods, it did not create any new offense, and the value of the property taken was not an essential element of the crime. but the provision was inserted in the statute only for the purpose of ameliorating the punishment, if it is shown on the trial by the defendant, or if it otherwise appears, that the goods are of less value than $20."

Thus, prior to the Act of 1913, discussed below, the larceny of property of any value was a felony; but a defendant was permitted to raise and have determined the issue as to whether the value of the stolen property exceeded $20.00. Upon trial of such issue, it was incumbent on defendant to show the value of the stolen goods did not exceed $20.00 in diminution of the sentence.

The Act of 1913 (Public Laws 1913, Chapter 118) is entitled, "AN ACT TO MAKE UNIFORM THE CRIME OF LARCENY IN THE STATE OF NORTH CAROLINA," and provides: "SECTION 1. That the larceny of and receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, *is hereby declared a misdemeanor,* (our italics) and the punishment therefor shall be in the discretion of the court. If the larceny is from the person or from the dwelling by breaking and entering, this section shall have no application: *Provided,* that this act shall not apply to horse stealing: *Provided, further,* that this act shall have no application to indictments or presentments now pending nor to acts or offenses committed prior

to the ratification of this act. SEC. 2. That the Superior Court of North Carolina shall have exclusive jurisdiction of the trial of all cases of the larceny of or the receiving of stolen goods, knowing them to be stolen, of the value of more than twenty dollars. SEC. 3 That all laws and clauses of laws in conflict with this act are hereby repealed."

The Act of 1913 applies in like manner to the separate criminal offenses of larceny and of receiving stolen goods knowing them to have been stolen. In each instance, where the value of the goods is not more than $20.00, the criminal offense *was declared to be a misdemeanor.* But where the value of the stolen goods is more than $20.00, the criminal offense, as theretofore, was a felony; and, in such case, the superior court has exclusive jurisdiction. Section 1 of the Act of 1913 was codified as C.S. 4251 and Section 2 was codified as C.S. 4252. They are now codified as G.S. 14-72 and G.S. 14-73, respectively. While it would appear the Act of 1913 was complete, it is noted the codifiers brought forward in C.S. 4251 and in G.S. 14-72 Section 3 of the Act of 1895, to wit, "(t)hat in all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen."

In *S. v. Talley* (1930), 200 N.C. 46, 156 S.E. 142, the defendant was convicted of the larceny of potatoes charged in the indictment to be of the value of $40.00. He was sentenced to a prison term of five years. The opinion of *Adams, J.,* after quoting the Act of 1895 and the Act of 1913, continued: "He (defendant) neither testified nor introduced any witnesses. There was evidence tending to support the State's contention that the value of the property was in excess of twenty dollars; there was other evidence from which the jury might have inferred that the value, as the defendant contended, did not exceed this amount. As the value of the property was a matter of defense, it was encumbent upon the defendant to prove its value in diminution of the sentence. (Citing *S. v. Harris, supra,* and *S. v. Dixon, supra*) He was not, however, required to introduce evidence; he could rely for this purpose upon the evidence offered by the State." A new trial was awarded.

It is noted that *S. v. Harris, supra,* and *S. v. Dixon, supra,* were based on the Act of 1895. The *decision* in *S. v. Talley, supra,* was that the trial judge erred in failing to submit for jury determination whether the value of the stolen goods exceeded $20.00. The statement that the value of the property was a matter of defense with the burden on defendant to prove its value in diminution of the sentence, was not necessary to decision.

Whether larceny is a felony or a misdemeanor, under the Act of 1913, C.S. 4251, depended upon whether the value of the stolen goods was more than $20.00. By successive amendments the diacritical amount has been raised (1) to fifty dollars, Public Laws 1941, Chap-

ter 178, (2) to one hundred dollars, S.L. 1949, Chapter 145, and (3) to two hundred dollars, S.L. 1961, Chapter 39. G.S. 14-72 and G.S. 14-73. (Note: The 1961 amendment became effective July 1, 1961, and is applicable to the present case.) It seems probable the General Assembly, in enacting these said amendments, was not motivated by a disposition to protect thieves from the adverse effects of inflation, but to reduce the number of cases (involving felony charges) in the exclusive jurisdiction of the superior court.

It is noted that, by Chapter 1285, S.L. 1959, the General Assembly amended G.S. 14-72 by inserting after the word "dwelling" and before the words "by breaking and entering," these words: "or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be." It seems probable the General Assembly enacted the 1959 amendment to obviate the question considered in *S. v. Andrews, supra;* for, under this amendment, larceny by breaking and entering any building referred to therein is a felony without regard to the value of the stolen property.

In *S. v. Weinstein* (1944), 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625; *certiorari* denied, 324 U.S. 849, 89 L. Ed. 1410, 65 S. Ct. 689, the defendant was indicted for larceny and for receiving stolen property knowing it to have been stolen. Upon conviction, he was sentenced to a prison term of "not less than three years nor more than five years." The value of the property, as charged in the bill of indictment, was $325.00. The defendant, on appeal, challenged the competency of certain evidence tending to show the value of the stolen property. After holding the evidence competent, the opinion of *Devin, J.* (later *C.J.*), continued: "It was necessary *for the State* to show the value of the property taken or received to be more than $50 in order to establish the commission of a felony under the statute as charged in the bill of indictment, G.S. 14-72, and it was competent for the State to show any circumstance which would throw light on the subject of inquiry." (Our italics) It is noted: (1) The defendant offered no evidence. (2) The jury found the value of the property to be $100.00.

In *S. v. Williams* (1952), 235 N.C. 429, 70 S.E. 2d 1, the defendant was indicted for the larceny of property of the value of $250.00. The jury returned a verdict of "GUILTY OF LARCENY OF PROPERTY OF THE VALUE IN EXCESS OF $50.00." A sentence of eighteen months was imposed. In upholding the verdict and judgment, *Barnhill, J.* (later *C.J.*), said: "A finding that defendant stole property of the value of more than $50 is not a finding that the property had a value of more than $100. G.S. 14-72. Hence, notwithstanding anything the trial judge may have said to the jury in his charge, the defendant

stands convicted of nothing more than a misdemeanor. He has suffered no loss of citizenship." The defendant, although indicted for a felony, was found guilty of a misdemeanor solely on account of the State's failure to establish beyond a reasonable doubt that the value of the stolen property exceeded $100.00.

In *S. v. Hill* (1953), 237 N.C. 764, 75 S.E. 2d 915, the jury returned a verdict of "guilty of receiving as charged in the bill of indictment." The defendant was sentenced to a prison term "of not less than 4 nor more than 7 years." It was held the verdict "necessarily included a finding beyond a reasonable doubt that the defendant knowingly and feloniously received the stolen goods as charged in the bill of indictment," to wit, stolen goods of the value of $210.05. The defendant did not except to the charge for failure of the court to instruct the jury that the burden of proof was on the State to satisfy the jury from the evidence beyond a reasonable doubt that the value of the stolen property exceeded $100.00 before they could find the defendant "guilty of receiving as charged in the bill of indictment." Defendant excepted to the verdict on the ground "no value was fixed on the property alleged to have been stolen." This exception was held "without merit."

In *S. v. Tessnear* (1961), 254 N.C. 211, 118 S.E. 2d 393, the defendant was convicted of receiving stolen property knowing it to have been stolen. The indictment charged the property was "of the value of more than $100.00." The defendant excepted to, and assigned as error, "the failure of the trial Court to instruct the jury that it was incumbent upon the State to prove beyond a reasonable doubt that the goods allegedly received by Max Tessnear were worth more than $100." It was held defendant's said exception was well taken. In awarding a new trial, this Court, in opinion by *Winborne, C.J.*, said: "In the bill of indictment the defendant was charged with a felony, that is, receiving goods of the value of more than one hundred dollars. G.S. 14-71 and G.S. 14-72. In order for the defendant to be found guilty under G.S. 14-71, *it is incumbent upon the State* to prove beyond a reasonable doubt that the value of the goods was more than one hundred dollars. *This is an essential element of the crime* because G.S. 14-72 specifically provides that 'the receiving of stolen goods knowing them to be stolen, of the value of not more than one hundred dollars, is hereby declared a misdemeanor.' " (Our italics)

In some respects, expressions in decisions since the Act of 1913 suggest diversity of opinion. However, these decisions, when considered in the light of the precise questions presented, appear to be in substantial accord with the conclusions stated below.

Under G.S. 14-72, as amended, the larceny of property of the value in excess of $200.00 is a felony. *S. v. Weinstein, supra; S. v. Bennett,*

supra. Under G.S. 14-72, as amended, the criminal offense of receiving stolen property, defined in G.S. 14-71, where the value of the property is in excess of $200.00, is a felony. *S. v. Mounce,* 226 N.C. 159, 36 S.E. 2d 918, and cases cited.

Under G.S. 14-72, as amended, the larceny of property of the value of $200.00, or less, is a misdemeanor. However, G.S. 14-72, as amended, does not apply when "the larceny is from the person, or from the dwelling or any storehouse, shop, warehouse, banking house, counting house, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, by breaking and entering," or "to horse stealing." In instances where G.S. 14-72, as amended, does not apply, the larceny, as at common law, is a felony without regard to the value of the stolen property. Under G.S. 14-72, as amended, the criminal offense of receiving stolen property, defined in G.S. 14-71, where the value of the property is $200.00 or less, is a misdemeanor.

Thus, except in those instances where G.S. 14-72, as amended, does not apply, whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends solely upon whether the value of the stolen property exceeds $200.00. *S. v. Weinstein, supra;* also, see *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381.

Except in those instances where G.S. 14-72, as amended, does not apply, we are of opinion, and so decide, that to convict of *the felony* of larceny, it is incumbent *upon the State* to prove beyond a reasonable doubt that the value of the stolen property was more than $200.00; and, this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury.

Moreover, where a defendant is indicted for the larceny of property of the value of more than $200.00, except in those instances where G.S. 14-72, as amended, does not apply, it is incumbent upon the trial judge to instruct the jury, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen property exceeds $200.00, the jury should return a verdict of guilty of larceny of property of a value not exceeding $200.00. The two offenses differ only in respect of one element, namely, the value of the stolen property. Hence, the misdemeanor of larceny is a less degree of the felony of larceny within the meaning of G.S. 15-170. The weight and credibility of the evidence are for jury determination; and it is incumbent upon the State to establish from the evidence beyond a reasonable doubt that the value of the stolen property was in excess of $200.00 before the jury can return a verdict of guilty of the felony of larceny as charged in the bill of indictment. The burden of proof is on the State to prove every element of the crime charged beyond

a reasonable doubt. *S. v. Hardy,* 189 N.C. 799, 804, 128 S.E. 152; *S. v. Alston,* 210 N.C. 258, 260, 186 S.E. 354.

True, "felonious intent" is an essential element of the crime of larceny without regard to the value of the stolen property. The phrase, "felonious intent," originated when both grand larceny and petit larceny were felonies. Now, "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. For definitions of "felonious intent," as an element of the crime of larceny, see *S. v. Powell,* 103 N.C. 424, 9 S.E. 627; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Booker,* 250 N.C. 272, 108 S.E. 2d 426.

We deem it appropriate to refer to the final sentence in G.S. 14-72, to wit: "In all cases of doubt the jury shall, in the verdict, fix the value of the property stolen." As noted above, this sentence was brought forward from the Act of 1895 and, after enactment of the Act of 1913, was codified as the final sentence of C.S. 4251 and of G.S. 14-72.

A plea of not guilty puts in issue *every essential element of the crime charged. S. v. McLamb,* 235 N.C. 251, 256, 69 S.E. 2d 537, and cases cited; 14 Am. Jur., Criminal Law § 268; 22 C.J.S., Criminal Law § 454. In our opinion, and we so decide, when a defendant pleads not guilty to an indictment charging the larceny of property of the value of more than $200.00, this suffices to raise an issue and present a case of doubt as to whether the property alleged to have been stolen is of the value charged in the bill of indictment or of any value.

Moreover, we are of opinion, and so decide, that the quoted (final) sentence of G.S. 14-72 does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200.00. When the jury is instructed, as indicated above, the verdict necessarily determines whether the value of the stolen property exceeds $200.00.

Here, the court failed to charge that, before the jury could return a verdict of "guilty as charged in the bill of indictment," the State must prove beyond a reasonable doubt that the value of the stolen property exceeded $200.00. This was an essential feature of the case, embraced within the issue raised by defendant's plea of not guilty and arising on the evidence; and the court, although defendant made no request therefor, was required to give such instruction. *S. v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53, and cases cited. Absent such instruction, the verdict did not fix the value of the stolen property as in excess of $200.00. Hence, the judgment imposing a prison sentence permissible only upon conviction of *the felony* of larceny was erroneous and constitutes ground for a new trial.

New trial.

WINBORNE, C.J., not sitting.

EDWARD D. GREER v. SKYWAY BROADCASTING COMPANY, A CORPORATION, AND B. P. JUSTICE.

(Filed 28 February, 1962.)

1. Public Officers § 9; Malicious Prosecution § 1—

A law enforcement officer may be held liable as an individual for malicious prosecution if such officer acts in a corrupt and malicious manner, not in the interest of the public, and without probable cause.

2. Malicious Prosecution § 8—

To make out a case of malicious prosecution the plaintiff must allege and prove that defendant instituted, or procured, or participated in a criminal proceeding against him maliciously without probable cause, and the termination of the prosecution in favor of plaintiff, and while it is not necessary to employ the term "want of probable cause," it is required that there be allegation of facts necessarily showing such want.

3. Same—

A complaint alleging that a law enforcement officer swore out a warrant charging of his own knowledge that plaintiff had committed certain specified crimes when he knew that the victim of the offenses had told him plaintiff was not the man who had committed the offenses, fails to state a cause of action against the officer for malicious prosecution, since the complaint fails to allege probable cause *ipsissimis verbis* or facts necessarily showing want of probable cause, it being possible that the officer had probable cause even though the victim could not identify plaintiff as the perpetrator.

4. False Imprisonment § 2; Arrest and Bail § 11—

Allegations to the effect that a law enforcement officer maliciously swore out a warrant and arrested plaintiff, without allegation of any defect in the warrant or that, if the warrant were defective, the officer was not authorized to arrest plaintiff without a warrant under G.S. 15-41, are insufficient to state a cause of action against the officer either for false imprisonment or false arrest.

5. Libel and Slander § 1—

Libel can be committed by defamatory pictures.

6. Same—

It would seem that slander as well as libel can be committed by defamatory words broadcast by radio.

7. Libel and Slander § 2—

Any written or spoken words or pictures falsely imputing that a person is guilty of the crime of rape or robbery are actionable *per se*.

8. Libel and Slander § 11—

All who take part in the publication of a libel, or who procure or command libelous matter to be published are jointly and severally liable, and persons entering into a common agreement or conspiracy to libel or slander another are jointly and severally liable.

9. Pleadings § 2—

The nature of the cause of action will be determined by the allegations of fact contained in the pleading as explained by the relief demanded, construing the pleading as a whole in favor of the pleader.

10. Pleadings § 12—

A demurrer admits the truth of factual averments well stated and relevant inferences deducible therefrom, but not legal inferences or conclusions.

11. Pleadings § 18—

Where the complaint alleges facts which might pertain to other causes of action, but which are alleged as bearing on the setting of the single cause of action alleged, and the facts alleged are sufficient to constitute only one cause of action, demurrer for misjoinder of parties and causes is properly overruled.

12. Same—

The complaint in the instant case, with the amendment thereto, alleging that defendant officer swore out and arrested plaintiff on a warrant charging of his own knowledge that plaintiff had committed certain crimes and that the defendant broadcasting company did broadcast by radio and television the arrest of plaintiff and the charge of the offenses, and that defendants acted maliciously pursuant to a conspiracy to injure plaintiff, and that the prosecutions were dismissed, *is held*, liberally construed as a whole in favor of the pleader, to state but a single cause of action against both defendants for joint libel and slander.

13. Libel and Slander § 13; Conspiracy § 2—

Where there is evidence that defendants agreed and conspired together to libel and slander plaintiff or evidence from which such conspiracy may be inferred, the rules governing the admissibility of evidence in prosecutions for criminal conspiracy are ordinarily applicable, and words and deeds of each conspirator in furtherance of the common purpose may be proved against both, and motion of one defendant to strike allegations relating to the conduct of the other is properly refused.

WINBORNE, C.J., not sitting.

APPEAL by defendant Skyway Broadcasting Company from *Campbell, J.*, August 1961 Term of HENDERSON.

Plaintiff's complaint is as follows, part summarized, part quoted:

One. Plaintiff is a resident of Henderson County.

Two. Skyway Broadcasting Company, hereafter called Skyway, broadcasts by radio and telecasts by television from its studio in Asheville by authority of a federal franchise.

Three. B. P. Justice is a constable in Mills River Township, Henderson County.

Four. Skyway transmits by radio and television programs news and pictures over Western North Carolina and parts of adjacent States

several times a day. "It broadcasts and telecasts news programs several times each day and at 7 and 11 o'clock p.m. and has on a good many occasions transmitted news and moving pictures of criminal arrests and cases initiated and handled by the defendant Justice in several townships of Henderson County except his own township of Mills River."

Five. On the evening of 17 January 1961 Justice called Skyway, and told it he was about to make an arrest in a sensational case, a rape and robbery case, and suggested that it send television cameras and news gatherers to get pictures and news of the perpetrator being brought to jail.

Six. Justice waited until the arrival of Skyway's employees, who went to the city hall in Hendersonville at his suggestion. Upon their arrival Justice suggested they remain there while he and others went to make the arrest.

Seven. Then Justice, accompanied by several officers at his request, went to plaintiff's home in Hendersonville, and Justice and one officer entered plaintiff's home. Justice handcuffed plaintiff, telling him he was under arrest charged with the felonies of rape and robbery with violence. Justice said nothing about having a warrant, and did not name the alleged victim.

Eight. Justice and the officers carried plaintiff to the city hall in Hendersonville, and upon their arrival just outside, Skyway's television cameras made pictures showing plaintiff entering city hall handcuffed and surrounded by Justice and the officers. Inside city hall Skyway's television cameras took additional pictures of plaintiff in handcuffs.

Nine. While plaintiff, Justice, the officers, and Skyway's camera operators were in the city hall, the alleged victim was brought in, and was told by Justice to look at plaintiff, and say if she identified him as the perpetrator of the crimes against her. She failed to identify him. Whereupon, Justice carried her into a private room, and closed the door. Ten minutes later Justice returned, and said she had identified plaintiff as the perpetrator of the crimes against her, although she had told Justice in the private room she could not identify him.

Ten. The failure of the alleged victim to identify plaintiff, and the statement by Justice that she had identified plaintiff in the private room, all occurred in the presence of Skyway's camera operators and news gatherers.

Eleven. Plaintiff was carried by Justice and the officers to the county jail, denied bail, and incarcerated therein until a hearing ten days later.

Twelve. Justice signed and published an affidavit that plaintiff was

guilty of the crimes of rape and robbery, of his own knowledge, after the alleged victim had told him plaintiff was not the man who raped and robbed her.

Thirteen. On the same night at 11:00 o'clock p.m., and only a short time after the employees of Skyway knew the alleged victim had failed to identify plaintiff, Skyway telecast a news item that plaintiff had been arrested for the crimes of rape and robbery, and identified by the victim. This telecast program was heard throughout its telecast area.

Fourteen. On the next day Skyway during its news programs at 7:15 o'clock p.m. and 11:00 o'clock p.m. showed pictures of plaintiff in handcuffs and in the custody of Justice and the officers, and its newscaster broadcast that plaintiff had been arrested for rape and robbery, and had been positively identified by the victim, but still refused to admit his guilt, which was heard throughout its listening area, though Skyway and its employees knew the alleged victim had failed to identify plaintiff.

Fifteen. Justice swore out a warrant charging plaintiff of his own knowledge with the crimes of rape and robbery, and naming himself on the warrant as the only witness. Several days later Justice tore up this warrant, and swore out another warrant charging plaintiff on information and belief with the same crimes, and naming six or seven witnesses on the warrant, none of whom knew anything about it.

Sixteen. When the case came on for hearing before a justice of the peace, Justice obtained a continuance for several days. When the case came on for hearing again, the alleged victim looked at plaintiff and others in the courtroom, and said she did not see the man who raped and robbed her. Whereupon, the justice of the peace dismissed the charges against plaintiff for want of probable cause.

Seventeen. On 8 February 1961 plaintiff by his attorney sent a letter to Skyway, the receipt of which it acknowledged, to the effect that the language used about him in its newscasts of 17 January 1961 and 18 January 1961 was false and defamatory. On 19 February 1961 Skyway on its 7 o'clock p.m. newscast merely stated the charges against plaintiff had been dismissed by the magistrate for want of probable cause. More than ten days have elapsed since Skyway received his letter, but it has failed and refused to retract its false and defamatory statements about him, or to apologize. Both defendants wilfully and deliberately libeled and slandered plaintiff, because both defendants knew the alleged victim had failed to identify plaintiff, and knew there was no evidence to support the charges of rape and robbery against him.

Eighteen. Both defendants wilfully, deliberately and maliciously

wrote out and published the defamatory language about plaintiff and the pictures, and have made no effort to rectify the great wrong and damage they have done him.

Nineteen. By reason of the malicious, wanton and reckless conduct of both defendants, and each one of them, plaintiff has sustained pecuniary loss, damage to his reputation, and has suffered mental and physical pain, entitling him to recover actual and punitive damages.

Twenty. Justice, after the alleged victim had told him plaintiff was not the man who assaulted and robbed her and after he had incarcerated plaintiff in jail, went to plaintiff's home about midnight, when no one was present except his helpless mother, and ransacked it in an effort to find property allegedly stolen from the alleged victim.

Twenty-one. Plaintiff did not rape or rob the alleged victim, all of which was known to both defendants.

Twenty-two. Skyway is the owner of property and assets in excess of one million dollars.

Wherefore, plaintiff prays that it recover actual and punitive damages from defendants, and each one of them, in a large amount, and that Justice be taken in arrest and held to bail.

By leave of court plaintiff filed an amendment to his complaint in substance as follows:

One. Both defendants conspired and agreed with each other to libel and slander plaintiff as heretofore alleged, and they agreed, expressly or impliedly, to charge and accuse plaintiff with the crimes hereinbefore alleged.

Two. The charges and accusations made against plaintiff by defendants were false, libelous, slanderous, and defamatory, to both defendants' own knowledge, and were prompted by actual malice, and were wilfully and recklessly made, uttered and published by both defendants in wanton and reckless disregard and criminal indifference to plaintiff's rights.

Defendant Justice filed a written motion to strike from the complaint paragraphs 5, 6, 7, 9, 16, 17, 20, and 22. Judge Campbell entered an order allowing his motion as to paragraphs 20 and 22, and denying it as to the other paragraphs. Justice did not except to the judge's ruling, and has not filed a petition for a writ of *certiorari* under Rules of Practice, Rule 4 (a) of this Court.

Defendant Skyway on 18 April 1961 filed a written demurrer to the complaint, and the amendment thereto, on two grounds: One, the complaint fails to allege facts sufficient to constitute a cause of action. Two, there is a fatal misjoinder of parties and causes of action.

Defendant Skyway on 22 August 1961 filed a written motion to

strike from the complaint the quoted sentence from paragraph 4, and all of paragraphs 3, 5, 6, 7, 8, 9, 11, 12, 15, 16, 18, 19, 20, and 22.

Judge Campbell entered an order and judgment overruling Skyway's demurrer, granting its motion to strike paragraphs 11, 15, 16, 20, and 22, and denying the remainder of its motion to strike.

From the judgment overruling its demurrer, and from the order denying its motion to strike in part, as above specified, Skyway appeals.

Parker, McGuire & Bailey, By J. M. Bailey, Jr., for defendant appellant.

R. Lee Whitmore for plaintiff appellee.

PARKER, J. Skyway assigns as error the overruling of its demurrer, and contends there is a clear and fatal misjoinder of parties and causes of action, for the reason that the complaint alleges four causes of action, which do not affect all the parties to the action. One, a cause of action against Justice as an individual for false arrest, false imprisonment, and malicious prosecution. Two, a cause of action against Justice as an individual for libel. Three, a cause of action against Skyway for libel. Four, a cause of action against both defendants for conspiracy to libel and slander plaintiff, though the allegations of conspiracy are vague and indefinite and not supported by any alleged factual basis.

Plaintiff contends a reading of the complaint, with the amendment thereto, reveals an alleged conspiracy entered into between the defendants to libel and slander plaintiff, and a libeling and slandering of plaintiff by both defendants pursuant to the conspiracy, and nothing more. That his allegations in respect to the taking out of the warrant, his arrest, and imprisonment are necessary to show how the libel and slander originated.

Has plaintiff alleged a cause of action against Justice individually for malicious prosecution, as contended by Skyway?

There is a sharp conflict of authority as to whether or not a law enforcement officer can be held liable for malicious prosecution. A number of Courts hold that the doctrine, which may aptly be termed the "doctrine of judicial immunity" is applicable to law enforcement officers. The rationale of these cases is public policy requires that law enforcement officers be exempted from civil liability for acts within the scope of their authority so that they may fearlessly administer their duties, since the efficient functioning of law enforcement machinery is dependent largely upon the investigation of crime and the accusation of offenders by such officers. Other Courts hold the "doc-

trine of judicial immunity" inapplicable to such officers. Annotation, 28 A.L.R. 2d 646; 34 Am. Jur., Malicious Prosecution, sec. 86.

In *State on relation of A. O. Hedgepeth v. L. L. Swanson, Sheriff of Vance County, and The National Surety Company*, 223 N.C. 442, 27 S.E. 2d 122, the complaint alleged, *inter alia*, that:

> " 'The defendant, Swanson, then acting by virtue and under color of his office as Sheriff of Vance County, and inspired not by any regard for the public interest or welfare, but simply and solely out of hate, vengeance and malice toward this plaintiff, wilfully, wantonly, falsely and maliciously, contriving and intending to injure the plaintiff, and to cause plaintiff to be arrested,' procured from a justice of the peace a search and seizure warrant, authorizing the defendant Swanson to search the premises of the plaintiff; and it is also alleged 'That the said defendant, Swanson, at the same time he procured the search and seizure warrant . . . by means of a false and malicious affidavit as hereinbefore set forth, went before . . ., the Clerk of Recorder's Court of Vance County, and falsely, wantonly, and maliciously, and without reasonable or probable cause therefor, charged the plaintiff, before the Clerk of the Recorder's Court, with violation of the liquor laws of the State by operating a whiskey still and manufacturing intoxicating liquor, and by means of a false and malicious affidavit caused said Clerk of Recorder's Court to make out a writ in due form of law for the arrest of plaintiff, and said defendant, Swanson, falsely, maliciously, and without probable cause caused plaintiff to be arrested on said charge, . . .' and that when the case came on for trial the 'Judge of the Recorder's Court directed that said prosecution and warrant be *nol prossed*. That a *nol pros* was thereupon entered in said cause and said prosecution was thereby ended and wholly determined, and this plaintiff was released from his bond and discharged from said Court'; that in swearing out the warrants aforesaid the defendant 'Swanson was actuated throughout, not by any regard for the public interest, but solely and exclusively by the hate, malice and spirit of revenge which he entertained toward the plaintiff'; and '. . . in swearing out said warrants and procuring the searching of the plaintiff's premises, and the arrest and prosecution of plaintiff upon a criminal charge, professed to be acting, and was acting, under and by virtue and color of his office, as Sheriff of Vance County.' "

Each defendant filed a demurrer *ore tenus* to the complaint on the ground it did not state facts sufficient to constitute a cause of action.

The demurrers were sustained, and plaintiff appealed. On appeal the judgment of the lower court was reversed. In its opinion the Court said:

> "There is ample allegation of the fact that the defendant in procuring the search warrant for the plaintiff's premises and the warrant for his arrest upon a charge of violating the prohibition laws acted corruptly and with malice. True, the words 'corruptly' or 'corruption' are not used to describe the action of the defendant but the words 'falsely,' 'wantonly,' 'out of revenge' and 'without regard to the public interest' all imply corrupt action on the part of the defendant Sheriff. And the words 'out of hate,' 'malicious' and similar expressions in the complaint are a clear allegation of malice. The complaint likewise alleges that the action of the defendant Sheriff in procuring the search of the plaintiff's premises and arrest of his person was 'without probable cause.'
>
> "The requirements for an action for malicious prosecution against a public officer to recover damages caused by the performance of discretionary acts by such officer in a corrupt and malicious manner having been alleged, the demurrer to the complaint filed by the Sheriff was erroneously sustained. . . ."

Paragraph 12 of the complaint alleges that Justice signed *and published* an affidavit that plaintiff was guilty of the crimes of rape and robbery, of his own knowledge, after the alleged victim had told him plaintiff was not the man who raped and robbed her. The complaint further alleges in paragraph 15 Justice swore out a warrant charging plaintiff of his own knowledge with the crimes of rape and robbery, and naming himself on the warrant as the only witness. Several days later Justice tore up this warrant, and swore out another warrant charging plaintiff on information and belief with the same crimes, and naming six or seven witnesses on the warrant, none of whom knew anything about it. Paragraph 15 of the complaint was stricken therefrom on Skyway's motion; Justice did not move that it be stricken. Paragraph 16 of the complaint alleges a failure of the prosecution of plaintiff for the crimes of rape and robbery. This paragraph was stricken from the complaint by Judge Campbell on Skyway's motion, but he denied Justice's motion to strike the same paragraph.

To make out a case of malicious prosecution the plaintiff must allege and prove that defendant instituted, or procured, or participated in a criminal proceeding against him maliciously, without probable cause, which ended in failure. *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609; *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446; *Wingate v. Causey*, 196 N.C. 71, 144 S.E. 530. "It is not necessary to allege a want

of probable cause in terms where there is a statement of facts necessarily showing it." 34 Am. Jur., Malicious Prosecution, sec. 116.

The complaint does not allege that Justice swore out the warrants against plaintiff without probable cause in terms. It may be, or it may not be, that Justice had probable cause to swear out the warrants here, even though the victim could not identify plaintiff as the perpetrator of the alleged crimes against her. However that may be, the complaint in our opinion does not contain a statement of facts necessarily showing want of probable cause. In the light of the complaint in the *Swanson* case, and the language of the Court in that case, the complaint here does not allege a cause of action against Justice individually for malicious prosecution.

It would seem from the language of the complaint that the warrants here were issued by a justice of the peace in Henderson County. There is nothing in the complaint to show that the warrants did not properly charge the crimes of rape and robbery against plaintiff, or that the justice of the peace issuing the warrants did not have jurisdiction as a committing magistrate for the offenses charged. If Justice did not have a warrant when he arrested plaintiff, there is no language in the complaint showing that he was not authorized to arrest him without a warrant under the provisions of G.S. 15-41. It seems from the language of the complaint that plaintiff was carried to jail, and held there without bail until the hearing, by the magistrate's commitment.

The language of *Ruffin, C.J.*, for the Court in *Welch v. Scott*, 27 N.C. 72, quoted with approval in *Alexander v. Lindsey*, 230 N.C. 663, 55 S.E. 2d 470, is as follows: "When the warrant purports to be for a matter within the jurisdiction of the justice, the ministerial officer is obliged to execute it, and, of course, must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded, or whether he committed an error or irregularity in his decision." "Ordinarily an officer is protected in serving a warrant, for the arrest of an accused named therein even though the warrant is defective." *Alexander v. Lindsey, supra.*

In our opinion, a study of the complaint as a whole, with the amendment thereto, leads us to the conclusion that it does not allege a cause of action against Justice individually for false arrest and false imprisonment.

Libel can be committed by defamatory pictures. *Flake v. The Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55; 33 Am. Jur., Libel and Slander, sec. 3. Libel, and it would seem slander, can be committed by defamatory words broadcast by radio, although it has been intimated that the distinctions between libel and slander are inapplicable to

radio broadcasting. 33 Am. Jur., Libel and Slander, p. 39; Annotation 171 A.L.R., p. 780 *et seq.;* 53 C.J.S., Libel and Slander, p. 200.

Any written or spoken words or pictures falsely imputing that a person is guilty of the crime of rape or robbery are actionable *per se,* because these crimes involve moral turpitude. *Penner v. Elliott,* 225 N.C. 33, 33 S.E. 2d 124; 33 Am. Jur., Libel and Slander, sec. 33; 53 C.J.S., Libel and Slander, p. 110, robbery, p. 121, rape.

"It is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally." *Taylor v. Press Co.,* 237 N.C. 551, 75 S.E. 2d 528, where plenary authority is cited in support of this principle of law.

"However, several persons may be jointly liable for a slander if there exists a common agreement or conspiracy between them to injure plaintiff. Where the slanderous words are uttered by one person at the instigation or direction of another, there is but one slander, for which they are jointly liable, . . ." 53 C.J.S., Libel and Slander, pp. 243-4. To the same effect, *Rice v. McAdams,* 149 N.C. 29, 62 S.E. 774. See also Annotation 34 A.L.R., pp. 346-7.

"Every pleader has or should have some definite theory which he seeks to develop in his pleading and upon which he expects the court to grant relief. This is generally determined by the allegations of fact and explained by the relief demanded." McIntosh, N. C. Practice and Procedure, 2nd Ed., Vol. 1, p. 556. The Court said in *Cox v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25: "In ascertaining whether a pleading upholds a theory, the court construes the allegations of the pleading with liberality in favor of the pleader with a view to presenting the case on its real merits." It is stated in 41 Am. Jur., Pleadings, sec. 70: "A pleading, like any other document, is to be construed as a whole."

A demurrer presents squarely for decision the sufficiency of such plea, because the demurrer, for the purpose, admits the truth of factual averments well stated, and such relevant inferences as may be deduced therefrom, but not legal inferences or conclusions of law asserted by the pleader. *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132.

Accepting as true the allegations of fact stated in the complaint, with the amendment thereto, and explained by the relief demanded, and construing their allegations of fact as a whole and with liberality in favor of the pleader with a view to presenting the case on its merits, we are of opinion, and so hold, that it states one cause of action against both defendants for joint libel and slander, by reason of a common agreement or conspiracy existing between them to injure plaintiff. The demurrer of Skyway was properly overruled.

"The rules and principles governing the admissibility of evidence

in criminal prosecutions generally are ordinarily applicable in prosecutions for defamation. . . . Acts and declarations of one of several conspirators alleged to have participated in a criminal libel may be shown, even though they were not made in the presence of the others, if the evidence suffices to make out a prima facie case of conspiracy." 33 Am. Jur., Libel and Slander, p. 305.

"When a conspiracy is established, everything said, done or written by any one of the conspirators, in execution or furtherance of the common purpose, is deemed to have been said, done, or written by each and all of them, and may be proved against any or all." *S. v. Lea,* 203 N.C. 13, 28, 164 S.E. 737, 745.

While the language of plaintiff's pleadings is prolix, the trial court properly refused to strike from the complaint on Skyway's motion the last sentence above quoted from paragraph 4, and the entire paragraphs 3, 5, 6, 7, 8, 9, 12, 18, and 19.

Judge Campbell's judgment and order from which Skyway alone appeals is

Affirmed.

WINBORNE, C.J., not sitting.

CARL A. BOY, JR., AND JAMES BOY, DOING BUSINESS AS CAROLINA AIRCRAFT COMPANY v. RIDDLE AIRLINES, INC., A CORPORATION.

(Filed 28 February, 1962.)

Sales §§ 6, 14— Evidence held sufficient to be submitted to the jury on question of seller's implied warranty of goods.

Plaintiffs' evidence, considered in the light most favorable to them, tending to show that they purchased the fuselage and center section of an airplane for the purpose of constructing an airplane around the fuselage and center section for use in flight, that defendant seller had knowledge of said purpose, and that by reason of the seller's prior agreement with the Air Force when the seller purchased the property as surplus, a plane reconstructed from the fuselage and center section could not be licensed or flown, and that plaintiffs had no knowledge of such restrictions upon the use of the plane, *is held* sufficient to be submitted to the jury on the issue of defendant's implied warranty and breach thereof, even though the evidence fails to make out an express warranty as alleged in the complaint.

APPEAL by plaintiffs from *Williams, J.,* May Civil Term 1961 of DURHAM, docketed and argued as No. 668 at Fall Term 1961.

Plaintiffs, partners doing business as Carolina Aircraft Company, instituted this action February 17, 1959, to recover damages on account of defendant's alleged breach of express and implied warranties and misrepresentations in connection with the sale by defendant to plaintiffs for $5,000.00 of an airplane fuselage and center section.

Plaintiffs' allegations, summarized or quoted, are stated in the following (our numbering) paragraphs.

1. In October, 1958, plaintiffs, acting through James W. Boy, entered into the contract of sale with defendant and paid the purchase price. During the negotiations, it was stated repeatedly to defendant's officials that plaintiffs were acquiring the fuselage and center section for a particular purpose, namely, "to rebuild an airplane around the fuselage and center section and then sell the airplane either somewhere in the United States or in Latin America." Defendant expressly and impliedly warranted that the fuselage and center section could be rebuilt as an airplane and that the assembled airplane could be legally registered and flown in the United States and elsewhere.

2. On December 24, 1958, defendant executed and delivered to plaintiffs a bill of sale for a Curtiss C-46 aircraft fuselage and center section, described by the Serial No. AFM 44-77847-A. Thereafter, plaintiffs made arrangements "to rebuild an aircraft around the fuselage and center section," and located a prospective purchaser in Latin America "for the airplane when rebuilt" at the price of $31,500.00 plus transportation expenses.

3. Plaintiffs were informed, after receipt of said bill of sale, that the fuselage and center section comprised parts of a wrecked Air Force plane purchased by defendant as surplus property from the United States Air Force; that the aircraft fuselage and center section, "even when re-assembled and rebuilt into a complete aircraft," cannot be registered by the Federal Aviation Agency, or by any other agency of the United States Government; and that, without such registration, such rebuilt and reassembled aircraft cannot be flown in the United States or in any other country.

4. Prior to and at the time of the contract of sale, "defendant was well aware of the fact that the aircraft fuselage and center section, which it intended to deliver to the plaintiffs, was subject to legal restrictions which prevented its use for any flight purposes"; but defendant "at no time disclosed to the plaintiffs the existence of these restrictions." Defendant's officials "knowingly, both expressly and impliedly, misrepresented that the aircraft fuselage and center section had no legal restrictions which would prevent their being used for flight purposes as plaintiffs intended." Plaintiffs were induced to buy

and did buy the fuselage and center section in reliance on defendant's said warranties and misrepresentations.

5. The fuselage and center section "are almost worthless to the plaintiffs or to anyone else other than the defendant. By reason of their bulk and the expense of moving them, the fuselage and center section have no fair market value except as junk or scrap, in which form it is worth . . . about $100.00."

6. "By reason of the defendant's misrepresentations and the breaches of the defendant's expressed and implied warranties, and by reason also of the failure of the defendant to fulfill its contract to provide a fuselage and center section that could legally be used for flight purposes, the plaintiffs have been damaged in the sum of $12,500.00."

Answering, defendant denied all of plaintiffs' allegations relating to breach of warranties and misrepresentations. Defendant admitted it sold the fuselage and center section to plaintiffs; that it received the purchase price of $5,000.00; and that, in December, 1958, it gave plaintiffs a bill of sale therefor. Defendant also admitted the fuselage and center section was bought by it as surplus property from the United States Air Force; that it was purchased "as a part number and not as an aircraft with serial number"; that it cannot be registered by the Federal Aviation Agency or by any other agency of the United States Government; and that the fuselage and center section was subject to legal restrictions preventing its use for flight purposes. Defendant alleged that James W. Boy was fully informed and had knowledge of these facts.

Evidence was offered by plaintiffs and by defendant.

At the conclusion of all evidence, the court, granting defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiffs excepted and appealed.

Everett, Everett & Everett for plaintiffs, appellants.

J. G. McKay, Jr., and Reade, Fuller, Newsom & Graham for defendant appellee.

BOBBITT, J. The sole question is whether the evidence, when considered in the light most favorable to plaintiffs, was sufficient for submission to the jury.

Background facts, disclosed by plaintiffs' evidence, include the following: Plaintiffs, under the name of Carolina Aircraft Company, had been engaged since 1946 in the business of buying and selling airplanes, and in repairing and rebuilding airplanes for sale, with headquarters in Durham, North Carolina. They had bought and sold "in the neighborhood of 400 airplanes," including C-46 airplanes. They "sold air-

planes primarily in South America." Both plaintiffs were airline transport pilots. James W. Boy was "Chief Pilot for Peruvian Airlines, Tapsa," based in Lima, Peru.

The negotiations in October, 1958, leading up to the sale, were between plaintiff James W. Boy and James P. Garvey, defendant's Supervisor of Surplus Sales, at defendant's principal office and main base of operations at International Air Terminal at Miami, Florida. The "fuselage and center section," which had been purchased by defendant from the United States Air Force, was at defendant's facility in Macon, Georgia.

In their brief, plaintiffs assert: "The defendant has consistently taken the position that the C-46 aircraft fuselage and center section were restricted for flight purposes, but that the plaintiffs knew of this restriction." Referring to this statement, defendant, in its brief, says: "The appellee reiterates this position and endorses this statement."

Plaintiffs' evidence consists principally (1) of the testimony, by deposition, of James W. Boy, (2) of the testimony of Carl A. Boy, Jr., and (3) of documents and photographs. The deposition of James W. Boy was taken April 24, 1961, in Guayaquil, Ecuador. There was no cross-examination.

Defendant's evidence consists of the testimony of James P. Garvey, with whom James W. Boy negotiated the contract of sale, and of documents.

The testimony of James W. Boy is summarized or quoted in the following (our numbering) paragraphs:

1. In October, 1958, he saw "a wrecked C-46 outside of Riddle Airlines' main gate in Miami, Florida, and was told to talk with a Mr. Jim Garvey in regard to these parts." When he approached Garvey "about the parts," Garvey said, "Let me sell you a whole C-46," and he replied, "Tell me more." Garvey then read from a Riddle Airlines' interoffice memo "parts necessary to fly a C-46 at Macon, Georgia." He looked over the list and asked the price. Garvey told him defendant "wanted $10,000 for it" and gave him the memo. He said he would think about it and make an inspection of the aircraft. He and Garvey also discussed "the other C-46 parts" he had come "to see about."

2. He and Garvey negotiated over the price for the fuselage and center section at Macon for several days. He made an offer of $5,000.00 "which they accepted." To the best of his recollection, "this bill of sale was delivered when (he) handed them the check."

3. There was no discussion "of what (he) was going to do with the airplane." He approached Garvey, originally, with reference to "those parts outside of their (defendant's) door" at Miami. He did tell Garvey

what he was going to do with these parts, namely, "that (he) knew of an aircraft that had been wrecked and needed a nose section." He purchased no property from defendant "other than a Curtiss C-46 aircraft fuselage and center section" at Macon.

4. "With respect to any restrictions placed on rebuilding the fuselage and center section of a Curtiss C-46 aircraft into a complete plane, there was never any mention of any restrictions at any time." He was in Peru when he first learned there was a restriction "on the manner of their use." His brother (Carl A. Boy, Jr.) notified him "that he had applied for registration of the aircraft and had been refused by the FAA."

5. Prior to delivery of the bill of sale, Garvey advised him "that the wings to the aircraft were owned by another company and were also located at the site of the aircraft and that the aircraft was without engines." Garvey told him a repair company at Macon had given the owner of the wings "an estimate of $1,500 for the repair" thereof. Garvey estimated it would cost $10,000.00 to repair "the damaged belly" of the fuselage and center section.

6. Garvey's statements as to estimated costs of repairs were made "when (he) was, so to speak, chiseling Mr. Garvey over the price of the aircraft." Garvey "was telling (him) of its merits and how inexpensively and how cheap (he) could have a complete C-46 ready to go."

7. If there had been no restrictions on the use of the fuselage and center section "when (he) paid $5,000 for it, (he) got a good buy." The fuselage and center section, if restricted so that it could not be rebuilt for flight purposes, "would be of very little value."

8. He made arrangements "to rebuild the Curtiss C-46 aircraft fuselage and center section into a complete aircraft. (He) made a trip to Texas and located a pair of wings that were overhauled and ready to go. (He) contacted E. E. Jones of Ramsa Airlines and arranged to borrow the necessary equipment to repair the damage."

James W. Boy did not identify any bill of sale or other exhibit. There is no evidence he ever saw the fuselage and center section. Nothing in James W. Boy's testimony indicates he had any contact with Garvey or other agent of defendant except during said negotiations in October, 1958.

The "fuselage and center section" was altogether, not in sections. It included a nose section. Garvey, defendant's witness, testified this was "quite a big thing, includes the cockpit." Too, Garvey testified that James W. Boy said all he wanted was "the nose from the airplane," but that defendant was unwilling to "cannibalize" the fuselage and center section, that is, tear it apart and sell it "piece by piece"; and

that James W. Boy said he could "sell the rest of it to Charlotte Leasing or someone." However, James W. Boy did not so testify; and Garvey's testimony, unless favorable to plaintiffs, may not be considered in passing on defendant's motion for judgment of nonsuit.

The testimony of Carl A. Boy, Jr., is summarized or quoted in the following (our numbering) paragraphs.

1. He had no contacts with Garvey until January, 1959. In October, 1958, while in Durham, he received a telephone call from James W. Boy. In compliance with James W. Boy's request, he went to Macon the next day by airplane. There, in company with Mr. Gerber, Chief of Maintenance at defendant's Macon installation, he checked the fuselage and center section against the said memo (forwarded to him by James W. Boy) and otherwise. This memo had been prepared by Gerber. In addition to the fuselage and center section, Gerber showed him "one horizontal stabilizer, and a vertical fan, and elevator, and one aeron," then located in a hangar, and told him that "these were parts of this deal." He told Gerber plaintiffs would take the airplane to Peru where they had a customer for it.

2. After he reported his findings to James W. Boy, the $5,000.00 offer was made and accepted. James W. Boy left for Peru. Carl A. Boy, Jr., returned to Durham.

3. In December, 1958, James W. Boy was in Miami. He then received from defendant a bill of sale dated December 24, 1958, which referred to a sale made by defendant to plaintiffs on October 29, 1958, and another or other documents, which he forwarded to Carl A. Boy, Jr. Carl A. Boy, Jr., with these documents, attempted to obtain an FAA registration number but was unable to do so. In January, 1959, he contacted Mr. Thompson, defendant's Executive Vice-President and Treasurer, seeking his assistance. He was advised by Mr. Thompson that "when (defendant) purchased the airplane from the Air Force, it was with the clear understanding that it was not to be flown"; that defendant had bought it for a special purpose, namely, to use the parts or certain parts in rebuilding an airplane; that it "would be breaking faith with the Air Force for him to go back and ask them at this date for papers that would allow us to fly the airplane"; and that, "(i)f anybody in this organization sold you that airplane and didn't tell you it was restricted, or had a restricted title, then we'll get rid of them and we'll give you your money back."

4. In a conference with Thompson, Garvey and others, Garvey stated he told James W. Boy when he bought the airplane that it had a restricted title and could not be flown. Thereupon, Thompson stated he would have to stand by Garvey and plaintiffs would have to sue.

5. "Except for flying, the only way the aircraft fuselage and center

section could be transported overland across the United States, or anywhere else for that matter, would be to disassemble it, which would make the cost prohibitive." To a junk dealer in Macon, the fuselage and center section would be worth about $250.00.

6. ". . . it would cost us approximately $19,000 to buy the parts and labor for installing the parts to make it ferryable." Plaintiffs had a purchaser for the reconstructed plane at the price of $31,000.00 plus transportation charges provided they could deliver it in Lima, Peru, "within 90 days from the first of the year."

It is unnecessary to review the evidence with reference to plaintiffs' prospective purchaser in South America. Our inquiry is to determine whether the evidence was sufficient for submission to the jury in respect of whether plaintiffs are entitled to recover, not to determine the measure or amount of damages plaintiffs are entitled to recover.

It is here noted that Garvey testified: "In order to fly the aircraft fuselage and center section located at Macon to Miami you would have to have a ferry permit." Again: "To get one (ferry permit) it would be required to have an FAA number." Again: "You could not get an FAA number if the plane was restricted so that it could not be flown."

Decision depends largely upon the testimony of James W. Boy. As indicated above, James W. Boy's testimony does not support plaintiffs' allegations that, in the negotiations, "the plaintiffs stated repeatedly to the officials of the defendant" that the particular purpose for which they were acquiring the fuselage and center section was "to rebuild an airplane around the fuselage and center section and then sell the airplane either somewhere in the United States or in Latin America." Moreover, plaintiffs' evidence discloses clearly that plaintiffs, at the time the sale was made, knew the fuselage and center section "comprised parts of a wrecked Air Force plane." Too, contrary to plaintiffs' allegation that defendant's officials "knowingly, both expressly and impliedly, misrepresented that the aircraft fuselage and center section had no legal restrictions which would prevent their being used for flight purposes as plaintiffs intended," James W. Boy testified: ". . . there was never any mention of any restrictions at any time."

"The Uniform Sales Act provides that 'any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.' Williston on Sales (Revised Edition), section 194. Our Legislature has not incorporated the Uniform Sales Act in our statutory law, but the accuracy of the lucid and succinct definition of an express

warranty embodied in the Act is fully supported by repeated decisions of this Court." *Potter v. Supply Co.*, 230 N.C. 1, 7, 51 S.E. 2d 908.

The bill of sale executed by defendant under date of December 24, 1958, provides: "For and in consideration of $10 & OVC the undersigned owner of the full legal and beneficial title of the aircraft described as follows: AIRCRAFT MAKE AND MODEL. Curtiss C-46 (Fuselage & center section only). SERIAL NO. AFM 44-77847-A, REGISTRATION MARK ..... does this 29 day of October 1958 hereby sell, grant, transfer, and deliver all of his right, title and interest in and to such aircraft unto: Carolina Aircraft, P. O. Box 365, West Durham, North Carolina, and to its executors, administrators, and assigns, to have and to hold singularly the said aircraft forever, and certifies that same is not subject to any mortgage or other encumbrance except TYPE OF ENCUMBRANCE NONE."

There was evidence that the bill of sale executed December 24, 1958, was on a form ordinarily used for the sale and transfer of a complete aircraft. Plaintiffs contend the references in the bill of sale to the "aircraft" and to "SERIAL NO. AFM 44-77847-A" constitute an express warranty as alleged. This contention is without merit. It plainly appears from this bill of sale that defendant sold to plaintiffs the "Fuselage & center section only," a fact well known to plaintiffs; and the serial number merely denotes the aircraft of which the fuselage and center section was once a part. Moreover, we think the provision, "TYPE OF ENCUMBRANCE NONE," indicates there was no mortgage or other lien on the fuselage and center section.

In our opinion, the evidence was insufficient to support a finding that defendant expressly warranted that there were no restrictions that would prevent an aircraft built around the fuselage and center section from being legally flown.

However, we think the evidence, when considered in the light most favorable to plaintiffs, is sufficient to support a finding that the purchase was made by plaintiffs for the particular purpose of constructing an airplane around the fuselage and center section for use in flight and that defendant had knowledge of plaintiffs' said particular purpose. The testimony of James W. Boy that he did not tell Garvey "what (he) was going to do with the airplane," when considered in context, would seem to imply that he did not tell Garvey whether the reconstructed plane was to be sold or used as a flyable aircraft. Certainly, this inference is permissible.

"When a buyer purchases goods for a particular purpose known to the seller and relies on the skill, judgment, or experience of the seller for the suitability of the goods for that purpose, the seller impliedly warrants that the goods are reasonably fit for the contemplated pur-

pose, and is liable to the buyer for any damages proximately resulting to him from the breach of this warranty." *Stokes v. Edwards*, 230 N.C. 306, 310, 52 S.E. 2d 797; 46 Am. Jur., Sales § 346 *et seq.;* 77 C.J.S., Sales § 325; Williston on Sales, Revised Edition, Vol. 1, § 235; *Berger v. E. Berger & Co.* (Fla.), 80 So. 296.

Plaintiffs make no contention they relied on the skill, judgment or experience of defendant. On the contrary, they relied upon the full and careful inspection made by Carl A. Boy, Jr. Plaintiffs make no contention there was any defect of such nature that an aircraft could not be constructed around the fuselage and center section and flown. On the contrary, they contend they bought the fuselage and center section solely because it was suitable for such use.

The evidence, when considered in the light most favorable to plaintiffs, tends to show plaintiffs were unable to obtain an FAA registration number and authority to fly an aircraft constructed around the fuselage and center section; that their inability to do so resulted from the fact that defendant, when it purchased the fuselage and center section from the Air Force in a negotiated sale, expressly agreed it would not be used for such purpose or flown; and that plaintiffs had no knowledge or notice of this limitation upon the use of the fuselage and center section until January, 1959. Thus, according to plaintiff's evidence, the limitation as to use derives from defendant's said agreement, not from any statute or regulation of the FAA or other governmental agency.

No decision dealing with a similar factual situation has come to our attention. The precise question seems to be one of first impression. However, we are mindful of this statement by *Connor, J.*, in *Swift & Co. v. Aydlett*, 192 N.C. 330, 334, 135 S.E. 141: "The doctrine of implied warranty in the sale of personal property is too well established in this jurisdiction now to be drawn in question. It should be extended rather than restricted. (Citations) The harshness of the common-law rule of *caveat emptor*, when strictly applied, makes it inconsistent with the principles upon which modern trade and commerce are conducted; the doctrine of implied warranty is more in accord with the principle that 'honesty is the best policy,' and that both vendor and vendee, by fair exchange of values, profit by a sale."

Under the circumstances here considered, we are of opinion, and so decide, that, if the purchase was made by plaintiffs for the particular purpose of constructing an airplane around the fuselage and center section for use in flight and defendant had knowledge of plaintiffs' said particular purpose, defendant, in making the sale, impliedly warranted that the fuselage and center section was free from restrictions imposed thereon by any agreement made by defendant

whereby its use for such purpose was prohibited. In this view, the evidence was sufficient to require submission to the jury.

Having reached the conclusion the evidence was sufficient to require submission to the jury on the issues relating to the alleged breach of implied warranty, we do not pass upon whether plaintiffs' allegations and evidence were sufficient to require submission as to issues appropriate, upon legal principles stated in *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454, in an action for fraud and deceit.

On the ground stated, the judgment of involuntary nonsuit is reversed.

Reversed.

J. MAX THOMAS, PETITIONER v. STATE BOARD OF ELECTIONS, DAVID M. McCONNELL, CHAIRMAN; WARREN R. WILLIAMS, JOSEPH E. ZAYTOUN, ROBERT S. EWING, DAN S. JUDD, MEMBERS OF THE STATE BOARD OF ELECTIONS; AND RAYMOND C. MAXWELL, EXECUTIVE SECRETARY, RESPONDENTS.

(Filed 28 February, 1962.)

1. Lieutenant-Governor; Elections § 1—

The succession of Governor and Lieutenant-Governor is fixed by the Constitution, and therefore when a Lieutenant-Governor dies during his term the Constitution excludes the right to have the vacancy in the office filled prior to the expiration of the term, and G.S. 163-7 does not apply in regard to the offices of Governor and Lieutenant-Governor.

2. Lieutenant-Governor; Constitutional Law § 9—

When a vacancy occurs in the office of Lieutenant-Governor, the powers, duties and emoluments of the office devolve upon the President of the Senate who shall discharge the duties and powers of the office of Lieutenant-Governor for the unexpired portion of the term to which the Lieutenant-Governor was elected.

3. Constitutional Law § 2—

In the construction of the Constitution all cognate provisions are to be considered and construed together to effectuate the will of the people as expressed in the instrument.

4. Mandamus § 1—

Mandamus is an extraordinary writ which issues only when there is no other adequate remedy, and may be employed only to enforce a clear legal right or the performance of a ministerial duty at the instance solely of the party entitled to demand such performance against the party under clear legal obligation to perform the act or grant the relief.

WINBORNE, C.J., not sitting.

THOMAS *v.* BOARD OF ELECTIONS.

APPEAL by petitioner from judgment entered by *Bickett, J.*, on 23 January 1962, after hearing the matter in Chambers in Raleigh, North Carolina, on 20 January 1962. From WAKE Superior Court.

This is a proceeding instituted in the Superior Court of Wake County by the petitioner, J. Max Thomas, who seeks to have the court issue in his behalf a writ of mandamus compelling respondent State Board of Elections to accept his filing fee and certify him as a Candidate for the office of Lieutenant-Governor of North Carolina in the primary election to be held in the year 1962, to fill the unexpired term of the late H. Cloyd Philpott as Lieutenant-Governor of North Carolina.

The petitioner tendered a notice of candidacy and a filing fee of $21.00 to the respondents on 15 December 1961. Petitioner is seeking to become a candidate of the Democratic Party for the office of Lieutenant-Governor in the primary to be held in May 1962.

Respondents answered the petition and denied the legal right of the petitioner to become a candidate for such office and alleged that said office was not open for the filing of candidates and would not be until the primary to be held in 1964.

The respondents filed a demurrer *ore tenus* to the petition and the matter was heard before his Honor, William Y. Bickett, Resident Judge of the Tenth Judicial District, in Chambers in the Wake County Courthouse in Raleigh, North Carolina, on 20 January 1962.

There were no questions or issues of fact to be determined or passed upon. It was admitted that the petitioner tendered the proper filing fee, and that he is eligible in all respects to become a candidate of the Democratic Party for the office of Lieutenant-Governor of this State if, under the Constitution and laws of this State, the year 1962 and the primary to be held in said year is the proper time for the election of a candidate to fill such office. Therefore, the matter was heard upon the pleadings and the demurrer interposed by the respondents and upon argument of counsel.

His Honor sustained the demurrer *ore tenus*, ordered that no writ of mandamus issue, and dismissed the proceeding. Judgment was entered accordingly.

The petitioner appeals to this Court, assigning error.

Attorney General Bruton, Asst. Attorney General Moody for the respondents.

Floyd Crouse; Joe Branch; Irving E. Carlyle for the petitioner.

DENNY, J. The question presented for determination arises out of the following factual situation: The Honorable H. Cloyd Philpott was

elected Lieutenant-Governor of this State for a term of four years in the general election in November 1960, and took the oath of office and entered upon the duties of the office in January 1961. He died on 19 August 1961.

As a matter of history, the Honorable Tod R. Caldwell was elected Governor and the Honorable Curtis H. Brogden was elected Lieutenant-Governor of North Carolina for four-year terms in 1872. Governor Caldwell died on 11 July 1874. Lieutenant-Governor Brogden took the oath of office as Governor on 14 July 1874. See Governor's Message to the General Assembly, reported in the Journal of the House, Session 1874-75, begininng on page 21.

It might be well to note that the succession of Lieutenant-Governor Brogden to the office of Governor is the only instance in the history of this State since the office of Lieutenant-Governor was created by the Constitutional Convention of 1868, when the Lieutenant-Governor succeeded to the Governorship before the midterm general election. In each other instance in which a Lieutenant-Governor has succeeded to the Governorship in this State, the vacancy in the office of Governor occurred after the midterm general election had been held. However, Governor Caldwell having died on 11 July 1874, less than thirty days prior to the next general election held on 6 August 1874, the question now before this Court has never been, nor could it have been, raised until the death of Lieutenant-Governor Philpott.

Therefore, the determinative question presented on this appeal is simply this: Is the succession of Governor and Lieutenant-Governor fixed by our Constitution, thereby excluding the right to have the vacancy in the office of Lieutenant-Governor filled by election prior to November 1964?

In considering the question presented, it is well to keep in mind that the offices of Governor and Lieutenant-Governor, aside from the powers and duties, are treated in the same constitutional manner. For example: The offices of the Executive Department of the State government were established and the terms fixed by the provisions of Article III, Section 1 of the Constitution of North Carolina, which reads as follows: "OFFICERS OF THE EXECUTIVE DEPARTMENT; TERMS OF OFFICE. — The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly

are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January."

The eligibility requirements of the Governor and Lieutenant-Governor are set out in the Constitution and are the same. Article III, Section 2 of the Constitution is as follows: "QUALIFICATIONS OF GOVERNOR AND LIEUTENANT-GOVERNOR. — No person shall be eligible as Governor or Lieutenant-Governor unless he shall have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the office shall have been cast upon him as *Lieutenant-Governor or President of the Senate.*" (Emphasis added)

There is certainly no denial of the fact that when the office of Governor becomes vacant, there is a constitutional plan of succession other than by an election, to fill the vacancy for the unexpired term. It is necessary, therefore, to examine the several sections of the Constitution bearing on the duties of the Lieutenant-Governor and the procedure to be followed when the "powers, duties and emoluments of the office of Governor shall devolve" upon the Lieutenant-Governor and he is unable to act.

Article III, Section 11 prescribes the duties of the Lieutenant-Governor as follows: "DUTIES OF THE LIEUTENANT-GOVERNOR. — The Lieutenant-Governor shall be President of the Senate but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly."

Article III of the Constitution deals with the Executive Department of our State government. The Lieutenant-Governor is an officer of the Executive Department. Even so, Article II of our Constitution which deals with the Legislative Department of the government, in Section 19, provides as follows: "PRESIDENT OF THE SENATE. — The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided." Article II further contains the following provisions in Section 20: "OTHER SENATORIAL OFFICERS. — The Senate shall choose its other officers and also a speaker (pro tempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor."

The constitutional method of succession is set out in Article III,

Section 12 of our Constitution which reads as follows: "IN CASE OF IMPEACHMENT OF GOVERNOR, OR VACANCY CAUSED BY DEATH OR RESIGNATION. — In case of the impeachment of the Governor, his failure to qualify, his absence from the State, his inability to discharge the duties of his office, or, in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities be removed, or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the President of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president."

We think the provisions of our Constitution clearly point out upon whom the powers, duties and emoluments of the offices of Governor and Lieutenant-Governor shall devolve in the event of a vacancy in either or both of said offices. We think this view is further supported by the provisions of Section 13 of Article III in our Constitution which reads as follows: "DUTIES OF OTHER EXECUTIVE OFFICERS. — The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article: Provided, that when the unexpired term of any of the offices named in this section in which such vacancy has occurred expires on the first day of January succeeding the next general election, the Governor shall appoint to fill said vacancy for the unexpired term of said office." This last proviso was authorized by Chapter 1033 of the North Carolina Session Laws of 1953,

and submitted to and approved by a vote of the people at the general election held on 2 November 1954.

It will be noted that the offices of Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance, have been created since the adoption of the Constitution in 1868 and Sections 1 and 13 of Article III of the Constitution amended to include these offices in the Executive Department of the State government.

The petitioner contends that his petition for a writ of mandamus is clearly supported by the provisions of G.S. 163-7, reading as follows: "FOR VACANCIES IN STATE OFFICES. — Whenever any vacancies shall exist by reason of death, resignation, or otherwise, in any of the following offices, to wit, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Solicitor, Justices of the Supreme Court, judges of the superior court, or any other State officer elected by the people, the same shall be filled by elections, to be held in the manner and places and under the same regulations and rules as prescribed for general elections, at the next regular election for members of the General Assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the Constitution."

In our opinion, when the General Assembly enacted the foregoing statute, it clearly recognized that the Governor and the Lieutenant-Governor were not subject to its provisions and that is the reason the statute contains the provision, "except as otherwise provided for in the Constitution."

Moreover, the Constitution does not otherwise provide except as to the offices of Governor and Lieutenant-Governor.

If it had been the intent of the framers of the Constitution to authorize or require the election of a successor to fill a vacancy in the office of Lieutenant-Governor, as required with respect to the offices named in the Constitution in Section 13, Article III, then we can think of no sound reason why the framers of the Constitution did not include the office of Lieutenant-Governor in Section 13, Article III of the Constitution. Every office in the Executive Department of the State government created by the Constitutional Convention of 1868, was named in Section 13 of Article III of the Constitution, and the manner of succession in the event of a vacancy in any of said offices is explicitly set out therein, except the offices of Governor and Lieutenant-Governor.

Moreover, in each of the offices named in Section 13, Article III of the Constitution in which a vacancy is required to be filled, the duty is imposed upon the Governor to appoint another to fill the office until a successor is elected and qualified.

Consequently, if the contentions of the petitioner are correct, we can think of no valid reason why the Governor should not have appointed a successor to Lieutenant-Governor Philpott immediately after his death, to serve until the next general election. We hold, however, there is no constitutional provision which authorizes the Governor to appoint a successor to Lieutenant-Governor Philpott, to fill out the vacancy now existing by reason of his death. Furthermore, no Governor has ever attempted to appoint another to fill a vacancy in the office of Lieutenant-Governor.

Here, again, we think the framers of the Constitution deliberately and advisedly provided for the succession of Governor and Lieutenant-Governor otherwise than by election, thereby withholding from the Governor the power to name his potential successor. On the other hand, whenever it becomes necessary for a President of the Senate to be elected, upon whom the powers, duties and emoluments of the office of Governor or Lieutenant-Governor may devolve, the power and responsibility for electing a President of the Senate is vested by the Constitution in that body. Section 12, Article III of the Constitution of North Carolina.

The factual situation involved in this appeal is not controlled by the decision in *Rodwell v. Rowland,* 137 N.C. 617, 50 S.E. 319.

We hold that the Constitution provides for the succession of the Governor and the Lieutenant-Governor and does not authorize a vacancy in either office to be filled at an election for any portion of an unexpired term. Section 12, Article III of the Constitution of North Carolina.

We further hold that when a vacancy occurs in the office of Lieutenant-Governor, the powers, duties and emoluments of the office of Lieutenant-Governor devolve upon the President of the Senate who shall discharge the duties and powers of the office of Lieutenant-Governor for the unexpired portion of the term to which the Lieutenant-Governor was elected.

In the case of *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858, 157 A.L.R. 441, *Stacy, C.J.,* speaking for the Court, said: "The will of the people as expressed in the Constitution is the supreme law of the land. *Warrenton v. Warren County,* 215 N.C. 342, 2 S.E. 2d 463. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. * * *"

When the provisions of our Constitution bearing on the question now before us are properly interpreted, we think they support in letter and spirit the conclusion we have reached.

" * * * Mandamus is an action or proceeding of a civil nature, extra-

ordinary in the sense that it can be maintained only when there is no other adequate remedy and designed to enforce clear legal rights or the performance of ministerial duties which are enjoined by law; but the writ will not be issued to enforce an alleged right which is in doubt. Not only must the plaintiff show that he has a clear legal right; he must show that the opposing party is under legal obligation to perform the act or to grant the relief for the performance or enforcement of which the action is prosecuted. * * *" McIntosh, North Carolina Practice and Procedure, Second Edition, Volume 2, Section 2445.

In our opinion, the petitioner is not entitled to the writ he seeks and we so hold; therefore, the judgment from which this appeal was taken is

Affirmed.

WINBORNE, C.J. not sitting.

ERNEST G. CRISP v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 28 February, 1962.)

1. **Trial § 31—**

In those cases in which it is proper for the court to give a peremptory instruction in favor of the party having the burden of proof, the court, after instructions to answer the issue in the affirmative if the jury should find the facts to be as all of the evidence tends to show, should instruct the jury to answer the issue in the negative if they fail to so find, in order that the jury may pass upon the weight and credibility of the evidence.

2. **Insurance § 61—**

In an action by the injured person against insurer in an automobile liability policy, the burden is upon plaintiff to prove that insurer issued and delivered the policy to insured and that the policy covered the vehicle owned by insured and involved in the collision in which plaintiff was damaged.

3. **Same—**

In an action by the injured person against insurer in an automobile liability policy, the burden is upon insurer to prove cancellation and termination of the policy prior to the collision when relied upon by it.

4. **Same—**

Whether proof of payment of premium is an essential element of a cause of action against insurer or whether it is a matter of defense upon

which insurer has the burden of proof, depends upon the provisions of the contract and the circumstances of the case; further, payment of premium as a condition for effective insurance may be waived.

5. Insurance § 3—

Pertinent statutory provisions in force at the time of the execution of an insurance contract enter into and form a part of the policy to the same extent as if they are actually written into it.

6. Insurance §§ 61, 65—

Where insurer, in accordance with G.S. 20, Art. 13, issues certificate FS-1 which is delivered to the Department of Motor Vehicles, insurer represents that everything requisite for a binding insurance policy has been performed, including payment or satisfactory arrangement for payment of premium, and thereafter nonpayment of the premium is no defense in an action by an injured third party against insurer.

7. Same—

After insurer has issued certificates FS-1, insurer, in order to avoid liability to a third person injured by negligent operation of the vehicle insured, must allege and prove cancellation and termination of the policy in accordance with the applicable statute.

8. Same—

The requirement of G.S. 30-310 that the notice of termination of insurance should contain a statement that proof of financial responsibility is required to be maintained and that operation of a motor vehicle without maintaining such proof is a misdemeanor, is mandatory and not directory, and when the substance of the required statement does not appear anywhere in the notice of cancellation mailed to insured, the notice of cancellation is ineffective, especially in a suit by an injured third person against insurer.

9. Insurance § 54—

Where, at the time of applying for a liability policy, insured owns but one vehicle which has a 1947 body and chassis and a 1948 motor, the fact that the policy, stating the correct motor number, describes the vehicle as a 1948 model, is not fatal, the inference being permissible that the policy sufficiently described the automobile owned by insured at that time and that it was the intention of the parties that that particular vehicle be insured.

WINBORNE, C.J., not sitting.

APPEAL by plaintiff from *Farthing, J.*, November 1961 Term of BUNCOMBE.

This is a civil action instituted 12 December 1960 to recover benefits under an automobile liability insurance policy.

The complaint is summarized as follows: Defendant, insurance company, issued and delivered to Julius Creed Robinson (hereinafter called "insured") automobile liability insurance policy No. 461 373-

F19-33, effective 19 June 1959 to 19 December 1959, having limits of liability, $10,000 each person, $20,000 each occurrence, $5000 property damage. The policy covered a 1948 Ford, No. ICA 333169. Insured paid the premium of $18.70 and the policy was in full force and effect on 4 December 1959. On that date plaintiff suffered personal injury and property damage in a collision with an automobile operated by insured and covered by the policy. The collision was caused by the actionable negligence of insured. In a damage suit growing out of this collision, plaintiff on 11 August 1960 recovered judgment against insured for $2500 and costs in the Superior Court of Buncombe County. Execution was issued against insured and returned unsatisfied. Under the terms of the insurance policy defendant is obligated to pay the judgment, with interest and costs.

Defendant's answer: It is not denied that plaintiff recovered judgment against insured as alleged in the complaint. Insured had no policy of insurance in force and effect with defendant on 4 December 1959. The policy referred to in the complaint was issued and delivered by defendant to insured on 17 July 1959. Insured applied for the policy on 19 June 1959 and paid $10 on the premium of $18.70. He has paid nothing since. Thereafter, at the request of insured, the policy was "cancelled, transferred and replaced" by policy No. 473 166-F19-33, effective 10 September 1959, insuring a 1947 Chevrolet. On 18 September 1959 a statement of premium (due 18 October 1959) was mailed to insured. He failed to make payment. Notice of cancellation, effective 6 November 1959, was mailed to insured in accordance with the provisions of the policy.

At the trial plaintiff offered documentary evidence, including policy No. 461 373-F19-33, the judgment roll and execution in the damage suit, and admissions in the answer. There was testimony that insured in the Fall of 1959 traded the Ford for a 1947 Chevrolet.

Defendant offered records and testimony relative to its transactions with insured. Defendant's evidence tends to show: On 19 June 1959 insured applied to defendant for a liability policy insuring a 1948 Ford, Motor No. ICA 333 469. He signed the application. The premium was $18.70. He paid $10 on account. Defendant issued form FS-1, promulgated by the North Carolina Department of Motor Vehicles, certifying to the Department that insured had met statutory requirements for financial responsibility. Policy No. 461 373-F19-33 was issued and mailed to insured with a statement for $8.70, balance of premium. The policy was for a 6 months period, 19 June 1959 to December 19, 1959. On 10 September 1959 insured reported that the Ford had been replaced by a 1947 Chevrolet, No. EAM 7038. Defendant issued a new policy, No. 473 166-F19-33, effective 10 September 1959

to 19 December 1959. Insured, according to the practice in defendant's business, was not required to sign application for the new policy. This contract was mailed to insured with a statement of premium due. The premium was increased because of the addition of insured's son as an operator of the vehicle. Insured did not pay the balance of premium or any part thereof. On 22 October 1959 defendant mailed to insured notice of cancellation of policy No. 473 166-F19-33, stating: "Dear Member: We have not received the full amount required to keep this policy in force. This leaves us with no alternative, and we are obligated to notify you that this policy is cancelled, effective on 11-6-59-12:01 A.M. Standard Time. We are confident that you do not want to face the hazards of owning and operating an automobile without insurance. Please forward your remittance without delay, and we will reinstate this policy, effective upon receipt of the amount due. Your State Farm Agent will be pleased to furnish you with any assistance you may desire." On 25 November 1959 defendant prepared and mailed form FS-4 to the North Carolina Department of Motor Vehicles giving notice of termination of this insurance as of November 10, 1959, at 12:01 A.M.

One issue was submitted to and answered by the jury, as follows: "Was Policy No. 461 373-F19-33 in force and effect on December 4, 1959, as alleged in the Complaint? Answer: No."

Judgment was entered decreeing that plaintiff recover nothing.

Plaintiff appeals.

Williams, Williams and Morris and J. N. Golding for plaintiff appellant.

Van Winkle, Walton Buck and Wall, O. E. Starnes, Jr., and Roy W. Davis, Jr., for defendant appellee.

MOORE, J. The judge instructed the jury as follows: ". . . (T)he court charges you . . . that if you believe all of the evidence in this case and find the facts to be as the evidence tends to show, that you would answer the issue NO." The jury did answer the issue "No."

In the first place, the instruction is insufficient in form. When a peremptory instruction is permissible, the court must leave it to the jury to determine the credibility of the testimony. *Reynolds v. Earley,* 241 N.C. 521, 85 S.E. 2d 904; *Shelby v. Lackey,* 236 N.C. 369, 72 S.E. 2d 757. Where the peremptory instruction is favorable to the party having the burden of proof, it must be in such form as to clearly permit a verdict unfavorable to such party in the event the jury finds that the evidence is not of sufficient weight and credibility to carry the burden. *Hunnicutt v. Insurance Co.,* 255 N.C. 515, 122 S.E. 2d 74.

Furthermore, the instruction given, had it been in proper form, was inappropriate in this case.

On this record the pleadings raise two issues. These may be stated as follows: (1) Did defendant issue and deliver to Julius Creed Robinson an automobile liability insurance policy which insured a 1947 Chevrolet, owned by Julius Creed Robinson and involved in a collision in which plaintiff was damaged on December 4, 1959, as alleged in the complaint? (2) If so, was the insurance policy cancelled and terminated prior to said collision? Plaintiff has the burden of the first issue, and defendant has the burden of the second.

The following facts do not appear to be controverted on this appeal: The 1947 Chevrolet described in policy No. 473 166-F19-33 was involved in an accident on 4 December 1959 in which plaintiff was damaged, and was being operated at the time by Robinson, the insured named in the policy. Plaintiff recovered judgment in the amount of $2500 against Robinson in a damage suit growing out of the accident. The judgment has not been paid.

In addition, plaintiff's evidence tends to show: Policy No. 461-373-F19-33 was issued and delivered by defendant to the named insured for the policy period 19 June 1959 to 19 December 1959. By its terms it insured not only the Ford automobile described therein but also any automobile acquired by insured during the policy period to replace the Ford described. In the Fall of 1959 insured traded the Ford for the 1947 Chevrolet which was involved in the collision in question.

This makes out a *prima facie* case for plaintiff. Defendant disagrees, and contends that plaintiff has the further burden of showing that the premium was paid.

As to whether one who claims benefits under a policy of insurance has the burden of proving that the premium has been paid, or whether nonpayment is a matter of defense, depends on the provisions of the insurance contract and the circumstances of the case. Nonpayment of premium has been held in some instances to be an affirmative defense. *Abernethy v. Insurance Co.*, 213 N.C. 23, 195 S.E. 30; *Harris v. Jr. O.U.A.M.*, 168 N.C. 357, 84 S.E. 405; *Wilkie v. National Council*, 147 N.C. 637, 61 S.E. 580; *Page v. Insurance Co.*, 131 N.C. 115, 42 S.E. 543. "The burden is on defendant to prove nonpayment of a premium or assessment . . . where the fact of payment has been prima facie proved, as where acknowledgement of payment is made in the policy, or where plaintiff is in possession of and produces the policy, and the other essentials to recovery are prima facie proved or admitted." 46 C.J.S., Insurance, s. 1316b(5)c, p. 397. Furthermore, payment of premium as a condition for effective insurance may be waived. *Pender v. Insurance*

Co., 163 N.C. 98, 79 S.E. 293; *Rayburn v. Casualty Co.*, 138 N.C. 379, 50 S.E. 762.

The insurance policy in the instant case is subject to the provisions of the Vehicle Financial Responsibility Act of 1957, G.S. Ch. 20, Art. 13. "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. Plaintiff, in the case at bar, issued certificate FS-1, and it was delivered to the North Carolina Department of Motor Vehicles. By the issuance of the certificate (FS-1) an insurer represents that it has issued and there is in effect an owner's motor vehicle liability policy. *Swain v. Insurance Co.*, 253 N.C. 120, 126, 116 S.E. 2d 482. In substance, by the issuance of the certificate the insurer represents that everything requisite for a binding insurance policy has been performed, including payment, or satisfactory arrangement for payment, of premium. Once the certificate has been issued, nonpayment of premium, nothing else appearing, is no defense in a suit by a third party beneficiary against insurer. To avoid liability insurer must allege and prove cancellation and termination of the insurance policy in accordance with the applicable statute, unless it is established by plaintiff's evidence or admissions.

". . . (T)he party asserting the cancellation of an automobile policy as a defense has the burden of proving it." Blashfield: Cyclopedia of Automobile Law and Practice (Perm. Ed.), Vol. 6 (Part 1), s. 3765.5, p. 405. See also *Barnes v. Trust Co.*, 229 N.C. 409, 50 S.E. 2d 2.

Defendant contends that its evidence shows that the subject insurance policy was duly cancelled for nonpayment of premium and that this entitles it to a peremptory instruction that the policy was not in force on the date in question.

G.S. 20-310 is the applicable statute in this case for the cancellation and termination of automobile liability insurance policies. It provides: "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured at the address shown on the policy. Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor. Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination

shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination."

In order to effectively cancel a policy an insurer must substantially comply with the requirements of this section. The notice mailed by defendant to insured failed to include on the face thereof "a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor." The statute provides that such statement *shall* be included on the face of the notice. "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. . . ." *Swain v. Insurance Co., supra.* It was the intent of the Act that motor vehicle owners maintain financial responsibility continuously and that the law enforce this purpose. It is our opinion that the statement required by G.S. 20-310 to be placed on the face of the notice of termination is not merely formal and directory. It is intended as a firm reminder to vehicle owners of the requirements of the law, and as a notice that failure to comply constitutes a criminal offense. It is to be given at the very time when insurance protection and financial responsibility is being withdrawn. The substance of the required statement appears nowhere in the language of the notice given by defendant. In the absence of circumstances in a civil action which might constitute a waiver or an estoppel, or render harmless the failure to include such statement, it is essential to a valid cancellation or termination, especially when the suit is by a member of the class the Act is designed to protect.

In passing, we observe that insurer did not mail to the Department of Motor Vehicles notice of the purported cancellation within 15 days following the effective date of cancellation stated in the notice to insured. Insured was advised that the effective date of cancellation was November 6, 1959. Notice was mailed to the Department November 25, 1959, and this notice stated that the effective date of cancellation was November 10, 1959.

We do not know, of course, what evidence may be adduced upon a retrial. It is our opinion that the uncontradicted evidence offered by defendant does not entitle it to a peremptory instruction that the alleged insurance policy was not in force on 4 December 1959.

We are not unmindful of defendant's argument that plaintiff fails to make out a *prima facie* case in accordance with the allegations of the complaint for that, it contends, the 1947 Chevrolet did not replace the Ford described in policy No. 461 373-F19-33 (the policy applied

for in June 1959 and delivered in July 1959). The evidence tends to show: In June 1959 insured went to the office of defendant's agent to apply for insurance. He owned only one automobile, a Ford. The Ford had a 1947 body and chassis and a 1948 motor. The correct motor number was given the agent. This motor number appears in the policy, and the policy describes the automobile as a 1948 Ford. This car was traded by insured for a 1947 Chevrolet in September 1959. According to policy provisions, insured reported the replacement, and a new policy (No. 473 166-F19-33) was issued insuring the Chevrolet.

Defendant now contends that, since plaintiff sues upon the first policy, he has not made out a *prima facie* case for the reason that the Chevrolet replaced a 1947 Ford, and not the 1948 Ford described in the policy. The contention is not sustained. Insured owned only one Ford at the time of the application. There is no suggestion by pleadings or otherwise that insured practiced any deceit, withheld any information, or gained any advantage. The proper motor number was given. The inference is permissible that the policy sufficiently describes the automobile owned by insured at that time, and that it was the intention of the parties that this particular automobile be insured. It was traded for the Chevrolet. The second policy, describing the Chevrolet, was merely an extension of the first policy. Its policy period ended 19 December 1959 as did that of the first policy.

New trial.

WINBORNE, C.J., not sitting.

IN RE WILL OF HATTIE KIRBY GILKEY.

(Filed 28 February, 1962.)

1. Wills § 4—

It is not required that the signature of a holographic will be witnessed, and testimony of three credible witnesses that the paper writing propounded was written and subscribed entirely in the handwriting of the author meets the requirements of G.S. 31-3.4.

2. Same—

The requirement that a holographic will be found after the death of testator among his valuable papers or papers considered by him to be valuable, is solely for the purpose of establishing *animus testandi*, and where testator places and leaves a holographic will among his valuable papers the fact that after the testator becomes incapacitated another

finds and sees the papers and removes them to a place of safety does not affect the statutory requirement of G.S. 31-3.4(a) (3).

3. Same—

Testimony that some three weeks prior to testatrix's death the paper writing probated as testatrix's holographic will was found in a metal box, containing other valuable papers, in the closet of testatrix's bedroom, that propounder moved the valuable papers to a lock box rented by him from a bank, and that the paper writing was found with testatrix's other papers in the lock box when inventoried after her death, together with evidence that at the time propounder found the papers testatrix was confined to a hospital incapacitated from her fatal illness, *is held* sufficient to be submitted to the jury on the question whether the paper writing was found among testatrix's valuable papers.

4. Same—

Where the person appointed attorney in fact finds the paper writing propounded by him among testatrix's valuable papers while testatrix was confined to a hospital incapacitated by her last illness, it is not error for the court to fail to charge with respect to the duty imposed upon propounder by the power of attorney to take possession and custody of the will and all other valuable papers belonging to testatrix.

WINBORNE, C.J., not sitting.

APPEAL by caveator from *Campbell, J.*, October 1961 Civil Term of McDOWELL.

Hattie K. Gilkey, a resident of McDowell County, died 6 December 1960. She left surviving a son, John M. Gilkey, a daughter, Virginia G. Hawkins, and a granddaughter, Harriet J. Frazelle, daughter of Mrs. Hawkins.

On 12 December 1960 John M. Gilkey (hereafter referred to as propounder) offered for probate as his mother's will a paper writing consisting of two sheets. The instrument was dated 7 June 1958. The opening sentence is: "This is my Last Will." It gave all of testator's property to propounder, but directed him to pay $5,000 to Harriet Frazelle. It named propounder as executor. The paper was probated in common form as the holographic will of Mrs. Gilkey.

Mrs. Hawkins filed a caveat, alleging: (1) There were no witnesses to the writing; (2) it was not found after the death of Mrs. Gilkey among her valuable papers or effects; (3) Mrs. Gilkey did not in June 1958 possess mental capacity to make a will; and (4) she was subject to improper and undue influence.

Propounder denied the allegations of undue influence and lack of mental capacity. He alleged the paper was in the handwriting of his mother, subscribed by her, and found among her valuable papers after her death.

The court without objection submitted and the jury answered issues as follows:

"1. Was the paper writing shown by Propounder's Exhibit #1 found among the valuable papers of Hattie Kirby Gilkey?

"ANSWER: Yes.

"2. Was the paper writing shown by Propounder's Exhibit #1 entirely in the handwriting of Hattie Kirby Gilkey?

"ANSWER: Yes.

"3. Was the paper writing shown by Propounder's Exhibit #1 found after the death of Hattie Kirby Gilkey?

"ANSWER: Yes.

"4. Is the paper writing shown by Propounder's Exhibit #1 the Last Will and Testament of Hattie Kirby Gilkey?

"ANSWER: Yes."

The court thereupon adjudged the paper writing to be the last will and testament of Mrs. Gilkey. Caveator excepted and appealed.

E. P. Dameron for propounder appellee.

Hamrick & Hamrick by J. Nat Hamrick, and Joseph B. Cheshire, Jr., for caveator appellant.

RODMAN, J. Caveator offered no evidence to support her allegations of lack of mental capacity or undue influence.

Mrs. Gilkey's signature was not witnessed. None was necessary if the requirements for a holographic will were established. G.S. 31-3.4(b).

The Legislature which convened in Hillsboro in April 1784 declared no will should be valid unless subscribed in testator's presence by at least two witnesses. Sec. 11, c. 204, Potter's Laws of North Carolina (1821). That statute is now in substance G.S. 31-3.3. The Legislature next convened in New Bern on 22 October 1784. It then amended the Act passed at the previous session. Sec. 5 of the amendatory Act reads: "And whereas the attestation of witnesses to wills and testaments required by the before mentioned act, (a) is intended to prevent frauds and impositions by the will of persons hastily drawn up in their last sickness, or from their want of sufficient knowledge for that purpose, and it may be proper to make exceptions from that rule in particular cases: *Be it therefore enacted,* That when any last will shall be found among the valuable papers or effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, and the same shall be in the hand-writing of such deceased person and his name subscribed thereto, or inserted in some part of such will, and if such hand-writing is generally known by the acquaintances of such

deceased person, and it shall be proved by at least three credible witnesses that verily believe such will and every part thereof is in the hand-writing of the person whose will it appears to be; then and in that case such will shall be sufficient in law to give and convey a sufficient estate in lands, tenements and hereditaments, any thing in the before recited act to the contrary notwithstanding." C. 225, Potter's Laws of North Carolina (1821).

The conditions prescribed by the Act of 1784 for a valid holographic will have remained substantially the same to the present time. G.S. 31-3.4.

Propounder, to show the instrument offered for probate complied with the statutory requirements for a valid holographic will, put on numerous witnesses, among others, the brother and two sisters of deceased, who testified that the instrument including the name Hattie K. Gilkey subscribed thereto was entirely in the handwriting of Mrs. Gilkey. No witness testified to the contrary. This testimony, accepted by the jury as true, sufficed to show compliance with subsecs. 1 and 2 of G.S. 31-3.4(a).

The third subsection of this statute requires the paper writing to be "(f)ound after the testator's death among his valuable papers or affects, or in a safe deposit box . . . where it was deposited by him or under his authority, or in the possession or custody of some person with whom . . . it was deposited by him or under his authority for safekeeping." To show compliance with this statutory requirement, propounder and his witnesses testified to these facts:

Mrs. Gilkey was 69 when she died. In March 1960 she went to Asheville for an operation for cancer. On 19 October she entered the hospital in Marion. She was in much pain. The cancer had apparently returned. She remained in the hospital one week. While Mrs. Gilkey was in the hospital in Marion propounder and caveator agreed it would be wise for Mrs. Gilkey to designate someone to handle her affairs. Mrs. Gilkey concurred. An attorney in Marion on 28 October drafted a power of attorney authorizing propounder to take possession of all of Mrs. Gilkey's properties, collect any sums owing her, and pay any debts owing by her with authority to sell or mortgage any of her properties. This instrument authorizing propounder to act for his mother was executed by Mrs. Gilkey and acknowledged by her before the Assistant Clerk of the Superior Court of McDowell County on 31 October.

Because of the spread of the cancer Mrs. Gilkey was readmitted to the Marion hospital on 3 November. She was critically ill. She remained in the hospital until her death on 6 December.

Mrs. Gilkey owned her home. She lived alone but rented a room to

a lodger who worked at night and slept during the day. About three weeks before Mrs. Gilkey's death and when it was apparent to propounder that his mother could not recover, he went to the home to look for some of her papers. On the floor in a closet in her bedroom he found a metal box which contained canceled checks, bank statements, and a large brown envelope. In this envelope propounder found: A policy of insurance issued to Mrs. Gilkey by Hospital Care Association, stock certificates issued to Mrs. Gilkey by American Telephone & Telegraph Co., First National Bank of North Carolina, and National Security Corporation, a watch, two wedding rings, and other jewelry, a deed for lots on Crescent and Fleming Avenues (land referred to in the will), and a sealed white envelope on which was written in Mrs. Gilkey's handwriting "My Will — To — John Millard Gilkey — Marion, N. C."

Propounder took the brown envelope with its contents to First National Bank of Marion and there lodged it in a safety deposit box which he had rented in July. He and his wife had access to this deposit box. He opened this deposit box twice prior to an inventory of its contents on 12 December 1960: first, on the day prior to Mrs. Gilkey's death to get one of the American Telephone & Telegraph stock certificates to use as collateral for a loan to be made by the bank to his mother; second, on the day of his mother's death to get some instructions which she had written concerning her funeral.

On 12 December the contents of the box were inventoried by the Clerk of the Superior Court of McDowell County, an official of the bank, propounder, and his attorney. The white envelope which contained the will was then sealed. The contents of the brown envelope were the same as when propounder first found it except for the certificate of telephone company stock which he had used as collateral for a loan from the bank, and in the place of that was the bank's receipt for the certificate. The contents at that time were established by the testimony of the clerk of the court and bank officials.

Caveator offered no evidence tending to contradict the evidence offered by propounder with respect to the finding of the brown envelope or its contents in November when found by propounder or the contents at the time of Mrs. Gilkey's death.

Caveator insists the testimony offered by propounder, summarized above, if true, is insufficient to meet the requirements of G.S. 31-3.4(a)(3). She challenges the sufficiency of this evidence by motion to nonsuit and by exceptions to the charge. Her position is that the statute requires an original discovery subsequent to death. Hence a paper purporting to be a will could not be "found" after the death of the

author by a person who, prior to the author's death, knew of and had seen the will with other valuable papers of the author.

To give effect to caveator's interpretation of the statute could and would doubtless in many instances defeat legislative intent. The requirement that the writing be found after death among testatrix's valuable papers was to show the author's evaluation of the document, important because lodged with important documents, to become effective upon death because left there by the author, thereby establishing the necessary *animus testandi.*

If the document had been placed among the author's valuable papers without her knowledge and consent, it would of course have no validity as a will even though found among the papers after the author's death. As said by *Connor, J.,* in *In re Will of Groce,* 196 N.C. 373, 145 S.E. 689: "There is no requirement as to the place where the paper-writing, and the valuable papers and effects, shall be found. The place where the papers and effects of deceased, including the paper-writing offered for probate, are found, after his death, is material, only upon the question as to whether or not such papers and effects are, and were considered by the deceased as valuable. The purpose of the statute is effectuated when the paper-writing propounded as a will is identified as the will of the deceased, by the fact that it is in his handwriting, and when his intent that it shall take effect as his will is shown by the fact that he kept it among papers and effects which he regarded as valuable, and which, in fact, were valuable."

Judge Connor's words epitomize previous decisions of this Court interpreting the statute. *In re Westfeldt,* 188 N.C. 702, 125 S.E. 531; *In re Jenkins,* 157 N.C. 429, 72 S.E. 1072, 37 L.R.A. (N.S.) 842; *In re Sheppard's Will,* 128 N.C. 54; *Alston v. Davis,* 118 N.C. 202; *Winstead v. Bowman,* 68 N.C. 170; *Hughes v. Smith,* 64 N.C. 493; *Hill v. Bell,* 61 N.C. 122; *Simms v. Simms,* 27 N.C. 684.

Tennessee adopted our statute prescribing the conditions for a valid holographic will. That portion of its statute requiring a deposit among testator's valuable papers was repealed in 1941. Seemingly North Carolina and Tennessee are the only states which have required a deposit among valuable papers or with someone for safekeeping as a requisite of a holographic will. 2 N.C. Law Rev. 107.

The interpretations given the statute by Tennessee courts are in harmony with the conclusions reached by this Court. *Pulley v. Cartwright,* 137 S.W. 2d 336, bears remarkable similarity to *In re Westfeldt, supra,* and this case. There a Mrs. Allen kept the document propounded in her purse which she kept with her. The night before Mrs. Allen's death a nurse took the purse and put it in a trunk in another room. It was there found after Mrs. Allen's death. The court

said: "The fact that the nurse moved the pocketbook after Mrs. Allen was no longer able to watch over her affairs, a few hours before her death, and put it in the trunk in the next room, without her knowledge or consent, cannot alter the situation and require the beneficiaries under the will to show that the trunk was where Mrs. Allen kept her valuable papers." See also *Hooper et al. v. McQuary,* 45 Tenn. 129; *Tate v. Tate,* 30 Tenn. 465.

The court properly imposed on propounder not only the burden of showing the papers were found among Mrs. Gilkey's valuable papers, but the burden of showing that she placed them there with testamentary intent.

Neither *Little v. Lockman,* 49 N.C. 494, nor *Adams v. Clark,* 53 N.C. 56, relied upon by caveator, support her contention. In *Little v. Lockman,* the determinative question was the character of the papers with which the will was placed. The rigidity of the rule there announced was criticized in *Winstead v. Bowman, supra,* and *In re Sheppard's Will, supra.* In *Adams v. Clark,* the will was exhibited by decedent some eight months prior to his death and then placed among his valuable papers, but there was no evidence to show where it was found after death, and because of the failure to explain where found after death, it was held propounder had failed to carry the burden.

Caveator also assigns as error the failure of the court to charge the jury with respect to the duty imposed on propounder by the power of attorney to take possession and custody of the will and other valuable papers belonging to his mother. The failure to charge that it was the duty of the attorney in fact to preserve his mother's valuable papers and effects required propounder to carry a heavier burden. Caveator cannot complain of this.

No error.

WINBORNE C.J., not sitting.

JOHN E. NEWTON v. THOMAS L. McGOWAN.

(Filed 28 February, 1962.)

1. Appeal and Error § 42—

A portion of the charge excepted to must be considered with the remainder of the charge and construed in context in determining whether the excerpt was or was not prejudicial.

2. Malicious Prosecution § 12; Trial § 34— Charge, construed contextually, held to have instructed jury as to facts which would require negative as well as affirmative finding and placed no burden of proof on defendant.

Where, in an action for malicious prosecution, the court charges the jury to the effect that the burden is upon plaintiff to prove by the greater weight of the evidence that defendant caused plaintiff to be arrested and prosecuted, and that defendant did so without reasonable grounds for suspicion or without knowledge of facts which would lead a man of ordinary caution to believe or entertain an honest suspicion that plaintiff was guilty, to answer the issue in the negative, *is held* without jury that, on the other hand, if it should find that defendant had reasonable grounds for suspicion or knowledge of facts which would lead a man of ordinary caution to believe or entertain an honest suspicion that plaintiff was guilty, to answer the issue in the negative, is held without prejudicial error when construed contextually, and the charge is not subject to the objection that it failed to charge the facts requiring a negative answer, or placed any burden on defendant to prove facts which would permit a negative answer.

3. Malicious Prosecution § 4—

Where a committing magistrate finds probable cause or when a defendant in a criminal action waives the preliminary hearing, a *prima facie* showing of probable cause is made, but such *prima facie* showing is not conclusive and the question of probable cause remains for the jury.

4. Same—

The fact that a defendant in a criminal prosecution demanded a jury trial, which under the applicable statutes required the recorder to transfer the cause to Superior Court without investigation, has no relation to the question of probable cause and does not establish probable cause even *prima facie.*

5. Malicious Prosecution § 12—

In this action for malicious prosecution, the court's definition of "malice" held not prejudicial on authority of *Motsinger v. Sink,* 168 N.C. 548.

6. Malicious Prosecution § 13—

A finding by the jury that defendant caused the arrest and prosecution of plaintiff and that the arrest and prosecution was without probable cause, establishes plaintiff's right of action and entitles him to nominal damages, with the burden on plaintiff to show damages beyond a nominal sum, but such burden does not require plaintiff to show the amount of damage with mathematical certainty and he is required merely to offer evidence from which the jury can reasonably find damages in excess of a nominal sum.

7. Same—

Where plaintiff in an action for malicious prosecution introduces evidence that he was arrested on false charges sworn to by defendant, and that the arrest was made in the presence of others and the fact of arrest

reported in the local newspaper, the evidence is sufficient to justify the jury in awarding more than nominal damages without the necessity of plaintiff's producing witnesses to testify as to injury to plaintiff's reputation or decreased earning capacity, and the court in its charge properly submits these elements of damage.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Morris, J.*, December 1961 Civil Term of PASQUOTANK.

Plaintiff brought this action to recover compensatory and punitive damages for an alleged malicious prosecution of the criminal charge of larceny. To support his claim he alleged: A warrant was issued by the Recorder's Court of Currituck County on 9 March 1960 at the request of and on an affidavit by defendant which charged plaintiff with the theft of defendant's slab wood; the warrant was issued without probable cause; defendant acted maliciously in procuring the warrant; the criminal action had terminated by a *nol pros* taken at the September Term 1960 of the Superior Court.

Defendant admitted the warrant was issued at his instance and on his affidavit. He denied he acted maliciously, asserting he acted in good faith, having good and probable cause to believe plaintiff guilty. He averred plaintiff, in the recorder's court, demanded a jury trial, thereby preventing the recorder's court from determining guilt or innocence, leaving it only with authority to bind plaintiff over to the Superior Court and the demand so made established probable cause justifying defendant's action in requesting the court to issue the warrant.

The court submitted issues which were answered by the jury as follows:

"1. Did the defendant cause the arrest and prosecution of the plaintiff, as alleged in the Complaint?

"ANSWER: Yes.

"2. If so, was the arrest and prosecution without probable cause?

"ANSWER: Yes.

"3. If so, was the arrest and prosecution malicious?

"ANSWER: Yes.

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

"ANSWER: $750.00."

Judgment was entered on the verdict. Defendant appealed.

Robert B. Lowry and Frank B. Aycock, Jr., for plaintiff appellee.

John H. Hall for defendant appellant.

RODMAN, J. Appellant's claim of prejudicial error is based on asserted imperfections in the charge.

The court, in the first part of the charge, read the issues to the jury and expressly informed them plaintiff had the burden of proving each issue. He then defined the terms "greater weight of evidence," "probable cause," and "malice." Next he reviewed the evidence and then informed the jury what the law was in relation to each issue. When he reached the second issue, he said:

"The burden of that issue is upon the plaintiff to satisfy you from the evidence and by its greater weight, and in that connection I instruct you that if the plaintiff has satisfied you from the evidence and by its greater weight that the defendant caused the plaintiff to be arrested and prosecuted by virtue of a warrant sworn out by the defendant in the Recorder's Court of Currituck County, wherein or whereby the plaintiff was charged in said warrant issued upon affidavit of the defendant with the larceny of a quantity of wood or slabs, the property of the defendant, that the affidavit made by the defendant was made without a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff was guilty of crime of larceny of said wood or slabs; or such affidavit for the issuance of such warrant was made by the defendant without there existing to his knowledge such a state of facts as would lead a man of ordinary caution to believe or to entertain an honest and strong suspicion that the plaintiff was guilty of the larceny of his, the defendant's, wood or slabs, then and in that event you would answer the second issue YES.

"If, on the other hand, you find that the defendant had a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the plaintiff had stolen his wood or slabs, or if the defendant had knowledge of such facts as would lead a man of ordinary caution to believe or to entertain an honest and strong suspicion that the plaintiff had stolen his wood or slabs, then the procurement of the arrest and prosecution of the plaintiff by the defendant would have been with probable cause and you would answer the second issue NO."

Appellant contends the quoted portion is erroneous and prejudicial in two respects. First, it informs the jury that proof of certain facts requires an affirmative answer, but fails to inform them that plaintiff's failure to establish the requisite facts required a negative answer; and, second, imposed a burden on defendant to find facts which would permit a negative answer.

Appellant, to support his contention, breaks the charge into two segments, the first segment ending with that portion permitting an af-

firmative answer and the second segment with that portion relating to a negative answer.

The duty to inform a jury as to when to give negative as well as affirmative answers to the issues is clearly stated in *Hunnicutt v. Insurance Co.*, 255 N.C. 515, which appellant cites and urges in support of his contention. The question here is: Does this charge fail to conform to the law as there stated? When an exception is taken to a portion of a charge, the whole must be considered and the part objected to considered in context. *Beauchamp v. Clark*, 250 N.C. 132, 108 S.E. 2d 535; 1 Strong's N. C. Index 124, note 443.

Applying this rule to the error asserted, it is, we think, apparent that the court correctly instructed the jury. The language used with respect to a negative answer imposed no burden on defendant. It is equivalent to a statement that failure to prove facts necessary for an affirmative answer required a negative answer.

Was the demand in the recorder's court for a jury trial and the execution of an appearance bond at the next term of the Superior Court equivalent to a waiver of a preliminary examination and hence an implied admission that probable cause existed?

Under our decisions when a committing magistrate finds probable cause or when a defendant in a criminal action waives a preliminary hearing, a *prima facie* showing of probable cause is made, but such finding or waiver of examination is not conclusive, the question of probable cause is still for the jury. *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E. 2d 751; *Bryant v. Murray*, 239 N.C. 18, 79 S.E. 2d 243; *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307. The original act relating to the transfer from the Recorder's Court of Currituck County to the Superior Court upon demand for jury trial required the recorder to sit as a committing magistrate and ascertain if probable cause existed. C. 897 S.L. 1945. But this statute was repealed. (See c. 273 S.L. 1949.) The present statute, c. 972 S.L. 1951, makes it the duty of the recorder to transfer without an investigation upon demand for jury trial. The demand for a jury trial under the present statute has no relation to the question of probable cause.

Appellant assigns as error the court's definition of "malice." The definition given by the court is taken verbatim from *Motsinger v. Sink*, 168 N.C. 548, 550, 84 S.E. 847. In substance, if not in identical language, it has been so defined in numerous cases since 1915 when the *Motsinger* case was decided. *S. v. Bass*, 255 N.C. 42, 120 S.E. 2d 580; *Abbitt v. Bartlett, supra; Brown v. Estates Corp.*, 239 N.C. 595, 80 S.E. 2d 645; *Betts v. Jones*, 208 N.C. 410, 181 S.E. 334; *Swain v. Oakey*, 190 N.C. 113, 129 S.E. 151; *Cottle v. Johnson*, 179 N.C. 426, 102 S.E. 769.

Defendant's final assignment of error is directed to the charge as it relates to the issue of damages. Apparently the court had before it 54 C.J.S. at p. 1103 when it enumerated damages which might flow from a malicious prosecution. Among other elements which the court told the jury it could consider in awarding damages was injury to his fame, reputation, and character, "if any such occurred," and "decrease in his earning capacity, if any."

Defendant argues it was error for the court to permit the jury to determine if any such injuries occurred and to assess damages therefor. He assigns two reasons for his contention: (1) Two witnesses for plaintiff testified to his continuing good reputation. None testified to the contrary. (2) Plaintiff was receiving a higher wage at the time of trial (December 1961) than he was receiving when arrested in March 1960.

Plaintiff testified he was arrested at his home. He had visitors at that time. A newspaper in Elizabeth City published the fact that he had been arrested on the charge of stealing plaintiff's wood. He had never before been charged with larceny or embezzlement nor had he ever committed such a crime.

When the jury answered the first three issues in the affirmative, thereby establishing plaintiff's right of action, he was, as a matter of law, entitled to nominal damages. The burden was, as the court told the jury, on plaintiff to show damages sustained beyond a nominal sum; but this burden did not obligate him to show the amount with mathematical certainty. When he offered evidence from which the jury could reasonably find damage in excess of a nominal sum, the amount of such damage was a question for the jury. *Creech v. Creech,* 98 N.C. 155; *Stevenson v. Northington,* 204 N.C. 690, 169 S.E. 622; *Roth v. News Co.,* 217 N.C. 13, 22, 6 S.E. 2d 882; 15 Am. Jur. 415.

The charges falsely made, accompanied by the arrest, followed by the news item reporting the asserted criminal conduct, suffice to support an award for more than nominal damages without the necessity of producing witnesses to testify their estimate of plaintiff's character had changed from good to bad. No one would gainsay the fact that it is easier for one of good reputation to secure employment in better paying positions than for one described as a thief to secure such employment.

Appellant has failed to show prejudicial error.

No error.

WINBORNE, C.J., not sitting.

JOHN ALLEN HARDING, EMPLOYEE, PLAINTIFF v. THOMAS AND HOWARD COMPANY, EMPLOYER; EMPLOYERS MUTUAL CASUALTY COMPANY, CARRIERS.

(Filed 28 February, 1962.)

1. Master and Servant § 53—

The North Carolina Workmen's Compensation Act does not provide compensation for an injury unless the injury is by accident. G.S. 97-2(6).

2. Same—

An "accident" as used in the Compensation Act is an unlooked for and untoward event which is neither expected nor designed by the injured employee, but a result produced by a fortuitous cause.

3. Master and Servant § 63—

An injury to the back from a ruptured or slipped disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way, and evidence that plaintiff suffered back injury as he picked up a 12 or 13 pound case of coffee in unloading operations just as he had been doing for some six years, is insufficient to support a finding that the injury arose by accident.

4. Constitutional Law § 10—

Whether the law as written and interpreted by the courts should be changed is a legislative and not a judicial question.

WINBORNE, C.J., not sitting.

APPEAL by defendants from *Paul, J.*, June 1961, BEAUFORT Superior Court.

This proceeding originated as a compensation claim before the North Carolina Industrial Commission. The hearing commissioner and the full commission found the plaintiff had suffered a compensable injury arising by accident out of and in the course of his employment as a truck driver for the defendant Thomas and Howard Company. The superior court, on appeal, sustained the findings and affirmed the award. The appellants challenge the sufficiency of the evidence to support the finding the injury arose by accident.

The evidence disclosed the claimant had been employed for more than six years as a truck driver, delivering groceries to retail stores in the territory. The deliveries consisted of package or case goods, including canned fruits, vegetables, flour, meal, sugar, coffee, and milk. Claimant also assisted in loading the truck at the employer's warehouse and in unloading at customers' places of business. "As I unloaded at Ipock's Red and White Supermarket, I had some of the case goods to the back of the truck, and I was going back and get another case and when I reached down and got it about as high as my knees—I

was standing inside the body of the truck facing the corner and then I reached down and picked up the case, as I was in the act of turning around with the case . . . the pain hit me in the back, and I dropped the case down on the floor. Then I stood up against the side of the truck until the pain eased off."

The claimant further testified the case he attempted to pick up contained 12 one-pound packages of coffee. He continued the round, completed the deliveries, though suffering considerable pain in the back. He continued to suffer and he had difficulty getting up from sitting or reclining position, and could only do so by pushing up with his hands and arms. The injury occurred as he picked up the case of coffee, just as he had been doing for six and one-half years. He went through the same motions, and as far as he knew did identically what he had been doing on all prior occasions. The truck was loaded and unloaded in the same way, and carried similar articles. "There was nothing unusual or different. . . . I had no catch or anything else in my back previously that gave me any severe pain. It had been three or four years since I had a kink or catch in my back."

Dr. Swain, orthopedic surgeon, testified examination (shortly after the injury) revealed clinical evidence of an extruded intervertebral disc in the lumbar region — L-4 — with moderate neurological deficit. . . . "The symptoms observed, the slipping of the disc, may have been caused by the subject stooping and picking up a weight from the floor. The amount being lifted from the floor would not have any bearing on my opinion, because I think that a man could just, I think it is possible for a man just to bend over and get it. On the other hand, I would say it would be more likely if he were picking up some weight."

The defendants appealed from the judgment of the superior court sustaining the findings and affirming the award.

John A. Wilkinson for plaintiff appellee.
Ward and Tucker for defendants, appellants.

HIGGINS, J. The North Carolina Workmen's Compensation Act does not provide compensation for injury, but only for injury by accident. G.S. 97-2(6). The term "accident" as used in the Compensation Act has been defined by this Court as (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. *Smith v. Creamery Co.*, 217 N.C. 468, 8 S.E. 2d 231; *Love v. Lumberton*, 215 N.C. 28, 1 S.E. 2d 121; *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844; *Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592.

In *Moore v. Sales Co.*, 214 N.C. 424, 199 S.E. 605, this Court ap-

proved the award of compensation by holding the evidence of injury by accident was sufficient to support the commission's finding and to take the case out of the rule followed in *Slade v. Hosiery Mills, supra,* and *Neely v. Statesville,* 212 N.C. 365, 193 S.E. 664. "In the case at bar *(Moore v. Sales Co.)* the evidence discloses that while the operation of handling and lifting pipes was done in the ordinary manner, and even that the plaintiff had lifted pipes in that way before, two things occurred which, taken together, were out of the ordinary, and are sufficient, we think, to bring into the transaction the element of unusualness and unexpectedness from which accident might be inferred." (1) Other employees who had assisted in the work had been discharged. The plaintiff and one helper remained and were required to lift a pipe weighing 400 to 450 pounds. (2) The claimant had never handled pipes of that weight.

Quoting further from *Moore v. Sales Co.,* "There is in the foregoing sufficient evidence of the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences, and these were of such a character as to justify the Industrial Commission in finding that plaintiff's injury was the result of accident."

To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. *Turner v. Hosiery Mills,* 251 N.C. 325, 111 S.E. 2d 185; *Holt v. Mills Co.,* 249 N.C. 215, 105 S.E. 2d 614. Accident and injury are considered separate. Ordinarily, the accident must precede the injury. *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289, and cases cited. Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Faires v. McDevitt & Street,* 251 N.C. 194, 110 S.E. 2d 898. In *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175, the evidence disclosed the claimant, a carpenter, was assisting in the erection of a prefabricated chimney — something he had not done before. The claim was contested not on the question of accident, but on the question whether the injury arose out of and in the course of the employment.

Complaint is sometimes made that this Court has placed too much emphasis on "accident" and too little on "injury." Our interpretation of the Workmen's Compensation Act is well known to the legislative department of the State. If and when a change is desirable, the General Assembly has ample power to make it. *Hensley v. Cooperative, supra; Holt v. Mills Co., supra.* Tested by the rules adhered to in previous decisions, we must hold the evidence is insufficient to sustain a finding

the claimant suffered injury by accident. The Superior Court will remand the cause to the North Carolina Industrial Commission for the entry of an order denying compensation.

Reversed.

WINBORNE, C.J., not sitting.

STATE v. MELVIN ROBERT LEWIS.

(Filed 28 February, 1962.)

1. Automobiles § 64—

If in one continuous operation of his vehicle a motorist violates either G.S. 20-140(a) or 20-140(b), or both, he is guilty of but a single offense of reckless driving.

2. Criminal Law § 164—

Where the indictment contains two counts and the verdict clearly convicts defendant upon one of the counts and but a single judgment warranted by such count is imposed, any doubt as to whether the verdict constituted a conviction on the other count is immaterial.

3. Criminal Law § 97—

Even though any comment by the solicitor upon the failure of defendant to testify is improper, such impropriety is cured when the court categorically instructs the jury that defendant's failure to testify should not be construed in anywise to his prejudice and that the jury should disregard any statements relating to defendant's failure to testify. G.S. 8-54.

4. Criminal Law §§ 116, 120—

In a prosecution for reckless driving and speeding a verdict of "guilty of careless driving" is not responsive and is not a permissible verdict, and therefore the court correctly refuses to accept such verdict and properly orders the jury to retire again and return a proper verdict.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Mintz, J.*, September 1961 Term, CURRITUCK Superior Court.

Criminal prosecution tried upon a bill of indictment containing three counts: (1) Unlawful and wilful operation of a motor vehicle upon the public highway carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others. (2) Unlawfully and wilfully operating a motor vehicle upon the public highway at a rate of

speed in excess of that allowed by law: to-wit, 70 miles per hour in a 60 mile per hour zone. (3) Unlawfully and wilfully operating a motor vehicle upon the public highway without due caution and circumspection, and at a speed and in a manner so as to endanger and be likely to endanger the person and property of diverse other persons and property then upon the highway.

The highway patrolman testified he observed the defendant driving a 1955 Ford on Highway 168 on the night of April 8, 1961. He observed the movement of the vehicle from 1,000 to 1,500 feet and in his opinion its speed was 70 miles per hour; that his speed watch clocked the vehicle at 70 m. p. h. He gave chase. Whereupon the defendant left the main highway, entered a dirt side road, and after traveling some distance at a speed of 45 miles per hour, with the lights cut off, the vehicle skidded and came to a stop in the highway where the driver abandoned it.

The defendant did not testify. However, he called one Leland Gibbs as a witness who testified he, and not the defendant, was the driver of the vehicle. Other evidence was introduced by the State tending to corroborate the patrolman. The defendant likewise introduced evidence tending to corroborate Gibbs.

During the argument the Solicitor stated: "He had not gone into certain evidence, to-wit, the statement of the defendant to the witness Weathersbee and to Mrs. Burger as being self-serving and for the reason that counsel for the defendant might get in certain self-serving statements and that he would not have to put the defendant on the stand as a witness in his own behalf."

Upon the basis of the solicitor's argument, the defendant moved for a mistrial and excepted to the court's refusal to grant it. In reference to this assignment, the judge charged the jury: "The defendant is not required to take the stand and if the defendant does not take the stand in his own behalf, as he has a right to do, or as he may elect to do, . . . that is a right he has and that his failure to take the stand should not be considered by the jury against him or to his prejudice. . . . Consequently no reference to his failure to take the stand is proper. I don't recall that any has been made, but if anything has been said about it by way of argument or objections or discoveries here, you will disregard those statements also."

As to permissible verdicts, the court charged the jury: "(1) Guilty as charged in the bill of indictment. (2) Guilty of reckless driving, and not guilty of speeding. (3) Guilty of speeding and not guilty of reckless driving." . . . "Or, if upon a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt

to — as to his guilt, then it would be your duty to give him the benefit of the doubt and acquit him as to the count of reckless driving, . . ."

"Now, as to speeding, if you find from the evidence and beyond a reasonable doubt that on the day in question the defendant drove his car along Highway 168, at a speed of 70 mph, in a zone with a speed limit of 60 mph, if you should so find, beyond a reasonable doubt . . . it would be your duty to convict him . . . If you are not so satisfied, or if you have a reasonable doubt, . . . it would be your duty to give him the benefit of the doubt and acquit him on the charge of speeding."

After a period of deliberation the jury returned to the court room and one of the jurors reported: "We find the defendant guilty of careless driving." Another juror asked: "Could we find the defendant guilty of careless driving?"

The Court: "He is charged with reckless driving."

The court did not accept the verdict. The jury, after further deliberation, returned the following verdict: "Guilty as charged on both counts."

The court imposed a prison sentence of four months, from which the defendant appealed, assigning errors.

T. W. Bruton, Attorney General, Charles D. Barham, Jr., Asst. Attorney General for the State.

Frank B. Aycock, Jr., Gerald F. White for defendant appellant.

HIGGINS, J. The confusion in this case apparently arose by reason of the two counts (1) and (3) in the bill, each purporting to charge a separate offense of reckless driving. All the evidence in the case showed one continuous operation of the vehicle. The reckless driving statute, G.S. 20-140, was amended by Ch. 1264, Session Laws of 1959, by separating under subsections (a) and (b) precisely the same acts which the statute already provided should constitute the offense of reckless driving. So, if a defendant is guilty of the acts condemned either under (a) or (b), or both, on one continuous operation of his vehicle, he is guilty of one offense of reckless driving and not guilty of two separate offenses.

It would seem, in the light of the charge, the verdict which the court accepted, "Guilty as charged on both counts," was a conviction on the charge of speeding and reckless driving rather than on two charges of reckless driving. However, conceding the verdict leaves some room for doubt in this respect, the verdict as accepted by the court was certainly sufficient to constitute one valid conviction for reckless driving. Only

one judgment was rendered and a conviction on a single count of reckless driving is sufficient to support the judgment imposed.

The defendant elected not to testify as a witness in his own defense. Hence any comment by the solicitor, calling attention to this failure, was improper. However, the presiding judge carefully instructed the jury that defendant's failure to testify in his own defense should not be construed in any wise to his prejudice. We feel that under the decisions of this Court the presiding judge properly and effectively removed any prejudicial effect that might have resulted from the solicitor's argument. G.S. 8-54; *State v. Roberts,* 243 N.C. 619, 91 S.E. 2d 589; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *State v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *State v. Tucker,* 190 N.C. 708, 130 S.E. 720.

The defendant contends the verdict first reported, "Guilty of careless driving," was tantamount to a verdict of not guilty on all counts of the bill. However, careless driving is not a crime. Such a verdict is not responsive to the charges of speeding and reckless driving contained in the bill. It was undoubtedly within the power of the presiding judge, in his discretion, to refuse to accept the verdict as first reported and to direct the jury to return a verdict on the charges laid in the bill. " 'Guilty of driving' is no crime and is not responsive to the charge in the indictment. Hence, the trial judge had the discretionary power to give further instructions to the jury and order that they retire and give further consideration to the matter and return a proper verdict." *State v. Gatlin,* 241 N.C. 175, 84 S.E. 2d 880. The case of *State v. Perry,* 225 N.C. 174, 33 S.E. 2d 869, relied on by the defendant, is not in point. The jury in that case returned a permissible verdict. In the instant case, as in Gatlin, the jury attempted to return an improper verdict.

Other assignments of error discussed by the defendant, including the objection to the charge, have been carefully examined and are found to be without merit. The evidence was ample to support the verdict. Its weight was for the jury.

No error.

WINBORNE, C.J., not sitting.

CARL HENRY ROBERTS v. COCA-COLA BOTTLING COMPANY OF ASHEVILLE, INCORPORATED.

(Filed 28 February, 1962.)

1. Pleadings § 1—

The clerk has authority to extend the time for filing a complaint to a date certain not to exceed 20 days from issuance of summons upon application and order stating the nature and purpose of the suit, G.S. 1-121, and the delivery of copies of the summons and order extending the time for the delayed filing, together with the filing of the complaint within the time limited, gives the court jurisdiction.

2. Same—

A statement in the application and order extending the time for filing of the complaint that the nature of the action is to recover a specified sum for personal injuries received as the result of negligence of the defendant, sufficiently states the purpose of the action within the purview of G.S. 1-121, and prior to the time set for the filing of the complaint a motion by defendant to quash the summons and dismiss the action will not lie.

3. Pleadings § 25—

If a cause of action in tort and a cause of action on contract arise out of the same transaction or are connected with the same subject of action, plaintiff may join both in the same complaint, and if he alleges only one of the causes of action he is entitled as a matter of right before time to answer expires to amend by alleging the other or to amend by striking the one and substituting the other. G.S. 1-161.

4. Pleadings § 1—

Where plaintiff procures an order extending the time for filing complaint upon application stating that the nature and purpose of the action is to recover a specified sum for negligent injury, and within the time allowed he files a complaint stating a cause of action for breach of implied warranty arising out of the same transaction, the judge of the Superior Court may deny defendant's motion to quash the summons and dismiss the action on the ground the application and order did not authorize the filing of a complaint based on contract, since the matters are within the wide discretionary powers of amendment given the court. G.S. 1-163.

5. Appeal and Error § 1—

Matters not adjudicated in the lower court are not presented on appeal.

6. Appeal and Error § 49—

A statement in the lower court that the petition and order for extension of time to file complaint substantially complied with G.S. 1-121 will be treated as a conclusion of law subject to review and not a finding of fact.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Clarkson, J.*, October 1961 Special Term, BUNCOMBE Superior Court.

In this civil action summons was issued on August 4, 1961. The plaintiff applied for, and the clerk entered, an order extending to August 24, 1961, the time in which to file the complaint. The application and the order stated: "The nature and purpose of the action is to recover the sum of $100,000.00 for personal injuries received as a result of the negligence of the . . . defendant."

On August 14, 1961, after service of the summons and order, the defendant, by special appearance, moved to quash the summons and dismiss the action for failure of the application and order to state the nature and purpose of the action as required by G.S. 1-121. Before the motion was heard, and within the time allowed, the plaintiff, on August 24, 1961, filed the complaint. In substance it alleged: That on August 8, 1958, the plaintiff bought a bottle of Coca-cola which was sealed and put on the market by the defendant for human consumption. The bottle actually contained sulphuric acid mixed with the Coca-cola. After drinking a part of the contents of the bottle, the plaintiff became violently ill, unconscious, and remained in such state of shock to his digestive and nervous systems as to destroy his previous good health.

Paragraph 12 of the complaint is here quoted in full: "12. That plaintiff, relying solely upon the warranty of defendant, and not otherwise, and depending upon defendant's skill and judgment as to the quality of said merchandise, purchased the same as aforesaid, and paid defendant seven (7¢) cents therefor." * * * "That the plaintiff have and recover of the defendant the sum of $100,000 for his personal and bodily injury herein sustained. . . ."

On September 14, 1961, the defendant made a second motion to dismiss upon the ground the application and order did not authorize the filing of the complaint based on breach of warranty.

Attached to the second motion was an answer denying the material allegations of the complaint and setting up a plea in bar that the action accrued on August 8, 1958, and the plaintiff had not asserted his claim for breach of implied warranty until the filing of his complaint on August 24, 1961, and recovery was barred by the statute of limitations.

At the hearing on the motions to dismiss, the court entered the following: "The court further finds as a fact that the petition of the plaintiff and the order of the clerk, as aforesaid, was a substantial compliance of G.S. 1-121, and that therefore said motions of the defendant should be denied."

The order accordingly allowed the defendant 30 days in which to answer. The defendant excepted and appealed.

Willson & Riddle, by Robert B. Willson for plaintiff appellee.

Williams, Williams and Morris, by R. R. Williams, Jr., for defendant appellant.

HIGGINS, J. The superior court acquires jurisdiction of a plaintiff by his institution of an action in that court. It acquires jurisdiction of the defendant by the service of the summons and the complaint. However, under certain conditions the plaintiff is not required to file and serve the complaint at the time the summons is issued and served. G.S. 1-121 provides: " . . . the clerk may . . . on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, . . . said application and order shall state the nature and purpose of the suit."

The delivery of copies of the summons and order extending time for the delayed filing, and the complaint, when filed, complete the service and give the court jurisdiction of the defendant. Until the cause is at issue the clerk acts for the court. His powers and duties are not to be confused with those of the judge who has wide discretionary powers of amendment not given to the clerk. G.S. 1-163; *Electric Co. v. Dennis,* 255 N.C. 64, 120 S.E. 2d 533; *Sawyer v. Cowell,* 241 N.C. 681, 86 S.E. 2d 431; *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785.

The defendant's first motion to quash the summons and dismiss the action for failure of the plaintiff's application and the clerk's order to state the nature and purpose of the action cannot be sustained. The intent of the statute was to require the plaintiff to alert the defendant by giving preliminary notice of the nature of the claim and the purpose of the suit, and that the ultimate factual averments would follow in a complaint later to be filed. The application and order in this case appear to be sufficient for the intended purpose of alerting the defendant that a complaint would be filed alleging damages in the sum of $100,000 as a result of the defendant's actionable negligence. The question is discussed in *Whitehurst v. Anderson,* 228 N.C. 787, 44 S.E. 2d 358.

After the plaintiff actually filed the complaint, a second motion to dismiss was interposed upon the ground the purpose and nature of the suit were limited by the application and order to damages resulting from negligence; whereas, the complaint stated a cause of action based on breach of implied warranty. However, a plaintiff may join two causes of action in the same complaint — one in tort, the other in contract — if the two causes arise out of the same transaction or are connected with the same subject of action. G.S. 1-123(1); *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Pressley v. Tea Co.,* 226 N.C. 518, 39 S.E. 2d 382; *Cedar Works v. Lumber Co.,* 161 N.C. 603, 77

S.E. 770; *Cook v. Smith,* 119 N.C. 350, 25 S.E. 958. The plaintiff, therefore, could have alleged two separate causes of action — one in tort for negligent breach of duty, the other in contract for breach of implied warranty. If he alleged only one, he could, as a matter of right before time to answer expired, amend and allege the other. Or he could amend by striking one and substituting the other. G.S. 1-161; *Pruitt v. Taylor,* 247 N.C. 380, 100 S.E. 2d 841; *Teague v. Siler City Oil Co.,* 232 N.C. 469, 61 S.E. 2d 345.

In the answer attached to the second motion, the defendant alleged, as a plea in bar, the lapse of more than three years between the date the action accrued, August 8, 1958, and the beginning of action for breach of contract, August 24, 1961, the day the complaint was filed. Whether (1) the plaintiff filed a complaint different in nature from that which he was authorized to do by his application and order; (2) whether the complaint actually filed was the beginning of new action as of the filing date; (3) or whether the action in contract could be related back to the summons and escape the plea of the statute of limitations, are questions not passed on by the superior court, hence not brought here by this appeal.

For the purposes of this appeal, we treat as a conclusion of law, and subject to review, the court's "finding of fact" that the petition and order substantially complied with G.S. 1-121. The court's order denying the motions to quash the service and dismiss the action has the effect of retaining the parties before the court and requiring the defendant to answer, or otherwise plead.

Affirmed.

WINBORNE, C.J., not sitting.

HERSEY MITCHELL v. WILLIAM LEON WHITE, JR. AND WILLIAM LEON WHITE, SR.

(Filed 28 February, 1962.)

1. Automobiles §§ 8, 46—

It is negligence *per se* for a motorist to turn left on the highway without first ascertaining that such movement can be made in safety or to turn left without giving a signal of his intention to do so in the manner prescribed and for the distance specified by the statute, G.S. 20-154(a), and an instruction placing the burden upon defendant to prove conjunctively plaintiff's violation of both these statutory requisites in making

a left turn in order to warrant an affirmative answer to the issue of contributory negligence must be held for prejudicial error.

2. Appeal and Error § 42—

Conflicting instructions upon a material aspect of the cause must be held for prejudicial error, particularly when the erroneous instruction is in the final directions to the jury, since it cannot be ascertained which instruction was followed by the jury.

3. Automobiles § 54f—

Proof of registration or admission of ownership of the vehicle involved in a collision constitutes *prima facie* evidence that the driver was the agent of the owner in such operation, and is sufficient to support but not to compel an affirmative finding on the issue of agency, but nevertheless plaintiff has the burden of alleging and proving agency, and therefore the court must submit the issue of agency to the jury, and the submission of the question under the issue of negligence, so that the jury must find either that both defendants are liable or that neither is liable, is not proper, and an affirmative finding by the jury will not support a judgment against the principal.

4. Trial § 40—

The issues must present all material controversies arising on the pleadings and be sufficient to support a final judgment.

WINBORNE, C.J., not sitting.

APPEAL by defendants from *Morris, J.*, September 1961 Term of CAMDEN.

This is a civil action, instituted 30 January 1961. Plaintiff seeks to recover damages for personal injury suffered in a collision of automobiles allegedly caused by the actionable negligence of defendants.

The collision occurred about 7:30 P.M., May 9, 1960, on North Carolina Highway 343 near South Mills in Camden County. The weather was clear and the highway level and straight. Plaintiff was driving in a southeastwardly direction approaching his home and intended to make a left turn into his private driveway. William Leon White, Jr., defendant, was traveling in the same direction, was overtaking and intended to pass plaintiff's vehicle.

Plaintiff's version of the occurrence: As plaintiff neared his driveway he reduced speed and looked in his rear view mirror. He saw a car coming up rapidly behind him. About 125 feet from his driveway he gave a hand signal for a left turn and continued the signal until the moment of impact. He "hit" his brake lights twice, but did not turn from the right-hand lane. When plaintiff was 25 feet from his driveway defendant's car struck his rear bumper and knocked him out of control. Defendants' car collided with his a second time. Plaintiff suffered personal injuries. The automobile he was driving belonged to his son.

Defendants' version: Defendant saw plaintiff's vehicle ahead and was gaining on it. Plaintiff gave no signal. When about 50 or 60 feet away defendant pulled into the left-hand lane to pass and blinked his lights. He did not sound his horn. When defendant was about 20 to 25 feet away plaintiff turned into the left-hand lane in front of defendant. Defendant applied brakes but could not avoid collision.

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

"1. Was the plaintiff, Hersey Mitchell, injured in his person by the negligence of the defendants? Answer: Yes.

"2. If so, did the plaintiff, Hersey Mitchell, by his own negligence contribute to his injuries as set up in the answer? Answer: No.

"3. What damages, if any, is the plaintiff, Hersey Mitchell, entitled to recover for his personal injuries? Answer: $800.00."

Judgment was entered in accordance with the verdict.

Defendants appeal.

John T. Chaffin for plaintiff.

McMullan, Aydlett & White for defendants.

MOORE, J. Defendants aver that plaintiff was contributorily negligent, and that his negligence consists, among other things, of having turned his vehicle to the left without ascertaining that such movement could be made in safety, and of having failed to give a signal of his intention to make the turn. G.S. 20-154(a).

The presiding judge instructed the jury as to the legal meaning of negligence and proximate cause, read and explained pertinent statutory provisions, including G.S. 20-154(a), and recapitulated the evidence. In giving final instructions on the second, or contributory negligence, issue, he charged: ". . . if the defendant has satisfied you from the evidence and by its greater weight that the plaintiff while driving along Highway 343, turned his automobile from the right lane of travel across the highway to his left, without first seeing that such movement could be made in safety and without first giving a signal, either mechanical or hand signal, to any vehicle which might have been affected by such turning from a direct line of travel, then such failure to give such signal would have constituted negligence per se, that is within itself, and if you find that the plaintiff failed to give such signal and you further find that as a proximate cause of such failure an accident resulted in which the plaintiff was injured, then you would answer the SECOND ISSUE 'YES'."

Defendants contend that this instruction is erroneous and entitles them to a new trial. We agree.

The instruction states that defendants, as prerequisite for a favorable answer to the second issue, must satisfy the jury by the greater weight of the evidence that the collision was proximately caused both by the failure of plaintiff to ascertain that he could make a left turn in safety before making such movement *and* the failure of plaintiff to give the statutory signal of his intention to make the turn. It states in substance that defendants must first prove that plaintiff failed to ascertain safe turning conditions and, having proved this, must go further and prove that plaintiff failed to signal his intention to turn, and that the failure to signal was the proximate cause of the collision.

The instruction places an unwarranted burden on defendants. This Court has said that under G.S. 20-154(a) "any person who undertakes to drive a motor vehicle upon a highway must exercise reasonable care to ascertain that such movement can be made in safety before he turns either to the right or the left from a direct line. Besides he is required by the same statute to signal his intention to turn in the prescribed manner and for the specified distance before changing his course 'whenever the operation of any other vehicle may be affected by such movement.' A motorist . . . is negligent as a matter of law if he fails to observe *either* of these statutory precautions . . . and his negligence in such respect is actionable if it proximately causes injury to another." (Emphasis added.) *Grimm v. Watson*, 233 N.C. 65, 67, 62 S.E. 2d 538. It is true that the judge, earlier in the charge, in explaining the applicable statute, expressly stated the substance of the above quotation from *Grimm*. But "it is elementary that where there are conflicting instructions with respect to a material matter — one correct and the other not — a new trial must be granted, as the jurors are not supposed to know which one is correct, and we cannot say they did not follow the erroneous instruction." *Hubbard v. R. R.*, 203 N.C. 675, 679, 166 S.E. 802. Moreover, the challenged instruction is the crux of the charge on the contributory negligence issue. It is the final and summary direction to the jury as to the burden defendants must carry in order to prevail on this issue. It is at this juncture that the court succinctly applies the law to the facts. The error lies at the heart of the charge and compels a new trial.

We think also that the court erred in failing to submit an issue as to agency. William Leon White, Jr., was driving the automobile of his father and codefendant, William Leon White, Sr. It was stipulated that White, Sr., was the owner, but it was denied that White, Jr., was operating the vehicle as the agent and about the business of the owner.

G.S. 20-71.1 creates a rule of evidence. It has no other or further

force or effect. Proof of registration or admission of ownership furnishes, by virtue of the statute, *prima facie* evidence that the driver is agent of the owner in the operation, and is sufficient to support, but not compel, a verdict on the agency issue. It takes the issue to the jury. Even so, plaintiff must allege, and has the burden of proving, agency. *Hartley v. Smith*, 239 N.C. 170, 79 S.E. 2d 767.

"It is the duty of the trial court, either of its own motion or at the suggestion of counsel, to submit such issues as are necessary to dispose of all material controversies arising on the pleadings and support a final judgment. Within this limitation, the form and number of the issues are within the sound discretion of the trial court." 4 Strong: N. C. Index, Trial, § 40, p. 347; *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731.

Defendants did not tender an agency issue. The court undertook to submit the matter to the jury on the first, or negligence, issue. We do not suggest that this was impossible, but it does present difficulties. The court's instructions on the legal principles involved are not entirely free of error, and there are no directions as to how the jury might indicate that there was no agency in the event it so found and also found that White, Jr., was guilty of actionable negligence. The only alternative, under the instructions as given, was to either find that both defendants were negligent as alleged or that neither was. Under the issues submitted and instructions given it cannot be said with certainty that the agency issue has been decided. Therefore the answers to the issues submitted are not sufficiently definite to support a judgment against William Leon White, Sr.

New trial.

WINBORNE, C.J., not sitting.

STATE v. ISAAC TAFT.

(Filed 28 February, 1962.)

1. Arrest and Bail § 6—

A law enforcement officer appointed by a county board of alcoholic control, while acting in the county in the discharge of his duties, is a "public officer" within the meaning of G.S. 14-223, and when such officer attempts to arrest a person whom the officer sees in the process of illegally manufacturing liquor, the fact that such officer's superior turns over the prosecution for violation of the liquor laws to the Federal Courts does not constitute such officer a voluntary agent of the Federal Govern-

ment so as to preclude the prosecution of such person under the statute for resisting such officer's attempt to arrest him.

2. Arrest and Bail § 3—

An A.B.C. law enforcement officer who sees a person aiding in the illegal manufacture of intoxicating liquor may arrest such person without a warrant, G.S. 15-41, since such A.B.C. officer, while acting within his county has the same powers and duties as are vested in the sheriff of the county. G.S. 18-22, G.S. 18-45(o).

3. Criminal Law § 9—

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

4. Intoxicating Liquor § 4—

The first offense of unlawfully manufacturing whiskey in this State is a misdemeanor and the second or subsequent offense of unlawfully manufacturing whiskey is a felony. G.S. 18-28.

5. Criminal Law § 161—

An exception to the charge will not be sustained when the charge considered in its entirety is free from prejudicial error.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Bone, J.*, August 1961 Mixed Term of PITT.

Defendant was tried and convicted in the recorder's court for Pitt County on two warrants: One, charging that defendant on 24 May 1961 did willfully and unlawfully resist, delay, and obstruct W. M. Taylor, a duly authorized A. B. C. officer, while in the discharge of his official duties, and while he was on duty and was attempting to arrest defendant for manufacturing whiskey, by kicking and biting said officer, and attempting to snatch away from him, a violation of G.S. 14-223. Two, charging defendant on the same date with assaulting the same officer with his hands, feet and mouth, a violation of G.S. 14-33. From a sentence of imprisonment defendant appealed to the superior court, where, upon his plea of not guilty, he was tried *de novo* by a judge and jury.

Without objection by defendant the two cases were consolidated for trial in the superior court. The jury convicted the defendant in both cases. In the case of resisting an officer he was sentenced to twelve months imprisonment. In the case of an assault on the officer he was sentenced to thirty days imprisonment; this sentence to run concurrently with the sentence imposed in the case of resisting an officer.

From the judgments of imprisonment, defendant appeals.

T. W. Bruton, Attorney General for the State.
Richard Powell and Samuel S. Mitchell for the defendant.

PARKER, J. The State's evidence is as follows: On 24 May 1961 W. M. Taylor, H. B. Lilly and James M. Ward were Alcoholic Beverage Control officers of Pitt County. James M. Ward was the chief A. B. C. officer of the county. Prior to that date they had located on the Forbes farm in Falkland Township, Pitt County, a still for the unlawful manufacture of whiskey, which was not in operation and no person was there. These three A. B. C. officers returned there on the morning of 24 May 1961. They left their automobile some distance from the site, and crawled to within 25 or 30 yards of the still. It was a 500-gallon still. 7,500 gallons of mash were there, which mash is designed and used in the still for the manufacture of whiskey. The still was in operation unlawfully manufacturing whiskey, and about 50 to 60 gallons of whiskey had been unlawfully run. Two men were at the still working. One was the defendant Taft, who was operating a force pump to put water in the mash, a necessary part of the distilling of the whiskey from the mash. The other man working at the still was not identified, and escaped.

After watching a short time, the officers got up, and ran to the still. When Taylor neared the still, he called to defendant, whom he had known before and who knew him, that he was under arrest. Taylor had on a green uniform. Defendant stood up, faced Taylor as if surprised and started running. Taylor ran after him about 50 steps, and caught him in the back of his belt. Defendant began tussling. Taylor would throw him on the ground, and he would get up. In the struggle defendant bit Taylor's right arm with his teeth, and kicked him on the shin with his feet, so that the flesh was rolled down from the bone. When Taylor was bitten by defendant, he turned him loose and he got away. When officer Lilly reached Taylor, Taylor got up on his knees, completely exhausted and vomiting. During the struggle Taylor told defendant once or twice, "Isaac, you just as well hold it; you're under arrest." The chief A. B. C. officer James M. Ward turned the case against defendant for unlawfully manufacturing whiskey over to the federal court.

Defendant's evidence tended to shown an alibi.

Defendant assigns as error the denial by the trial court of his motion for a directed verdict in each case and for a dismissal of both cases, made at the close of the State's case, and renewed at the close of all the evidence.

Pitt County operates liquor stores under our Alcoholic Beverage Control Act, G.S. 18-36 *et seq.* G.S. 18-41 provides for county boards

of alcoholic control. G.S. 18-45(o) empowered the Pitt County board of alcoholic control to appoint law enforcement officers, and provides: "The persons so appointed shall, after taking the oath prescribed by law for the peace officers, have the same powers and authorities within their respective counties as other peace officers." It further provides: "Any law enforcement officer appointed by such county boards and any other peace officer is hereby authorized, upon request of the sheriff or other lawful officer in any other county, to go into such other county and assist in suppressing a violation of the prohibition law therein, and while so acting shall have such powers as a peace officer as are granted to him in his own county and be entitled to all the protection provided for said officer while acting in his own county." See *Langley v. Taylor,* 245 N.C. 59, 95 S.E. 2d 115. Manifestly, W. M. Taylor on 24 May 1961 was "a public officer" within the intent and meaning of G.S. 14-223 performing the duties for which he was employed by the Pitt County board of alcoholic control, and entitled to the protection of that statute. Defendant's contention that W. M. Taylor at the time was not "a public officer" within the meaning of G.S. 14-223, but a voluntary agent for the federal government, because Taylor's chief, James M. Ward, turned the charge against defendant of unlawfully manufacturing whiskey over to the federal court, is without merit.

G.S. 18-23 reads: "It is the duty of the sheriff and other officers mentioned in § 18-22 to seize and then and there destroy any and all liquor which may be found at any distillery for the manufacture of intoxicating liquor in violation of law, and to arrest and hold for trial all persons found on the premises engaged in distilling or aiding or abetting in the manufacture or sale of intoxicating liquor."

The officers mentioned in G.S. 18-22 are the sheriff of each county in the State and the police of each incorporated town or city in the State. G.S. 18-45(o) vests A. B. C. officers, while acting within their respective counties, with the same powers and duties as are vested in the sheriff of each county in the State and in the police of each incorporated town or city in the State by virtue of G.S. 18-22 and G.S. 18-23, and also with the same duties and powers, while acting in any other county of the State, under the circumstances specifically set forth in G.S. 18-45(o).

G.S. 15-41 provides: "A peace officer may without a warrant arrest a person: (a) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence."

G.S. 18-28 makes the first offense of unlawfully manufacturing

whiskey in this State a misdemeanor, and the second or subsequent offense of unlawfully manufacturing whiskey a felony.

The State's evidence shows that W. M. Taylor, an A. B. C. officer of Pitt County, saw defendant and another man in Pitt County at a still unlawfully engaged in the manufacture of whiskey. It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241. Under those circumstances, if believed by the jury beyond a reasonable doubt, Taylor had a lawful right to arrest defendant there without a warrant. G.S. 18-22, 18-23, 18-45(o), and 15-41. The evidence was amply sufficient to carry the case to the jury on both cases. The trial court properly denied defendant's motion for a directed verdict in each case and for a dismissal of both cases.

Defendant has no exceptions to the evidence. Defendant has several assignments of error to the charge, which are overruled. A careful reading of the charge in its entirety shows that the charge is free from prejudicial error, that the law applicable to the facts in evidence was fairly and accurately stated to the jury. No new question is presented by the assignments of error to the charge, which needs or merits discussion.

In the trial below we find

No error.

WINBORNE, C.J., not sitting.

STATE v. CHARLES D. PHILLIPS.

(Filed 28 February, 1962.)

1. Forgery § 1—

Forgery is the false making or alteration of an instrument in writing which is apparently capable of effecting a fraud, which making or alteration is with fraudulent intent.

2. Same—

If the signature to a check is that of a real person, the State, in order to make out a case of forgery, must prove that the signature was made without authority of such person, since otherwise authority will be presumed and the instrument would not be a false instrument, while if the signature is that of a fictitious person the signature must have been affixed of necessity without authority.

3. Forgery § 2—

That the signature to an instrument is that of a fictitious person may be established by either direct or circumstantial evidence, and evidence that there was no account in the drawee bank in the name of the person purported to be the maker of a check is some evidence the purported maker is a fictitious person.

4. Same—

Evidence that defendant aided in the execution of a purported check sufficient in form to constitute a negotiable instrument payable to order, without evidence that the purported maker is a fictitious person but to the contrary that he was an actual person, and without evidence that the porported maker had not authorized defendant to make the check, is insufficient to be submitted to the jury on a charge of forgery.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Riddle, S.J.*, September 1961 Criminal Term of BUNCOMBE.

This is a criminal action. The bill of indictment alleges that Charles Phillips, Robert Fletcher Jarrett and Charles Oscar Taylor "unlawfully and feloniously, of his own head and imagination, did wittingly and falsely make, forge, and counterfeit, and did wittingly assent to the falsely making, forging and counterfeiting a certain check or order for the payment of money, which said forged check or order is as follows, to-wit:

ASHEVILLE, N. C. August 18, 1961 No. 684

FIRST NATIONAL BANK AND TRUST COMPANY
PAY TO THE ORDER OF FRANK JOHNSTON
Twenty Four Dollar 70/100 DOLLARS $24.70
(Signed) Frank Johnston

with intent to defraud, . . ." There is also a count of uttering the check described.

It is inferred from the record that Jarrett and Taylor pleaded guilty or were tried previously. In any event Phillips (hereinafter referred to as defendant) was tried separately. He pleads not guilty.

The evidence for the State tends to show: About 8:30 P.M. on Saturday, 18 August 1961, defendant and Jarrett entered a grocery store operated by Mr. and Mrs. Tom Buckner at Barnardsville, N. C. Mr. Buckner was away, and Mrs. Buckner was in charge. Jarrett and defendant were strangers to her. Jarrett ordered $2.00 worth of gasoline. When Mrs. Buckner went outside to deliver the gasoline, defendant reduced the amount to $1.00 and stated that he would take the others where they planned to go. Taylor had been in the store but had gone

outside. After delivering the gasoline Mrs. Buckner re-entered the store and filled a large order of groceries and other merchandise for Jarrett. The purchases amounted to $24.70. Jarrett told defendant to write a check. Defendant filled in the check described in the bill of indictment and passed it to Jarrett. Jarrett signed it. On the original check the payee is "Frank Johnston," the purported maker "Frank Johnson." Defendant handed it to Mrs. Buckner. Mrs. Buckner requested defendant to put his address on the back of the check. He complied by writing thereon what appears to be "Pensacola, N. C., cfo Peney Thadgiller." As defendant drove away Mrs. Buckner noted the license number of the car. The following Monday Mr. Buckner took the check to the bank on which it was drawn. It was not deposited but was presented for payment. He "didn't receive any money for that check." The bank put a "tag" on it. (What appeared on the "tag" is not disclosed by the record.) By tracing the license plate on the car defendant was apprehended. It belonged to Frank Messer. Defendant told Messer in the presence of a deputy sheriff that he had taken it from Messer's car and put it on his own. Defendant told the deputy he had bought his car from Frank Johnson. He denied writing the check.

At the close of the State's evidence defendant moved for nonsuit. The motion was overruled. Defendant declined to offer evidence and renewed his motion for nonsuit. The motion was then allowed on the count of uttering and denied on the count of forgery.

The jury returned verdict of guilty. Judgment was entered imposing an active term in State's prison.

Defendant appealed.

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

S. Thomas Walton for defendant.

MOORE, J. The court erred in denying defendant's motion for nonsuit.

Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. *State v. Dixon,* 185 N.C. 727, 117 S.E. 170.

The State's evidence is sufficient to justify the inference that defendant aided and abetted Jarrett in the execution of the purported check. The check is sufficient in form to constitute a negotiable instrument payable "to order." G.S. 25-14. But the State offered no evidence

tending to show the falsity of the instrument, *i.e.,* that it was executed without authority.

If the name signed to a negotiable instrument, or other instrument requiring a signature, is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud — the instrument being sufficient in form to import legal liability — an indictable forgery is committed. However, if the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority. "To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that a person who signed another's name did so without authority." *State v. Dixon, supra.*

"Evidence that the name signed to an instrument is that of a fictitious person is admissible to prove that the instrument is a forgery, and any circumstantial evidence tending to prove that the name is that of a fictitious person is likewise admissible. Thus persons so situated that they would probably know the signer if he existed may testify that they do not know of any such person. Similarly, evidence as to the result of inquiries made for persons whose names appear on an instrument is admissible to show their nonexistence, although the person making the inquiries may have been unacquainted with the place, or the search may not have been extensive. Likewise evidence is admissible as to the result of an inspection of the assessment rolls of the town where such persons were alleged to live. In the case of a check it may be shown that the drawer had no account with the bank on which it was drawn, or was not a customer thereof; . . ." 37 C.J.S., Forgery, s. 82, p. 94. ". . .(T)he testimony of a proper officer of the bank on which a check was drawn that the purported maker of such check had no account in the bank is admissible as tending to prove that such purported maker was a fictitious person." 49 A.L.R. 2d, Anno: Forgery — Fictitious name, s. 5(a), p. 879. And it has been held that such testimony is *prima facie* evidence of the nonexistence of the maker. *ibid,* s. 5(b), p. 880.

Where defendant signs the name of another person to an instrument, there is no presumption of want of authority. On the contrary, "Where it appears that accused signed the name of another to an instrument, it is presumed that he did so with authority." 37 C.J.S., Forgery, s. 80 b, p. 91. Of course, it is not a presumption of law. For an example

of facts sufficient to make out a *prima facie* case of want of authority, see *State v. Coleman*, 253 N.C. 799, 117 S.E. 2d 742.

In the instant case the State offered no evidence tending to show that Frank Johnson, the purported maker of the check in question, is a fictitious person. There is no testimony from an officer or employee of the First National Bank and Trust Company of Asheville, the bank on which the check is drawn, that Frank Johnson is unknown to and has no account in that bank. There is merely the testimony of Mr. Buckner that no money was received "for that check." It may well be that the account of Frank Johnson, if any, had insufficient funds on deposit for payment of the check, or that Johnson had stopped payment. There was no testimony from any of the State's witnesses that they had made any effort to locate Johnson or had made inquiries concerning his whereabouts or existence. Defendant told the deputy sheriff he had purchased his car from Frank Johnson. This tends to show that Johnson is a real person. Yet, apparently no effort was made to locate him. It is certain he was not called as a witness to testify that he had not authorized the making of the check.

The State makes no showing that the signing of the check was unauthorized and false. The court should have allowed the motion to nonsuit.

The judgment below is

Reversed.

WINBORNE, C.J., not sitting.

STATE v. DONNIE E. JOHNSON.

(Filed 28 February, 1962.)

1. Criminal Law § 5—

Defendant's mental incapacity to know the nature and quality of his acts or incapacity to distinguish between right and wrong is a defense to a charge of crime.

2. Criminal Law § 62—

An expert may testify from his personal observation and examination of defendant over a considerable period of time as to his opinion that, although defendant in general knew the difference between right and wrong, defendant for some specific event or thing could not distinguish right from wrong and could not do so at the time he was admitted to the hospital for observation about 16 days after the alleged homicide,

since such testimony would reasonably permit a jury to make an inference of insanity at the time of the commission of the offense charged.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Bone, J.*, September 1961 Term of CRAVEN.

Criminal prosecution upon an indictment charging that defendant on 1 September 1960 "feloniously, wilfully, and of his malice aforethought, did kill and murder Thelma M. Johnson." G.S. 15-144.

Plea: Not Guilty. Verdict: Guilty of second degree murder.

From a judgment of imprisonment, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General G. A. Jones, Jr., for the State.

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

PARKER, J. The State's evidence tends to show the following facts:

Thelma M. Johnson was defendant's wife. Three or four weeks before 1 September 1960 defendant said that he was going to kill her just as sure as she is living. On 1 September 1960 just a very brief time before he began hitting and stabbing his wife with a knife in the city of New Bern he said "I'll slow walk her." Shortly thereafter he beat and stabbed his wife with a knife. His wife was carried to a local hospital, and died there the next day as a result of a stab wound in her right chest inflicted by defendant with a knife.

The principal defense relied on by defendant is that he lacked mental capacity to commit a crime. He testified in part in substance: While he was in the U. S. Marine Corps, he fell and fractured the back of his skull. Since then he has had tremendous headaches. Sometimes he is himself, and sometimes he is not. Sometimes his mind "gets in a tense," and he doesn't know what he has been doing or saying. They say he killed his wife on 1 September 1960; he doesn't know. He will not say he didn't kill her; he may have. He doesn't know anything about it. He got out of the Marine Corps in 1950, 1958 or 1959. The Marine Corps released him, and he gets $84 a month. He remembers going to a hospital at Camp Lejeune, and the naval hospital at Portsmouth, Virginia.

The record shows that Judge Burgwyn presiding over the September Term 1960 of Craven County Superior Court entered an order committing defendant to the state hospital for the insane at Goldsboro, by virtue of G.S. 122-91. The record further shows that Judge Morris presiding over the November 1960 term of said court entered an order extending the time of defendant's commitment to the said state hos-

pital for the insane at Goldsboro, because it appeared to the court that more time is needed for the medical authorities there to examine and observe defendant.

During the trial Dr. Norman Bruce Kyles, a psychiatrist practicing at the state hospital for the insane in Goldsboro, now called Cherry Hospital, was sworn as a witness for defendant. Dr. Kyles testified in substance: Under court orders he examined defendant from 16 September 1960 until 6 January 1961, and from 30 January 1961 until 18 July 1961. His examinations consisted of interviews with defendant. He examined his case history. He was then asked by one of defendant's counsel, "And what did that case history consist of?" The solicitor for the state objected, and the judge had the jury to retire to the jury room.

Whereupon, in the absence of the jury, Dr. Kyles was asked many questions by one of defendant's counsel, and gave many answers, which appear in the record pp. 29-42, both inclusive. This is a summary of some of his testimony given in the absence of the jury:

His examination was a mental examination requiring answers; not a physical examination. During his interviews with defendant he observed that defendant's manner showed a degree of depression, that we call apathy, and not too much concern with the situation he was in. Some deficiency of intellectual functioning; memory defect and lack of it; in general, confusion as to his whole situation, where he was and the purpose of his being there. He found evidence of brain deterioration caused, in his opinion, by actual tissue damage of some nature. From his examination of defendant he formed the opinion that he could have done an act, and not be fully aware that it was an act that was right or wrong. He formed the opinion that in general defendant would know the difference between right and wrong, but that for some specific event or thing he could not fully distinguish between right and wrong. Defendant excepted to the exclusion of this testimony from the jury.

During the lengthy examination of Dr. Kyles by one of defendant's counsel in the absence of the jury, he was asked many incompetent questions. During this examination the court asked Dr. Kyles this question: "Let me ask him something while you are thinking of something else there. Doctor, leaving out the record from the naval hospital that you had, do you have an opinion satisfactory to yourself, based upon your observation of the defendant, your examination of him and such observation and examinations as was made of him at the institution to which you're assistant superintendent and which were part, made as a part of the record of that institution, now based upon those things and leaving out the record, do you have an opinion — satisfactory to

yourself as to whether or not the defendant had sufficient mental capacity to distinguish right and wrong on, I believe the date he was admitted, September 16, 1960?" To which Dr. Kyles replied: "Yes sir, may I qualify that. I do believe that he had the ability at that time to distinguish in general right from wrong."

When one of defendant's counsel at the end of his long examination of Dr. Kyles in the jury's absence said that is all, the court said: "There'll be no necessity to repeat it in the presence of the jury because I have excluded everything that is important to the defendant. I'm going to sustain the objections to it and exclude all of it." Naturally under those circumstances the State did not cross-examine Dr. Kyles.

The Court said in *S. v. Swink*, 229 N.C. 123, 47 S.E. 2d 852:

> "It is a well settled rule in the administration of criminal justice in this State that an accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act."

See also *S. v. Bracy*, 215 N.C. 248, 1 S.E. 2d 891, to the same effect.

Dr. Kyles, a psychiatrist at the state hospital for the insane, who under court orders had observed and examined defendant for a considerable period of time, beginning within some sixteen days after the commission of the alleged offense, and had a reasonable opportunity of forming an opinion satisfactory to himself as to his mental condition, was qualified to express an opinion as to his sanity or his ability to understand the difference between right and wrong, and should have been permitted by the court to give his opinion in respect thereto in evidence before the jury. *S. v. Matthews*, 226 N.C. 639, 39 S.E. 2d 819; *S. v. Hawkins*, 214 N.C. 326, 333, 199 S.E. 284, 288; *S. v. Nall*, 211 N.C. 61, 188 S.E. 637; *S. v. Keaton*, 205 N.C. 607, 172 S.E. 179; *S. v. Jones*, 203 N.C. 374, 166 S.E. 163.

The judge excluded from the jury testimony of Dr. Kyles summarized above, which was relevant, both as to time and matter, and material on the issue of defendant's mental condition at the time of the offense charged, which could reasonably permit a jury to make an inference of insanity of the defendant at the time of the commission of

the offense charged in the indictment, and this constitutes prejudicial error entitling defendant to a new trial, and it is so ordered.

New trial.

WINBORNE, C.J., not sitting.

NICHOLAS A. WALKER v. CARL O. STORY.

(Filed 28 February, 1962.)

1. Trial § 19—

A motion for judgment of nonsuit is a demurrer to the evidence and presents the legal question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury upon the issue; judgment of nonsuit is also proper if it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover.

2. Judgments § 33—

A judgment of involuntary nonsuit for the insufficiency of evidence is *res judicata* and bars a subsequent action if the allegations and evidence in the subsequent action are substantially identical with those of the first.

3. Judgments § 38—

Since a judgment of involuntary nonsuit for the insufficiency of the evidence bars a subsequent action on the same cause only if the allegations and evidence in the second action are substantially identical with those of the first, the plea of *res judicata* in the second action is improperly sustained upon consideration of the pleadings alone without the introduction of evidence.

4. Limitation of Actions § 12—

The statutory provision allowing a second action to be brought within a year after judgment of nonsuit extends the period of limitation but does not abridge it.

WINBORNE, C.J., not sitting.

APPEAL by plaintiff from *Campbell, J.*, August 31, 1961 Regular Term of POLK.

This action was instituted June 26, 1961.

The complaint alleges plaintiff is the owner of a described tract of land; that defendant claims an interest therein adverse to plaintiff, which claim constitutes a cloud on plaintiff's title; and that plaintiff is entitled to have the cloud so created removed. Answering, defendant

denied plaintiff owned the land; and, as a further defense, alleged his ownership and rightful possession thereof.

As a separate further defense, defendant pleaded, as *res judicata,* a judgment of involuntary nonsuit entered June 7, 1960, at the conclusion of plaintiff's evidence, in the trial of a prior action by plaintiff against defendant, which, on plaintiff's appeal, was affirmed by this Court.

On defendant's motion, the cause was heard on defendant's plea of *res judicata.* It was stipulated that the complaint, answer and judgment in the prior action were as set forth in the copies attached to defendant's answer. No other evidence was offered.

The court found as a fact that plaintiff could have presented in the prior action "any and all evidence to establish his title to the premises in question that the plaintiff could offer and establish in the present cause"; and, based expressly on *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123, entered judgment sustaining defendant's plea of *res judicata* and dismissing the action.

Plaintiff excepted and appealed.

W. Y. Wilkins, Jr., for plaintiff appellant.
Jones & Jones for defendant appellee.

BOBBITT, J. The sole question presented on this appeal is whether the court erred in sustaining defendant's plea of *res judicata* and in dismissing the action on that ground.

The complaint in plaintiff's prior action against defendant contains substantially the same allegations set forth in the complaint in the present action; and, apart from the plea of *res judicata,* defendant's allegations in the two actions are substantially the same.

At the trial of the prior action, the court, on defendant's motion, entered judgment of involuntary nonsuit at the conclusion of plaintiff's evidence. On plaintiff's appeal therefrom, this judgment was affirmed on the ground the evidence offered by plaintiff was insufficient to establish his alleged title and right to possession. *Walker v. Story,* 253 N.C. 59, 116 S.E. 2d 147.

A motion for judgment of nonsuit under G.S. 1-183 is a demurrer to the evidence. McIntosh, North Carolina Practice and Procedure, § 565; *Lewis v. Shaver,* 236 N.C. 510, 512, 73 S.E. 2d 320, and cases cited. It presents a question of law, namely, whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to carry the case to the jury and to support a recovery. *Ward v. Smith,* 223 N.C. 141, 25 S.E. 2d 463.

"It is the duty of the court to allow the motion in either of two

events: first, when all of the evidence fails to establish a right of action on the part of plaintiff; second, when it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover." *Jenkins v. Fowler,* 247 N.C. 111, 115, 100 S.E. 2d 234, and cases cited.

Where the insufficiency of plaintiff's evidence is the ground on which the court sustains a demurrer to the evidence and enters a judgment of involuntary nonsuit, the plaintiff is permitted to institute a new action and therein offer additional evidence to overcome such deficiency. If, upon the trial of the new action, "it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and *substantially identical evidence,* and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation." (Our italics) *Hampton v. Spinning Company,* 198 N.C. 235, 240, 151 S.E. 266; *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809, and cases cited; *McDevitt v. Chandler,* 241 N.C. 677, 679, 86 S.E. 2d 438, and cases cited; *Pemberton v. Lewis,* 243 N.C. 188, 90 S.E. 2d 245.

These well established legal principles are fully recognized in *Hayes v. Ricard,* 251 N.C. 485, 491, 112 S.E. 2d 123. There, in the hearing on defendants' plea of *res judicata,* evidence was offered by plaintiffs and by defendants; and, based on the court's findings, it was held that the judgment of involuntary nonsuit entered in the former action "was an adjudication upon the merits of the action, for that plaintiffs' evidence showed affirmatively that defendant Ricard had a better title to the land from a common source, and that they are not entitled to recover, which was her (defendant's) defense."

Reference is made in *Hayes v. Ricard, supra,* to the well established rule that "(a) judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822. But this rule is applicable where, as held in *Hayes v. Ricard, supra,* the judgment in the prior action constitutes an adjudication thereof upon the merits, not to a judgment of involuntary nonsuit entered on account of the insufficiency of plaintiff's evidence. *Kelly v. Kelly, supra,* p. 150.

No question relating to the statute of limitations is now presented. Whether plaintiff seeks to invoke the provisions of G.S. 1-25 does not appear. The complaint makes no reference to the prior action. In this connection, it is noted: "The statute (now G.S. 1-25) allowing actions to be brought within a year after judgment of nonsuit, was intended

to extend the period of limitation, but not to abridge it." *Keener v. Goodson,* 89 N.C. 273; McIntosh, North Carolina Practice and Procedure, § 125, and cases cited. See also, *Bradshaw v. Bank,* 172 N.C. 632, 90 S.E. 789; *Rankin v. Oates,* 183 N.C. 517, 112 S.E. 32; *Sexton v. Farrington,* 185 N.C. 339, 117 S.E. 172.

Whether the judgment in the prior action is a bar to the present action depends upon whether the evidence presented by plaintiff herein is substantially the same as that offered by plaintiff upon trial of the prior action. "A plea of *res judicata* cannot be determined on the pleadings alone, but only after the evidence is presented." *Hall v. Carroll,* 253 N.C. 220, 116 S.E. 2d 459; *Hayes v. Ricard, supra.* Here, neither the evidence offered at the trial of the prior action nor the evidence plaintiff proposes to offer in the present action was before the court. Hence, the judgment of the court below was entered prematurely and must be reversed.

Reversed.

WINBORNE, C.J., not sitting.

MABEL E. JORDAN, ADMINISTRATRIX OF WENDELL EASON, v. STATE HIGHWAY COMMISSION.

(Filed 28 February, 1962.)

State § 5f—

Where, in a proceeding under the Tort Claims Act, there is sufficient evidence to support the Industrial Commission's findings of negligence on the part of a State employee which proximately caused the injury in question, such findings are conclusive, even though there be evidence that would support contrary findings.

WINBORNE, C.J., not sitting.

APPEAL by respondent from *Morris, J.,* October-November 1961 Term of PERQUIMANS.

This is a suit for damages under the Tort Claims Act.

Claim was filed with the Industrial Commission and the case was heard before Commissioner Peters in Hertford, N. C., on 17 October 1960. Evidence was offered only by claimant.

Stipulations of the parties and claimant's evidence tend to show:

Wendell Eason, an 8 year old boy, was fatally injured about 10 A.M. on 20 October 1959 while crossing Highway 37 in Perquimans

County. He was struck by an automobile owned by respondent, State Highway Commission, and being operated by respondent's employee, W. H. Bray. The boy had gone from a cotton field on the south side of the highway to a "rolling store" on the north side. The so-called "rolling store" was a converted school bus which was driven from place to place, and from which the owner retailed merchandise. It had stopped on the north side of the highway opposite the cotton field and as close to the road ditch as it could get, and was headed west with its two left wheels on the paved surface. The motor was not running, but the left blinker lights were operating. These lights were red and about the size of saucers. The road was level and was straight for about 1/4 mile to the east of the store and a considerable distance to the west. The weather was clear. There were a number of people working in the cotton field. Several made purchases from the store. Decedent entered the bus, purchased candy, got off the front of the bus, stopped and looked, proceeded across the highway toward the cotton field, and was struck while in the south lane near the edge of the hard-surface. Respondent's automobile came from the east. Bray did not sound the horn. As he came around the curve 1/4 mile away he was driving at a speed of 60 miles per hour or more. As he neared the bus he applied brakes and left tire marks about 35 feet long in the north lane. These ended 30 feet from the bus. He moved into the south lane. There were tire marks 51 feet and 5 inches in length in the south lane to the point of the accident. These marks continued for 51 feet beyond that point. ". . . (T)here was a skip in between these (marks) in the righthand lane and those in the lefthand lane." Decedent was thrown to the hood of the car. When the car stopped he was thrown forward about 8 feet beyond the front of the car. He died in the hospital three days later.

The hearing Commissioner found facts, among others, that respondent's automobile was being operated at a speed greater than was reasonable and prudent under the circumstances, the driver operated the car without due care and circumspection, and the negligence of the driver was the sole proximate cause of the injury to and death of decedent. He concluded that claimant is entitled to recover, and awarded $5000 damages.

Respondent requested review by the full Commission. After hearing, the Commission adopted the findings of fact, conclusion of law and award of the hearing Commissioner as its own.

Respondent filed exceptions and appealed to Superior Court. The Superior Court overruled the exceptions and affirmed the award of the Commission.

Respondent appealed to this Court.

Wilson & Wilson for defendant appellant.
John H. Hall for plaintiff appellee.

PER CURIAM. The Commission's findings of fact are supported by competent evidence. These findings sustain the conclusion of law, which is sufficient basis for the award.

In a proceeding under the Tort Claims Act (G.S., Ch. 143, Art. 31), if there is competent evidence to support the findings of fact by the Industrial Commission, such findings are conclusive, and on appeal are not subject to review by the Superior Court or this Court. This is true even though there is evidence that would support contrary findings. *Mica Co. v. Board of Education,* 246 N.C. 714, 100 S.E. 2d 72.

The judgment below is.

Affirmed.

WINBORNE, C.J., not sitting.

STATE v. HENRY IVEY STROUD.

(Filed 28 February, 1962.)

1. Criminal Law § 19—

Where, upon defendant's demand for a jury trial in the recorder's court, the cause is transferred to the Superior Court under provisions of statute, and the defendant is tried in the Superior Court upon a duly returned indictment, the fact that upon the trial in the Superior Court the judge inadvertently refers to the trial as upon a "warrant" instead of indictment does not prejudice defendant, and does not support a contention that defendant was tried in the Superior Court upon the original warrant.

2. Automobiles § 72—

Conflicting evidence as to whether the defendant was under the influence of intoxicating beverage at the time he was apprehended operating a motor vehicle on a State highway is properly submitted to the jury in a prosecution under G.S. 20-138.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Bone, J.,* September 1961 Term of CRAVEN.

Attorney General Bruton and Assistant Attorney General Moody for the State.
Charles L. Abernethy, Jr., for defendant appellant.

PER CURIAM. On 26 April 1961 Carl C. Jones, a State Highway Patrolman, made an affidavit charging defendant with the operation of a motor vehicle on that date on the public highways while under the influence of intoxicating liquors and the reckless operation of the vehicle in violation of G.S. 20-140. Based on this affidavit a warrant issued requiring defendant to appear at the Craven County Recorder's Court on 2 May to answer said charges.

Defendant appeared on 13 June 1961 and demanded a jury trial. This demand ousted the jurisdiction of the recorder's court. C. 115 P.L. 1929; *S. v. Perry,* 254 N.C. 772, 119 S.E. 2d 865. Bond in the sum of $250 was, as prescribed by statute, required for defendant's appearance at the next criminal term of the Superior Court of Craven County. The next term of that court convened on the first Monday in September. At that time the grand jury returned a true bill charging defendant with the identical offenses which he was required to answer in the recorder's court. The bill sent to and returned by the grand jury was assigned number 5467.

Book P-2, p. 307, in the office of the Clerk of the Superior Court shows the "PLEA, JURY, VERDICT AND JUDGMENT" in case "5467 *State v. Henry Ivey Stroud.*" The court did not submit the count charging reckless driving. The jury found defendant guilty of driving under the influence of intoxicating beverages. Judgment was entered on the verdict. No appeal was noted during the term. After the term expired. defendant gave notice of appeal in "STATE OF NORTH *CAROLINA v. HENRY IVEY STROUD No. 5467.*"

Judge Bone, opening his charge, said: "Ladies and Gentlemen of the Jury, the defendant is being tried upon a warrant which charges that on the 26th day of April, 1961, he did unlawfully and willfully operate a motor vehicle on the State highways of North Carolina while under the influence of intoxicating liquors, a violation of Section 20-138 of the General Statutes of North Carolina . . ."

Defendant here contends the trial was a nullity and the judgment should be arrested because a trial on a warrant could only be had in the Superior Court upon appeal from a court inferior to the Superior Court. *S. v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602. His legal position is sound, but it has no application to the facts disclosed by the record here. It affirmatively appears from the record defendant was tried on the bill of indictment which charged the identical offense described in the original warrant. Judge Bone inadvertently named the document informing defendant what offenses were charged. This in no way prejudiced defendant. It cannot change the fact affirmatively appearing that defendant entered

a plea of not guilty of and was tried on the first count set out in the bill of indictment.

Defendant's motion to nonsuit was properly overruled. He testified he had taken several drinks of whisky not long prior to his arrest. He was operating a motor vehicle on the highway when arrested. He insisted that the whisky consumed had not affected him. The evidence for the State was to the contrary. This conflict in the testimony was properly submitted to the jury.

No error.

WINBORNE, C.J., not sitting.

STATE OF NORTH CAROLINA v. CHARLIE ROBERT PEEDE.

(Filed 28 February, 1962.)

Criminal Law § 19—

Where prosecutions are transferred from the recorder's court to the Superior Court upon defendant's demand for a jury trial, the jurisdiction of the recorder's court is ousted and the Superior Court acquires original jurisdiction of the charges and properly tries defendant upon bills of indictment found by the grand jury and not upon the original warrants.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Copeland, Special Judge,* August Special Criminal Term 1961 of CRAVEN.

The defendant, Charlie Robert Peede, was arrested upon warrants issued and made returnable to the Craven County Recorder's Court. The first warrant issued on 19 December 1960 charged the defendant (1) with unlawfully and wilfully operating a motor vehicle on the State highways of North Carolina without having in his possession an operator's license issued to him by the Department of Motor Vehicles, in violation of G.S. 20-7; (2) that he did operate a motor vehicle on the highways without having obtained liability insurance; (3) that he failed to transfer title to said motor vehicle, in violation of G.S. 20-73; and (4) that he did unlawfully and wilfully operate a motor vehicle on the State highways of North Carolina on or about the 18th day of December 1960 while said vehicle was not equipped with sufficient lights as required by G.S. 20-129.

The second warrant issued on 9 January 1961 charged the defendant with the operation of a motor vehicle after his license had been re-

voked by the Department of Motor Vehicles and while said revocation was in full force and effect, in violation of G.S. 20-28.

The defendant appeared in the Craven County Recorder's Court on 2 May 1961 and demanded a jury trial in both cases. Bonds were fixed in each case and the cases transferred to the Superior Court of Craven County for trial. The grand jury returned three true bills of indictment against the defendant charging him with the same five offenses with which he was charged in the warrants which had been made returnable to the Craven County Recorder's Court.

The defendant entered a plea of not guilty to each of the five counts contained in the three bills of indictment.

The State offered evidence tending to support the charges laid in the bills of indictment, including a certified record from the Department of Motor Vehicles showing the revocation of the defendant's license.

The defendant did not introduce any evidence.

The case was submitted to the jury upon the charge of the court and the jury returned a verdict of guilty as charged.

The five counts in the bills of indictment were consolidated for judgment. A sentence of eighteen months was imposed, the defendant to be assigned to work under the supervision of the State Prison Department.

From the judgment imposed the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., for the State.

Charles L. Abernethy, Jr., for defendant.

PER CURIAM. The defendant having demanded a jury trial in both cases in the Craven County Recorder's Court, the jurisdiction of the Recorder's Court was ousted and the Superior Court of Craven County vested with exclusive original jurisdiction of the charges laid in the warrants. Therefore, the jurisdiction of the Superior Court was not derivative but original, and it was necessary for defendant to be tried on bills of indictment and not upon the original warrants. *S. v. Norman,* 237 N.C. 205, 74 S.E. 2d 602; *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381.

The assignments of error present no prejudicial error that would justify a new trial. There is ample evidence to support the verdict, and the judgment imposed is not in excess of that provided by law.

No error.

WINBORNE, C.J., not sitting.

RICHARD CRATCH, W. T. CRATCH, C. D. CRATCH, HUBERT CRATCH, DANIEL CRATCH, SALLY CRATCH, JOFFREY CRATCH, CLEVE CRATCH, BLAKE CRATCH, WILLIAM CRATCH, AND BERNIE CRATCH v. PLUMMIE TAYLOR AND RUFUS PARAMORE.

(Filed 28 February, 1962.)

1. Appeal and Error § 19—

Exceptions which appear nowhere in the record except in the purported assignments of error are ineffective.

2. Appeal and Error § 21—

Even when there are no exceptions or they have not been preserved, the appeal itself will be taken as an exception to the judgment and presents for review whether the court's conclusions of law are supported by the findings of fact, and when the findings support the judgment, the judgment must be affirmed.

3. Appeal and Error § 49—

Where there are no effective exceptions to the findings of fact, it will be presumed that the findings are supported by competent evidence and are binding on appeal.

WINBORNE, C.J., not sitting.

APPEAL by plaintiffs from *Paul, J.*, in Chambers at Washington, North Carolina, 5 August 1961. From BEAUFORT.

Plaintiffs instituted this action to remove a cloud from their alleged title to four acres of land on Blount's Creek in Beaufort County, known as Cotton Patch Landing.

The matter was referred. The plaintiffs sought to establish title by adverse possession and the referee found that they had done so. On 8 September 1958 the defendants filed a motion to re-refer the matter to the referee on the ground that the referee had failed to meet the requirements of Section 1-195 of the General Statutes of North Carolina for that the referee's purported findings of fact and conclusions of law were not stated separately as required by the above statute.

Immediately after filing the above motion on 8 September 1958, the defendants filed their exceptions to the referee's report to be considered by the court should the cause not be re-referred.

The matter came on for hearing in Chambers by his Honor, Malcolm C. Paul, Resident Judge of the Second Judicial District, who heard the matter upon consideration of the pleadings, the evidence adduced at the hearing before the referee and the exceptions filed by the defendants, and found as a fact and entered judgment as follows:

"The Referee's Finding of Fact No. 2 is overruled and set aside and the court finds as a fact that plaintiffs have failed to establish title

by adverse possession or in any other recognized manner to the premises in controversy, and the report of the Referee is modified accordingly. Upon the facts so found, the court overrules the Conclusion of Law reached by the Referee and concludes as a matter of law that plaintiffs are not the owners of the premises in controversy and that defendants have not trespassed thereon as alleged;

"IT IS THEREFORE ORDERED AND DECREED that the action be, and the same hereby is dismissed and plaintiffs taxed with the costs herein."

The plaintiffs appeal, assigning error.

Leroy Scott and A. W. Bailey for plaintiffs.
Rodman & Rodman for defendants.

PER CURIAM. The assignments of error purport to be supported by exceptions which appear nowhere in the record except in the purported assignments of error. Such exceptions are ineffective and will not be considered on appeal. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118. 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. An exception to the signing of the judgment presents nothing for review except whether or not the court's conclusion of law is supported by the finding or findings of fact; such exception does not challenge the correctness of any findings of fact. *Logan v. Sprinkle,* 256 N.C. 41, 123 S.E. 2d 209.

When no exception has been taken to a finding of fact, such finding is presumed to be supported by competent evidence and is binding on appeal. *Goldsboro v. RR.,* 246 N.C. 101, 97 S.E. 2d 486.

In this case, the finding of the court below supports the judgment and it is

Affirmed.

WINBORNE, C.J., not sitting.

STATE v. HATTIE BELL BURTON.

(Filed 28 February, 1962.)

1. Appeal and Error § 41; Criminal Law § 155—

Where all of the evidence of a particular character is stricken except evidence first elicited by defendant on cross-examination, with respect to which there is no objection or exception, defendant cannot complain.

2. Appeal and Error § 19; Criminal Law § 154—

An assignment of error which fails to present the error relied on without the necessity of going beyond the assignment itself is ineffective.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Copeland, S.J.*, August 1961 Special Term of CRAVEN.

This is a criminal action. The bill of indictment charges that defendant, Hattie Bell Burton, assaulted Frank Burton (her husband) with a deadly weapon, with intent to kill, inflicting serious injury not resulting in death. Defendant pleads not guilty.

The State's evidence tends to show: On 28 May 1961 a police officer was called to the Burton home. He met Frank on the porch and went in the house with him in order for Frank to get some clothes. In the officer's presence defendant told Frank that if he came back in the house that night she was going to kill him. The officer left as Frank was leaving the house. About 45 minutes later the officer went to the hospital in response to a call. He found Frank at the hospital with a pistol wound in his wrist. The officer obtained a warrant and arrested defendant. At the time of the arrest defendant stated to the officer that she had shot Frank with a pistol and should have killed him.

Defendant offered no evidence. The court submitted the case to the jury on the lesser and included offense of assault with a deadly weapon. The jury returned a verdict of guilty.

The court entered judgment and imposed an active 12 months prison sentence.

Defendant appealed.

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

Charles L. Abernethy, Jr., for defendant.

PER CURIAM. The assignments of error are without merit. The crucial assignments relate to the admission of certain testimony of the arresting officer as to what Frank Burton told him in the absence of defendant. The only testimony of this character admitted and not

stricken was first elicited by defendant on cross-examination, and with respect to which there was no objection or exception. Furthermore, these assignments are not sufficient in form to present the errors relied on without the necessity of going beyond the assignments themselves to learn what the questions are. Rule 21, Rules of Practice in Supreme Court; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271. See 1 Strong: N.C. Index, Appeal and Error, s. 19, p. 90.

The evidence is sufficient to support the verdict. The punishment is not in excess of that provided by law.

No error.

WINBORNE, C.J., not sitting.

BEULAH REID BAGWELL v. TOWN OF BREVARD.

(Filed 28 February, 1962.)

1. Pleadings § 12—

A demurrer admits the facts alleged but not the pleader's legal conclusions.

2. Pleadings § 19; Negligence § 23—

Whether the facts alleged in the complaint, admitted by demurrer, are sufficient to constitute negligence is a question of law.

3. Municipal Corporations § 12—

A municipal corporation is not an insurer of the safety of its sidewalks but is only under duty to exercise ordinary care to maintain them in a reasonably safe condition for travel by those using them in a proper manner and with due care, and the fact that there is a difference in elevation of approximately one inch between two adjacent concrete sections of a sidewalk does not constitute a breach of the municipality's legal duty.

WINBORNE, C.J., not sitting.

APPEAL by plaintiff from *Riddle, Special Judge,* August Special Term, 1961 of TRANSYLVANIA.

Personal injury action.

Plaintiff alleged she fell and was injured October 22, 1960, about 2:30 p.m., while walking along the sidewalk on the north side of Main Street approximately 25 feet from the intersection of Main and Caldwell Streets; that her fall was proximately caused by a defective and

dangerous condition in the sidewalk; and that defendant was negligent in that, with knowledge or notice thereof, it failed to correct said defective and dangerous condition.

Answering, defendant denied negligence and pleaded contributory negligence.

When the case came on for trial, defendant demurred *ore tenus* on the ground the facts alleged by plaintiff did not constitute actionable negligence.

Judgment, sustaining the demurrer and dismissing the action, was entered. Plaintiff excepted and appealed.

J. Bruce Morton and Robert T. Gash for plaintiff appellant.
Ramsey, Hill & Smart for defendant appellee.

PER CURIAM. The facts alleged, but not the pleader's legal conclusions, are deemed admitted when the sufficiency of a complaint is tested by a demurrer. Whether the admitted facts constitute negligence is a question of law.

Plaintiff's allegations describe the alleged defect and her fall as follows: (1) "(T)he said sidewalk was constructed of large concrete sections, approximately six feet square." (2) "(O)ne of the concrete sections was elevated approximately one inch above the adjacent concrete section." (3) When plaintiff's "left foot came to rest along the length of the irregular portion between the concrete sections," the "unequal pressure on the bottom of the plaintiff's foot" caused her ankle to turn, "throwing the plaintiff with great force down to the pavement."

The legal duty of defendant, a municipal corporation, is to exercise ordinary care to maintain its sidewalks in a reasonably safe condition for travel by those using them in a proper manner and with due care. It is not an insurer of the safety of its sidewalks.

Here, the alleged defect or irregularity is a difference in elevation of approximately one inch between two adjacent concrete sections of the sidewalk. Defendant's failure to correct this slight irregularity did not constitute a breach of its said legal duty. Hence, the judgment of the court below is affirmed.

Affirmed.

WINBORNE, C.J., not sitting.

ROY LEE GODLEY v. W. H. WHICHARD.

(Filed 28 February, 1962.)

1. Negligence § 37b—

The proprietor of a swimming resort operated for hire, while not an insurer of his patrons' safety, is under duty to exercise due care to see that the place and the appliances incident to its use are reasonably safe.

2. Negligence § 37f—

Evidence that defendant operated a pier for public bathing, that along the pier were signs designating the various depths of the water, and that plaintiff dived to his injury in water some three and one-half feet deep at a point where a sign designated a depth of six feet, is sufficient to be submitted to the jury on the issue of negligence.

WINBORNE, C.J., not sitting.

APPEAL by plaintiff from *Parker, J.,* September 1961 Term, BEAUFORT Superior Court.

Civil action to recover for personal injury the plaintiff sustained when he dived from a pier maintained by the defendant as a public bathing resort on the Pamlico River. The plaintiff's evidence tended to show he paid the required fees for locker and bathing privileges and proceeded along the pier which extended from the shore for several hundred feet into the river. The pier was approximately three feet above the water line. At intervals throughout its length, signs were posted showing the depth of the water beginning at two feet near the shore and gradually increasing to six feet at the point where the pier formed an L. The plaintiff walked along the pier, observed the signs, and near the L, where according to the sign the depth was six feet, he dived headfirst into the water, struck the bottom, breaking both wrists and three vertebrae in his neck. The water was dingy. The bottom was not visible. The actual depth was three or three and one-half feet.

At the close of the plaintiff's evidence the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

Hallett S. Ward, LeRoy Scott for plaintiff appellant.
Rodman & Rodman, John A. Wilkinson for defendant appellee.

PER CURIAM. The proprietor of a swimming resort operated for hire is not an insurer of the patron's safety. He must, however, exercise due care to see the place and appliances incident to its use are reasonably safe. A proprietor may not mislead a patron by false statements

of the water's depth. The evidence at the trial was sufficient to go to the jury on the issue of defendant's actionable negligence. Consequently, the judgment of nonsuit is reversed in order that the jury may determine the issues raised by the pleadings.

Reversed.

WINBORNE, C.J., not sitting.

LEOLA FULCHER DAVIS v. JOSEPH NEAL DAVIS.

(Filed 7 March, 1962.)

1. Cancellation and Rescission of Instruments § 8; Torts § 7—

Allegations that insurer's agent misrepresented to plaintiff that the instrument related only to her medical and hospital bills, that she was told that the doctor was demanding payment and she had no means to pay, that at the time she executed the release she was sick and suffering pain resulting from the injuries negligently inflicted, and that she did not read the instrument because of these facts and could not have understood it if she had attempted to read it, are *held* sufficient to charge that the release was obtained by fraud.

2. Cancellation and Rescission of Instruments § 10; Torts § 7— Evidence that release was obtained by fraud held sufficient to be submitted to jury.

Evidence to the effect that plaintiff had finished only the sixth grade in public school, had difficulty understanding what she reads, that the insurer's agent obtained a statement in regard to the accident in which plaintiff was injured from her husband, inquired of plaintiff as to her hospital and medical expenses, stated he was going to give her money to pay them if she would sign a paper which he handed her in such manner as to conceal the writing, and that the paper was a release of her husband from liability for injuries received in the accident, *is held* sufficient to be submitted to the jury on the issue of whether the release was obtained by fraud.

3. Cancellation and Rescission of Instruments § 2—

In order to obtain relief from the contract on the ground of fraud a party must show a false factual representation made with knowledge of its falsity or in culpable ignorance of its truth or falsity, with fraudulent intent, and that the misrepresentation was material and reasonably relied upon.

4. Cancellation and Rescission of Instruments § 2—

Ordinarily, a person who signs a written instrument without reading it when he has opportunity to do so understandingly is bound thereby, and

may avoid the legal consequences of the instrument only by showing that he executed it in reliance on false representations or under special circumstances, and that a person of ordinary prudence would have so executed the instrument under like conditions, and the failure of the court to charge the jury in regard to whether a person of ordinary prudence would have executed the instrument under the same or similar circumstances must be held for prejudicial error.

5. Cancellation and Rescission of Instruments § 10; Fraud § 11—

Inadequacy of consideration, while evidence of fraud, is ordinarily insufficient alone to take the issue of fraud to the jury.

WINBORNE, C.J., not sitting.

PARKER, J., dissents.

APPEAL by defendant from *Walker, S.J.*, August 1961 Term of CARTERET.

Plaintiff seeks to recover damages from her husband, defendant, for injuries sustained when the automobile operated by her husband and occupied by her as his guest collided with an automobile proceeding ahead of defendant when that car stopped to permit oncoming traffic to pass so that it might make a left turn. She alleges the collision which occurred 4 April 1959 was proximately caused by the negligence of defendant.

Defendant denied the asserted negligence and as an additional defense he pleaded a release executed by plaintiff on 21 April 1959.

Plaintiff, replying to the affirmative defense, admitted signing without reading the release pleaded by plaintiff, but alleged it was lacking in effect (a) because obtained by fraudulent representations relied on by her, and (b) because of inadequacy of consideration.

To determine liability the court submitted these issues:

"1. Was the plaintiff injured as a result of the negligence of the defendant, as alleged in the complaint of the plaintiff?

"2. Did the plaintiff sign the Release referred to in the Answer and Further Defense of the Defendant?

"3. Was the signature of Mrs. Davis to the Release procured through, or as a result of, false and fraudulent representations knowingly made to her by Mr. Coyle?

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

Based on answers favorable to plaintiff, judgment was entered in her favor for $1433 and costs. Defendant appealed.

Harvey Hamilton, Jr., for plaintiff appellee.

Hamilton, Hamilton & Phillips by Luther Hamilton for defendant appellant.

RODMAN, J. Defendant, by demurrer to the reply, challenges the sufficiency of the facts alleged to invalidate the release admittedly executed. The release, by its terms, releases and discharges the defendant from all claims and demands arising out of the collision referred to in the complaint. The reply in substance alleges the insurance agent who took the release misrepresented its contents, assuring plaintiff that it related only to her medical and hospital bill, enabling her to obtain funds for the payment of these items; she was told the doctor was demanding his money; she had no means to pay and was at that time sick and suffering pain resulting from the injuries negligently inflicted. She did not read because of these facts, and could not have understood it if she had attempted to read it.

Giving the pleadings the liberal interpretation required, G.S. 1-151, *Lynn v. Clark,* 254 N.C. 460, 119 S.E. 2d 187, *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 are of the opinion that the reply is sufficient to withstand the demurrer.

The instrument relied on to discharge plaintiff's claim for damage is printed. It is headed: **RELEASE AND INDEMNITY AGREEMENT.** The body of the instrument is in 10-point type. Immediately over the signature of plaintiff is the warning: **READ CAREFULLY BEFORE SIGNING.** The caption and warning are here printed as appears on the release.

Plaintiff's evidence relating to the release, summarized, is: She and her husband live on Harkers Island. She finished the sixth grade in public school, but it took her eight years to do so. She has difficulty in understanding what she reads. Her husband finished the sixth or seventh grade. He also has difficulty in reading. Mr. Coyle, agent for the insurance company, came to her home, stating he wished to see defendant and inquired if that was his residence. Plaintiff answered in the affirmative, stating defendant was not then at home but working on his boat. Although Coyle was unknown to her or to defendant, she invited him in, offering to notify her husband that Coyle wished to see him. She went to defendant's place of work and returned with him. She, defendant, and the insurance agent were present when defendant, at the request of Coyle, described the collision. This was reduced to writing, read by Coyle, approved and signed by both plaintiff and defendant. Coyle then inquired as to plaintiff's physical condition and the amount of hospital and medical expenses incurred. She gave Coyle

the hospital bill for $23. The medical bill was estimated. Then, quoting plaintiff: "He (Coyle) said, 'I am going to give you $75.00 to pay for your medicine,' and he wrote the check out and kept the check in his hand. He said, 'Mrs. Davis, if you will sign this paper,' and I said, 'Yes.' He took the paper out of his brief case and folded the paper — he folded it over and said, 'Sign here,' and I signed . . . When he got to the door, he turned around and looked at me and said, 'Mrs. Davis, now you can't sue Joe.' . . . I can't read very good, very little. Mr. Coyle didn't ask me to read the paper writing that he asked me to sign, and I didn't ask him to read it. I was depending on him. My husband can't read very well either. I relied on what he told me — that the paper writing was just covering my medicine bill." She further testified that although she had never seen Mr. Coyle before he came to the house: "He said at the time that he was from the insurance company. There wasn't any question in my mind as to what he wanted to talk to us about. I was satisfied it was about the accident." She testified that her husband offered no advice or suggestion with respect to whether she should or should not sign the release. She further testified: "I had been knowing all along that I could sue Joe. I did not have in mind bringing any kind of action against him."

Coyle denied any misrepresentation with respect to the contents of the paper, asserting that the $75 was in fact paid for a complete release. Touching the execution of the document, he said: "I do not believe that Mrs. Davis actually read the whole of the paper. She had it at the chair just before she signed it — looked at it, signed it and gave it back to me. I told her what it was. She did not ask me to read it. She did not ask her husband to read it. I did nothing to keep her from reading it. I did not in any way conceal or try to conceal any of the contents of it, and I did not in any way conceal or try to conceal any of the contents of the draft for $75.00."

To obtain relief from a contract on the ground of fraud, the complaining party must show: a false factual representation known to be false or made in culpable ignorance of its truth with a fraudulent intent, which representation is both material and reasonably relied upon by the party to whom it is made, who suffers injury as a result of such reliance. *New Bern v. White*, 251 N.C. 65, 110 S.E. 2d 446; *Early v. Eley*, 243 N.C. 695, 91 S.E. 2d 919; *Parker v. Hensel*, 242 N.C. 211, 87 S.E. 2d 201; *Electric Co. v. Morrison*, 194 N.C 316, 139 S.E. 455. When we examine plaintiff's evidence to ascertain if it suffices to withstand defendant's motion to nonsuit, we reach the conclusion that it is sufficient, although admittedly the question is a close and narrow one.

The law imposes on everyone a duty to act with reasonable prudence for his own safety. So one who contracts with another cannot ignore

the contract merely because he becomes dissatisfied upon learning of the obligation assumed when, without excuse, he made no effort to ascertain the terms of the contract at the time he executed it. One who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance. *Harris v. Bingham,* 246 N.C. 77, 97 S.E. 2d 453; *Harrison v. R.R.,* 229 N.C. 92, 47 S.E. 2d 698; *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5; *Presnell v. Liner,* 218 N.C. 152, 10 S.E. 2d 639; *Breece v. Oil Co.,* 211 N.C. 211, 189 S.E. 498; *Bank v. Dardine,* 207 N.C. 509, 177 S.E. 635; *Aderholt v. R.R.,* 152 N.C. 411, 67 S.E. 978.

To escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence. Did plaintiff act with reasonable prudence in relying on the representations which she says were made by Coyle? Defendant, to obtain an answer to that question, requested the court to submit as the fourth issue: "If so, in signing the Release did she act as a person of ordinary prudence would have under the same or similar circumstances?"

The court could have, by its charge on the third issue, included this as an element necessary for an affirmative answer. The charge is not in the record, but the parties stipulated: "(T)hat in the jury charge by the Court no reference was made or charge given respecting the questions that would have been raised and made the subject of jury inquiry under tendered Issue No. 4 . . ."

Shenck, J., said in *McLain v. Insurance Co.,* 224 N.C. 837, 32 S.E. 2d 592: "The principle applicable to alleged fraudulent statements relied upon to vitiate an instrument, is stated in *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5, as follows: 'It must be a false representation of fact materially affecting the value of the contract and which is peculiarly within the knowledge of the person making it and in respect to which the other person in the exercise of proper vigilance has not an equal opportunity of ascertaining the truth.'

"The principle with which we are now concerned is also clearly stated in Cooley on Torts (Fourth Edition), at page 580, in the following words: 'Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them, and that, therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.'

"It has long been a recognized principle of law that where the parties

have equal means of information, so that with ordinary prudence and diligence, either may rely upon his own judgment, they are presumed to have done so, or, if they have not done so, they must abide the consequences." *Isley v. Brown,* 253 N.C. 791, 117 S.E. 2d 821; *Gray v. Edmonds,* 232 N.C. 681, 62 S.E. 2d 77; *Harding v. Insurance Co.,* 218 N.C. 129, 10 S.E. 2d 599; *Dorrity v. Building & Loan Asso.,* 204 N.C. 698, 169 S.E. 640; *King v. R.R.,* 157 N.C. 44, 66, 72 S.E. 801; *Dellinger v. Gillespie,* 118 N.C. 737; Restatement, Torts, sec. 541; 17 C.J.S. 515; 76 C.J.S. 647, 648. "This rule does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it, the salutary principle that each one must 'mind his own business' and exercise due diligence to know what he is doing." *Varser, J.,* in *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406.

Plaintiff contends that the amount paid, $75, is, when compared with fair compensation as fixed by the jury, $1433, so grossly inadequate as to invalidate the release as a matter of law. The law is otherwise. As said by *Allen, J.,* in *Knight v. Bridge Co.,* 172 N.C. 393, 398, 90 S.E. 412: "The owner of tangible property or of a claim for damages may give it away or may sell it for less than its value, and the contract is valid in the absence of fraud, undue influence, or oppression; but if the contract is attacked as fraudulent, the inadequacy of consideration is evidence of fraud, and if gross, is alone sufficient to carry the case to the jury on the issue of fraud." The rule as thus stated does not relieve one to whom an offer is made of the responsibility of, as *Varser, J.,* said, minding his own business and exercising due diligence to know what he is doing.

Pertinent to the adequacy of the amount paid is plaintiff's testimony: "I had been knowing all along that I could sue Joe. I did not have in mind bringing any kind of action against him." She could not, of course, set the release aside by a change "in mind."

New trial.

WINBORNE, C.J., not sitting.

PARKER, J., dissents.

OSCOE BASNIGHT, MELVIN BASNIGHT, ST. CLAIRE BASNIGHT, MILROE ETHERIDGE, MYRTLE B. PECK, AND ENID B. FORD v. G. R. DILL, HARRIET G. DILL, SARAH DILL, A. T. DILL, JR., THOMAS G. DILL, JOHN B. GREEN, GRACE G. BURNETTE, MATTIE G. TURNBULL, BENJAMIN B. HURST, MARY EMMA HIRSHFIELD, MARTHA H. GIBBS, AND LENA W. GREEN.

(Filed 7 March, 1962.)

1. Wills § 33—

A devise of property by will is to be construed as one in fee simple unless the will contains plain and express language disclosing a contrary intent. G.S. 31-38.

2. Same—

A devise of land to husband and wife by the entireties with further provision that if the devisees should die in possession of the property it should descend to the heirs of testatrix's mother, *is held* to carry the fee to the husband and wife by the entireties, and the subsequent devise to the heirs of testatrix's mother is void as repugnant to the fee theretofore devised. Upon the death of the surviving wife in possession of the lands the property goes to the residuary devisee under her will.

WINBORNE, C.J., not sitting.

APPEAL by defendants from *Bone, J.*, November Civil Term 1961 of CRAVEN.

This was a civil action tried upon an agreed statement of facts without the intervention of a jury, all parties having waived trial by jury.

The facts essential to an understanding of the question in controversy on this appeal are as follows:

Mrs. Kate Churchill McGehee, prior to her death, was the owner in fee simple of a certain lot or parcel of land known as No. 100 Pollock Street, New Bern, North Carolina. Mrs. McGehee died testate on 28 August 1931; her last will and testament was probated on 3 September 1931 and appears of record in the office of the Clerk of the Superior Court of Craven County in Will Book J, at page 206. The controversial portion of the second item in said will reads as follows: "I give, devise and bequeath to Mr. A. M. Bell and Mrs. Della Bell, his wife, by the entireties as husband and wife, my home at No. 100 Pollock St., New Bern, N. C. adjoining that of my uncle, T. A. Green, which I recently purchased from Mrs. Belle M. Hyman: But in the event the said A. M. Bell and wife Della should die in possession of the property, then the same shall descend to the heirs of Mrs. Susan A. Churchill, my mother. * * *"

A. M. Bell and wife, Della Bell, took possession of the devised property shortly after the probate of Mrs. McGehee's will, and remained in possession thereof until the death of A. M. Bell on 3 May

1938. Mrs. Della Bell then continued in possession thereof until her death on 1 February 1961.

Mrs. Della Bell died testate and her will was probated in the office of the Clerk of the Superior Court of Craven County and appears of record in Will Book N, at page 170.

Plaintiffs in this action are the residuary devisees under the will of Della Basnight Bell, who was one and the same person as Della Bell. Defendants in this action are the heirs of Mrs. Susan A. Churchill.

This action was instituted for the purpose of having the court construe that portion of the second item of the will of Mrs. Kate Churchill McGehee quoted above.

The court below held that the will of Mrs. Kate Churchill McGehee devised to A. M. Bell and his wife, Della Bell, an estate in fee simple as tenants by the entirety, and that the plaintiffs under the last will and testament of Della Basnight Bell were devised an estate in fee simple absolute in and to said property. Judgment was entered accordingly.

The defendants appeal, assigning error.

Barden, Stith & McCotter for plaintiff appellees.
Raymond E. Sumrell; Dill & Fountain for defendants, appellants.

DENNY, J. The sole question for determination on this appeal is simply this: Did the last will and testament of Kate Churchill McGehee vest in A. M. Bell and wife, Della Bell, an estate in fee simple in and to the property described in the second item of said will?

G.S. 31-38 reads as follows: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

Therefore, unless a will contains plain and express language, showing that the testator did not intend to devise a fee, the devise will be construed as one in fee simple.

In *Lineberger v. Phillips,* 198 N.C. 661, 153 S.E. 118, the testatrix devised real property, including the lot in question, to her son, Laban Lineberger, with absolute power of disposition, but should he die without children, it was provided in the will that the property which had not been disposed of at his death would devolve upon the testatrix's brother, in trust, for the use and benefit of the wife and children of a deceased son by her second marriage. *Stacy, C.J.,* in speaking for the Court, said: "The case turns on the question as to whether Laban Lineberger acquired an undivided one-half interest in fee, or is able

to convey such an interest, in the lands devised to him in items three and four of his father's (mother's) will.

"His Honor correctly held for the plaintiffs. *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626. It is provided by C.S. 4162 (now G.S. 31-38), that when real estate is devised to any person the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. Hence, under this statute, an unrestricted devise of real estate passes the fee. *Barbee v. Thompson,* 194 N.C. 411, 139 S.E. 838. Indeed, it is generally necessary that restraining expressions be used to confine a devise to the life of the devisee. *Holt v. Holt,* 114 N.C. 241, 18 S.E. 967."

In the case of *Roane v. Robinson,* 189 N.C. 628, 127 S.E. 626, Mrs. Virginia Roane died on 22 June 1905, leaving a last will and testament which was duly probated. After making certain specific bequests of jewelry, she left everything else she owned to her husband, "personal and real, to be his own, entirely and solely, to use and spend as he chooses, without any restriction. In the event, however, that he does not marry and have issue, I wish what is left of my realty at his death to be divided" as set out in the fourth item of her will. Mr. Roane remarried but had no children born of the second marriage. He contracted to sell certain real estate devised to him by his first wife. The question raised was whether or not he had a fee simple title to the property. This Court said: "The question presented has been before the Court so often that nothing more is necessary than a brief review of some of the decisions in which the controlling principle is treated. Whether a devise of land with a power of disposition over it carries the fee or a lesser estate is obviously dependent upon the terms in which it is expressed. The rule is clearly stated in *Carroll v. Herring* (180 N.C. 369, 104 S.E. 892): 'Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exceptions to such a rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition.' "

In *Burgess v. Simpson,* 224 N.C. 102, 29 S.E. 2d 38, the following provision in a will was in controversy: "I give, devise and bequeath to my beloved wife, Bessie Pitt Burgess, all of my worldly estate, real, personal or mixed, to which I shall be entitled at the time of my decease; to have and to hold to her and her executors, administrators and assigns, forever. However, let it be provided that at the end of my beloved wife's natural existence, should the whole or any part thereof of my original estate remain undisposed of by her, the same shall go to my nearest of kin, the same to be theirs absolutely, and in fee simple forever." This Court held in a *Per Curiam* opinion that the devisee acquired a fee simple title to the real estate devised, on authority of *Lineberger v. Phillips, supra.*

In the case of *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506, the testator devised property to his wife "with full and complete power to her to use, consume and dispose of the same absolutely as she shall see fit," followed by a provision that, "(A)fter the death of my wife I bequeath and devise whatever of my estate shall remain unconsumed and undisposed of by my said wife to my wife's nephew, Briggs Thornton * * *." This Court held that the latter clause was repugnant to the absolute gift to the wife and was void and would not defeat the devise and bequest to her, nor limit it to a life estate.

Among the other cases in accord with the conclusion reached in the following decisions and in the court below, we cite the following: *Patrick v. Morehead,* 85 N.C. 62, 39 Am. Rep. 684; *Fellowes v. Durfey,* 163 N.C. 305, 79 S.E. 621; *Carroll v. Herring,* 180 N.C. 369, 104 S.E. 892; *Barbee v. Thompson,* 194 N.C. 411, 139 S.E. 838; *Hambright v. Carroll,* 204 N.C. 496, 168 S.E. 817; *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862; *Peyton v. Smith,* 213 N.C. 155, 195 S.E. 379; *Taylor v. Taylor,* 228 N.C. 275, 45 S.E. 2d 358. Cf. *Rudisill v. Hoyle,* 254 N.C. 33, 118 S.E. 2d 145.

The words "give, devise and bequeath," used by Kate Churchill McGehee in devising her property at 100 Pollock Street, New Bern, North Carolina, to A. M. Bell and wife, Della Bell, as tenants by the entireties, in light of the provisions of G.S. 31-38, gave them a fee simple title to the devised property. Moreover, the language, "(B)ut in the event the said A. M. Bell and wife Della should die in possession of the property," carries the connotation that they had the power to sell the property and might not be in possession thereof at the time of their death. Therefore, the attempted devise over was void for repugnancy. *Roane v. Robinson, supra.*

Upon the death of A. M. Bell, his wife, Della Bell, became the sole owner of the devised property in fee simple. Consequently, defendant

heirs of Mrs. Susan A. Churchill have no right, title, interest or estate in the premises in controversy.

We concur in the judgment entered below, and it is

Affirmed.

WINBORNE, C.J., not sitting.

JOHN MILLER SPARKS v. UNION TRUST COMPANY OF SHELBY.

(Filed 7 March, 1962.)

1. Pleadings § 12—

A demurrer admits the truth of factual averments well stated in the complaint and such relevant inferences of fact as may be deduced therefrom, but not legal inferences or conclusions of law.

2. Banks and Banking § 1—

A bank organized and created under the statutes of this State has only such powers and duties as are expressly granted by statute or are fairly incidental thereto.

3. Banks and Banking § 3—

A bank is not under duty to warn a prospective investor of the financial condition of a depositor of the bank.

4. Same—

Allegations to the effect that an investor went to an officer of the bank and disclosed his plans to borrow money to erect a building to be leased to a certain person, that the officer of the bank was withholding bad checks of such person in a large amount which if released would result in insolvency of such person, and that the bank officer failed to disclose to the investor the fact of such person's insolvency, *is held* insufficient to state a cause of action against the bank, since the bank was under no duty to disclose the financial condition of one of its depositors.

5. Banks and Banking § 2—

Allegations that the manager of a branch of a bank withheld from circulation bad checks in a large sum for a depositor, without allegations that the managing officers of the bank had any knowledge that he was so withholding checks, *are held* insufficient to state a cause of action against the bank, since the acts of the manager were *ultra vires*. and the bank is not chargeable with notice thereof, such acts not having been done in the interest of the bank.

6. Principal and Agent § 8—

The rule that the knowledge of the agent will be imputed to the principal does not apply when the circumstances are such as to disclose that the

agent is acting in his own personal interest and adversely to that of the principal, or has a motive in concealing the facts from the principal.

WINBORNE, C.J., not sitting.

APPEAL by plaintiff from an order of *Clark, S.J.*, entered at November 1961 Term of CLEVELAND sustaining a demurrer *ore tenus* to plaintiff's complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Henry M. Whitesides for plaintiff appellant.
D. Z. Newton for defendant appellee.

PARKER, J. The complaint alleges in substance, except when quoted:

Defendant is a state bank with its principal office in the town of Shelby. It has a branch bank in the town of Lawndale of which John Francis Carpenter was manager. At all times mentioned Carpenter was an agent of defendant, and was acting within the scope of his employment. On 1 October 1956 plaintiff went to Carpenter in his capacity as manager of defendant's branch bank in Lawndale, and stated to him in detail his desire to borrow money to erect a building to be leased for a term of five years to Yates Williams. He informed Carpenter of his proposed plan "in a confidential nature" solely because Carpenter was manager of defendant's branch bank in Lawndale. During the conversation Carpenter knew of his own knowledge and in his capacity as manager of defendant's branch bank in Lawndale, that he, Carpenter, as manager of the defendant's branch bank in Lawndale, was retaining the sum of $152,469.12 in bad cheques drawn by Yates Williams, and if these cheques were put in circulation, it would render Williams insolvent. Carpenter as manager of defendant's branch bank in Lawndale knew, or should have known, that Williams was being presented to the general public as a wealthy and prosperous businessman. In fact, by reason of the acts of defendant bank through its branch manager in Lawndale, defendant was allowing Williams to present himself as a prosperous businessman, when he was insolvent in the sum of $152,469.12, which was being concealed by Carpenter as manager of defendant's branch bank in Lawndale.

If defendant by its branch manager Carpenter had informed plaintiff of the true financial condition of Williams, he would not have entered into a long-term lease with Williams. If defendant had properly run its branch bank at Lawndale, Williams would not have been able to hold himself out to the general public as being in sound financial condition, when he was insolvent.

When defendant was advised through its branch manager Carpenter

of plaintiff's proposed plan above stated, and was in a position to prevent him from harm as a result of defendant's misconduct in retaining Williams' cheques, which had been occurring for ten years prior to 1 October 1956, it refused to divulge such information to plaintiff, although it knew full well he would be financially injured as a result of its secretiveness. Defendant through its branch manager Carpenter knew, or should have known, that plaintiff's proposed plans were based upon mistaken impressions as to the financial condition of Williams, and that defendant had sole knowledge of Williams' insolvency and did not impart it to plaintiff, when plaintiff was about "to render himself to a financial loss."

Plaintiff erected a special building for Williams, and leased it to him for five years. At that time plaintiff had an existing lease with Williams, which was entered into in September 1956, when the financial condition of Williams was represented to the general public to be good, said representations being made possible solely by defendant's illegal acts.

In October or November 1957 the acts of Carpenter became known, and the assets of Williams were seized. As a result thereof Williams due to insolvency was unable to make any payments of rent on his two leases with plaintiff, and plaintiff has been damaged thereby in the sum of $1,750.00.

Defendant knew, or should have known, the loss to plaintiff was the natural and probable resulting consequence of its acts. "Defendant when consulted in a confidential manner by the plaintiff prior to entering into said second lease and building said building especially for said lease should have, could have, and was morally and legally responsible to notify the plaintiff of his impending predicament, all of which the defendant, by and through its agent John Francis Carpenter, did not do."

Defendant's demurrer *ore tenus,* for the purpose, admits the truth of factual averments well stated, and such relevant inferences as may be deduced therefrom, but not legal inferences or conclusions of law asserted by the pleader. *Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132.

It would seem from a study of the complaint and plaintiff's brief that he has attempted to allege a case of damages for defraud and deceit against defendant bank for not informing him or concealing from him the alleged fact that Carpenter, manager of its branch bank in Lawndale, was retaining $152,469.12 in worthless cheques of Yates Williams and thereby permitted Williams to hold himself out as a prosperous businessman, when in fact he was insolvent.

Defendant is a state bank organized and created under the pro-

visions of G.S. Chapter 53, Article 2, Creation of Banks. Its powers and duties are set forth in Article 6 of the same chapter. State banks have no powers beyond those expressly granted, or those fairly incidental thereto, in Article 6 of Chapter 53 of G.S. *Pue v. Hood, Comr. of Banks,* 222 N.C. 310, 22 S.E. 2d 896; *Young v. Roberts,* 252 N.C. 9, 112 S.E. 2d 758.

"Banks are under no duty at law to warn the investing public as to the financial condition of their depositors." *Cunningham v. Merchants Nat. Bank* (C.C.A. 1st), 4 F. 2d 25, 41 A.L.R. 529, cert. denied in 268 U.S. 691, 69 L. Ed. 1160 (case growing out of criminal financial career of Charles Ponzi). The Court said in *Taylor v. Commercial Bank,* 174 N.Y. 181, 66 N.E. 726, 62 L.R.A. 783, 95 Am. St. Rep. 564: "Nor is it within the line of the duty of a cashier to disclose the condition of the accounts of the customers of a bank whenever inquiry is made as to their responsibility."

What this Court said in *Bank v. Finance Co.,* 192 N.C. 69, 133 S.E. 415, 48 A.L.R. 519, is apposite: "A national bank has no power to engage in the business of furnishing to depositors or to others gratuitiously or for compensation, direct, or indirect, information as to the solvency, or condition or reputation, financial or otherwise, of persons, firms or corporations. An agreement to furnish such information is *ultra vires.* . . ." This is in accord with the general rule. Anno. 48 A.L.R. 529.

In Zollmann's Banks and Banking, Per. Ed., Vol. 5, sec. 3413, pp. 379-380, it is stated: "Depositors have the right of secrecy. A bank therefore is under an implied obligation to keep secret its records of accounts, deposits, and withdrawals."

The factual averments in the complaint are that Carpenter, manager of defendant's branch bank at Lawndale, was holding worthless cheques of Yates Williams on the day plaintiff talked with him as to his plans of erecting a building for lease to Williams in the sum of $152,469.12, and had been holding worthless cheques of Williams for ten prior years. Carpenter's acts in doing so were *ultra vires,* because not authorized or permitted by G.S. Chapter 53, Article 6, powers and duties of state banks. There is no allegation of fact that defendant bank and its other officers and directors knew anything of Carpenter's holding Williams' worthless cheques; in fact, it is a fair inference that Carpenter concealed such information from them. In this respect it may not be amiss to say that plaintiff states in his brief: "The deception [Carpenter's holding Williams' worthless cheques] was uncovered by a bank audit and both Carpenter and Williams sent to prison." There is no allegation in the complaint that plaintiff was a customer of defend-

ant. It seems a fair inference from the language of the complaint that Williams was a customer and depositor of defendant bank. According to the factual allegations of the complaint, there was no fiduciary relation between plaintiff and defendant bank. *Abbitt v. Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906.

We are of the opinion that there is nothing in the allegations of fact in the complaint that amounted to constructive notice to defendant bank that its branch manager in Lawndale was engaged in independent, fraudulent, and *ultra vires* transactions with Yates Williams which it was to Carpenter's interest to conceal, and which was no part of the lawful business of defendant bank and was not in its interest, and that defendant bank is not chargeable with Carpenter's uncommunicated knowledge of such facts. *Bank v. Burgwyn,* 110 N.C. 267, 14 S.E. 623, 17 L.R.A. 326; *Roper v. Ins. Cos.,* 161 N.C. 151, 157, 76 S.E. 869, 872; *Corporation Commission v. Bank,* 164 N.C. 357, 79 S.E. 308; *Anthony v. Jeffress,* 172 N.C. 378, 90 S.E. 414; *Bank v. West,* 184 N.C. 220, 114 S.E. 178; *Bank v. Wells,* 187 N.C. 515, 122 S.E. 14; *Federal Reserve Bank v. Duffy,* 210 N.C. 598, 188 S.E. 82; 7 Am. Jur., Banks, sec. 281. In respect to the well-defined exception to the general rule that knowledge of the agent is imputed to the principal, the Court said in *Federal Reserve Bank v. Duffy, supra:* "Where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, this rule does not apply."

Defendant bank was under no duty at law to warn or tell plaintiff of Yates Williams' financial condition. Plaintiff has not alleged a case of fraud and deceit, for "the principle is basic in the law of fraud as it relates to nondisclosure that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent." 23 Am. Jur., Fraud and Deceit, sec. 78, p. 854, where many cases in support of the text are cited. Here under the allegations of fact of the complaint there was no legal duty on the part of defendant bank, under the circumstances, to speak to or inform plaintiff about Williams' financial condition.

The averments of plaintiff's complaint, liberally construed pursuant to the provisions of G.S. 1-151, do not state facts sufficient to constitute a cause of action for fraud and deceit against defendant bank,

and further the facts stated are not sufficient to state any cause of action against defendant bank. Consequently defendant's demurrer *ore tenus* to the complaint was properly sustained.

Affirmed.

WINBORNE, C.J., not sitting.

DONALD EDWARD MAYNOR, BY HIS NEXT FRIEND, JOSEPH C. REYNOLDS v. RICHARD CLAYTON PRESSLEY AND JULIUS McCREE PRESSLEY.

(Filed 7 March, 1962.)

1. Negligence § 20—

A plea of contributory negligence must allege acts or omissions on the part of plaintiff which will support the conclusion that plaintiff was guilty of negligence constituting a proximate cause of the injury, and mere allegation that plaintiff was negligent is insufficient.

2. Automobiles § 35— Allegations held insufficient to state defense of contributory negligence.

Plaintiff was a passenger in a car and was injured in an automobile accident while the vehicle was being driven by one of defendants. Defendants alleged that after plaintiff and defendant driver had drunk some five to seven beers apiece plaintiff persuaded and encouraged defendant driver to drive plaintiff on a trip, that plaintiff knew of defendant's condition, and that the accident occurred on the return trip. *Held:* There being no allegation as to the length of time intervening between the several incidents, or that defendant driver lacked capacity to drive, or that plaintiff, having knowledge of such incapacity, voluntarily exposed himself to the danger of riding as a passenger when he should have foreseen an injury might result, the allegations are insufficient to state contributory negligence and should have been stricken on motion.

3. Pleadings § 34—

Allegations in the answer which are insufficient to state a defense should be stricken on motion as irrelevant.

WINBORNE, C.J., not sitting.

On *certiorari* to review order of *Clarkson, J.*, Regular October Civil Term 1961, BUNCOMBE Superior Court.

The plaintiff instituted this civil action to recover damages incurred as a result of an automobile accident while he was a passenger in a 1955 Chevrolet automobile owned by Julius McCree Pressley and driven by Richard Clayton Pressley.

The defendants filed a joint answer denying that Richard C. Pressley was negligent in operating the vehicle. As a plea in bar, the defendants allege the plaintiff was guilty of contributory negligence. Judge Phillips, on plaintiff's motion, struck the plea upon the ground the facts alleged were not sufficient in law to constitute a valid plea of contributory negligence. The defendants amended the answer by a slightly different wording. Judge McLean granted the plaintiff's second motion to strike, holding the factual allegations insufficient. As a third attempt to plead contributory negligence, the defendants alleged: " . . . the plaintiff and the defendant, Richard Clayton Pressley, had for some length of time been drinking beer together prior to the alleged accident; that the plaintiff and the defendant had consumed some five to seven beers apiece which drinking was one of the contributing factors of said collision. That the plaintiff thereafter persuaded and encouraged said defendant to drive said plaintiff to his girl friend's house full aware of the defendant's condition and that it was on the trip returning therefrom that the alleged accident occurred; and that the plaintiff was the instigator and planner of said trip and it was at his encouragement that said trip was made."

The court entered an order denying the third motion to strike. We granted *certiorari* to review that order.

Williams, Williams and Morris, By J. N. Golding for defendants appellees.

S. Thomas Walton for plaintiff appellant.

HIGGINS, J. A plea of contributory negligence must allege negligent acts or omissions on the part of the plaintiff which contributed to his injury as one of its proximate causes. *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301; *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854; *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326; *Holderfield v. Trucking Co.,* 232 N.C. 623, 61 S.E. 2d 904; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251.

An allegation that a party was negligent is not enough. The ultimate facts alleged must be such as to permit a reasonable inference of some negligent act or omission on the part of the plaintiff which contributed to his injury. The defendants do not allege the driver was under the influence of intoxicants or that he was otherwise incapacitated to operate the vehicle. They allege that during some undisclosed period of time the driver and the plaintiff had consumed five to seven beers. Neither the size of the drinks nor the effect of taking them, was alleged. Some time afterwards they paid a visit to the girl friend's home.

How long, or how short, the stay is not alleged. On the return trip the accident occurred.

It is alleged that the plaintiff knew about the driver's condition, whatever it was, and with that knowledge continued to ride with him. If the driver was intoxicated, if he was incapable of operating the automobile with safety, and the plaintiff, after notice, voluntarily continued to ride as a passenger, it would seem to be a rather simple matter to say so in the pleading. For failure to allege the facts essential to the plea, Judge Phillips ordered the plea stricken. For the same failure after amendment, Judge McLean entered a similar order. For the third time the plea was filed with the defects unremedied. However, the court entered an order denying the motion to strike.

The plea fails to allege facts which are sufficient in law to show the defendant, Richard C. Pressley, lacked capacity to drive the vehicle and the plaintiff, knowing of the incapacity, voluntarily exposed himself to the danger of riding as a passenger when he should have foreseen that injury might result. *Dinkins v. Carlton,* 255 N.C. 137, 120 S.E. 2d 543; *Bell v. Maxwell,* 246 N.C. 257, 98 S.E. 2d 33. If the facts alleged are insufficient as a defense, the plea should be stricken as irrelevant. *Davis Co. v. Hosiery Mills,* 242 N.C. 718, 89 S.E. 410. The motions to strike should have been allowed. The cause is remanded to the Superior Court of Buncombe County for the entry of an order striking the plea in bar.

Reversed.

WINBORNE, C.J., not sitting.

CHRISTINE C. JOHNSON, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF T. B. JOHNSON, AND CHRISTINE C. JOHNSON, INDIVIDUALLY *v.* FANIDA CALE JOHNSON.

(Filed 7 March, 1962.)

1. Wills § 64—

At the time of executing the will in suit testator had a wife and one child. The will devised and bequeathed all of testator's property to his wife, stating that testator knew she would use same for the benefit of herself and "our children," and that testator made this disposition in order that his wife might carry on the business without the necessity of a sale of any part of the property. *Held:* A child born after the execution of the will is not entitled to a share of the estate, since the will referred to "children" and gave testator's reason for excluding them. G.S. 31-5.5.

2. Trusts § 1—

A devise and bequest to testator's wife "knowing full well she will use the same for the benefit of herself and our children" does not create a trust in favor of the children.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Parker, J.*, December 9, 1961, BERTIE Superior Court.

Civil action to have the court, by declaratory judgment, determine the rights of the parties under the will of T. B. Johnson. The facts are not in dispute.

T. B. Johnson, a resident of Bertie County, died on February 18, 1961. His will, excuted June 22, 1944, was probated in common form. At the time the will was executed, the testator and his wife, Christine C. Johnson, had one child, Elizabeth Ann Johnson, born April 17, 1942. Another daughter, Fanida Cale Johnson, was born November 20, 1950. The wife and both daughters survive.

The controversy involves this item of the will: "First. I give, devise and bequeath to my wife, Christine Johnson, in fee simple, all of my property, real, personal and mixed, of whatever kind and nature I may own at my death, and wheresoever situate, knowing full well that she will use the same for the benefit of herself and our children, and I do this in order that she may carry on any business that I own without the necessity of a sale of any part of my property."

Judge Parker entered judgment that Christine C. Johnson is the sole devisee and legatee under the will, and that Fanida Cale Johnson, the after-born child, is not entitled to share in the estate. Her guardian *ad litem* excepted and appealed.

Gillam & Gillam by M. B. Gillam, Jr., for plaintiff appellee.
Pritchett & Cooke by J. A. Pritchett for defendant appellant.

HIGGINS, J. The appellant makes two contentions: First: That Fanida Cale Johnson, an after-born child, is entitled to share in her father's estate, no provision having been made for her in his will. Second, if the court should hold the will manifests the testator's intent that the after-born child should not share in his estate, nevertheless the will creates a trust, and that Christine C. Johnson holds as trustee for the benefit of herself and of any children *in esse* at the date of the testator's death.

The controlling statute is G.S. 31-5.5: "A will shall not be revoked by the birth of a child . . . to the testator after the execution of the will, but any such after-born . . . child shall be entitled to such share in

testator's estate as it would be entitled to if the testator had died intestate, unless (1) the testator made some provision in the will for the child; (2) it is apparent from the will itself that the testator intentionally did not make specific provision therein for the child."

Mr. Johnson knew his will would take effect at his death. In plain and simple language he gave his estate to his wife in fee — nothing to Elizabeth Ann Johnson, his only child, then two years of age. Obviously he intended that any after-born child or children should fall in the same category as Elizabeth Ann and should not share in the estate. The use of the words "our children" is conclusive of this intent. The testator in the will assigned two reasons for the gift in fee to the wife: (1) "Knowing full well she will use the same for the benefit of herself and our children." (2) "I do this in order that she may carry on any business that I may own without the necessity of a sale of any part of my property." *Sheppard v. Kennedy,* 242 N.C. 529, 88 S.E. 2d 760.

Nothing in the will indicates any intent to create a trust. On the contrary, the testator gives his property to his wife, not in trust, not charged with any burden, but in fee, "knowing full well" how she will use it. *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465; *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298; *Andrew v. Hughes,* 243 N.C. 616, 91 S.E. 2d 591.

The judgment entered in the Superior Court of Bertie County is Affirmed.

WINBORNE, C.J., not sitting.

STATE v. CHARLES SPENCER AND JOHNNY SPENCER.

(Filed 7 March, 1962.)

1. Criminal Law § 107—

Where defendants offer evidence of an alibi, the recapitulation of defendants' evidence that they were at a place other than the place at which the offense was committed is not sufficient, but it is incumbent upon the court to instruct the jury as to the legal effect of their evidence as to an alibi, it being a substantive feature of the case. The correct form of an instruction on an alibi is set forth.

2. Same—

It is the duty of the court to charge the jury as to the law upon all

substantial features of the case arising upon the evidence without a special request.

WINBORNE, C.J., not sitting.

HIGGINS and RODMAN, JJ., dissent.

APPEAL by defendants from *Mintz, J.*, September Criminal Term 1961 of PENDER.

There was a separate, identical indictment against each defendant, charging each one with an assault with a deadly weapon, to-wit, a pistol, on Robert Beaty with intent to kill resulting in serious injury, a violation of G.S. 14-32. These indictments by consent were consolidated for trial.

Plea: Not Guilty by each defendant. Verdict: Guilty as charged as to each defendant.

From a judgment of imprisonment as to each defendant, each defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General Ralph Moody for the State.

Aaron Goldberg for defendants, appellants.

PARKER, J. The State's evidence tends to show that on the night of 5 February 1961 Robert Beaty, accompanied by four persons, drove his automobile to a place called the "Big Four" in Pender County, owned and operated by the defendants' father. He was having trouble with his automobile. While he and a mechanic were working on his automobile on the ground outside of the building called "Big Four", he was shot six times by the defendants, who were on the ground outside the building when they shot him. Charles Spencer was shooting with a rifle, and Johnny Spencer with a pistol.

Defendants offered the testimony of a number of witnesses, including themselves, to the effect that at all times during the shooting of Robert Beaty on the ground outside of the "Big Four" building, they were inside the building called "Big Four," and did not go outside until after all the shots which hit Robert Beaty had been fired, and that neither one of them shot Beaty.

Defendants state in their brief that the sole and chief defense on which they relied was an alibi.

As correctly stated in the State's brief filed by the Attorney General, the trial court recapitulated and stated all the evidence given by defendants and their witnesses showing they were inside the building called the "Big Four" at the time Beaty was shot outside the building, and gave the defendants' contentions in respect thereto. However, the

trial court did not instruct the jury as to the legal effect of their evidence as to an alibi, and defendants assign this as error. This assignment of error is good.

In *S. v. Melton,* 187 N.C. 481, 122 S.E. 17, the Court said: "The defendant's evidence of an alibi was substantive; it was vital; it was perhaps the chief defense on which he relied; and without tendering a special prayer he was entitled to an instruction as to the legal effect of his evidence if it should be accepted by the jury."

In *S. v. Sheffield,* 206 N.C. 374, 386, 174 S.E. 105, 111, it is said: "A defendant is entitled to instruction on alibi without special prayer. *S. v. Melton,* 187 N.C. 481; C.S. 564; *S. v. Steadman,* 200 N.C. 768 (769)."

In *S. v. Sutton,* 230 N.C. 244, 52 S.E. 2d 921, it is written: "Evidence of an alibi is substantive and the defendant was entitled to an instruction as to the legal effect of his evidence of alibi, if believed and accepted by the jury. *S. v. Melton,* 187 N.C. 481, 122 S.E. 17."

It is indubitable law in this jurisdiction that, "the court is required to charge the jury the law upon all substantial features of the case arising upon the evidence without a special request." *S. v. Faust,* 254 N.C. 101, 118 S.E. 2d 769.

S. v. Ardrey, 232 N.C. 721, 62 S.E. 2d 53, quotes with approval the following from *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630: "The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instruction to that effect."

Defendants were entitled to a charge on alibi substantially as follows: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal." *S. v. Minton,* 234 N.C. 716, 68 S.E. 2d 844. See *S. v. Allison,* 256 N.C. 240, 123 S.E. 2d 465, as to charge on alibi.

The indictment against Charles Spencer alleges the deadly weapon used by him was a pistol. All the State's evidence is that it was a rifle. Defendant Charles Spencer on this appeal makes no reference to this variance between *allegata et probata.*

For prejudicial error in the charge defendants have a right to another jury, and a new trial. It is so ordered.

New trial.

WINBORNE, C.J., not sitting.

HIGGINS and RODMAN, JJ., dissent.

BERNARD BALINT v. ELBERT M. GRAYSON
AND
HELEN BALINT v. ELBERT M. GRAYSON.

(Filed 7 March, 1962.)

1. Appeal and Error § 19—

Such of appellant's exceptions as he desires to preserve and present for review must be grouped in the assignments of error and the assignments must refer to the exceptions upon which they are based and disclose the question sought to be presented without the necessity of going beyond the assignments themselves, Rules of Practice in the Supreme Court Nos. 19(3), 21, and failure to comply with the Rules does not present the exceptions for review, the Rules being mandatory.

2. Appeal and Error § 21—

While an appeal is in itself an exception to the judgment and presents the record for review, this rule refers to the record proper and includes only its essential parts, such as the pleadings, verdict, and judgment.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Hooks, S.J.*, October 1961 Civil Term of ONSLOW.

These are civil actions for recovery of damages allegedly caused by the actionable negligence of defendant.

About 9:00 P.M. on 23 April 1956 plaintiffs, husband and wife, were riding in an automobile owned and being operated by the latter. They were travelling southwardly on U. S. Highway 17 in Onslow County. Defendant entered the highway from the Oasis Drive-in lot which is located on the west side of the highway. His automobile collided with the car in which plaintiffs were riding. Plaintiffs suffered personal injuries, and *feme* plaintiff's automobile was damaged. Plaintiffs instituted separate actions. By agreement of the parties the two cases were consolidated for trial.

At the trial defendant stipulated that plaintiffs were injured and damaged by his negligence as alleged. The only matter in controversy was the amount of plaintiffs' damages.

The jury awarded damages — $10,000 to male plaintiff, $3500 to *feme* plaintiff. Judgments were entered accordingly.

Defendant appeals.

Ellis, Godwin & Hooper for plaintiffs.
Joseph C. Olschner for defendant.

PER CURIAM. Defendant makes seven assignments of error. They do not conform to the rules of this Court.

The following two assignments are typical:

"ASSIGNMENT #1: The Court erred in allowing plaintiff's counsel to ask leading questions."

"ASSIGNMENT #3: The Court erred in allowing plaintiffs to erroneously prove damages to the car."

It will be noted that the exceptions relied upon are not grouped in the assignments of error, and the assignments do not refer to the exceptions upon which they are based.

"While the form of the assignments of error must depend largely upon the circumstances of each case, they should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is. The assignment of error should indicate the page of the record where the exception is to be found." 1 Strong: N. C. Index, Appeal and Error, s. 19, p. 90.

"The function of the assignment of errors is to group and bring forward such of the exceptions previously noted as the appellant desires to preserve and present to the Court. . . ." *ibid.*

Where appellant's exceptions are not grouped as required by the Rules of Practice in the Supreme Court, Rules 19(3) and 21, 254 N.C. 797, 803, they may not be considered. *Ellis v. R. R.*, 241 N.C. 747, 86 S.E. 2d 406. The rules of practice in this Court are mandatory. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E. 2d 306. An exception which is not assigned as error is deemed abandoned. *Rose v. Bank*, 217 N.C. 600, 9 S.E. 2d 2. An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. *Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E. 2d 271.

An appeal to the Supreme Court is itself an exception to the judgment or to any other matter of law appearing on the face of the record. The record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict and judgment. *Lowie & Co. v. Atkins, supra.*

In the instant case the verdict supports the judgment.

No error.

WINBORNE, C.J., not sitting.

STATE v. QUINCY ROY KEA.

(Filed 7 March, 1962.)

1. Homicide § 2—

The evidence in this case held sufficient to be submitted to the jury and support the verdict of guilty of murder in the second degree.

2. Homicide § 26; Criminal Law § 161—

An instruction in a homicide prosecution that manslaughter is an unlawful killing of a human being with malice but without premeditation and deliberation must be held for prejudicial error upon appeal from conviction of murder in the second degree, notwithstanding that in other portions of the charge the court gave a correct definition of manslaughter as the unlawful killing of a human being without malice and without premeditation and deliberation.

3. Criminal Law § 151—

The Supreme Court is bound by the record as docketed.

WINBORNE, C.J., not sitting.

APPEAL by defendant from *Burgwyn, Emergency Judge,* November Term 1961 of PENDER.

Criminal prosecution on bill of indictment charging defendant with the murder of Roscoe Lloyd. When the case was called for trial, the Solicitor announced that the State would "seek no greater verdict than that of Guilty of Murder in the Second Degree."

On Monday, June 19, 1961, defendant shot Roscoe Lloyd, who died two or three hours later from gunshot wounds so inflicted. The shooting occurred at defendant's home in Caintuck Township, Pender County, located a quarter of a mile, over a "very rough" road, from the nearest paved road. Lloyd came to defendant's home on a truck, got off the truck and approached defendant. Defendant, standing at the front door of his home, fired once, using a double-barrel, sixteen-gauge shotgun.

There was evidence tending to support defendant's contention that, incident to prior difficulties, Lloyd had threatened him and earlier that day, at the home of one George Moore, had told him he was going to kill him; that he told Lloyd twice to stop before he "grabbed it (the shotgun) and pulled the trigger"; and that, when Lloyd did not stop, he fired the shotgun solely because of his fear that Lloyd would kill him or inflict serious bodily injury.

The jury returned a verdict of "Guilty of Murder in the Second Degree." Judgment, imposing a prison sentence of "not less than fifteen years nor more than twenty years," was pronounced. Defendant appealed.

STATE *v.* KEA.

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

John W. Campbell and Napolean B. Barefoot for defendant appellant.

PER CURIAM. It is unnecessary to review the evidence in detail. Suffice to say, when considered in the light most favorable to the State, the evidence was sufficient to support the verdict of guilty of murder in the second degree.

Defendant assigns as error, *inter alia*, this portion of the charge: "Manslaughter is the unlawful killing of a human being *with malice* but without premeditation and deliberation, as I have said to you, and is of two kinds, voluntary and involuntary. Voluntary manslaughter, as I have said, is the unlawful killing of a human being *with malice* but without premeditation and deliberation." (Our italics) Defendant's assignment of error is based on exceptions duly taken.

The challenged instruction contains obvious error. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. The unlawful killing of a human being with malice, but without premeditation and deliberation, is murder in the second degree.

The court, in an earlier instruction, had given the correct definition of manslaughter. Defendant contended, if guilty at all, he was guilty of no greater crime than manslaughter. The failure, by reason of the conflicting instructions, to draw clearly and accurately the distinction between murder in the second degree and manslaughter must be held sufficiently prejudicial to entitle defendant to a new trial.

Whether the erroneous instruction is attributable to an error in taking or transcribing the charge, or to "a slip of the tongue," we must base decision on the record as it comes to us.

New trial.

WINBORNE, C.J., not sitting.

STATE v. CHARLES M. BIRCKHEAD.

(Filed 21 March, 1962.)

1. **Criminal Law § 26; Constitutional Law § 34—**

The fundamental principle that no person can be twice put in jeopardy of life or limb for the same offense comes within the purview of Art. I, Sec. 17 of the State Constitution.

2. **Criminal Law § 26—**

A conviction or acquittal of a less degree of a crime will bar a subsequent prosecution for a higher degree of the crime arising out of the same act when the facts necessary to convict in the second prosecution would necessarily have been sufficient for conviction in the first, with the sole exception that a conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime embracing the former when the inferior court does not have jurisdiction of the higher crime.

3. **Rape § 6—**

Assault with intent to commit rape is a less degree of the crime of rape. G.S. 15-170.

4. **Criminal Law § 26—**

A conviction or acquittal on an indictment charging assault with intent to commit rape will bar a subsequent prosecution for rape based upon the same occurrence.

5. **Same—**

Where the same act constitutes a violation of two statutes and, in addition to any common elements, an additional fact must be proven in each which is not required in the other, the offenses are not the same in law and in fact, and conviction or acquittal in the one will not support a plea of former jeopardy in the other, but when only one of the offenses requires the proof of an additional fact, so that evidence necessary to sustain a conviction of such offense would necessarily be sufficient to sustain conviction in the other, the first is a higher degree of the second, and the principle of former jeopardy applies.

6. **Same—**

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial on a valid indictment or information before a court of competent jurisdiction after arraignment and after plea, and after a competent jury has been empaneled and sworn.

7. **Criminal Law § 122—**

In cases less than capital the court in the exercise of its sound discretion may order a mistrial before verdict, without the consent of defendant, for physical necessity or for necessity of doing justice, and the court need not support its order by findings of fact.

8. **Same; Criminal Law § 167—**

The discretionary power of the trial judge to order a mistrial is not

unlimited, and if the court acts arbitrarily and beyond the bounds of its discretion, the act amounts to a gross abuse of discretion.

9. Same—

Where it is apparent from the record that the court ordered a mistrial on an indictment charging assault with intent to commit rape solely in order that defendant might be indicted and prosecuted for rape, and that there was no interference on the part of defendant or from any other source, there is no necessity for ordering a mistrial in the "furtherance of justice" within the purview of the discretionary power of the court to order a mistrial, and the court's act in so doing constitutes an abuse of discretion.

10. Criminal Law § 26—

In this prosecution for assault with intent to commit rape the prosecuting witness testified to the fact of penetration and the trial judge thereupon ordered a mistrial solely for the purpose of permitting the solicitor to charge defendant with rape. *Held:* In the prosecution for rape growing out of the same act, defendant's plea of former jeopardy should have been allowed.

PARKER, J., dissents.

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

APPEAL by defendant from *Hobgood, J.*, April 1961 Term of CUMBERLAND. It was docketed and argued as case No. 582 at the Fall Term 1961.

This is a criminal action. The bill of indictment charges defendant with rape of an adult female. Defendant pleaded not guilty, and the jury returned a verdict of "guilty of rape with recommendation of life imprisonment."

The trial judge entered judgment "that defendant be confined to State's prison . . . for and during the term of his natural life."

Defendant appeals and assigns errors.

Attorney General Bruton for the State.
Arthur L. Lane and Earl Whitted, Jr., for the defendant.

MOORE, J. Defendant assigns as error the denial of his plea of former jeopardy.

The date of the alleged offense is 29 December 1960. At the February Term 1961 the grand jury returned a true bill of indictment against defendant for an assault with intent to commit rape. During the second week of that term defendant was placed on trial on this charge. He was arraigned and pleaded not guilty. A jury was sworn and empaneled. The State offered evidence. In the course of prosecutrix's testimony the following transpired:

"Q. What, if anything, did this man do with his private parts?
"A. He just, he just, had intercourse with me, I guess.
"Q. Did this man ever penetrate you with his private part?
"A. Yes.
"Q. How long did this man stay in your bed room?
"A. Maybe ten minutes; I guess ten or fifteen minutes. I am not sure how long it was.
"Court: Members of the jury, go back to the jury room a minute.
"The jury retired.

> "Solicitor Braswell: If it please the Court, may we make this general statement to the Court. Now that we have heard this much of the prosecuting witness' testimony, and heard the facts as reported to us at this time, now that we have heard from the witness stand, we desire that the Court order a mistrial and we desire to submit to the Grand Jury a bill of indictment for the Capital Crime of Rape, and desire that this man be held without privilege of bond.
>
> "Court: All right, take the order of the Court: It is ordered that a Juror be withdrawn, Juror No. 12, and a mistrial is ordered to the end that justice might be served and that a correct charge may be presented to the Grand Jury.
>
> "It is Further Ordered that the defendant be held without privilege of bond pending Grand Jury indictment."

At the March Term 1961 the grand jury returned a true bill of indictment against defendant for rape. This indictment is based on the same occurrence and involves the same female as the assault bill. The rape case was called for trial during the second week of the April Term 1961. Defendant entered a plea of former jeopardy which was heard and rejected. The trial proceeded; defendant was convicted and sentenced to life imprisonment.

Captain Leon Allen, who took part in the investigation on 29 December 1960, testified for the State at the second trial and stated he talked to prosecutrix on the day of the occurrence and it was his "impression from that conversation that there had been no penetration." The prosecutrix stated on cross-examination at the second trial: "I testified in the preliminary hearing that I did not feel the man's penis in me. When I testified that, I thought that this man meant with my hands, but I did feel him but not with my hands." Other witnesses testified at the second trial that prosecutrix told them on the day of the occurrence that she had been penetrated.

"It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice

put in jeopardy of life or limb for the same offense. *S. v. Prince,* 63 N.C. 529; *S. v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871. . . . While the principle is not stated in express terms in the North Carolina Constitution, it has been regarded as an integral part of the 'law of the land' within the meaning of Art. I, sec. 17. *S. v. Mansfield,* 207 N.C. 233, 176 S.E. 761." *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243.

It was an established principle at common law that a conviction or acquittal of a lesser degree of a criminal offense was a bar to a subsequent prosecution of a higher degree of the same offense. ". . . (I)f a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manslaughter of the same person, or *e converso,* if he be indicted of manslaughter, and be acquit, he shall not be indicted for the same death, as murder, for they differ only in degree, and the fact is the same." 2 Hale P.C. 246. See also Chitty's Blackstone, 19th London Ed., Book IV, p. 336.

In the United States it is the accepted rule that "prosecution for and a conviction or acquittal of part of a single crime is a bar to any subsequent prosecution based upon the whole or any part of the same crime, . . . Also, a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. But a former trial and acquittal or conviction will not be a bar to a subsequent prosecution unless the defendant could have been convicted on the same evidence in the former trial, of the offense charged in the subsequent trial." 1 Wharton's Criminal Law and Procedure (1957), pp. 294, 295, citing many cases. Accord: 15 Am. Jur., Criminal Law, s. 386, pp. 60-62.

North Carolina is strongly committed to this principle. In *State v. Midgett,* 214 N.C. 107, 198 S.E. 613, *Stacy, C.J.,* quoted with approval from *Dowdy v. State,* 13 S.W. 2d 794 (Tenn.) the following: "When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater — as an assault is involved in an assault and battery, as an assault and battery is involved in an assault and battery with intent to commit felony and as a larceny is involved in a robbery — and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second." The rule in this jurisdiction has been stated in this wise: "Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, it is held that an acquittal or conviction for the first is a bar to a prosecution for the second." 15 N.C. Law Review 55. This is hereinafter referred to as the "lesser degree rule."

The following cases illustrate the application of the rule by this Court. It was held that a conviction for assault and battery barred a subsequent prosecution for riot. *State v. Ingles,* 2 Haywood 5, 3 N.C. 4. Where defendant was indicted for robbery, and had been previously tried on charges of burglary and larceny, arising out of the same occurrence as the alleged robbery, and had been acquitted of burglary and convicted of larceny, it was held that larceny is a lesser grade or degree of the offense of robbery and conviction of the former bars prosecution of the latter. *State v. Lewis,* 9 N.C. 98. Where defendant had been acquitted on charges of conspiracy to burglarize a home and of burglariously robbing the home, it was held that the trial judge should have heard and disposed of defendant's plea of former jeopardy at the trial of defendant on a murder indictment — an occupant of the home having been killed in the perpetration of the alleged burglary and robbery. *State v. Bell,* 205 N.C. 225, 171 S.E. 50. After defendant's acquittal on an indictment for arson, it was error for the court to withhold from the consideration of the jury defendant's plea of former acquittal in a trial for murder of one who was fatally burned in consequence of the alleged arson. *State v. Clemmons,* 207 N.C. 276, 176 S.E. 760. In *State v. Cross,* 101 N.C. 770, 778, 7 S.E. 715, it is said: ". . . (W)hen an offense is a *necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction,* a conviction or acquittal of one is a bar to a prosecution to the other."

The only exception to this well established rule is the holding in some cases that conviction of a minor offense in an inferior court does not bar a prosecution for a higher crime, embracing the former, where the inferior court did not have jurisdiction of the higher crime. *State v. Albertson,* 113 N.C. 633, 18 S.E. 321; *State v. Shelly,* 98 N.C. 673, 4 S.E. 530; *State v. Huntley,* 91 N.C. 617.

We now consider the question as to whether or not assault with intent to commit rape is a lesser degree of the offense of rape. It was formerly held that they were separate offenses and the former was not a lesser degree of the latter. In *State v. Jesse,* 20 N.C. 95 (1838), defendant was charged with rape and assault with intent to commit rape in separate counts in the same bill of indictment. He was acquitted of rape and convicted of assault with intent to commit rape. Judgment on the assault count was arrested because of a fatal defect in the bill of indictment. Defendant was later charged with assault with intent to commit rape, involving the same transaction, in a legally sufficient bill of indictment. He pleaded formal acquittal. On appeal it was held that prosecution under the second indictment was not barred by the acquittal on the rape count in the first. It would seem that there was

valid basis for this decision, under the circumstances there presented, without reaching the question as to whether the assault charged was a lesser degree of rape. However, the Court states *inter alia*: ". . . both the crime of rape, and that of assault with intent to commit rape are felonies created by statute. But they owe their existence to different statutes; the former to the statute of Westminster, 2nd, and the latter, to the statute of this State of 1823." Further: ". . . an indictment *for doing a criminal act,* is not supported by proof of an intent to do that act, although the intent to perpetrate, and the perpetration, be each a crime, and of the same grade. . . . (A)n acquittal upon an indictment charging the doing of an act is not a bar to an indictment charging the intent to do it." Parenthetically, both rape and assault with intent to commit rape were crimes at common law. Chitty's Blackstone, 19th London Ed., Book IV, pp. 210-215 and 217.

The apparent holding in *Jesse* has been overruled and abrogated both by statute and court decisions. This Court in an opinion delivered by *Parker, J.*, declared: "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape. G.S. 15-170; *S. v. Roy* and *S. v. Slate,* 233 N.C. 558, 64 S.E. 2d 840. G.S. 15-169 provides that 'On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted.' " *State v. Green,* 246 N.C. 717, 719, 100 S.E. 2d 52. See also *State v. Williams,* 185 N.C. 685, 116 S.E. 736. G.S. 15-169 was enacted in 1885. G.S. 15-170 (1891) provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

It is now settled law in this jurisdiction that an assault with intent to commit rape is a lesser degree of the crime of rape. Therefore, a conviction or acquittal of the former bars a subsequent prosecution of the latter based on the same act or transaction. This should settle the first phase of the matter under consideration.

But the State insists that in the instant case a different test controls. It contends that the two offenses are not the same in fact or in law. Its argument is very similar to the Court's discussion in *Jesse.* The gist of the State's position is: "In order for a defendant to be convicted of the crime of rape there must be proof of penetration, but, on a charge of assault with intent to commit rape, this fact is not an essential element. The two charges are separate and distinct crimes."

It cites and relies on three cases. The case *sub judice* is of sufficient importance to justify a thorough examination of each of these cases.

(1) *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424. Defendant was acquitted of rape. He was subsequently indicted and arraigned on a charge of carnal knowledge of a female over 12 and under 16 years of age, based on the same act or occurrence. The trial court overruled defendant's plea of former acquittal, and this Court sustained the ruling. *Higgins, J.,* speaking for the Court declared: " 'To support a plea of former acquittal it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be the same offense —*the same both in fact and law.*' *S. v. Malpass,* 189 N.C. 349, 127 S.E. 248; *S. v. Taylor,* 133 N.C. 755, 46 S.E. 5; *S. v. Williams,* 94 N.C. 891. 'If two statutes are violated even by a single act and *each* offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute'. *S. v. Stevens,* 114 N.C. 873, 19 S.E. 861; *S. v. Robinson,* 116 N.C. 1046, 21 S.E. 701."

This test applied in the *Barefoot* case is indubitably the correct test for determining, upon a plea of former jeopardy, whether or not offenses are the same in fact and in law. Our Court has consistently applied this test in a long line of opinions. The number of cases is too great to justify a complete listing here, but the following are typical: *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871; *State v. Williams,* 229 N.C. 415, 50 S.E. 2d 4; *State v. Pierce,* 208 N.C. 47, 179 S.E. 8; *State v. Ellis,* 200 N.C. 77, 156 S.E. 157; *State v. Hooker,* 145 N.C. 581, 59 S.E. 866; *State v. Lytle,* 138 N.C. 738, 51 S.E. 66; *State v. Taylor, supra; State v. Robinson, supra; State v. Morgan,* 95 N.C. 641; *State v. Nash,* 86 N.C. 650; *State v. Yancy,* 4 N.C. 133.

The test is stated in *State v. Stevens, supra,* as follows: "A single act may be an offense against two statutes, and if *each* statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other." (Emphasis added.) The test is explained in *State v. Nash, supra,* in this manner: ". . . two offenses may have several circumstances in common, and yet to constitute *either* some other circumstance is to be added; and it is the allegation on the record of this additional circumstance, peculiar to *each,* which constitutes them distinct crimes. . . ." (Emphasis added.) This is hereinafter referred to as the "additional facts test."

If two statutes are violated by a single act or transaction, and if *each* statute requires proof of an additional fact not required by the other, the offenses are not the same. As explained in *Barefoot,* relied on by the State, rape embraces elements not required to be proved in

carnal knowledge of a female between 12 and 16 years of age, and carnal knowledge embraces elements not required to be proved in rape — the offenses therefore are not the same though they have some elements in common. The opinion explains the matter thus: "The two offenses are separate and distinct. The constituent elements are not identical. If the victim in a prosecution for rape is over 12 years of age, the intercourse must be *by force and against her will.* Her former chastity is immaterial. Her consent is a complete defense. In a prosecution for carnally knowing and abusing a female child over 12 and under 16 years of age, her former chastity is a material part of the charge and must be proved. Her consent is not a defense."

Application of the test is clearly illustrated in *State v. Robinson, supra.* The offenses involved are assault with a deadly weapon and carrying a concealed weapon. Actual possession of a pistol, on the occasion in question, is the common factor. The opinion states: "The assault is an entirely separate and distinct offence from that of carrying a concealed weapon, and it does not alter the case that the assault was made with a weapon illegally concealed. The assault with a deadly weapon is a complete offence whether the weapon is carried concealed or openly. The offence of carrying a concealed weapon is complete, irrespective of the fact that an assault is or is not committed with it. Therefore the conviction for an assault with deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon." In like manner the offenses involved in the other cases listed in the third paragraph next above are shown to be different and distinct. The instant case does not meet this test of distinctness. It is true that rape embraces an element — penetration — which is not involved in assault with intent to commit rape. But every element of assault with intent to commit rape is embraced in the crime of rape. The "additional facts test" is bilateral in application, and *each* offense must require proof of an element or fact not required to be proved as to the other. Therefore, upon a plea of jeopardy, rape and assault with intent to commit rape are the same in fact and law according to the "additional facts test."

For further clarity *Barefoot* states the corollary to the "additional facts test" as follows: "The rationale of the rule seems to be: If the facts alleged in the second indictment, when offered in evidence, would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise it does not." This principle is likewise deeply imbedded in our law and has been consistently applied as complimentary to the "additional facts test." The following are a few of the many cases in which this rule has been discussed and applied: *State v. Bell, supra; State v. Freeman,* 162 N.C. 594, 77 S.E. 780; *State v. Hankins,*

136 N.C. 621, 48 S.E. 593; *State v. Williams, supra; State v. Nash, supra; State v. Lindsay,* 61 N.C. 468; *State v. Stanly,* 49 N.C. 290; *State v. Birmingham,* 44 N.C. 120. For convenience, this rule is hereinafter referred to as the "included offense rule," and this is merely an enlargement or broader application of the "lesser degree rule." This rule when applied to the offenses in the instant case demonstrates that, upon a plea of former jeopardy, they are the same in fact and law. The facts alleged in the rape bill, when offered in evidence, are sufficient to sustain a verdict of guilty of assault with intent to commit rape. G.S. 15-170; *State v. Green, supra.* Furthermore, the record shows that the judge at the second trial instructed the jury that it might return a verdict of guilty of assault with intent to commit rape. The State's testimony was such as to fully justify such verdict.

The principles laid down in the *Barefoot* case fully sustain the conclusion we had reached by application of the "lesser degree test." They do not support the State's contention.

(2) The second case relied on by the State is *State v. Midgett, supra.* Defendant, while operating his automobile, struck and killed two pedestrians. On charges of drunken and reckless driving he was acquitted in recorder's court. He was thereafter indicted for manslaughter and pleaded former acquittal. The plea was rejected. On appeal this ruling was sustained.

In its argument in the instant case the State highlights the following statement taken from the opinion in *Midgett:* "Additional facts must be alleged and proved to establish the greater which need not appear on the trial of the lesser offense. *S. v. Pierce,* 208 N.C. 47, 179 S.E. 8; *S. v. Hooker,* 145 N.C. 581, 59 S.E. 866; *S. v. Robinson,* 116 N.C. 1046, 21 S.E. 701; *S. v. Stevens,* 114 N.C. 873, 19 S.E. 861." A careful reading of the opinion in context leads to the conclusion that this statement is not intended as an independent test of general application. The cases cited as authority for the statement do not support the proposition that it, standing alone, is a test. The cited cases apply the "additional facts test" which is stated in the *Barefoot* case and is fully discussed above. The Court was merely making a unilateral application of the "additional facts test."

Moreover, the Court was careful, as a preliminary matter, to state: "Nor is the one (drunken and reckless driving) a lesser degree of the other (manslaughter)." (Parentheses supplied.) The implication is clear. If the one offense had been a lesser degree of the other, the purported test would have no application.

Furthermore, this statement which the State seeks to apply as a test in the case at bar is not the basis upon which the decision rests. The opinion says: "It seems clear . . . that the instant case falls

within the terms of the fourth class as set out by *Mr. Justice Cook* in the *Dowdy case. . . .*" The *fourth class* referred to is stated as follows: "But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." This principle of law is, of course, a limitation on and in some respects the converse of the "included offense rule" set out in the *Barefoot* case and already discussed herein. This principle stated by *Justice Cook* is, of course, valid and sound. For instance, under this principle acquittal or conviction of a simple assault or assault with a deadly weapon would not bar a subsequent prosecution for murder. Neither of the former are necessarily included in or lesser degrees of the offense of murder.

The opinion in *Midgett* adds: "There is also authority for the position that jeopardy incident to a trial before an inferior court does not extend to an offense beyond its jurisdiction — the theory being that, to be in jeopardy, there must be not only a sufficient legal charge, but also a sufficient jurisdiction to try the charge."

It is manifest that the decision in *Midgett* does not rest on the purported test relied on by the State here, and that the Court did not intend in the making of the statement to promulgate a new independen test for differentiating criminal offenses, or to even suggest that the language used is of general application as a test, or that it was intended to be anything more than a unilateral application of the universally recognized "additional facts rule" set out in *Barefoot.*

We are not unmindful of the statement in *State v. Freeman, supra,* (quoted in *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594) as follows: ". . . (T)he offenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to be proven in the trial of each." No authority is cited in *Freeman* for this statement. A careful examination of the *Freeman* and *Lippard* opinions leads to the conclusion that the Court intended to state the "additional facts test," and used language which falls short of the full import of that test. If the language used were a true test for determining whether or not offenses are the same, a person who has committed a felonious assault — an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death — could be successively convicted and punished for an assault inflicting serious injury, an asault with a deadly weapon, and the felonious assault. Likewise, a person who has committed the capital offense of murder could

be successively convicted and punished for manslaughter, murder in the second degree and murder in the first degree. Also, a person who has committed rape could be indicted in two counts, in one for rape and in the other for assault with intent to commit rape, and, upon a verdict of guilty as charged, could be punished on both counts.

(3) The State also relies on *State v. Malpass,* 189 N.C. 349, 127 S.E. 248. In this case defendant scattered nails and tacks in an unpaved public highway, and as a result the tires of several automobiles were punctured. Defendant was charged in separate counts with obstructing the public highway and malicious injury to personal property. The jury convicted on both counts, and punishment was imposed in each count. Defendant complained that the judgment inflicted double punishment for the same offense. The Court held that the offenses were not the same. The "additional facts test" is stated, and the Court rests its decision on the statement quoted above from the *Freeman* case. It seems clear that the Court considered this statement only a limited and unilateral application of the "additional facts test." These matters have hereinbefore been fully discussed. The *Malpass* case adds nothing to the matters already discussed.

The cases relied on by the State do not justify its conclusion. When all pertinent tests are applied, it is palpably evident that, on consideration of a plea of former jeopardy, the offense of assault with intent to commit rape is a lesser degree of the offense of rape, when based on the same occurrence, and the two offenses are the same in fact and in law.

In the instant case there was no acquittal or conviction at the first trial. A mistrial was ordered. We must now inquire whether, under the law of this State, jeopardy attached on the first trial, and whether the circumstances were such as to permit the trial court in its sound discretion to discharge the jury before verdict and order a mistrial.

In a few jurisdictions jeopardy does not attach until there has been an acquittal or conviction. *State v. Buente,* 165 S.W. 340 (Mo. 1914); *State v. Van Ness,* 83 A. 195 (N.J. 1912). But North Carolina follows the majority rule and holds that ". . . jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." *"State v. Bell, supra; State v. Ellis, supra.* In the instant case jeopardy attached at the first trial unless prevented by the discharge of the jury and the ordering of a mistrial before verdict.

This Court in an opinion delivered by *Bobbitt, J.,* in *State v. Crocker, supra,* reviewed its prior decisions and stated the law in this juris-

diction relative to discharge of jury before verdict and ordering mistrials, without the consent of defendant, as follows:

"In the earlier cases the rule as stated by *Ruffin, C.J.*, in *S. v. Ephraim,* 19 N.C. 162, was that, *in the absence of the defendant's consent,* the trial judge had no authority to discharge the jury and hold the defendant to await a second trial '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.' (Emphasis supplied.) See *S. v. Garrigues,* 2 N.C. 241; *In re Spier,* 12 N.C. 491.

"As pointed out by *Stacy, C.J.*, in *S. v. Beal,* 199 N.C. 278, 294, 295, 154 S.E. 604, the rule has been greatly relaxed; and it has been recognized that the necessity justifying an order of mistrial may be one of two kinds, 'physical necessity and the necessity of doing justice.'

"The two kinds of necessity, *i.e.*, 'physical necessity' and the 'necessity of doing justice' were so classified by *Boyden, J.*, in *S. v. Wiseman,* 68 N.C. 203. As to 'physical necessity,' he said: 'One class may not improperly be termed physical and absolute; as where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial: or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial.' As to 'necessity of doing justice,' he said that this arises from the duty of the court to 'guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution.'

"It will be observed that 'the necessity of doing justice' is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. In *S. v. Wiseman, supra,* the basis for mistrial was 'tampering with the jury.' In *S. v. Bell,* 81 N.C. 591, and in *S. v. Washington,* 89 N.C. 535, 45 Am. Rep. 700, a juror had fraudulently procured himself to be put on the jury for the purpose of acquitting the defendant in a trial for murder. In *S. v. Cain,* 175 N.C. 825, 95 S.E. 930, a juror had given a false answer to the solicitor bearing upon his fitness and qualifications to serve as a juror. In *S. v. Upton,* 170 N.C. 769, 87 S.E. 328, it was discovered that a juror was disqualified because of nonresidence. As stated by *Ashe, J.*, in *S. v. Bell,* 81 N.C. 591, it is the duty of the trial judge 'to see that there is a fair and impartial trial, and to interpose his authority to prevent all unfair dealing and corrupt or fraudulent practices on the part of either the prosecution or the defense.'

"The rule recognized and restated in many cases is succinctly expressed by *Pearson, C.J.*, in *S. v. Jefferson,* 66 N.C. 309, as follows:

'It is settled that in a trial for a capital felony for sufficient cause the Judge may discharge the jury and hold the prisoner for another trial; in which case it is his duty to find the facts and set them out in the record, *so that his conclusion as to the matter of law arising from the facts may be reviewed by this Court.*' (Emphasis supplied.) While it is stated repeatedly that the order of mistrial, even in capital cases, is a matter resting in the sound discretion of the trial judge, it is equally well settled that the findings of fact must be sufficient to warrant the exercise of this discretionary authority. *S. v. Tyson, supra.*"

"In misdemeanors, and all cases of felonies not capital, the court below has the discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable." *State v. Guice,* 201 N.C. 761, 763, 161 S.E. 533. Such action by the judge is reviewable only in case of gross abuse of discretion. *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264.

We conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness, and for "necessity of doing justice." He need not support his order by findings of fact. His order is not reviewable except for gross abuse of discretion, and the burden is upon defendant to show such abuse. But the discretion of the trial judge is not unlimited, and if it be affirmatively shown that no physical necessity or "necessity for doing justice" existed, the order of mistrial will be deemed arbitrary and beyond the scope of the court's discretion. Where a court acts arbitrarily and beyond the bounds of its discretion under the semblance of exercising discretion, such action by the court amounts to a gross abuse of discretion.

The question here is whether the court in ordering a mistrial exceeded the limits of its discretion. The court made no specific findings of fact, but the reason for the order of mistrial clearly appears in the record. Defendant was on trial upon a bill of indictment charging an assault with intent to commit rape. In the course of prosecutrix's testimony she stated that she had been penetrated. The Solicitor immediately moved for a mistrial that he might "submit to the Grand Jury a bill of indictment for the Capital Crime of Rape." The court immediately granted the motion and stated that mistrial was ordered "to the end that justice might be served and that a correct charge may be presented to the Grand Jury." It is patent that the jury was discharged in order that defendant might be charged with a higher degree of the offense.

Physical necessity and "necessity for doing justice" are not involved. The trial could have proceeded to verdict and judgment in a fair, orderly and legal manner. No fraudulent practices were involved. There had been no jury tampering, no "keeping back" of witnesses on the part of the State, and no "occurrence of an incident of a nature that would render impossible a fair and impartial trial under the law."

The mistrial was not in the "furtherance of justice," but was obviously unjust if defendant was thereby exposed to punishment for a higher degree of the offense charged. The State has dominant control of criminal cases. It has at its command law enforcement officers to fully investigate alleged offenses and report the results of the investigation. From the information obtained it decides what, if any, the criminal charge shall be. It determines when it is ready for trial and fixes the time for the trial to begin. It has full opportunity to confer with its witnesses before the trial commences. If such conference discloses that it has misconceived the offense involved, it may send a new bill and delay the trial until it has been returned. If its preparation has been faulty, is it thereby entitled to more than one full opportunity to make preparation and gain a conviction, when there has been no fraud or interference on the part of defendant or from any other source? On the other hand, if the prosecuting witness is uncertain of the details of the occurrence until testimony is being given on the trial in the court of competent jurisdiction, does justice require such stringent action based on the belated revelation? We think not. Furthermore, in the instant case, the court sought by its order to expose defendant to capital punishment. By any reasonable appraisal of the circumstances, this calls for a strict application of the rules for, indeed, it places this in the category of capital cases. The very fact that a mistrial was ordered before verdict indicates that the judge was of the opinion that a verdict and judgment on the offense of assault with intent to commit rape would bar a subsequent prosecution for rape — which is correct indeed. *State v. Shepard,* 7 Conn. 54. The court was attempting to do indirectly what it could not do directly.

We have no case in this jurisdiction on all fours with the case at bar, but the cases in other jurisdictions (following the majority rule as to when jeopardy attaches, as we do) hold, without exception, that where the trial court, without consent of the defendant, discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime, for which crime he is subsequently indicted or tried, he is twice in jeopardy and should be discharged. The textbook writers are in accord with this principle, as will appear below. Some courts have reached this conclusion on constitutional grounds. *People v. Hunckeler,* 48 Cal. 331 (1874); *People v. Karney,* 44 N.Y.S.

2d 691 (1943), affd. on appeal to Court of Appeals, 56 N.E. 2d 102. It is true that California and New York have provisions against double jeopardy in their constitutions. We do not, but we have said that "it has been regarded as an integral part of the 'law of the land' within the meaning of Art. I, s. 17." *State v. Crocker, supra; State v. Mansfield, supra.* We now turn to the authorities elsewhere.

"Where, on the trial, the court, without the consent of accused, discharges the jury because it is of the opinion that the evidence shows him guilty of a higher crime, for which crime he is subsequently indicted or tried, he is twice in jeopardy and should be acquited." 22 C.J.S., Criminal Law, s. 259, p. 678. Accord: 15 Am. Jur., Criminal Law, s. 387, p. 62; Ann. Cas. 1915D, 886; 12 Cyc., Criminal Law, p. 272.

In *Bell v. State,* 30 S.E. 294 (Ga. 1898), a plea of former jeopardy was sustained. Defendant was put on trial in the City Court of Atlanta on a charge of assault and battery on a female. During the course of the trial a juror was withdrawn and a mistrial ordered, and defendant was held in custody to answer in Superior Court on a charge of assault with intent to commit rape. The City Court had no authority to hold preliminary hearings and to determine probable cause. Defendant pleaded former jeopardy. The appellate court declared: "Where a person has been put in legal jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded on the same act." A similar result was reached in an analagous case in Alabama. It involved the same legal and factual circumstances. *State v. Blevins,* 32 S. 637 (Ala. 1902). In *People v. Hunckeler, supra,* defendant was put on trial for murder and pleaded former jeopardy. He had previously been indicted for manslaughter, and at his trial on this indictment the court, without his consent, ordered a mistrial because it was of the opinion that the evidence showed defendant was guilty of murder. Defendant was thereafter indicted for murder for the same killing. California had a statute purporting to authorize the judge to discharge the jury and hold defendant for a higher offense. Notwithstanding this statute, the appellate court held that defendant was "twice put in jeopardy for the same offense" and entitled to discharge. It was held that the statute did not apply in situations where the first offense was a lesser degree of the second. A New York case involved identical circumstances, both as to law and facts. *People v. Karney, supra.* The court sustained the plea of double jeopardy, and declared unconstitutional the statute which purported to authorize a judge to order a mistrial in such situations. In condeming the statute and action under it, the opinion says:

"The occurrence which the statute (s. 400) anticipates embraces a deadly motive, viz: to provide greater punishment for the accused." For other decisions in accord with the foregoing, see: *People v. Ng Sam Chung,* 29 P. 642 (Cal.); *Ingram v. State,* 52 S.E. 759 (Ga.); *Application of Williams,* 333 P. 2d 280 (Ariz.); *Griffin v. State,* 113 S.E. 66 (Ga.); *State v. Noel,* 268 N.W. 654 (N.D.).

In states having rule that there is no jeopardy until after conviction or acquittal, the holdings are otherwise. *State v. Buente, supra; Larson v. State,* 140 N.W. 176 (Neb.). There is no double jeopardy where the court at the first trial has no jurisdiction. *Thompson v. State,* 6 Neb. 102.

The reason for mistrial in this case does not fall within the category "necessity for doing justice," as this phrase is understood in the administration of law in this jurisdiction.

The plea of former jeopardy should have been sustained. The court below will vacate the judgment, set aside the verdict, and discharge the defendant.

The State, if the facts justify and if so advised, may indict and try defendant for nonburglarious breaking and entering of a dwelling house with felonious intent. G.S. 14-54.

The judgment below is

Reversed.

PARKER, J., dissents.

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

RAYMOND BAYER AND WIFE, CATHERINE BAYER v. NELLO L. TEER CO.

(Filed 21 March, 1962.)

1. Waters and Water Courses § 2—

The common law rule that the owner of land, in the absence of malice or negligence or any contractual or statutory restriction, has the absolute right to intercept and use percolating waters has been modified by the "reasonable use" rule under which the land owner may use percolating water for any use which is reasonable and legitimate in the natural enjoyment or improvement of his own land, provided he does not waste the water, use it for purposes unconnected with the improvement or enjoyment of his land, or act maliciously or negligently.

2. Trial § 21—

On motion to nonsuit, plaintiffs' evidence is to be taken as true and considered in the light most favorable to them, giving them the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence which is favorable to plaintiffs or tends to explain and make clear plaintiffs' evidence may be considered, but defendant's evidence which tends to contradict or impeach plaintiffs' evidence is to be disregarded.

3. Waters and Water Courses § 2— Pumping of water necessary in reasonable operation of rock quarry held not unreasonable interference with percolating waters.

In plaintiffs' action to recover damages for the diminution and contamination of their well water resulting from defendant's quarry operations, nonsuit is properly entered on evidence tending to show that defendant was operating its rock quarry in accordance with accepted standards and pumped no more water from the bottom of its open pit than was necessary in the beneficial and useful operation of the quarry, there being no evidence of malice or negligence on the part of defendant or of any intentional contamination of or interference with plaintiffs' supply of percolating waters, and the fact that the water pumped from the pit was not used by defendant does not constitute waste of the water within the reasonable use doctrine.

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

APPEAL by defendant from *Bone, J.*, 2 October 1961 Term of CRAVEN.

Action *ex delicto* to recover damages to plaintiffs' property allegedly caused by defendant's wrongful and unreasonable and negligent acts in its operation of its rock quarry, in four respects, which are set forth in the issues submitted to the jury. These issues, with the jury's answers thereto, are as follows:

"1. Have plaintiffs been damaged by the defendant's negligent use of dynamite and other explosives, as alleged in the Complaint?

"ANSWER: No.

"2. If so, in what amount?

"ANSWER: _____

"3. Has plaintiffs' land been damaged by the wrongful acts of the defendant in wrongfully diverting or collecting surface waters and discharging them upon the lands of the plaintiffs, as alleged in the Complaint?

"ANSWER: Yes.

"4. If so, in what amount?

"ANSWER: $200.00.

"5. Has plaintiffs' land been damaged by the wrongful act of the defendant in causing dust and dirt to be wrongfully discharged upon the lands and property of the plaintiffs, as alleged in the Complaint?

"ANSWER: No.

"6. If so, in what amount?

"ANSWER: _____

"7. Did the defendant wrongfully and unreasonably remove such excessive amounts of percolating water in connection with the quarrying operation as to contaminate the plaintiffs' water supply, as alleged in the Complaint?

"ANSWER: Yes.

"8. If so, in what amount were the plaintiffs damaged thereby?

"ANSWER: $2,000.00."

From a judgment entered upon the verdict that plaintiffs recover $2,200.00 and the costs, defendant appeals.

C. B. Nye by C. E. H., Jr., and Lee and Hancock by C. E. Hancock, Jr., for defendant appellant.

Ward and Tucker by J. E. Tucker, and Whitehurst and Henderson by David S. Henderson for plaintiff appellees.

PARKER, J. Defendant assigns as error the denial by the trial court of its motion for judgment of nonsuit as to any cause of action alleged by plaintiffs for the diminution and contamination of their water supply by defendant, which motion was made at the close of plaintiffs' evidence, and renewed at the close of all the evidence.

Defendant in its brief makes no contention that there was any error in the trial so far as the jury awarded $200.00 damages to plaintiffs for the defendant's wrongfully diverting or collecting surface waters and discharging them upon their lands, and makes no contention in its brief that they are not entitled to judgment against it for that amount. In fact, it candidly conceded such in the oral argument before us.

Plaintiffs own a lot of land in Craven County situate on a paved road, between the road and Brice's Creek. Its frontage on the road is about 100 feet, on the creek about 70 feet, and its depth is about 70 feet. Plaintiffs purchased this lot about 1947 for $150.00, plus a used washing machine. About that time they bought three Dallas Huts for $100.00, which they moved to this lot, and put together with many improvements, and made a home. They first put down a shallow well, which was not satisfactory, and then put down an 80-foot well, which gave good water. After prior occupation of this house by other members of the family, plaintiffs moved into it in the autumn of 1958.

By deed dated 27 August 1957 defendant acquired a tract of land adjacent to plaintiffs' lot and about 8 or 10 feet from plaintiffs' house. In the same area it has a property interest in other lands upon which it operated a rock quarry. The distance from plaintiffs' lot to this rock quarry is about 1000 feet. Adjacent to plaintiffs' lot defendant

erected a large ramp for use in bringing rock and other material from its quarry to Brice's Creek for transportation by water.

Plaintiffs allege in paragraph 6 of their complaint:

> "That in connection with said operations [of its quarry rights], the said Nello L. Teer Company has caused to be dug a deep well or wells, the water from which is being used in connection with its operations; that it has used such unreasonable and excessive amounts of water from the usual subterranean channels, which furnish water for the area and particularly for the plaintiffs' lands and uses, that the natural flow of said water has become so depleted that a great scarcity of water is available to the plaintiffs' pump for use in their home, and salt and other minerals not theretofore present in the water have come into the well, making the same unuseable for human consumption, and the water also contains materials that make it unuseable for laundry, for cleaning, or for other household uses of water, and it is wholly unfit for bathing or general sanitary purposes."

After the complaint was filed plaintiffs, with leave of court, amended their complaint by adding to paragraph 6 the following:

> "That the defendant Nello L. Teer Company has elected, without regard to the plaintiffs' rights and in disregard of the effect upon plaintiffs' property and with the knowledge of such effect, to pump the water from said mine or wells away from its natural flow, and has diverted it from any use in its operations, at the same time depriving the plaintiffs of their right to use said water, and the same was done willfully and maliciously and in reckless disregard of the plaintiffs' rights."

The above allegations are denied by the defendant in its answer and in its amendment to its answer.

Plaintiffs' evidence relevant to defendant's motion for judgment of nonsuit is as follows:

Maurice Odel Caton, a sanitary engineer with the North Carolina State Board of Health, on an unspecified date went to defendant's rock quarry. He saw some large pumps operating continuously pumping water from the bottom of the quarry pit to a stream. According to his observation the rock quarry was not otherwise in operation.

C. W. Hodges, Jr., a drainage contractor, testified for plaintiffs:

> "I'm familiar with open pit mining and I have seen several carrying on. I am familiar with the open pit mining operations of the Nello Teer Company near Brice's creek. . . . At the extreme

end of the pit, I would say that hole was approximately 60 to 70 feet deep. They had a pump there; how deep that was I couldn't say. They pumped a great quantity of water out of the pit; *it was necessary for the operation.* I would say they would have a minimum pumping capacity in there of about 5,000 or 6,000 gallons per minute." Emphasis ours.

Clyde Needham testified for plaintiffs:

"The depth of the quarry is 40 feet. . . . I have seen the quarry in operation pumping water. . . .The water was being pumped directly out in and into this branch I referred to, and that in turn dumped into Brice's Creek. The water was in no way, shape or form being run through any Teer operation that you could see. . . . The Teer Company started operations at its quarry over on the Brice's Creek in January of 1957."

Albert R. Bell, who was found by the trial court to be an expert civil engineer with experience in the field of water supply, testified for plaintiffs on direct examination:

"If water were continuously pumped at a rate of at least 5,000 gallons per minute, during 1957 and for a period of 90 days from an excavation 40 feet below the level of Brice's Creek and located within 1,000 feet of the Bayer well, which is approximately 80 feet below the level of Brice's Creek, and was pumped with a suction type pump, and if the Bayer well is located approximately 60 feet from Brice's Creek, on the same side of said creek as the excavation, it is my opinion that that would cause the Bayer well to salt up. In the Coastal Plains section of North Carolina you have brackish waters abutting in your creeks, and you have salt water underlying the fresh water."

He testified on cross-examination:

"I have visited the quarry site of the Nello Teer Company; I have also visited the quarry site of Superior Stone in this same general area. I generally noticed the operations and how they were operating the quarry on my visits to the Teer quarry. *I found that the Teer Company was very definitely operating its quarry by accepted good standards.* . . . Both the Teer Company and Superior Stone were operating by pumping water out of the quarry. . . . *I found the Nello Teer quarry to be operating in accordance with the best practices of open pit mining.* . . . In my opinion, Mr. Bayer could probably obtain water by drilling a well in a new location on his property at an expense of about $3.00 a foot for

the drilling and the pipes, casing, or $240 for a well 80 feet deep. . . . The Teer Company is not pumping water from its quarry as of this date; I would say it has been over a year since they have pumped water. Dynamite is not required in the type of operation now being used and water is not being pumped from the quarry in the manner heretofore described, at the present time." Emphasis ours.

He testified on redirect examination:

"The Teer Company was not using the water being pumped out; the water was being wasted. *It was to de-water the quarry to enable them to operate.* The water was being disposed of through a fluent ditch running into the creek." Emphasis ours.

He testified on recross examination:

"He was talking about pumping the water out of the pit; *I never saw the Teer operations pumping any more water than it was necessary for an efficient operation.*" Emphasis ours.

Plaintiffs' evidence further shows that after defendant began pumping large quantities of water from its rock quarry the water from their well became salty, it had a petroleum or kerosene odor, and was not drinkable or useable, and as a result the value of their property was seriously impaired.

Defendant's evidence in respect to its pumping water from its rock quarry is as follows:

J. T. Carter, Jr., general foreman of defendant, testified:

"The Teer Company did not at any time pump any water out of the pit that was not necessary so that it could conduct operations normally. We pumped the amount of water that was necessary to get into the bottom of the pit to load the stone and to get it out. . . . The first week of January, 1959, was the last time that Nello Teer Company has used any explosives. The last part of January, 1959, was the last time it's pumped any water out of the pit for the purpose of keeping the level of the water lower. . . . We do not need dynamite in the type operations being conducted now. The pumps that we used to use for pumping the water out of the pit are no longer located in the area; they have been sent to various locations; the platform is not even there any longer; we don't need them any more. The type of operations we were conducting there in 1957 and 1958 were a standard type of open mining operations."

Hugh H. Byrd, defendant's superintendent in charge of the New Bern area, testified:

> "We ceased the dynamiting and the pumping of water on the property in January 1959. We changed the method of operation because the operation was using a method which was too expensive to remain in competition."

All the evidence in the case is, and the theory of the trial below was, that we are concerned here with subterranean waters, which are percolating waters, and not a subterranean stream or streams. As to the distinction between the two classes of subterranean waters see *Jones v. Loan Association*, 252 N.C. 626, 114 S.E. 2d 638.

The principle underlying the English or common law doctrine governing the use of percolating waters is that the owner of the soil owns all that lies beneath the surface, and, at least in the absence of malice or of negligence, or of any contractual or statutory restriction, has the absolute right to intercept the water before it leaves his premises and make whatever use of it he pleases, regardless of the effect that such use may have on an adjoining or a lower proprietor through whose land the water, in its natural course, would filtrate, percolate or flow. Under this doctrine such inconvenience to a neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action. This doctrine was first applied to percolating waters in *Acton v. Blundell*, 12 Meeson and Welby's Reports 324 (1843), 152 English Reprint 1223, still the leading case on this subject, which held "the owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry." This rule, which is still the rule in England, was followed in a majority of the early decisions in this country. *Jones v. Loan Association, supra; Rouse v. City of Kinston*, 188 N.C. 1, 123 S.E. 482, 35 A.L.R. 1203; 56 Am. Jur., Waters, sec. 113; 93 C.J.S., Waters, pp. 770-1; Anno. 29 A.L.R. 2d 1358-1361, 1366-1368.

Many States, including North Carolina *(Jones v. Loan Association, supra; Rouse v. City of Kinston, supra)*, have since modified or rejected the English or common law rule in favor of what has become known generally as the American doctrine of "reasonable use" and it seems the general trend of recent decisions in many if not most of the States of this country is in favor of such rule and away from the English or common law rule. Annos. 29 A.L.R. 2d 1361-1364, 109 A.L.R. 399, 55 A.L.R. 1398; 56 Am. Jur., Waters, sec. 114; 93 C.J.S.,

Waters, 771-773, in all of which a great number of these cases are cited.

In *Rouse v. City of Kinston, supra,* the Court said: "We think the American rule, adopted in most of the States where this question has arisen, the 'reasonable use' of percolating water, the correct rule."

A clear and accurate statement of the American rule of "reasonable use" is set forth in *Sloss-Sheffield Steel and Iron Co. v. Wilkes,* 231 Ala. 511, 165 So. 764, 109 A.L.R. 385, reaffirmed on subsequent appeal 236 Ala. 173, 181 So. 276:

> "But this early rule of the common law has given way to the doctrine of 'reasonable use,' by which the landowner is said to have the right only to a reasonable and beneficial use of the waters upon the land or its percolations or to some useful purpose connected with his occupation and enjoyment. The 'reasonable use' theory does not prevent the proper consumption of such waters in agriculture, manufacturing, irrigation, or otherwise, nor the development of the land for mining and the like, although the underground waters of neighboring properties may be thus interfered with or diverted. He may consume it, but he must not waste it to the injury of others. He may pump or draw or drain such waters without liability to his neighboring landowners, when it is proper for the natural and legitimate use or improvement of his own land, but not in an unreasonable manner to force and increase the flow to divert them to some use disconnected with such improvement and enjoyment whereby the flow of waters or their percolation under the lands of others are destroyed or diminished."

Evans v. City of Seattle, 182 Wash. 450, 47 P. 2d 984, had a factual situation almost similar to the instant case. Six suits by Andrew C. Evans and wife and others against the City of Seattle were consolidated. From a judgment for plaintiffs, the defendant appealed. The Court held that the city owning a gravel pit was not liable for diverting percolating waters from lower adjacent lands by drainage ditch, where drainage was for purpose of extracting gravel and property was valuable for no other purpose. In its opinion the Court said:

> "The American courts have adopted the rule of reasonable use which limits the right of the landowner to such amount of the percolating waters under his land as may be necessary for some useful purpose, or such as it may be necessary for him to divert in order to make reasonable use of his land. . . .
>
> "The fact is well established that the appellant city was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of ex-

tracting the gravel for use. Apparently, the gravel pit property was valuable for no other purpose than that of producing gravel, and the city, being the owner, had, we think, under the reasonable use and correlative rights doctrine, a legal right to so drain the gravel pit as to make the product thereof available for use without thereby incurring any liability to others.

"Reversed, with directions to dismiss the consolidated action."

N. M. Long & Co. v. Cannon-Papanikolas Const. Co., 9 Utah 2d 307, 343 P. 2d 1100, (17 Sept. 1959), was a suit for damages and for injunctive relief based upon claim that residential developers in draining and conditioning their land had drained water from adjoining lands of plaintiffs. Defendants are in the business of developing and constructing residential subdivisions. In 1953 and 1954 they acquired about 92 acres of land in the locality of plaintiffs' properties. The greater portion of defendants' land being swampy, they caused drains to be installed to lower the water table to condition the land for their purpose. It is this which plaintiffs claim had the effect of draining the water from their lands and depleting their water sources. The district court rendered judgment for defendants and plaintiffs appealed. The Supreme Court held the defendants were not obliged to anticipate that drainage of their land, a greater portion of which had been swampy, would result in reducing waters to other tract owners, and defendants did not have to let their land remain in swampy condition for purpose of protecting underground waters of adjoining lands, and affirmed the judgment of the trial court.

In *Sycamore Coal Co. v. Stanley*, 292 Ky. 168, 166 S.W. 2d 293, Lemuel S. Stanley and Cordelia Stanley brought an action against Sycamore Coal Co. to recover damages for the alleged destruction of a well or spring on their land. There was a verdict for the Stanleys in the sum of $475.00, and the Coal Co. filed a motion for an appeal. The Stanley farm adjoins appellant's land. Appellant drilled a core hole 4 inches in diameter on its land about 60 feet from a well on the Stanleys' land which had been drilled to a depth of 28 feet. The core drilling by appellant was for the purpose of determining the thickness and quality of coal seams underlying its land. When the drill reached a depth of 60 feet the water in the Stanleys' well disappeared. Appellant later filled the hole with cement, and the water rose in the Stanleys' well to a depth of about 14 inches. Theretofore it had stood at 4½ feet. There was no evidence of a subterranean stream flowing in a known and defined channel. The Court said in its opinion:

"The owner of land when putting it to a legitimate use is not liable to the owner of adjoining lands for injuries to wells or

> springs fed by hidden underground streams flowing in unknown channels. . . . According to this rule [the American or reasonable use rule], the right of a landowner to subterranean percolating waters is limited to a reasonable and beneficial use of the waters under his land, and he has no right to waste them, whether through malice or indifference, if, by such waste, he injures a neighboring landowner. 27 R.C.L., pages 1171-1178; Annotations in 109 A.L.R. 395; *Kinnaird v. Standard Oil Company,* 89 Ky. 468, 12 S.W. 937, 7 L.R.A. 451, 25 Am. St. Rep. 545. Here, the appellant was using its land in a legitimate manner, and it drilled the hole for a necessary and useful purpose. There is nothing in the proof tending to show that the injury to the appellees' well should have been anticipated by appellant, and there is no question of malice or waste. At the conclusion of the evidence the court should have sustained appellant's motion for a directed verdict in its favor."

In *United Fuel Gas Co. v. Sawyers, Court of Appeals of Kentucky,* 19 June 1953, 259 S.W. 2d 466, the Court held that where the Gas Co., in a legitimate manner, drilled a gas well on its own property, and there was no proof that defendant should have anticipated injury to well on the Sawyers' adjoining land, nor any question of malice or waste on the part of the Gas Co., contamination of Sawyers' well, even if causally connected to the drilling operation, was *damnum absque injuria.* The Court stated "The decision is confined to the pollution of percolating waters."

"Mining operations, being a reasonable use of land, do not, in general make one carrying on such operations liable because percolating waters are intercepted or drawn away so as to destroy or injure springs or wells belonging to the owner of the surface or of adjoining lands. There are some decisions to the contrary, which adhere to the doctrine of correlative rights in percolating waters." 36 Am. Jur., Mines and Minerals, sec. 193. To the same effect 58 C.J.S., Mines and Minerals, sec. 274. In section 274, page 776, of C.J.S., this in addition is stated: "Where the right to mine is separated from the ownership of the surface, the owner of the minerals is not liable to the surface owner because of the incidental loss of waters supplying springs or wells when caused by the ordinary working of the mine. . . ." This section 274 is restricted to the flow of percolating waters.

In the case of a well sunk by a proprietor in his own land, the percolating waters which feed it from a neighboring soil do not flow openly in the sight of the neighboring proprietor, but through the earth beneath its surface. No man can tell what changes these underground sources of percolating waters have undergone in the progress of time. It

may well be, that it is only yesterday, that they first took the course and direction which enabled them to supply the well. "A person who obstructs the flow of a known subterranean stream, ordinarily knows to a substantial certainty that he will prevent the water from flowing as it naturally would, and his obstruction is therefore intentional. On the other hand, a person who obstructs the flow of mere percolating waters ordinarily does not know to a substantial certainty what the consequences will be, and the harm which does result is not intentional. Restatement of the Law of Torts, Vol. IV, p. 333." *Jones v. Loan Association, supra.*

In passing upon defendant's motion for judgment of involuntary nonsuit, it is settled law in this jurisdiction that the plaintiffs' evidence is taken as true, and they are entitled to have their evidence considered in the light most favorable to them, and to have the benefit of every reasonable inference to be drawn therefrom. So much of defendant's evidence as is favorable to plaintiffs or tends to explain or make clear plaintiffs' evidence may be considered, but that which tends to contradict or impeach plaintiffs' evidence is to be disregarded. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *Polansky v. Ins. Ass'n.,* 238 N.C. 427, 78 S.E. 2d 213; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492.

All of plaintiffs' evidence, and any evidence of defendant favorable to them, show these facts: Defendant was mining or taking rock from its rock quarry "in accordance with the best practices of open pit mining," or in other words "by accepted good standards," and that it pumped no more percolating waters therefrom than "was necessary for the operation." It is true that Albert R. Bell, found by the trial court to be an expert civil engineer with experience in the field of water supply, testified on redirect examination for plaintiff "the water was being wasted," but immediately thereafter he testified, "it was to de-water the quarry to enable them to operate." Defendant was using its rock quarry in a legitimate and natural manner and making the only use of it for which it was reasonably adapted, and was pumping no more percolating waters therefrom than was necessary for its beneficial and useful operation, and under those circumstances it was not required by law to use the percolating waters, and the fact it did not use it under those circumstances does not make it chargeable with waste. There is here no evidence on defendant's part of malice, or of negligence, or of waste, or of an intentional contamination or interference with plaintiffs' supply of percolating waters to their well. Defendant was not required to let its rock quarry remain unworked because of percolating waters in order to protect the underground percolating waters on plaintiffs' land. The fact that defendant has changed its

operations of its rock quarry, perhaps because of new processes or of new conditions there, does not mean its former pumping of percolating waters therefrom was unreasonable or negligent or constituted waste. There is no evidence that defendant was making an unreasonable use or waste of underground percolating waters. Defendant's motion for judgment of involuntary nonsuit made at the close of all the evidence was improperly overruled.

Rouse v. City of Kinston, supra, is clearly distinguishable. In that case the City of Kinston dug artesian wells and conveyed percolating waters thereby obtained to the City for sale to its inhabitants for drinking and sanitary purposes and fire protection. *Jones v. Loan Association, supra,* is also clearly distinguishable, in that plaintiffs' evidence tended to show a negligent obstruction of percolating waters.

When this opinion is certified down to the superior court, that court will vacate the answers to the seventh and eighth issues and vacate the judgment that plaintiffs recover $2,200.00 from the defendant, and enter judgment sustaining defendant's demurrer made at the close of all the evidence as to any cause of action alleged by plaintiffs for the diminution and contamination of their water supply from percolating waters to their well, and further enter judgment that plaintiffs have and recover from defendant $200.00 and the costs.

Affirmed in part.

Reversed in part.

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

L. D. MASTERS AND WIFE, SALLY ANN MASTERS, v. FORREST V. DUNSTAN.

(Filed 21 March, 1962.)

1. Attorney and Client § 5—

An attorney is not liable to his client against whom judgment has been rendered for any negligence in the conduct of the litigation if the client had no meritorious defense to the action.

2. Judgments § 28—

A judgment is a bar to a subsequent action if the judgment is rendered by a court of competent jurisdiction and adjudicates the identical fact, question or right as between the identical parties, or persons in privity with a party or parties to the prior suit, so that the estoppel by judgment is of necessity mutual.

3. Judgments § 29—

A party is in privity within the purview of the doctrine of estoppel by judgment if he has a mutual or successive relationship to the same rights of property as a party to the action and his interests have been legally represented at the trial, but a mere personal interest in the subject matter of the action or mere participation in the trial without being a party or privy thereto, does not bring him within the doctrine of estoppel.

4. Same; Attorney and Client § 5—

An attorney against whose client a default judgment has been taken is not in privity with the client upon the hearing of a motion to set aside the default judgment for surprise and excusable neglect, even though the attorney employs counsel and participates in the hearing of the motion, and the finding of want of a meritorious defense in the hearing of the motion to set aside is not *res judicata* on that question in the client's subsequent action against the attorney for negligence in the conduct of the defense, and order striking the attorney's allegations relating to such plea of *res judicata*, is properly allowed.

5. Attorney and Client § 5; Evidence § 19—

In an action by a client against his attorney for negligence in permitting a default judgment to be taken against the client, the attorney is not entitled to introduce in evidence the record denying the motion to set aside the default judgment because of want of meritorious defense, since, in the absence of estoppel by judgment, a finding by the court in one action, subject to certain exceptions, can not be used as evidence of such fact in a subsequent action.

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

APPEAL by defendant from *Mintz, J.*, September 1961 Term of PASQUOTANK.

This is a civil action in which plaintiffs allege that they were damaged by the actionable negligence of defendant. The action was commenced in Beaufort County, and on motion of defendant was removed to Pasquotank County.

The complaint is summarized as follows:

Plaintiffs are residents of Virginia. Defendant is a resident of North Carolina and is a duly licensed and practicing attorney at law. About 14 April 1960 J. W. Carey instituted an action in Camden County against plaintiffs, L. D. Masters and wife. Plaintiffs retained defendant to defend the suit. They had a meritorious defense, and were so advised by defendant. Plaintiffs were ignorant of procedural requirements in this jurisdiction and relied on defendant's knowledge and skill. Defendant negligently failed to file any pleadings and thereby allowed default judgment to be entered against plaintiffs. By reason of such negligence plaintiffs have been damaged in the sum of $4203.54.

Defendant, answering, enters a general denial of material allegations of the complaint, and for a further and affirmative defense alleges:

"Eighth: That at the time of the commencement of the action *(Carey v. Masters)* . . . the plaintiff therein filed his complaint, a copy of which is attached hereto and marked Exhibit One and made a part hereof, as if copied herein verbatim.

"Ninth: That in connection with the transaction alleged in said complaint in said prior action, the plaintiffs herein (defendants in said prior action) did sign and enter into the contract referred to in section six of said complaint in said prior action. That a copy of said contract is hereto attached and marked Exhibit Two, and made a part hereof, as if copied herein verbatim. That notice is hereby given to the plaintiffs in this action to produce the original of this contract at the trial of this action, or a copy thereof or other secondary evidence of its contents will be offered in evidence at the trial of this action. *That said contract is referred to as Exhibit A in the judgment hereinafter referred to in section tenth of this answer.*

"Tenth: That after the default judgment was entered in the action referred to in section three of the complaint, the defendant herein employed Gerald F. White, of McMullan, Aydlett & White, Attorneys at Law, Elizabeth City, North Carolina, to represent defendants in that action (plaintiffs herein) in moving to set the said judgment aside under the provisions of General Statutes 1-220. That the law firm of Rodman & Rodman, Washington, North Carolina, at the instance of the defendants in that action (plaintiffs herein) also represented plaintiffs herein in said motion. That Edward N. Rodman appeared for said plaintiffs herein at the hearing of said motion. That said motion was heard before his Honor Joseph W. Parker, Judge presiding at the April 1961 Term of the Superior Court of Camden County. That after hearing the evidence offered by the parties in that action, and the arguments of counsel, the Court adjudged that the Plaintiffs herein, who were the defendants in the action referred to in section three of the complaint, had no meritorious defense to said action. That a copy of said judgment is hereto attached and marked Exhibit Three and made a part hereof, as if copied herein verbatim. There being no appeal from said judgment by plaintiffs herein (defendants therein), said judgment constitutes the law of the case. That the plaintiffs herein, as aforesaid, were the movants in said motion, were present at the hearing on said motion and together with their said attorneys, Rodman & Rodman, participated in said hearing on said motion. That the matters and things hereinbefore set out are pleaded by way of estoppel as against the plaintiffs herein, and as between the parties hereto, as res judicata of plaintiffs' claim herein."

Plaintiffs moved to strike that part of paragraph Ninth shown in italics and all of paragraph tenth of defendant's further defense. By

order entered 18 September 1961 the court allowed the motion to strike.

Defendant excepted, gave notice of appeal, and petitioned for writ of *certiorari* which was granted 17 October 1961.

Defendant assigns error.

Rodman & Rodman for plaintiffs.
McMullan, Aydlett & White for defendant.

MOORE, J. In an action by a client against his attorney, the attorney is not liable for negligence in the conduct of litigation where, notwithstanding such negligence in defense of a suit, the client has no meritorious defense. 7 C.J.S., Attorney and Client, s. 146, p. 983: *Frost v. Hanscome,* 246 P. 53 (Cal. 1926).

Defendant alleges that it has been determined by final judgment in a court of competent jurisdiction that plaintiffs had no meritorious defense to the suit prosecuted by J. W. Carey against plaintiffs, and that he is entitled to plead that judgment as an estoppel in this case.

After default judgment was entered in Carey's action, plaintiffs herein employed counsel, other than defendant, and moved to set aside the default judgment on the ground of excusable neglect. G.S. 1-220. Defendant herein also retained counsel and joined plaintiffs in prosecution of the motion. The court found that the failure of the attorney to file pleadings was not attributable to Masters and wife and that such neglect was excusable, but found that Masters and wife had no meritorious defense to Carey's action. The court refused to set aside the judgment. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507. Masters and wife did not appeal from the order denying the motion, but instituted the instant action to recover of defendant on account of his alleged negligence in failing to file pleadings and defend the Carey suit. Defendant herein, as an affirmative defense, pleads the finding of no meritorious defense in the order denying the motion to set aside the default judgment as "estoppel as against the plaintiffs herein, and as between the parties hereto, as *res judicata* of plaintiffs' claim herein." Plaintiffs moved to strike this affirmative defense. The court ruled that the finding in the order refusing to set aside the default judgment does not constitute an estoppel in the instant case, and ordered the defense stricken.

"It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter." *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157. ". . . (W)hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question,

and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *Humphrey v. Faison,* 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore,* 44 N.C. 157.

An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit. *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; *Distributing Co. v. Carraway,* 196 N.C. 58, 144 S.E. 535. An estoppel must be mutual, and where one party is not estopped, the adverse party cannot be estopped. *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570; *Meacham v. Larus & Brothers Co.,* 212 N.C. 646, 194 S.E. 99.

Defendant herein was not a party to the *Carey* suit, but argues that his participation in the motion to set aside the default judgment puts him in privity with plaintiffs herein. His contention is stated in his brief as follows: ". . . .(I)t is a fundamental principle that the estoppel of a judgment applies not only to parties but also to privies. It is said in the case of *COACH COMPANY v. BURRELL,* 241 N.C. 432, that a privy, when applied to a judgment or decree, is 'one whose interest has been legally represented at the trial.' It clearly appears from the answer herein that the legal interest of defendant Dunstan was represented on the motion in the prior action. He employed a firm of attorneys for that purpose. His interest and that of Masters and wife were one and the same at the hearing on the motion in the prior action. A person in privity under the doctrine of estoppel by judgment is one whose interests are so identified in interest with a party that such party represents the same legal right. *HAYES v. RICARD,* 251 N.C. 485, 491. It appears from the answer filed herein, together with the exhibits attached thereto and by reference made a part thereof as if copied therein verbatim, that defendant Dunstan and plaintiffs Masters and wife, were each working together and seeking to accomplish the same objective on the motion in the prior action, namely, that of having the default judgment vacated."

There is no definition of the word "privity" which can be applied in all cases. The following general principles stated in 72 C.J.S., Privities; Privies; Privy, pp. 956-958, are pertinent:

> "The ground of privity is property, not personal relation, and it relates to persons in their relation to property, and does not relate

to any question, claim or right independent of property. . . . whether the privity be one of estate, contract, blood, or law, it has no personal basis as a mere matter of sentiment, but rests on some actual mutual or successive relationship to the same right of property.

"Absolute identity of interest is essential to privity, and sometimes the word 'privity' merely means identity of interest, and is defined as meaning interest or mutuality of interest; and it is said that in legal literature 'privity' means partaking of, having a part or interest in or recognizance of any action, matter, or thing.

". . . Privies are persons who are parties to, or have an interest in, any action or thing, or any relation to another; those who are partakers of, or have an interest in any action or thing, or any relation to another; persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them; persons whose interest in an estate is derived from the contract or conveyance of others. Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest; and consequently to be affected with them by the litigation, and all others not included in these classes are strangers. However, the fact that persons are interested in the same question or in proving the same facts, or that one person is interested in the result of litigation involving the other does not make them privies.

"In order to make a man a privy to an action he must have acquired an interest in the subject matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately."

In *Meacham v. Larus & Brothers Co., supra,* S and M were passengers in an automobile and were injured when the automobile collided with another vehicle. S sued for damages. M testified for S at the trial. The judgment was adverse to S. M sued the same defendants who pleaded the judgment in the suit by S as *res judicata* in the action by M. This Court held that mere participation in the trial of the action creates no estoppel by judgment against one not a party. In *Falls v. Gamble,* 66 N.C. 455, it was held, as succinctly stated in the headnote, that "No estoppel of record is created against one not a party to the record, even though he had instigated the trespass, on account of which the action was brought, aided in defence of the action, employed counsel, introduced his deeds in evidence and paid the costs, and though he and the present defendant claimed by deeds under the present trespasser."

When used with respect to estoppel by judgment, the term "privity" denotes mutual or successive relationship to the same rights of property. One is "privy," when the term is applied to a judgment or decree, whose interest has been *legally* represented at the trial. A party will not be concluded by a former judgment unless he could have used it as a protection, or as a foundation of a claim, had the judgment been the other way. *Coach Co. v. Burrell, supra.*

Defendant herein had no such property interest or right in the subject-matter of the *Carey* suit as to entitle him, in his own name and right as distinct from that of his principals and clients, to have maintained a motion to set aside the default judgment. And if he had had such interest or right, the mere participation by him in the motion as attorney or witness would have created no estoppel against him, unless his interest or right was by succession from plaintiffs herein. In the hearing on the motion to set aside the default judgment defendant herein was not legally involved; he was present and representing the rights and interest of plaintiffs herein. He had a personal, but not a legal, interest in the outcome. His interest was not identical with, nor by succession from, his clients. His interest arose from his obligation to his clients, not out of the transactions or matters being litigated between his clients and Carey. If the court had found that he had negligently failed to file pleadings in the *Carey* case, that such neglect was not attributable to his clients but was excusable as to them, and that they had a meritorious defense, and if the court, upon such findings, had refused to set aside the default judgment, such findings would not have estopped defendant in the instant case to deny negligence on his part and to assert want of a meritorious defense. He was not legally represented therein and could not have appealed from the order in his own right. Moreover, he does not in the instant action recognize the order in question as binding upon him — it, in effect, finds that he was inexcusably negligent in failing to file pleadings, yet, in his answer in the case at bar, he denies negligence. As already stated, an estoppel must be mutual. Since an opposite finding on the question of meritorious defense would not have estopped defendant, the finding made does not estop plaintiffs. Defendant was not in privity with plaintiffs.

The court did not err in striking defendant's affirmative defense of estoppel by judgment. Nor are the facts alleged therein competent *as evidence* on the issue of meritorious defense. "Except where the principle of *res judicata* is involved, the previous finding of a court cannot be used as evidence of the fact found. . . ." Stansbury: North Carolina Evidence, s. 143, pp. 288, 289. ". . . *(A) judgment in another cause,* finding a fact now in issue, is ordinarily not receivable." Wigmore on Evidence, Vol. V, s. 16712, p. 689. See also: *Bullock v. Crouch,* 243 N.C.

40, 89 S.E. 2d 749; *Rabil v. Farris*, 213 N.C. 414, 196 S.E. 321; *Keenan v. Commissioners*, 167 N.C. 356, 83 S.E. 556; *Coble v. Huffines*, 133 N.C. 422, 45 S.E. 760; *Briley v. Cherry*, 13 N.C. 2. There are exceptions to this rule: 20 Am. Jur., Evidence, s. 1001, pp. 848, 849; 50 C.J.S., Judgments, s. 821, pp. 384, 385; *Hodges v. Wilkinson*, 111 N.C. 56, 15 S.E. 941; *Galloway v. McKeithen*, 27 N.C. 12. But none of the exceptions apply here.

The judgment below is

Affirmed.

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

SUSAN HELENE MASON, BY HER NEXT FRIEND, MARY LOU MASON v. LUNDY GILLIKIN, JR., AND JAMES EVERETT LAWRENCE.

(Filed 21 March, 1962.)

1. Automobiles §§ 30½, 41b.1—

Evidence favorable to plaintiff tending to show that defendants started from the same point on the highway and drove their respective cars at excessive speed for a distance of almost a mile, the one following closely behind the other up to the point of the accident, *is held* sufficient to support a finding that defendants wilfully engaged in a speed competition in violation of G.S. 20-141.3(b), so that each would be liable for injuries resulting therefrom regardless of which of the racing cars actually inflicted injury.

2. Automobiles § 41d—

Evidence that one defendant, while traveling at excessive speed, in attempting to pass the car preceeding him, drove to his left and struck a third car which was standing on its side of the highway, headed in the opposite direction, *is held* sufficient to to be submitted to the jury on the issue of such defendant's negligence.

3. Appeal and Error § 1—

Where it is decided on appeal that motion to nonsuit was correctly denied but a new trial is awarded on other exceptions, the Supreme Court will refrain from discussing the evidence except to the extent necessary to show the reasons for the conclusion reached.

4. Automobiles § 37; Evidence § 35—

Plaintiff sought to hold defendants liable as joint tort-feasors in wilfully engaging in a speed competition resulting in a collision between one of the racing cars and a third car in which plaintiff was a passenger. Testimony on cross-examination of the driver of the car in which plain-

tiff was riding to the effect that defendants were "racing" is incompetent as opinion evidence invading the province of the jury, and is prejudicial to both defendants.

5. Automobiles § 37; Evidence § 16—

In an automobile accident suit it is prejudicial error to permit plaintiff to cross-examine a defendant as to whether he had been involved in prior and unrelated collisions.

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

APPEAL by defendants from *Bone, J.*, October Term 1961 of CARTERET.

Plaintiff's action is to recover damages for personal injuries resulting from a collision on U. S. Highway #70 approximately four miles from Beaufort, between 7:00 and 7:30 p.m., on August 21, 1959, between a 1953 Oldsmobile operated by Elton Lee Mason, plaintiff's father (hereafter referred to as Mason), and a 1953 Oldsmobile operated by defendant Gillikin. Plaintiff, a four-year old girl, was a passenger in her father's car. She alleged the collision and her injuries were proximately caused by the concurring negligence of defendants.

U. S. Highway #70, where the collision occurred, runs north-south. Mason, whose residence was on the west side of said highway, backed his car out of his private driveway onto said highway, intending to drive (south) to Beaufort. Defendant Lawrence, operating a 1956 Oldsmobile, and defendant Gillikin, operating a 1953 Oldsmobile, were traveling north on said highway. The only collision was between the Gillikin and Mason cars.

Plaintiff alleged the collision and her injuries were proximately caused by the concurring negligence of defendants. She alleged defendants, and each of them, (1) were guilty of reckless driving as defined in G.S. 20-140; (2) were operating their cars on a public highway wilfully in speed competition with each other in violation of G.S. 20-141.3; (3) were operating their cars "at a fast, furious and highly dangerous rate of speed," to wit, "in excess of 80 miles per hour." In addition, she alleged, as to defendant Gillikin, (1) that he failed to keep his car under proper control; (2) that he followed the Lawrence car so closely "his vision of the Mason automobile was blocked" thereby; and (3) that he "suddenly and abruptly pulled out from his right-hand lane of traffic onto and across the white line and into his left-hand, or west lane of traffic," without first ascertaining whether such movement could be made in safety. Plaintiff alleged she was entitled to recover damages in amount of $20,000.00.

Defendants, in separate answers, denied all allegations as to their negligence. Defendant Gillikin, based on facts set forth, alleged the

negligence of Mason was the sole proximate cause of the collision. Defendant Lawrence, based on facts set forth, alleged he had passed the Mason car before the Gillikin and Mason cars collided and that he "was in no way involved in said collision and did nothing whatsoever to cause or contribute to said collision which occurred between said other two vehicles."

Evidence was offered by plaintiff and by each defendant.

Evidence favorable to plaintiff, summarized, tended to show: Lawrence, in his 1956 Oldsmobile, and Gillikin, in his 1953 Oldsmobile, started, shortly after 7:00 p.m., both headed north, the Lawrence car in front of the Gillikin car, from a point on U. S. Highway #70 near a "grapevine" or vineyard. There were two sharp curves in the highway between the "grapevine" and Mason's driveway. From the "grapevine" to the first curve, the distance was less than one-fourth of a mile. From the first curve to the second, the highway was straight and the distance was about one-fourth of a mile. From the second curve to Mason's driveway, the highway was straight and the distance was four-tenths of a mile. As the cars proceeded around the first curve, along the straight between the two curves and from the second curve towards Mason's driveway, they were traveling at a speed of from 85 to 95 miles per hour. During this time, the Gillikin car was close behind the Lawrence car; but, as they approached the Mason driveway, Gillikin pulled out to his left in an attempt to pass Lawrence, and was traveling in his left (west) lane when he struck the side of the Mason car. Before Gillikin pulled out to pass Lawrence, Mason had backed out onto the west side of the highway, had stopped and was headed at an angle (southwesterly) and was about to straighten his car and drive south towards Beaufort.

Evidence favorable to defendants, summarized, tended to show: They were driving north on said highway. Gillikin did, but Lawrence did not, start from the "grapevine." Gillikin, driving north, overtook what he learned later was the Lawrence car. Lawrence did not know who was driving the car that was overtaking him. Lawrence was driving at a speed of 40-45 miles per hour. Gillikin was driving at a speed of 50-55 miles per hour. Gillikin was several car lengths behind Lawrence. Gillikin pulled out to his left to pass Lawrence before Mason backed his car onto the highway. As the two cars approached, Mason backed onto the highway, crossing the center line and into the east lane. Lawrence, by pulling to his right onto the shoulder, avoided striking the Mason car. Gillikin was unable to avoid striking the Mason car.

Evidence for plaintiff and evidence for defendants was in sharp conflict as to other particulars, including the following: (1) as to the exact time of the collision, whether it was then dark or "dusk dark," and as

to visibility independent of car lights; (2) as to whether the lights on Mason's car were burning; and (3) as to the distance of defendants' cars, south of Mason's driveway, when Mason backed onto the highway and when Gillikin pulled out to his left to pass Lawrence.

Motions for judgment of nonsuit were made by each defendant and were overruled. Each defendant excepted.

The court submitted and the jury answered the following issues: "1. Was the plaintiff injured by the negligence of the defendant Lundy Gillikin, Jr., as alleged in the complaint? Answer: Yes. 2. Was the plaintiff injured by the negligence of the defendant, James Everett Lawrence, as alleged in the complaint? Answer: Yes. 3. What amount, if any, is plaintiff entitled to recover? Answer: $7,500.00."

Judgment "that the plaintiff have and recover of the defendants jointly and severally the sum of $7,500.00" and costs, was entered. Each defendant excepted and appealed; and each defendant, based on exceptions separately taken by him, sets forth separate assignments of error.

Harvey Hamilton, Jr., for plaintiff appellee.

C. R. Wheatly, Jr., and Thomas S. Bennett for defendant Gillikin, appellant.

Barden, Stith & McCotter for defendant Lawrence, appellant.

BOBBITT, J. In *Boykin v. Bennett*, 253 N.C. 725, 731, 118 S.E. 2d 12, this Court, in opinion by *Moore, J.*, held: "The violation of the racing statute, G.S. 20-141.3(a) and (b), is negligence *per se*. Those who participate are on a joint venture and are encouraging and inciting each other. The primary negligence involved is the race itself. All who wilfully participate in speed competition between motor vehicles on a public highway are jointly and concurrently negligent and, if damage to one not involved in the race proximately results from it, all participants are liable, regardless of which of the racing cars actually inflicts the injury . . ."

The evidence, when considered in the light most favorable to plaintiff, was, in our opinion, sufficient to support a finding that Gillikin and Lawrence operated their cars wilfully in speed competition in violation of G.S. 20-141.3(b) and that their negligence in this respect proximately caused the collision. As to Gillikin, independent of whether he and Lawrence operated their cars wilfully in speed competition, there was sufficient evidence to support a finding that his negligence, in other respects, proximately caused the collision. Hence, the court's action, in overruling defendants' motions for judgment of nonsuit, is approved.

Since a new trial is awarded, we refrain from discussing the evidence

presently before us except to the extent necessary to show the reasons for the conclusion reached. *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, and cases cited.

On direct examination, Mason testified in detail as to what he saw with reference to the approaching cars of Lawrence and Gillikin, the course of travel and speed of each, etc., until the Gillikin and Mason cars collided. On cross-examination, he was asked this question: "You knew you didn't have time to back in front of him (Lawrence) if he had been, if you had gotten on his side of the road?" Objection by defendant Lawrence was overruled and Mason answered: "I would have if he hadn't been *racing*." (Our italics) Defendant Lawrence moved to strike the answer. The court overruled said motion and defendant Lawrence excepted. Thereupon, Mason testified he "didn't form any estimate of the speed until it (Lawrence car) got within a hundred yards of (him)." Mason was then asked: "Your side of the road was clear?" Objection by defendant Lawrence was overruled and Mason answered: "If I had known anybody was *racing*, I sure would have waited until they got by." (Our italics) Defendant Lawrence moved to strike the answer. The court overruled said motion and defendant Lawrence excepted.

Defendant Lawrence contends, and rightly so, that the court erred in denying his motions to strike Mason's said answers wherein Mason testified, in effect, that Lawrence and Gillikin were racing. This testimony, in our opinion, clearly invaded the province of the jury. Whether negligence on the part of Lawrence proximately caused plaintiff's injuries depended upon whether Lawrence and Gillikin operated their cars wilfully in speed competition, that is, wilfully engaged in "racing." This was the critical controverted issue as between plaintiff and Lawrence and a primary controverted issue as between plaintiff and Gillikin.

"A witness must ordinarily confine his testimony to matters within his actual knowledge. He cannot, over objection, be asked questions calling for, or permitted to express, his opinion or conclusion upon facts which are in the province of, and are to be determined by, the jury or by the court trying a case without a jury, provided those facts are capable of being so detailed and described that they can be fully placed before the jury or the court by the witness or by other witnesses having actual knowledge of them." 20 Am. Jur., Evidence § 765.

"Conclusions of a witness as to the issue of negligence and related issues are inadmissible where the material facts can be placed before the jury for their consideration and they are competent to draw a correct inference therefrom." 32 C.J.S., Evidence § 448.

Our decisions are in full accord: *Bevan v. Carter,* 210 N.C. 291, 186 S.E. 321; *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828; *Wood v. Insurance Co.,* 243 N.C. 158, 160, 90 S.E. 2d 310, and cases cited; *Jones v. Bailey,* 246 N.C. 599, 601, 99 S.E. 2d 768, and cases cited.

While it does not appear that defendant Gillikin moved to strike Mason's testimony as to "racing," it would appear that this incompetent evidence was prejudicial alike to Lawrence and to Gillikin.

On cross-examination, counsel for plaintiff, over objections by defendant Gillikin, was permitted to question Gillikin as to the number of accidents or wrecks in which he had been involved. The court overruled each and all of his objections and defendant Gillikin excepted. In this manner, testimony was elicited that Gillikin had been involved in two or three wrecks, including the collision with the Mason car, and specifically that he had been (on some unidentified occasion) in an accident involving a car he was driving and a car one Connie Gillikin was driving. Defendant Gillikin contends, and rightly so, that testimony as to unrelated wrecks or collisions in which he had been involved was incompetent and that his objections should have been sustained.

"Generally, evidence of a driver's previous accidents is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is immaterial in the determination of the driver's negligence on the occasion in question. Conversely, it is also generally held that evidence that a driver has not been involved in any prior accidents is not competent as to the issue of the driver's negligence in the accident in question." 5A Am. Jur., Automobiles and Highway Traffic § 946; Annotation: "Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents," 20 A.L.R. 2d 1210 *et seq.,* and supplemental decisions; Blashfield, Cyclopedia of Automobile Law and Practice, Permanent Edition, Vol. 9C, § 6210; Huddy, Cyclopedia of Automobile Law, Ninth Edition, Vol. 15-16, Sec. 203.

In *Heath v. Kirkman,* 240 N.C. 303, 307, 82 S.E. 2d 104, it is stated: "But evidence of reputation for negligence or of acts of negligence on prior unrelated occasions is not competent to show that the driver was negligent on the occasion of plaintiff's injury. *Robbins v. Alexander,* 219 N.C. 475, 14 S.E. 2d 425." "As a general rule, evidence of other accidents or occurrences is not competent and should not be admitted." *Karpf v. Adams,* 237 N.C. 106, 74 S.E. 2d 325. In the present case, nothing appears to indicate the said evidence was competent under any exception to said general rule.

We are of opinion, and so hold, that the admission of incompetent

evidence, as indicated above, was sufficiently prejudicial to entitle both defendants to a new trial. Having reached this conclusion, it is unnecessary to discuss questions raised by defendants' other assignments of error.

New trial.

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

LUNDY GILLIKIN, JR. v. ELTON LEE MASON.

(Filed 21 March, 1962.)

1. Trial § 46.1—

Where the jury is unable to agree on a verdict and the court orders a mistrial and continues the case, the case remains on the civil issue docket for trial *de novo*, unaffected by rulings made during the trial.

2. Same; Trial § 30; Appeal and Error § 3—

Where the court grants plaintiff's motion to dismiss defendant's cross action, over defendant's exception and notice of appeal, and the trial of plaintiff's cause continues, and thereafter a mistrial is ordered in plaintiff's cause upon the inability of the jury to agree on a verdict, the order of mistrial does not disturb the prior nonsuit of the cross action, and such nonsuit must be considered as a final judgment from which an appeal lies, notwithstanding the failure of the court to implement by formal judgment its ruling on the motion to dismiss the cross action.

3. Trial § 21—

Defendant is a plaintiff in regard to his cross action, and therefore upon motion to nonsuit a cross action the evidence tending to sustain the cross action must be considered in the light most favorable to defendant and evidence favorable to plaintiff must be disregarded.

4. Automobiles §§ 41d, 42b— Evidence held for jury in action for collision resulting from attempt to pass car traveling in same direction.

The evidence favorable to defendant tended to show that he turned on his lights and backed his car out of his private driveway to the shoulder of the road and stopped, looked both ways, saw no car approaching from the east and saw a car approaching from the west some 200 yards away on its right-hand side or southern half of the highway, that he then backed his car onto the northern side of the highway without going beyond the center line, and that the side of his car, back of the hood, was struck by plaintiff's car after plaintiff had driven to the left to pass a preceding car which plaintiff had been following at excessive speed. *Held:* The evidence is sufficient to be submitted to the jury on defendant's cross action and does not show contributory negligence in regard to the cross action as a matter of law.

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

GILLIKIN *v.* MASON.

APPEAL by defendant from *Walker, Special Judge,* September Term 1961 of CARTERET.

Action and cross action growing out of a collision on U. S. Highway #70, approximately five miles east of the Town of Beaufort, about 7:30 p.m., August 21, 1959, between two Oldsmobiles, one owned and operated by plaintiff and the other owned and operated by defendant. Each owner-operator alleged the collision was proximately caused by the negligence of the other and each seeks to recover for the resulting damage to his car.

At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved for judgment of nonsuit. The court denied these motions and defendant excepted.

At the close of all the evidence, defendant tendered the following issues: "1. Was plaintiff's automobile damaged through the negligence of the defendant, as alleged in the Complaint of the plaintiff? 2. Did the plaintiff by his own negligence contribute to his damage? 3. What amount, if any, is plaintiff entitled to recover of the defendant? 4. Was the defendant Mason's automobile damaged through the negligence of the plaintiff, as alleged in the cross action of the defendant? 5. What amount, if any, is the defendant Mason entitled to recover of the plaintiff Gillikin?" The court refused to submit issues 2, 4 and 5. Defendant excepted. The court submitted issues 1 and 3.

As stated in the record: "At the close of all the evidence, the plaintiff moved for dismissal of defendant's cross action, which motion was allowed by the Court." Defendant excepted.

Upon trial on the two issues designated above as 1 and 3, the court, on account of the jury's inability to agree on a verdict, ordered a mistrial and continued the case.

Defendant appealed, assigning errors.

C. R. Wheatly, Jr., and Thomas S. Bennett for plaintiff appellee.
Hamilton, Hamilton & Phillips for defendant appellant.

BOBBITT, J. With reference to plaintiff's cause of action, whether the court erred in denying defendant's motions for judgment of nonsuit is not presented. No judgment was entered against defendant. He had no right of appeal from the denial of his said motions. When the court ordered the mistrial and continuance, the case, as to plaintiff's cause of action, remained on the civil issue docket for trial *de novo,* unaffected by rulings made *therein* during the trial conducted by Judge Walker. *GMC Trucks v. Smith,* 249 N.C. 764, 107 S.E. 2d 746, and cases cited.

Although the court, with reference to plaintiff's alleged cause of action, ordered the mistrial and continuance, the court's prior ruling,

allowing plaintiff's motion for dismissal of defendant's cross action, was not disturbed. Compare *GMC Trucks v. Smith, supra.* Defendant's appeal entry is in these words: "Upon the nonsuit of the defendant's counterclaim or cross-complaint, the defendant objected and excepted and gave notice of appeal in open Court, with further notice waived." No judgment implementing the court's said ruling was entered. Even so, upon this record, the court's said ruling must be considered as a judgment of nonsuit as to defendant's alleged cross action.

With reference to the cross action, defendant's status was that of a plaintiff. Hence, in passing upon whether the court erred in nonsuiting the cross action, the evidence must be considered in the light most favorable to defendant. Evidence favorable to plaintiff must be disregarded. *Ashley v. Jones,* 246 N.C. 442, 98 S.E. 2d 667.

In brief, evidence favorable to defendant tends to show: U. S. Highway #70 runs east-west. Its width is twenty feet or more, with shoulders of eight feet or more. Defendant lives on the north side of the highway. He got in his car, turned the lights on, backed out of his private driveway to the shoulder of the highway and stopped. He looked both ways. No car was approaching from the east. Looking west, he saw one car "about 200 or 300 yards up the road." This car, coming from Beaufort, was on its "right-hand side going east." Defendant was going to Beaufort. He backed onto his (north) side of the highway. He did not go beyond the center line. When he "began to turn to get straight to go towards Beaufort," the car he saw (Lawrence car) "was then a couple of hundred feet of (him)." While in that position, defendant's car was struck by plaintiff's car. Plaintiff, who had been driving (east) behind the Lawrence car, "run around or was in the act of passing" the Lawrence car when plaintiff's car struck the left side of defendant's car. All the damage to defendant's car was back of the hood, starting at the left-hand door. There was no collision between defendant's car and the Lawrence car.

With reference to defendant's cross action, we reach these conclusions: (1) There was ample evidence to support a finding that negligence on the part of plaintiff proximately caused the collision. (2) When considered in the light most favorable to defendant, the evidence did not establish as a matter of law that negligence on the part of defendant proximately caused the collision. These issues, raised by the pleadings, were for jury determination upon sharply conflicting evidence. Having reached these conclusions on the basis of the admitted evidence, it is unnecessary to consider whether the court erred in excluding other evidence proffered by defendant.

It is noted: Defendant, in his cross action, alleged the negligence of plaintiff proximately caused the collision. He did not *eo nomine* plead

the contributory negligence of plaintiff in bar of plaintiff's right to recover. Plaintiff, in his complaint, alleged the negligence of defendant proximately caused the collision. He filed no reply to defendant's cross action.

Obviously, this action and *Mason v. Gillikin, ante,* 527, ... S.E. 2d ....., grow out of the same collision. However, it is noted: In this action, U. S. Highway #70, where the collision occurred, is referred to in the pleadings and evidence as running east-west, but in *Mason v. Gillikin* it is referred to as running north-south.

For the reasons stated, the ruling of the court below, treated as a judgment of nonsuit as to defendant's cross action, is reversed.

Reversed.

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

THOMAS E. HODGES v. ANNIE J. HODGES.

(Filed 21 March, 1962.)

1. Trusts § 13— Agreement of owner to sell lands and divide or reinvest proceeds of sale may create a resulting trust.

Plaintiff's allegations and evidence were to the effect that plaintiff's mother furnished monies with which plaintiff's father built a house on land owned by him under agreement that plaintiff should have a remainder in the property, that this lot was thereafter sold and the proceeds used to buy a second lot, that the father conveyed the remainder after reservation of a life estate in this lot to plaintiff, that plaintiff thereafter reconveyed the remainder to his father under an agreement that the father would sell this second lot and reinvest the proceeds in a third lot for the benefit of both, and that the father had the fee simple title in the third lot conveyed to himself in violation of the agreement. *Held:* Plaintiff's right to assert a resulting trust is not dependent solely upon the agreement between plaintiff's mother and father with respect to the first lot, but plaintiff is entitled to assert a resulting trust if he conveyed the remainder in the second lot to his father under an agreement that the lot should be sold and the proceeds invested for the benefit of both, and an instruction limiting plaintiff's rights to the agreement relating to the first lot is prejudicial error.

2. Same; Frauds, Statute of § 6a—

Where the remainderman conveys his interest to the life tenant under an agreement that the life tenant should sell the realty and reinvest the proceeds in other property, the remainderman cannot compel the life tenant to sell, but when the life tenant does sell and uses the proceeds in the purchase of other realty, the remainderman may assert a parol

trust in such other property, since in such instance the remainderman is not attempting to engraft a trust upon his own deed, and the right of the remainderman to compel the life tenant to account for the proceeds of the sale does not come within the statute of frauds.

3. Trusts § 17—

Where plaintiff asserts a resulting trust pursuant to the agreement of the owner of land to sell same and invest the proceeds in other realty for the benefit of himself and plaintiff, plaintiff has the burden of establishing the agreement by clear, cogent, and convincing proof, and the burden of showing that the proceeds were in fact invested in the particular property against which the trust is asserted and the proportion of the purchase price which was derived from the sale of the land.

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

APPEAL by plaintiff from *Mintz, J.*, October 1961 Civil Term of NEW HANOVER.

Plaintiff seeks by this action to engraft a trust for his benefit on a lot on Twenty-First Street in Wilmington conveyed to B. B. Hodges by deed dated 27 August 1948. B. B. Hodges, by will probated in December 1959, devised this lot to defendant, his widow. Plaintiff is the son of B. B. Hodges and the first wife of B. B. Hodges. Defendant was B. B. Hodges's last wife.

The complaint alleges B. B. Hodges owned a lot in Benson. He constructed a house on this lot with monies furnished by his then wife, plaintiff's mother, and "Bradley B. Hodges agreed with his said wife, the plaintiff's mother, that he would hold the title to the said house and lot for their son, Thomas E. Hodges, in fee simple subject to a life estate in Bradley B. Hodges, and that if he sold said property and reinvested the proceeds of said sale, the proceeds should be used to buy a home subject to the same trusts, terms and conditions." He alleges that B. B. Hodges sold the property in Benson and used the proceeds to purchase a house and lot on Sixth Street in Wilmington, and, pursuant to the agreement with plaintiff's mother, conveyed that lot to plaintiff, reserving to himself a life estate. Thereafter the Sixth Street property was sold and the proceeds derived from the sale invested by B. B. Hodges in a lot on Twenty-First Street in Wilmington, title to which was taken in the name of B. B. Hodges. The law engrafted a trust on said property resulting from the use of plaintiff's monies in the purchase.

Defendant denied the asserted trust. As a further defense she alleged that any trust obligation which might have existed had been satisfied by the purchase of a lot on Fifth Street in Wilmington, title to which was vested in B. B. Hodges for life and in plaintiff in fee in remainder.

The court submitted a single issue as to plaintiff's title to the lot in

controversy. The jury answered the issue in the negative. Judgment was rendered on the verdict. Plaintiff appealed.

Rountree & Clark and Isaac C. Wright for plaintiff appellant.
Louis A. Burney and Elbert A. Brown for defendant appellee.

RODMAN, J. The record discloses that B. B. Hodges purchased a lot on Sixth Street in Wilmington in September 1945. By deed dated 12 December 1946 he conveyed this property to plaintiff, reserving a life estate for himself. Witnesses for plaintiff testified to declarations made by B. B. Hodges that he purchased the property on Sixth Street with monies derived from the sale of the Benson property. By deed dated 26 March 1947 plaintiff reconveyed his interest in remainder in the Sixth Street property to B. B. Hodges. Plaintiff was at that time a minor. The record does not disclose what consideration, if any, is recited in the deed. Plaintiff's witnesses testified to declarations by B. B. Hodges at the time of the conveyance of the Sixth Street property to him that he would sell the property and reinvest the proceeds in other lands, taking title for life in B. B. Hodges and in remainder to the plaintiff. The record states the lot on Sixth Street was sold by deed dated 26 February 1949, recorded 2 March 1949. The record does not disclose the amount received by B. B. Hodges for the Sixth Street lot nor when payment was made. There was evidence from which the jury could find that B. B. Hodges had contracted to sell sometime prior to February 1949, the date of his deed. The evidence tends to show that B. B. Hodges paid more for the lot on Twenty-First Street, the lot in controversy, than he received from the sale of the Sixth Street lot.

B. B. Hodges purchased a lot on Fifth Street in Wilmington. The exact date of this purchase does not appear. It was purchased between December 1948 and March 1950. The record does not disclose the amount paid for that lot.

Seemingly there was a misunderstanding of plaintiff's rights based on the facts alleged in the complaint and the evidence offered to support those allegations. The court charged the jury that plaintiff, to impose a trust on the lot on Twenty-First Street, had the burden of proving the alleged agreement between plaintiff's mother and father, thereby creating a trust in plaintiff's favor on the lot in Benson, and, pursuant to that trust agreement, B. B. Hodges sold that lot and invested the proceeds in a lot on Sixth Street in Wilmington, which lot was likewise sold and the proceeds invested in the lot in controversy. Plaintiff, by exceptions to the charge, challenges the restriction so imposed on his right to recover.

Grave doubt as to plaintiff's right to recover would exist if that right was dependent on the creation of a trust for plaintiff's benefit by the agreement between his mother and father pursuant to which the mother provided the father with funds to erect a house on land then owned by the father. *Rhodes v. Raxter,* 242 N.C. 206, 87 S.E. 2d 265; *Frey v. Ramsour,* 66 N.C. 466. But plaintiff's rights are not dependent upon a trust imposed on the lot in Benson. It appears from the evidence, and seemingly without contradiction, that plaintiff did acquire a remainder interest in the lot on Sixth Street in Wilmington by the deed from his father. Whether the deed was made to plaintiff for the remainder interest in the Sixth Street property pursuant to an agreement between his father and mother or was a gift from the father or a combination of both was immaterial. The crucial questions were: First, was a trust imposed on the proceeds derived from the sale of the Sixth Street lot? If so, were the funds derived from that sale invested in the lot on Twenty-First Street, or were they, as defendant contends, used to purchase a lot on Fifth Street, the remainder interest in which was subsequently conveyed to plaintiff?

In the absence of fraud or other ground for equitable relief, a grantor may not impose a parol trust for his benefit on land which he conveys by deed purporting to vest title in the grantee. *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548; *Schmidt v. Bryant,* 251 N.C. 838, 112 S.E. 2d 262; *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028.

But plaintiff does not here seek to impose a trust on the lot on Sixth Street. His position is that he conveyed his remainder interest in that property upon an agreement that grantee would sell and reinvest the proceeds in other real estate. He could not have forced his grantee to comply with the asserted agreement to sell. *Schmidt v. Bryant, supra.* But, when his grantee performed his contract and sold, plaintiff had a right to call upon the grantee to account for the proceeds of sale. *Schmidt v. Bryant, supra; Walters v. Walters,* 172 N.C. 328, 90 S.E. 304; *Brown v. Hobbs,* 147 N.C. 73; *Bourne v. Sherrill,* 143 N.C. 381; *Barbee v. Barbee,* 108 N.C. 581; *Simpson v. Henry N. Clark Co.,* 55 N.E. 2d 10, 154 A.L.R. 380; Bogert Trusts and Trustees, sec. 66; Scott on Trusts, sec. 52.1.

The law is stated in Restatement, Trusts 2d, sec. 52 (p. 130) in this language: "If the owner of land transfers it to another person upon an oral trust to sell the land and to hold the proceeds in trust, the beneficiary cannot compel the transferee to sell the land; if, however, he does sell the land there is a valid contract to hold the proceeds in trust, and although the transfer of the land is the consideration for the promise to hold the proceeds in trust, the proceeds are personal proper-

ty and the contract is not required by the Statute of Frauds to be in writing."

If plaintiff establishes by clear, cogent, and convincing evidence the agreement to sell the lot on Sixth Street and reinvest the proceeds of sale in other land, a trust estate in plaintiff's favor would, to the extent of his interest in said funds, be created. The investment of those funds in other lands solely in the name of B. B. Hodges would, to the extent of plaintiff's interest in the monies derived from the sale, create a resulting trust in the properties so purchased. *Hoffman v. Mozeley,* 247 N.C. 121, 100 S.E. 2d 243; *Grant v. Toatley,* 244 N.C. 463, 94 S.E. 2d 305; *Wilson v. Williams,* 215 N.C. 407, 2 S.E. 2d 19.

If the agreement to reinvest the proceeds of the sale of the Sixth Street property in other lands for the father for life with the remainder to plaintiff be established, it will of course be necessary, for plaintiff to recover, to show that the proceeds were in fact invested in the lot on Twenty-First Street and the proportion of the purchase price of that lot which came from the sale of the lot on Sixth Street. *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321; *Holden v. Strickland,* 116 N.C. 185.

The date of the purchase of the property on Twenty-First Street, the date of the sale of the property on Sixth Street, the date of the purchase of the lot on Fifth Street, the amounts received and paid for these properties, and the conveyance of the lot on Fifth Street to plaintiff in remainder are all matters which the jury can take into consideration in determining the rights of the parties.

Since there was error in limiting plaintiff's right to recover to proof of the alleged agreement between plaintiff's mother and father, there must be a

New trial.

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

KIRBY S. PARRISH, E. H. (HARVEY) PARRISH, FRED O. PARRISH, J. W. PARRISH, JAKE S. PARRISH, BENJAMIN F. PARRISH, RACHEL P. CROWDER, PENNINAH P. DUKE AND MAMIE W. GRIFFIN v. CHARLES BRANTLEY, LIZZIE W. BRANTLEY, LILLIAN J. WOOD AND LILLIAN J. WOOD, ADMX. OF ESTATE OF B. F. WOOD, DECEASED, AND MARYLAND CASUALTY COMPANY, A CORPORATION.

(Filed 21 March, 1962.)

1. Pleadings § 12—

A demurrer requires the court to pass on the legal sufficiency of a challenged pleading.

2. Pleadings § 19—

If the facts alleged in a complaint constitute a defective statement of a good cause of action, demurrer to the complaint should be sustained but plaintiff should be granted leave to amend. G.S. 1-131.

3. Same—

If the facts alleged in the complaint disclose that plaintiff does not have a cause of action, demurrer thereto should be sustained and the action dismissed.

4. Executors and Administrators § 35—

Distributees may not maintain an action against the administratrix and the surety on her bond to recover for alleged mismanagement of the assets of the estate when it is alleged that the personal assets of the estate were insufficient to pay debts and costs of administration and there is no allegation that by proper management the personal estate would have been sufficient to provide funds for distribution, since the distributees are entitled to share in the estate only in assets remaining after payment of all debts.

5. Corporations § 5—

Distributees of a deceased stockholder may not maintain an action against the officers of the corporation for mismanagement of the corporation resulting in the bankruptcy of the corporation and the worthlessness of the stock constituting a part of the assets of the estate when neither the trustee in bankruptcy nor the corporation is a party and there is no allegation of demand upon and refusal of the corporation or the trustee in bankruptcy to institute the action.

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

APPEAL by plaintiffs from *Clark, S.J.*, December 1961 Civil Term, NASH Superior Court.

In this civil action the plaintiffs seek to recover the sum of $69,314.50 and interest from February 20, 1951. They allege, as best we are able to unravel the complaint, the following: They are the next of kin and heirs at law of B. F. Wood who died intestate on February 20, 1951, without lineal descendants. His widow, the defendant Lillian

J. Wood, qualified as administratrix of the estate. The defendant Maryland Casualty Company became surety on her bond. The assets of the estate at Mr. Wood's death consisted, in part, of six shares of "A" (voting) stock and 300 shares of "B" (nonvoting) stock in Brantley-Wood & Company, a North Carolina corporation; that the actual value of the intestate's interest in the corporation was $69,314.50. Three shares of the "A" stock were awarded to the widow as her year's allowance.

Here are quoted three paragraphs from the plaintiffs' complaint:

> "5. That the personal assets of the estate of said decedent were insufficient to provide the widow's year's support and to pay debts of the estate, taxes and costs of administration.
>
> "8. That the personal assets have been exhausted and that Lillian J. Wood, widow of said decedent, will not be entitled to any amount which may be recovered by reason of this litigation.
>
> "12. That on the 5th day of March, 1951, 13 days after the date of the death of the said decedent, the defendants, Charles Brantley, Lizzie W. Brantley and Lillian J. Wood, conspired, agreed and consented together to have three shares of Class 'A' voting stock in said corporation, a part of the stock owned by the estate of said decedent, transferred to the said Lillian J. Wood to the end that she might become a stockholder, director and officer in the said corporation."

The plaintiffs allege further that Lillian J. Wood was elected a director and officer in Brantley-Wood & Company and that she, Charles Brantley, and Lizzie W. Brantley, as directors, by all sorts of mismanagement, including speculation in cotton futures, wrecked the corporation. ". . . the stock in said corporation became worthless (the corporation) . . . was thereafter adjudged a bankrupt and there was no equity for stockholders. . . ."

The plaintiffs demanded judgment for the $69,314.50, the value of the intestate's stock in Brantley-Wood & Company, and its debentures due him at the date of his death.

The defendants filed separate demurrers upon the grounds (1) the complaint fails to allege facts sufficient to state a cause of action and (2) misjoinder of parties and alleged causes.

The court entered judgment sustaining the demurrers. The plaintiffs appealed.

L. L. Davenport for plaintiffs appellants.

Fields & Cooper, By Milton P. Fields for defendants Charles Brantley and Lizzie W. Brantley, appellees.

O. B. Moss, and Gardner, Connor & Lee for defendant Wood, appellee.

Battle, Winslow, Merrell, Scott & Wiley, By Francis E. Winslow for defendant Maryland Casualty Company, appellee.

HIGGINS, J. The demurrers challenge the complaint upon two grounds: (1) Failure to allege facts sufficient to constitute a cause of action; and (2) misjoinder of parties and causes. The Court passes on a demurrer as a matter of law. If the facts alleged in a complaint constitute a defective statement of a good cause of action, judgment is entered sustaining the demurrer but permitting the plaintiff to amend. G.S. 1-131. *Lumber Co. v. Pamlico County*, 250 N.C. 686, 110 S.E. 2d 282. However, if the complaint shows the plaintiff does not have a cause of action, that is, the cause he attempts to allege is fatally defective, judgment is entered sustaining the demurrer and dismissing the action. *Perrell v. Service Co.*, 248 N.C. 153, 102 S.E. 2d 785; *Adams v. College*, 247 N.C. 648, 101 S.E. 2d 809.

The plaintiffs claim the right to maintain this action as the next of kin and distributees of B. F. Wood who died intestate in 1951. The defendants are: Lillian Wood, widow and administratrix of her husband's estate, Maryland Casualty Company, her bondsman, Charles Brantley, and Lizzie W. Brantley. The plaintiffs allege that Mr. Wood and the Brantleys were the directors and owners of the stock in Brantley-Wood & Company, a North Carolina corporation; that the stock owned by Mr. Wood and the debentures which he held in the corporation were worth the sum of $69,314.50 at the time of his death.

The plaintiffs allege the administratrix and the Brantleys conspired to have three shares of voting stock in Brantley-Wood & Company transferred to Lillian J. Wood "to the end that she might become a stockholder, director and officer of the corporation." They further allege that Mrs. Wood and the Brantleys, by many specifically charged acts of mismanagement, including gambling in cotton futures, wrecked the corporation, causing it to be adjudged a bankrupt, and the stock to become worthless. This action is to recover what the plaintiffs allege was the value of the Wood interests in the corporation as of his death, and interest from that date.

The plaintiffs do not claim any right to recover what actually was, or what by proper management should have been, their distributive shares in the Wood estate. In fact, as shown by allegations 5 and 8 of the complaint, the Wood estate was insolvent. There were no personal assets to distribute. Hence the complaint neither states nor attempts to state a cause of action against the administratrix or her bondsman for failure to pay distributive shares. "Courts are not open to 'parties'

who have no interest to preserve." *Utilities Com. v. Kinston,* 221 N.C. 359, 20 S.E. 2d 322. Nor do plaintiffs allege that by proper management on the part of the administratrix the personal estate would have been sufficient to provide any personal assets for distribution to the next of kin. See *Poindexter v. Bank,* 244 N.C. 191, 92 S.E. 2d 773.

Realizing their inability to show a net estate for distribution, the plaintiffs base their claim of loss exclusively on the directors' mismanagement of the corporation. The amount claimed is the value of the Wood interest in the corporation at the date of the intestate's death. So much appears in the complaint itself. By way of further confirmation, the plaintiffs' brief states: "This action is brought by plaintiffs to recover judgment for damages alleged to have resulted from the defendants' mismanagement, dereliction and maladministration of the affairs of Brantley-Wood & Company, a corporation." May the distributees of a decedent who owned stock maintain an action against the officers of that corporation for mismanagement?

Ordinarily, the right to sue officers of a corporation for mismanagement is in the corporation. Relief must be sought through the corporation or in an action to which it is a party. In the absence of allegation that the action by the corporation has been demanded and refused, a demurrer must be sustained dismissing the action. *Jordan v. Hartness,* 230 N.C. 718, 55 S.E. 2d 484. Recovery can be had in behalf of the corporation only. *Hill v. Erwin Mills,* 239 N.C. 437, 80 S.E. 2d 358; *Hawes v. Oakland,* 104 U.S. 450, 26 L.ed. 827; *Hoyle v. Carter,* 215 N.C. 90, 1 S.E. 2d 93; Strong's N.C. Index, Vol. 1, "Corporations," § 5, p. 611. Under certain limited circumstances, minor stockholders may sue for mismanagement but the corporation must be a party. *Fulton v. Wright,* 255 N.C. 185, 120 S.E. 2d 412. When the corporation is in bankruptcy, the trustee must bring the action, or must be a party. Remington on Bankruptcy, § 1206; *Bynum v. Scott,* 217 Fed. 122; *Stephan v. Merchants Collateral Corp.,* 256 N.Y. 418, 176 N.E. 824. The foregoing applies to the rights of stockholders. Conceivably the personal representative may represent a deceased stockholder. However, the next of kin after death, and stockholders after dissolution by bankruptcy or otherwise, share only after debts are paid. Allegations that the estate is insolvent and the corporation is bankrupt affirmatively show the disqualification of plaintiffs to maintain this action. Consequently, if the plaintiffs offered plenary proof of all they allege, the effect would be to prove themselves out of court. *Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717; *In re Davis,* 248 N.C. 423, 103 S.E. 2d 503; *Fuquay Springs v. Rowland,* 239 N.C. 299, 79 S.E. 2d 774; *Ice Cream Co. v. Ice Cream Co.,* 238 N.C. 317, 77 S.E. 2d 910.

Having concluded the plaintiffs' alleged cause of action is inherently defective, we do not reach the question of misjoinder. The judgment of the Superior Court of Nash County is

Affirmed.

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

GREELEY B. CARTER v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 March, 1962.)

1. Appeal and Error § 51—

In an action for negligence, nonsuit entered without assigning the legal ground therefor must be sustained if the evidence fails to show defendant's negligence, or if it affirmatively shows plaintiff's contributory negligence as a matter of law.

2. Railroads § 5—

The evidence in this case held sufficient to be submitted to the jury on the issue of the negligence of defendant railroad proximately causing a grade crossing accident, all doubts being resolved in plaintiff motorist's favor.

3. Same—

Evidence tending to show that plaintiff was familiar with the grade crossing in question, that he did not stop his vehicle before entering on the crossing, that he became aware of the approaching locomotive when it was some 30 feet from the crossing, and that plaintiff then applied his brakes and skidded onto the tracks in front of the train, *is held* to disclose contributory negligence as a matter of law.

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

APPEAL by plaintiff from *Morris, J.*, September 1961 Civil Term, NEW HANOVER Superior Court.

The plaintiff instituted this civil action to recover for personal injury and damage to his automobile resulting from a grade crossing collision between his vehicle and the defendant's engine near Wilmington in New Hanover County. The accident occurred shortly before 6:00 a.m. on June 3, 1957. The plaintiff, driving a 1953 Pontiac on Princess Street Road, approached the crossing from the west. The defendant's engine approached the crossing from the southeast.

The plaintiff alleged his injuries and damages were proximately caused by the defendant's negligence in these particulars: (1) The en-

gine crew did not keep a proper lookout; (2) did not give any signal of the engine's approach; (3) operated the engine at excessive speed; (4) did not slow down or stop in time to avoid the accident; (5) maintained a foul right of way which obstructed the view of the train's approach.

The defendant denied all allegations of negligence and, by way of further defense, alleged the plaintiff was familiar with the crossing; that he failed to look and listen for the train's approach, of which he had an unobstructed view; that he attempted to cross the intersection at an excessive and unsafe rate of speed; that he ran into the crossing in front of the train and his injury and damage were the result of his own negligent acts.

The plaintiff admitted he was familiar with the crossing. He testified: "As I approached the crossing, . . . I slowed down, looked . . . both ways. On the right hand or western side of the Atlantic Coast Line tracks . . . there were weeds, and bushes . . . higher than my head, I would say roughly, seven or eight feet high; . . . These weeds and bushes grew within ten or twelve feet of the hard surface portion of the Princess Street Road. . . . I could not see the train coming because of the weeds and bushes grown up on the embankment. I would say I was about 30 feet from the track before I could see the train. . . . The moment I saw the train I applied my brakes and tried to stop, but I was not able to avoid a collision. . . . there was sand on the street, and I went to skidding, and then the train hit me. . . . The train, as it approached did not blow any horn or whistle or ring any bell. There wasn't any watchman . . . at that crossing . . . I did not see the train long enough to form an opinion as to what speed . . . I would say I was about 30 feet from the crossing before I discovered or first became aware that the train was approaching."

The evidence indicated a dirt road eight or ten feet wide paralleled the railroad track along which the train approached. One of plaintiff's witnesses testified he had a ruler six feet in length and that the weeds and bushes near the track were higher than the end of the ruler. "It (top of weeds and bushes) must have been nine feet from the ground counting the little hill," (apparently an embankment near the track). He had never seen an engine approach from the southeast. He didn't know whether one could be seen over the obstruction, and didn't know whether the top of the engine was 16 feet high, though he guessed it was about eight feet.

The evidence disclosed the weeds and bushes were near the track — also near the road. There was no evidence, however, the obstructions were on the railroad right of way.

At the close of plaintiff's evidence, the court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

S. Bunn Frink, Elbert A. Brown, Isaac C. Wright, By I. C. Wright for plaintiff appellant.

Poisson, Marshall, Barnhill & Williams, By M. V. Barnhill, Jr., for defendant appellee.

HIGGINS, J. The trial judge did not assign the legal ground upon which he based the nonsuit. The judgment must be sustained if the evidence fails to show the defendant's negligence. Conversely, it must be sustained if the evidence does show plaintiff's contributory negligence as a matter of law.

The evidence of negligence on the part of the railroad leaves us with disturbing doubts as to its sufficiency to make out a case. The plaintiff did not hear any signal of the train's approach. However, he did not remember whether his windows were up or down. There is evidence of a partial obstruction of a traveler's view of the track on which the train approached. There is, however, no evidence the obstruction was on the defendant's right of way. The plaintiff testified the train crew did not give any warning signal. Fully realizing the evidence presents a fringe case on the first issue, we resolve the doubts in plaintiff's favor. *Jarrett v. R.R.*, 254 N.C. 493, 119 S.E. 2d 383; *Coltrain v. R.R.*, 216 N.C. 263, 4 S.E. 2d 853; *Harris v. R.R.*, 199 N.C. 798, 156 S.E. 102; *Collett v. R.R.*, 198 N.C. 760, 153 S.E. 405; *Johnson v. R.R.*, 163 N.C. 431, 79 S.E. 690.

While the plaintiff's evidence leaves the question of defendant's negligence in the twilight, we think his contributory negligence appears in full daylight. He lived in the vicinity and was familiar with the crossing and its surroundings. Yet, with this full knowledge, he failed to stop, but proceeded toward the crossing until he became aware of the train's approach, suddenly applied his brakes, and skidded on to the track in front of the train. He failed to use his faculties but trusted to luck which, as sometimes happens, turned out to be bad. According to his admission, he saw the train, or, as he said, he became aware of its approach when it was 30 feet from the crossing. But his speed and his failure to stop had placed him in the danger zone from which he could not extricate himself. "It does not suffice to say that the traveler stopped, looked and listened; the looking and listening must be timely so that the precaution may be effective." *Johnson v. R.R.*, 255 N.C. 386, 121 S.E. 2d 580.

The plaintiff in this case did not stop as in *Johnson v. R.R.*, 255 N.C. 386, or as in *Jarrett v. R.R., supra.* There was no evidence that the train was speeding as in those cases. "In the instant case plaintiff knew that he was approaching a railroad, and he knew he was entering a zone of danger. He was required before entering upon the track to look

and listen and to ascertain whether a train was approaching." *Irby v. R.R.*, 246 N.C. 384, 98 S.E. 2d 349; *Arvin v. McClintock*, 253 N.C. 679, 118 S.E. 2d 129; *Beaman v. R.R.*, 238 N.C. 418, 78 S.E. 2d 182; *Jones v. R.R.*, 235 N.C. 640, 70 S.E 2d 669; *Parker v. R.R.*, 232 N.C. 472, 61 S.E. 2d 370; *Dowdy v R.R.*, 237 N.C. 519, 75 S.E. 2d 639; *Penland v. R.R.*, 228 N.C. 528, 46 S.E. 2d 303; *Jeffries v. Powell*, 221 N.C. 415, 20 S.E. 2d 561.

The foregoing cases are authority for compulsory nonsuit on the basis of plaintiff's contributory negligence. The judgment entered in the Superior Court of New Hanover County is

Affirmed.

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

PAUL D. PARKER, ADMINISTRATOR OF THE ESTATE OF PAUL CHEATHAM PARKER, DECEASED v. TRAVIS JACKSON FLYTHE AND CHARLES ALBERT BRITT.

(Filed 21 March, 1962.)

1. Automobiles § 41d—

Testimony as to skid marks, the location of the respective vehicles after the collision and of other physical facts at the scene, together with testimony of statements of one defendant after the accident and testimony of the other defendant upon the trial, *is held* insufficient to show or raise a reasonable inference that either defendant failed to keep his car on his right side of the highway or failed to yield one half the highway to the car driven by intestate in the opposite direction, and therefore nonsuit was correctly entered in plaintiff's action based upon defendants' violation of the statutes. G.S. 20-146 and G.S. 20-148.

2. Negligence § 24a—

In order to be sufficient to be submitted to the jury, evidence of negligence must raise more than a mere conjecture.

3. Pleadings § 28—

Plaintiff must prove his case in conformity with facts alleged in the complaint.

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

APPEAL by plaintiff from *Paul, J.*, November Civil Term 1961 of NORTHAMPTON.

Administrator's action to recover damages for the alleged wrongful

death of his intestate, Paul Cheatham Parker, who died March 15, 1959.

The collisions referred to below occurred on March 15, 1959, about 12:15 a.m., on Highway #258, in Northampton County, between Woodland and Murfreesboro, approximately two and one-half miles north of Woodland. Highway #258, where the collision occurred, is straight and runs north-south.

Prior to said collisions, plaintiff's intestate, hereafter called Parker, was operating a 1954 Buick, defendant Britt was operating a 1955 Oldsmobile, and defendant Flythe was operating a 1957 Ford, on Highway #258. Parker was driving south toward Woodland. Britt and Flythe were driving north toward Murfreesboro.

Plaintiff alleged that, as Parker was meeting the cars operated by defendants, Flythe, in an attempt to overtake and pass Britt, drove into his (Flythe's) left lane and into the path of Parker's oncoming car. Plaintiff alleged that, on account of the negligence of defendants, in particulars set forth, defendants' cars, successively, collided with Parker's car, and the two collisions proximately caused Parker's death.

Defendants, answering separately, denied all allegations as to their negligence; and each defendant, for a further defense and as a counterclaim, alleged the collision involving his car was proximately caused by the negligence, in particulars set forth, of Parker. Each defendant alleged he saw the Parker car "swerve across the center line of said highway," and that he "attempted to propel his car out of the path" of the Parker car but was unable to do so. Flythe alleged the Parker car "ran into the left front side of and collided with" the Flythe car. Britt alleged the Parker car "ran into the front end of and collided with" the Britt car.

Plaintiff, by replies, denied the allegations set forth in the further defense and counterclaim of each defendant.

At the close of plaintiff's evidence, the court, allowing defendants' motions therefor, entered judgment of nonsuit as to each defendant and dismissed plaintiff's action. Each defendant having announced he would take a voluntary nonsuit as to his counterclaim, the court also ordered "that the counterclaim of each defendant be dismissed as of voluntary nonsuit."

Plaintiff excepted and appealed.

James R. Walker, Jr., and Samuel S. Mitchell for plaintiff appellant.
Martin & Flythe for defendants appellees.

BOBBITT, J. Immediately after said collisions, Parker was dead.

The evidence was sufficient to support a finding that his death was proximately caused by one or both of the collisions.

The paved portion of the highway was approximately 22 feet wide. On the east side, there was an eight-foot shoulder. On the west side, the shoulder was "maybe 6 feet or 7 feet."

In determining what proximately caused the collisions, the crucial question is which driver or drivers failed to drive "upon the right half of the highway" in violation of G.S. 20-146 and failed to give to the other "at least one-half of the main-traveled portion of the roadway" in violation of G.S. 20-148. To establish his allegations as to what proximately caused the collisions, plaintiff offered (1) the testimony of D. S. Skiles, the investigating State Highway Patrolman, and (2) the testimony of defendant Britt, called and examined (at trial) as an adverse witness.

Skiles testified in detail as to what he observed upon his arrival at the scene of the collisions and as to what Flythe and Britt then told him had occurred. Skiles' testimony, summarized or quoted, bearing upon physical conditions observed by him, is set forth below.

After the collisions, the Flythe car was north of the Parker car and the Parker car was north of the Britt car. The Britt car was across the highway, at right angles thereto, a portion in each highway lane, fronting toward the east. The left front, including fender, light, hood and grille, were damaged. The Parker car was 15-16 feet north of the Britt car. It was on the east shoulder, facing east, "with the right side . . . making an acute angle with the east edge of the highway." The left headlight and the windshield of the Parker car were gone. The principal damage was to the left front, extending to the fire wall. The right front door was also damaged.

Debris was on both sides of the center line of the highway, in the area between the Parker and Britt cars and under the Britt car. A nine-foot skid mark, made by the Britt car, was in the east lane of the highway. Skid and scuff marks made by the Parker car were in the east lane of the highway. No marks made by the Parker car were in the west lane.

Parker's body was in the (west) lane for southbound traffic, near the center line, a short distance south of the Britt car.

The Flythe car was on the west shoulder, facing a ditch, "the back part of the car sticking over the pavement approximately two feet and a half or maybe three feet or better." The entire left front was severely damaged. Tread marks, made by the left front wheel of the Flythe car, started "just to the right of the white line" and continued in an arc, first curving to the east (Flythe's right) and thereafter curving to the west and crossing the center. During all or part of its said course,

the mark was made, apparently, by the rim of the left front wheel of the Flythe car. When it came to rest, the Flythe car was 129 feet from the area of the debris.

Skiles testified, on direct examination, as to these statements made by Flythe at the scene of the collisions. Flythe said "he was traveling along on his right-hand side headed to Murfreesboro," and that the Parker-Flythe collision occurred when the Parker car "cut to its left into his side" and he (Flythe) pulled to his right. Flythe also said the Parker "car swerved over to his left and he (Flythe) pulled to his right and struck the vehicle and lost control of it and there is where it landed."

Britt testified, on examination by plaintiff's counsel, that he was following, and was never in front of, the Flythe car; that, when he last saw the taillights thereof, the Flythe car was 50-75 yards ahead of him; and that Flythe's taillights disappeared and Parker's lights "flew in (his) face" and "were coming right across the lane to (him)."

After careful consideration, we are of opinion, and so decide, that the evidence when considered in the light most favorable to plaintiff, does not show, and does not permit a reasonable inference, that either Flythe or Britt, at the time of the collision, was operating his car to his left of the center of the highway. Whether the evidence as to physical conditions is considered alone or in combination with (1) the testimony as to Flythe's statements to Skiles and (2) the testimony of Britt, the same conclusion is reached.

The sufficiency of plaintiff's evidence must be tested in the light of well settled legal principles recently stated in *Boyd v. Harper,* 250 N.C. 334, 339, 108 S.E. 2d 598, and in cases cited therein. As stated by *Brogden, J.,* in *Grimes v. Coach Co.,* 203 N.C. 605, 609, 166 S.E. 599: "In the present case, deductions, inferences, theories and hypotheses rise and run with the shifting turns of interpretation, but proof of negligence must rest upon a more solid foundation than bare conjecture."

It is noted: There was no evidence sufficient to show the factual situation alleged by plaintiff as the basis for his allegations of negligence, namely, that Flythe, in an attempt to overtake and pass Britt, drove into his (Flythe's) left lane and into the path of Parker's oncoming car. According to Britt's uncontradicted testimony, Britt was never in front of Flythe. See *Sowers v. Marley,* 235 N.C. 607, 611, 70 S.E. 2d 670. "Plaintiff must prove his case in conformity with the facts he alleges to create liability." *Bundy v. Belue,* 253 N.C. 31, 36, 116 S.E. 2d 200, and cases cited.

On account of plaintiff's failure to offer evidence sufficient to support

a finding that negligence, if any, on the part of defendants, or either of them, proximately caused Parker's death, the judgment of nonsuit, as to each defendant, is affirmed.

Affirmed.

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

SYLVIA S. THERRELL v. RUFUS FRED FREEMAN.

(Filed 21 March, 1962.)

1. Trial § 33—

The trial court is required by statute to declare and explain the law arising on the evidence as to all substantial features of the case without prayer for special instructions, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient, the provisions of the statute being mandatory. G.S. 1-180.

2. Same—

Where statutory law is involved in an action, a simple explanation thereof is generally preferable to reading the statute to the jury, but in any event the court is required not only to charge the statutory law but also to apply the statutory law to the evidence in the case.

3. Negligence § 28—

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence, and without explaining the law applicable to the facts in evidence, constitutes prejudicial error.

4. Appeal and Error § 17—

Certiorari is allowed in this State only upon vote of a majority of the members of the Supreme Court in conference, and when the Court has decided that defendant had not been guilty of laches in prosecution of the appeal and that the appeal is meritorious, and grants *certiorari*, it is irrelevant and impertinent for opposing counsel to contend in the brief that *certiorari* should not have been allowed.

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

On writ of *certiorari* from *Sink, E.J.*, April 1961 Civil Term of MECKLENBURG. Defendant appealed.

This is a civil action to recover for personal injuries suffered by plaintiff in a collision of motor vehicles allegedly caused by the actionable negligence of defendant.

Plaintiff and defendant were operating automobiles northwardly along South College Street in Charlotte. Defendant was following plaintiff. Plaintiff stopped and defendant's car ran into the rear of plaintiff's vehicle.

The Court submitted issues of negligence, contributory negligence and damages. The jury answered the first two issues in favor of plaintiff and awarded $7500 damages. Judgment was entered in accordance with the verdict. Defendant excepted and gave notice of appeal.

The case on appeal was not settled by agreement or by the judge prior to the time for docketing in the Supreme Court. Defendant petitioned the Supreme Court for writ of *certiorari* and the petition was allowed.

Defendant assigns error.

Bailey & Booe for plaintiff.
John H. Small for defendant.

MOORE, J. Defendant assigns as error the court's instructions to the jury on the second or contributory negligence issue. Exceptions relate particularly to the judge's definition of contributory negligence, his failure to declare and explain the law arising on the evidence, and his failure to apply the law to the facts.

Defendant alleges that plaintiff was negligent on the occasion in question in that she (1) violated G.S. 20-154(a) by suddenly stopping the vehicle she was operating without first ascertaining that she could do so in safety, (2) failed to give a signal of her intention to stop, and (3) failed to keep a proper lookout; and that such negligence on plaintiff's part was a contributing cause of the collision and plaintiff's injuries. Whether there was evidence to support any or all of these specific allegations of negligence is a question not presented on this appeal. We assume that one or more of the allegations was supported by evidence since the court submitted an issue of contributory negligence.

In charging on this issue the court declared: "Contributory negligence is but the failure to exercise due care upon the plaintiff as a driver, and due care means here just what it did before." The court then properly placed the burden of proof on defendant, and gave defendant's contentions in very general terms. Nowhere in the charge, on this issue or elsewhere, is there any instruction, declaration or explanation as to the law with reference to stopping, signals or lookout, nor any attempt to apply the law relative to any of these matters to the particular facts and circumstances in this case. The court concluded its charge on this issue as follows: "If you shall be satisfied

by the greater weight of the evidence with his contentions on the second issue, you will answer it Yes, and if you are not so satisfied . . . you answer it No."

The court's charge on the contributory negligence issue is inadequate and fails to comply with G.S. 1-180. The provisions of that statute are mandatory, and a failure to comply is prejudicial error. *Godwin v. Hinnant,* 250 N.C. 328, 108 S.E. 2d 658.

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. *Byrnes v. Ryck,* 254 N.C. 496, 119 S.E. 2d 391; *Rowe v. Fuquay,* 252 N.C. 769, 114 S.E. 2d 631; *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331. If the pertinent law is statutory, a mere reading of the statute without applying the law to the evidence is insufficient. *Chambers v. Allen,* 233 N.C. 195, 63 S.E. 2d 212. The court is not required to read the statute to the jury; a simple explanation of the law is generally preferable. *Kennedy v. James,* 252 N.C. 434, 113 S.E. 2d 889; *Batchelor v. Black,* 232 N.C. 314, 59 S.E. 2d 817.

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence and without explaining the law applicable to the facts in evidence, constitutes prejudicial error. *Dixon v. Wiley,* 242 N.C. 117, 86 S.E. 2d 784.

Defendant makes thirty-one assignments of error. Since there must be a new trial, it is not deemed necessary or beneficial to discuss them *seriatim.* The errors involved, if any, may not recur upon a retrial.

Counsel for plaintiff contends in the brief that *certiorari* should not have been allowed by this Court. The argument is irrelevant and impertinent. Long before the time for filing brief this question was moot.

It is the custom and practice in this Court that all petitions for *certiorari* and all motions relating to appeals are considered and decided by the full Court in conference. Concurrence of a majority of the Court is required for decision in any of these matters. *Certiorari* may be granted in some appellate courts without a conference vote and by acquiescence of less than a majority of the members, but not so here. The fact that orders are signed by only one member of the Court, for the Court, may not be taken to mean that the Justice who signed the order passed on the petition alone. The petition for *certiorari* in the instant case was considered by the full Court in conference, with all members present. The decision thereon is the decision of the Court. The Court decided that defendant had not been guilty of laches

in prosecution of the appeal and that the appeal was meritorious. In exercise of its discretion the Court issued the writ. *State v. Angel*, 194 N.C. 715, 140 S.E. 727. Counsel will not now be heard to say that the writ was improvidently issued. The matter is not debatable.

New trial.

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

EARL J. FOWLER v. NATIONWIDE INSURANCE COMPANY, WILLIAM R. EASTRIDGE AND MAX WILSON.

(Filed 21 March, 1962.)

1. Contracts § 31—

A wrongful interference by a third person with a contract for personal services gives rise to a cause of action in favor of a party to the contract.

2. Same; Contracts § 19; Attorney and Client § 7— Execution of new contract in regard to entire subject matter constitutes novation.

Plaintiff attorney's evidence was to the effect that he had a contract with an injured person to collect compensation for the injuries, that defendant insurer, its agent, and its appraiser, induced the injured person to breach the contract, and that upon her request as to the amount owing for services theretofore rendered, plaintiff named a sum and gave her a release upon payment of such amount. Plaintiff's evidence further disclosed that thereafter the injured party told plaintiff what had transpired, and made a new contract with plaintiff identical with the original, and that plaintiff then instituted suit for the injured party, obtained a settlement and received his contractual portion of the sum paid. *Held:* The execution of the second contract constituted a novation and substituted the new contract for the old, and therefore plaintiff may not maintain any action against defendants for wrongfully inducing the injured party to breach the original contract.

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

APPEAL by plaintiff from *McLean, J.*, August 1961 Term of BUNCOMBE.

Plaintiff seeks damages because of the alleged tortious conduct of defendants in procuring Shirley Jo Whitaker (hereafter merely Whitaker) to breach her contract with plaintiff.

Plaintiff's evidence is sufficient to show *prima facie* these facts: On 29 September 1959 Whitaker, a guest in an automobile operated by Jesse Black, was injured in a collision with another motor vehicle operated by Mrs. Godfrey. Nationwide was Mrs. Godfrey's liability

insurance carrier. Eastridge was an employee of Nationwide authorized to adjust and settle claims against its insured. Wilson operated a garage and made appraisals of property damage for Nationwide. On 3 October 1959 Whitaker contracted with plaintiff, an attorney at law, to obtain compensation, by settlement or litigation, for the injuries sustained by Whitaker in the collision. Plaintiff, as compensation for his services, would receive a percentage of the amount paid to Whitaker in settlement of her claim. Plaintiff would receive a smaller percentage if Whitaker's claim was fixed by agreement than if determined in a lawsuit. Pursuant to this contract plaintiff contacted Nationwide and its agent, Eastridge. There were negotiations looking to a settlement of Whitaker's claims. With knowledge of plaintiff's contract, defendants fraudulently induced Whitaker to breach it, representing to her that settlement would be made if Whitaker would discharge plaintiff, thereby securing greater benefits for herself. To induce plaintiff to consent to a cancellation of his contract, defendants suggested a false reason which Whitaker could assign for the termination. Whitaker, acting pursuant to the advice and instructions of defendants, notified plaintiff that she would not proceed with her contract, assigning as the reason for the abandonment of her claim the objection of her husband to possible litigation. This reason had been suggested by defendants. It was not true. She inquired of plaintiff the amount owing for his services. The sum named was paid by Whitaker with money obtained from defendants for that purpose. The sum so paid was less than the amount which defendants had furnished Whitaker. Plaintiff thereupon gave Whitaker a full release.

Nationwide did not settle with Whitaker as it had led her to believe it would. She then went back to plaintiff, informed him what had transpired, and made a new contract with plaintiff identical in terms with her original contract. Plaintiff then instituted suit for Whitaker against Godfrey. During the trial of that action Nationwide, with the approval of plaintiff, settled with Whitaker. Plaintiff received his contractual portion of the sum then paid.

Defendants' motion for nonsuit at the conclusion of plaintiff's evidence was allowed. Plaintiff appealed.

Lee & Allen for plaintiff appellant.

Williams, Williams & Morris by Robert R. Williams, Jr., for defendant, appellees.

RODMAN, J. The right to recover damages resulting from a wrongful interference with a contract for personal services has long been recognized. *Haskins v. Royster,* 70 N.C. 601; *Jones v. Stanly,* 76 N.C.

355; *Arkansas v. Texas*, 346 U.S. 368, 98 L. ed. 80; *Edwards v. Dowdy*, 70 S.E. 2d 608; *Lurie v. New Amsterdam Casualty Co.*, 1 N.E. 2d 472; *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754, 84 A.L.R. 35; *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176, and the numerous authorities there cited.

For the purpose of this appeal it may be conceded that plaintiff's evidence relating to the breach of the contract of 3 October would have sufficed to support a verdict for wrongfully inducing Whitaker to breach her contract had plaintiff elected to pursue that course; but he waived that right and took in payment for his services a sum which he fixed as fair compensation. That payment and the release then given Whitaker, so long as it remained in force, released defendants from liability.

Plaintiff, ignorant of the fraud causing him to consent to the release, could, upon discovering the facts, have maintained an action to set the release aside and for damages resulting from the fraudulent interference with his contractual rights; but when, with knowledge of the facts, he elected to make a new contract for the same services, he substituted the new for the old; the original thereupon ceased to exist. The acceptance of benefits under the new contract was a complete bar to plaintiff's original right of action. *Morgan v. Speight*, 242 N.C. 603, 89 S.E. 2d 137; *Bixler v. Britton*, 192 N.C. 199, 134 S.E. 488; *Burns v. McFarland*, 146 N.C. 382; *Swift v. Beaty*, 282 S.W. 2d 655; *Krause v. Hartford Accident & Indemnity Co.*, 49 N.W. 2d 41; *Bailey v. Banister*, 200 F. 2d 683; 12 Am. Jur. 1041; 17 C.J.S. 885.

Affirmed.

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

THELMA VANCE v. REV. T. R. HAMPTON, MARSHALL HALL, CHAIRMAN OF THE BOARD OF DEACONS; ALBERT HERNDON, MANUEL LOWERY, AND GLENN WELLS, MEMBERS OF THE BOARD OF DEACONS; AND WILLIE HINTON, CHAIRMAN OF THE BOARD OF TRUSTEES OF MOUNT CALVARY BAPTIST CHURCH OF GASTONIA, NORTH CAROLINA; AND EXCELSIOR CREDIT UNION.

(Filed 21 March, 1962.)

1. Appeal and Error § 19—

Where no exception appears in the entire case on appeal, appellants' assignments of error are ineffectual.

2. Appeal and Error § 21—

A sole exception to the judgment presents only the question whether error of law appears upon the face of the record, and in the absence of error of law so appearing, the order or judgment must be affirmed.

3. Injunctions § 13—

Where a temporary restraining order is dissolved upon the hearing to show cause but the action is not dismissed, the findings of fact or recitals in the order, relating solely to whether the temporary order should be continued or dismissed, are not binding upon the trial on the merits if the parties thereafter file pleadings which raise issues of fact.

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

APPEAL by plaintiff from *Walker, Special Judge,* August Civil Term 1961 of GASTON.

On May 26, 1961, when summons was issued, Judge Froneberger signed an *ex parte* order providing: ". . . IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant Excelsior Credit Union be temporarily restrained from paying out any portion of the Building Fund deposited in the name of Mt. Calvary Baptist Church; and that the other defendants herein be temporarily restrained from exercising the option to purchase the site on North Marietta Street, from calling further congregational meetings, and from taking any action to expel your affiant and Samuel Lowery from office in said church until a final determination of this action." The defendants were ordered to appear before Judge Farthing at time and place specified and "show cause why the restraining order should not be made permanent until such time *as a suit* can be properly adjudicated." (Our italics) The said order was based on the "AFFIDAVIT OF PLAINTIFF," in which the "affiant" prayed that "a temporary restraining order be issued" containing the provisions set forth in said order.

Immediately after said order and said "AFFIDAVIT OF PLAINTIFF," there appears in the record a consent order dated June 16, 1961. This consent order, signed by Judge Farthing and bearing the consent of counsel for plaintiff and for defendants, recites "that the plaintiff and defendants have settled, agreed and compromised *certain* of the matters and things at issue and in controversy between them and have consented to the entry of the following order." (Our italics) The consent order of June 16, 1961, in pertinent part, provides:

"NOW, THEREFORE, IT IS, BY CONSENT, ORDERED:

"1. That the temporary restraining order dated May 26, 1961, signed by P. C. Froneberger, Resident Judge of the 27th Judicial District, be dissolved.

"2. That a congregational meeting to determine whether or

not an option for the purchase from John L. Farris of certain realty on North Marietta Street, or any other option for the purchase of realty, should be exercised be called within a period of not in excess of thirty (30) days from the date of this order.

"3. That such congregational meeting be presided over by Rev. J. H. Acker, Pastor of St. Paul's Baptist Church of Gastonia, North Carolina.

"4. That written notice of such congregational meeting be mailed to every member of Mount Calvary Baptist Church at least seven (7) days before the date of such meeting by the Rev. J. H. Acker, as presiding officer, and in addition verbal notice of such meeting be given from the pulpit of the Mount Calvary Baptist Church seven (7) days or more before such congregational meeting.

"5. That such congregational meeting be governed by the rules of parliamentary procedure heretofore adopted by the congregation of Mount Calvary Baptist Church.

"6. That the plaintiff be not required to file a complaint in this action until further order of this Court."

Immediately after said consent order, there appears in the record a report dated July 28, 1961, by J. H. Acker, stating that a meeting of the congregation of Mount Calvary Baptist Church, duly called and convened, was held July 18, 1961, at which time action was taken as set forth in the (attached) minutes of said meeting as taken by Mrs. Prince W. Ramseur, the Secretary. According to said minutes, a vote was taken on a motion, duly made and seconded, that "the Church purchase the property on North Marietta Street from John L. Farris"; that 222 persons were present, exclusive of children; that 146 voted in favor of the motion; that 50 voted against the motion; and that 26 did not vote.

In a motion filed July 29, 1961, plaintiff challenged the validity of the action taken at the meeting held July 18, 1961, on grounds set forth therein, and prayed:

(a) "That the action taken at the meeting on July 18, 1961, be declared null and void."

(b) "That a temporary restraining order be issued against the defendant Excelsior Credit Union from paying out any portion of the building fund."

(c) "That the Court order another congregational meeting to be held for the purpose of determining whether the said option should be exercised; that until such time the other defendants be

restrained from calling further congregational meetings or attempting to exercise the said option."

(d) "For such other and further relief as your movant may be entitled to in law and in equity by reason of the premises."

Upon the filing of plaintiff's said motion and based thereon, Judge Froneberger, on July 29, 1961, signed an *ex parte* order providing: ". . . it is hereby ordered, adjudged and decreed that the defendant Excelsior Credit Union be temporarily restrained from paying out any portion of the building fund deposited in the name of Mount Calvary Baptist Church; and that the other defendants herein be temporarily restrained from exercising the option to purchase the site on North Marietta Street and from calling further congregational meetings until further order of this Court." The defendants were ordered to appear at time and place specified and "show cause why the restraining order should not be made permanent until such a time *as a suit* can be properly adjudicated." (Our italics)

At the hearing on return of the order to show cause issued July 29, 1961, Judge Walker, based on said report of J. H. Acker and attached minutes of said meeting of July 18, 1961, entered an order dated August 15, 1961, providing: ". . . IT IS ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order dated the 29th day of July, 1961, be, and the same is hereby dissolved, both as against the Excelsior Credit Union with reference to the paying out of the Building Fund, and as to the officials of said Church with reference to the exercising of the option to purchase the North Marietta Street site."

The record contains this entry: "To the signing of the foregoing Order, the plaintiff excepts, and in open Court notes an appeal to the Supreme Court of North Carolina."

On appeal, plaintiff's assignments of error are as follows:

"1. For that the Court dissolved the temporary restraining order dated July 29, 1961, without hearing the motion filed by the plaintiff on July 29, 1961.

"2. For that the Court refused to permit plaintiff to introduce any evidence in support of his motion on the grounds that the written report of J. H. Acker, dated July 28, 1961, was binding and conclusive.

"3. For that the Court refused to examine any of the parties, any of the witnesses, or J. H. Acker and Prince W. Ramseur, presiding officer and Secretary, respectively, of the congregational meeting held on July 18, 1961."

Garland & Eck and Robert L. Bradley for plaintiff appellant.
Mullen, Holland & Cooke for defendants appellees.

PER CURIAM. An assignment of error not supported by an exception is ineffectual. *Barnette v. Woody,* 242 N.C. 424, 88 S.E. 2d 223. Here, no exception appears in the entire case on appeal. Hence, there is no basis for the assignments of error appellant attempts to set forth; and no question of law is presented to this Court for decision. *Rigsbee v. Perkins,* 242 N.C. 502, 87 S.E. 2d 926; *Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496. See Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783, *et seq.* Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118.

The only question raised by an exception to the judgment is whether error of law appears upon the face of the record. *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271, and cases cited. Here, no error of law appears on the face of the record. Hence, Judge Walker's order of August 15, 1961, is affirmed.

It is noted that neither Judge Farthing's order of June 16, 1961, nor Judge Walker's order of August 15, 1961, dismisses the action. If plaintiff should file a complaint herein and defendants should answer, and an issue is raised by the pleadings as to the validity of the action taken at the meeting held July 18, 1961, the *findings of fact* or *recitals* in Judge Walker's order of August 15, 1961, relevant solely in determining whether *the temporary* restraining order of July 29, 1961, should be continued in effect or dissolved, will not be binding upon the parties at trial.

Affirmed.

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

THE GENERAL TIRE AND RUBBER COMPANY v. DISTRIBUTORS, INC., AND FRANK R. CARSON, TRUSTEE.

(Filed 21 March, 1962.)

1. Appeal and Error § 40—

A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial and harmful.

2. Appeal and Error § 39—

The burden is upon appellants to show error amounting to a denial of some substantial right.

3. Trial § 33—

Where the charge contains a summary of the material aspects of the evidence sufficient to bring into focus the controlling legal principles, and applies the law to the facts upon every substantial feature of the cause, the charge is sufficient, the court not being required to recapitulate the evidence witness by witness, nor to instruct on subordinate features of the case in the absence of proper request therefor. G.S. 1-180.

4. Appeal and Error § 42—

An exception to the failure of the court to charge as to admissions in the pleadings and evidence, a request for such instructions having been withdrawn, cannot be sustained when the record fails to disclose specifically the admissions referred to, there being no prayer for special instructions in accordance with legal requirements.

5. Trial § 40—

The issues are sufficient when they present all material controversies arising on the pleadings and are sufficient to support the judgment.

6. Trial § 34—

When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the terms "greater weight" or "preponderance of the evidence" in the absence of prayer ~~for~~ special instructions.

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

APPEAL by defendants from *Pless, J.*, October 23, 1961 Civil "A" Term of MECKLENBURG.

This is a civil action instituted 24 March 1958.

Plaintiff sued for possession of merchandise, consisting of vinyl flooring and other floor covering products, which it had previously consigned to corporate defendant and which was stored in corporate defendant's warehouses subject to disposition in accordance with a "warehouse agreement" between the parties. Ancillary proceedings in Claim and Delivery were issued, the products were seized by the sheriff, and, upon failure of corporate defendant to give bond, they were delivered to plaintiff. Plaintiff alleges that it is the owner and entitled to the immediate possession of the merchandise and that corporate defendant wrongfully detains it. Defendants deny the allegations of the complaint and counterclaim for damages for breach of the contract under which corporate defendant was distributor of plaintiff's line of floor covering products in North and South Carolina.

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

"1. At the time the personal property was taken from the defendant's warehouse in March, 1958, was the plaintiff lawfully entitled to its possession, and did the defendants wrongfully detain said personal property, as alleged in the Complaint? Answer: Yes.

"2. Did the plaintiff wrongfully breach its contract with the defendants, as alleged in the Counterclaim? Answer: No.

"3. What amount is defendant entitled to recover of the plaintiff? Answer: _____."

Judgment was entered decreeing that plaintiff is entitled to retain the merchandise and defendants recover nothing on account of their counterclaim.

Defendants appeal.

Orr & Osborne for plaintiff.
Ralph C. Clontz, Jr., for defendants.

PER CURIAM. At the Fall Term 1959 this case was before this Court on questions relating to pleadings. *Rubber Co. v. Distributors, Inc.*, 251 N.C. 406, 111 S.E. 2d 614. At the Fall Term 1960 it was here again, on matters relating to the merits of the case. *Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E. 2d 479. The pleadings and facts essential to an understanding of the case are set out in the former opinions. The only material change since the last opinion is in an amendment to the answer. It was alleged in the original answer that the distributorship contract was to continue for "an indefinite period of time . . . so long as defendant made reasonable efforts to promote said products. . . ." After the opinion at the Fall Term 1960 the superior court permitted corporate defendant to amend so as to allege that the distributorship contract was "for a period of at least seven years, and so long after said seven-year period that the defendant make reasonable efforts to promote said products of plaintiff."

Thereafter, on motion of plaintiff, Frank R. Carson, Trustee in an assignment by corporate defendant for benefit of creditors, was made a party defendant. Parties to this appeal stipulate: ". . . (T)hat the parties were properly before the court, and that the court had jurisdiction over all of the parties and the subject matter of this action."

Defendants make forty-one assignments of error based on seventy-two exceptions. It is manifest that defendants have thoroughly reviewed the record and set out in their assignments a complete catalog of omissions, irregularities and possible errors in the trial. The trial lasted seven days and the record contains 471 pages, exclusive of the assignments of error. Perfection in detail in such an extended trial is

impossible. It is inevitable that slight omissions and error in detail and emphasis in stating the evidence, giving the contentions of the parties and instructing on subordinate features will appear in the court's charge at a lengthy trial. "A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial and harmful." Strong: N. C. Index, Appeal and Error, s. 40, p. 118; *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222. The burden is upon appellants to show error amounting to a denial of some substantial right. *In re Gamble,* 244 N.C. 149, 93 S.E. 2d 66. The court is not required to recapitulate the evidence, witness by witness. Nor is it required to instruct on subordinate features of the case without a proper request therefor. A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. A careful examination of the charge in the case at bar leads us to the conclusion that the trial judge applied the law to the facts in substantial compliance with the requirements of G.S. 1-180. When called to his attention he corrected a factual misstatement. Defendants requested the judge to charge as to admissions in the pleadings and evidence in accordance with its trial brief. It then withdrew its request and asked the judge to "just preserve my Record indication." The record does not disclose specifically the admissions which defendants then requested be given to the jury. There were no prayers for instructions in accordance with legal requirements, so far as the record discloses.

The issues submitted to the jury were sufficient to settle the material controversies arising on the pleadings and to support the judgment. *Mitchell v. White, ante,* 437; *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601; *Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912. The first issue makes two inquiries, (1) whether plaintiff is entitled to possession of the merchandise, and (2) whether defendant wrongfully detained it. The charge clearly explains both phases of the issue, and clearly instructs the jury that plaintiff had the burden of proving the affirmative of both propositions before being entitled to a favorable or affirmative answer to the issue. We find no error in the form of the issue or the court's instructions with respect thereto.

The court correctly placed the burden of proof on the first issue on plaintiff, and of the second and third issues on defendants. It correctly stated that the quality of proof required is "by the greater weight of the evidence." It did not define "greater weight of the evidence." "When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the terms 'greater weight' or 'preponderance of the evidence' in

the absence of prayer for special instructions." 4 Strong: N. C. Index, Trial, § 34, p. 338, and cases there cited.

In the trial below, we find.

No error.

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

MRS. VERNON E. KIZER v. WILLIAM M. BOWMAN.

(Filed 28 March, 1962.)

1. Appeal and Error § 47—

The refusal to strike allegations from the complaint will not be disturbed when no prejudice resulted to defendant therefrom.

2. Limitation of Actions § 12; Pleadings § 25—

Where the facts in regard to the accident in suit are alleged in the complaint, an amendment which characterizes defendant's conduct as amounting to gross negligence does not amount to a statement of a new cause of action notwithstanding that gross negligence may be essential to a recovery by plaintiff, since the conclusion of gross negligence may be deduced from the alleged facts, and therefore the action is not barred when the complaint is filed within the time limited even though the amendment is filed thereafter.

3. Automobiles § 47—

"Gross negligence" within the purview of the Florida statute requiring a showing of gross negligence in order for a gratuitous guest to recover against the driver of a car is not synonymous with culpable negligence in the law of crimes, but gross negligence lies between ordinary negligence and culpable negligence and may be defined as a course of conduct from which a reasonable and prudent man would know that injury to person or property would probably and most likely result.

4. Same—

Whether the driver of a car is guilty of gross negligence so as to constitute the basis for recovery by a gratuitous guest is ordinarily a question for the jury, and each case must be determined in accordance with its particular facts.

5. Same—Evidence held sufficient to be submitted to the jury on the question of defendant's guilt of gross negligence.

While speed alone is ordinarily insufficient to support a finding of gross negligence, evidence tending to show that defendant driver was traveling 65 miles per hour during a heavy rain with poor visibility, that he turned to his left side of the highway to pass a preceding truck without ascertaining whether he could do so in safety, that he then saw a car ap-

proaching from the opposite direction when it was only about 150 feet distant, that he then cut his car quickly to the right to get back into the right lane, resulting in loss of control of the car and injury to plaintiff guest, *is held* sufficient to be submitted to the jury under the Florida statute on the question of whether the driver was guilty of gross negligence.

6. Same—

Under the Florida statute, a guest passenger who pays, in accordance with previous agreement, one-half of the cost of gasoline and oil for the trip is not a gratuitous passenger.

7. Damages § 5—

Allegations that by reason of her injuries plaintiff had been forced to undergo painful and prolonged medical treatments, to wear splints and a cast by reason of broken ribs and back, and that she had been advised her injuries were permanent, *is held* sufficient basis for the admission of evidence and a charge by the court as to nursing, medical, and hospital bills.

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

APPEAL by defendant from *Campbell, J.*, October Term 1961 of TRANSYLVANIA.

This is a civil action instituted by the plaintiff, a citizen and resident of Transylvania County, North Carolina, for the recovery of damages for personal injuries. The cause arose out of an automobile accident occurring on U. S. Highway No. 27, near Haines City, Florida, on 30 November 1957.

It is alleged that in November 1957 the defendant (who is a brother of the plaintiff) approached the plaintiff and advised her that his daughter (Mrs. W. K. Robinson) and her family had come to visit the defendant and his wife in Morganton, North Carolina, and that both families planned a week's trip to Florida, and expressed a desire that the plaintiff and her husband accompany them and share the expenses of the trip; that plaintiff and her husband had made several trips to Florida previously and were familiar with the roads and points of interest. It is further alleged that the defendant proposed that he would take the plaintiff and her husband in his 1957 Oldsmobile "88" automobile if the plaintiff and her husband would pay one-half of the gas and oil expense of the trip and one-third of the rent of a furnished apartment and cost of groceries during their stay in Florida; that plaintiff and her husband agreed to the proposal.

The group left for Florida from the defendant's home in Morganton on 25 November 1957. Plaintiff and her husband and defendant and his wife went to Florida in the defendant's automobile, and the Robin-

sons made the trip in a station wagon owned and operated by Mr. Robinson.

After spending several days at Delray Beach, Florida, they began the return trip to North Carolina on 30 November 1957. Mr. Robinson, driving his station wagon, left first, followed by the defendant driving his Oldsmobile. With the defendant in his automobile were his wife in the front seat, and the plaintiff and her husband with the Robinsons' infant daughter seated in a small car chair between them in the rear seat.

It is alleged in paragraph VI of the complaint as follows: "That around noon on said date, as defendant approached Haines City, Florida, on U. S. Highway #27, he was delayed by heavy traffic and lost contact with the automobile in front of him in which his daughter and her family were traveling; that it was raining hard at the time and visibility was poor and the asphalt highway over which defendant was traveling was slick; that, despite the hard rain, poor visibility and dangerous condition of the highway, the defendant speeded up his said automobile and drove along said highway at a rapid rate of speed; that defendant overtook a large truck traveling in the same direction along said highway, and, without slowing down or making any effort to ascertain if said movement could be made in safety, he negligently, carelessly and recklessly attempted to pass said truck; that when the defendant came abreast of the truck, he observed an automobile approaching him from the opposite direction; that the defendant thereupon, instead of passing said truck and driving onto his own side of the highway, as he could have done, he negligently, carelessly and recklessly jerked his said automobile suddenly and sharply to the right, throwing it into a skid, during which it turned completely around twice, weaving between two approaching automobiles and hurtling down said highway completely out of control for approximately 300 feet to an intersecting farm road where it struck a culvert with teriffic force, bounced up and turned around in the air and landed in a swamp facing the direction from which it had come, and rocked violently back and forth sideways."

By leave of court, the plaintiff amended her complaint on 15 April 1961, by inserting the following: "VI-A. That the foregoing acts of the defendant constituted gross negligence and willful and wanton misconduct on the part of the defendant and such gross negligence and willful and wanton misconduct of the defendant caused the collision hereinabove described and was the proximate cause of the injuries which the plaintiff received and for which this action is brought."

It is further alleged in paragraph VII of the complaint: "That the terrific impact threw the plaintiff against the left side of said car and

then against the child's chair on her right with great force and violence, breaking two ribs on her left side, two ribs on her right side, tearing the ligaments in her left shoulder, breaking her backbone, and otherwise bruising and injuring her."

The plaintiff alleged that by reason of her injuries as aforesaid she was forced to undergo painful and prolonged medical attention; that she had been bandaged in rib splints for many weeks on account of her broken ribs; that she was forced to wear a steel and leather cast which reached from her neck to her hips, continuously for five months, and during the daytime for a year thereafter, and still has to wear said brace most of the time and has to use a special chair and bed because of her injuries; that she suffers excruciating and agonizing pain: that since her injury she has been totally disabled to work and that she has been informed and believes that her injuries are permanent.

The defendant answering the complaint denied all allegations of negligence, gross negligence, and wanton and willful misconduct on his part, but admitted that "plaintiff and her husband paid one-half of the expenses of the trip and one-third of the cost of an apartment and groceries" while in Florida.

Vernon E. Kizer, the husband of plaintiff, testified in pertinent part as follows: "As we traveled up this highway, #27, Mr. Robinson's car was in the lead. We were traveling in a heavy rain and we had lost sight of Mr. Robinson and his car and they had part of the lunch in their car and we had part in ours, and Mr. Bowman speeded up to overtake them and came in behind this truck loaded with farm workers. At that time we were traveling on an asphalt road two lanes wide. It was raining and visibility was poor. You couldn't see very far. When Mr. Bowman came up behind the truck * * * he cut to the left in an attempt to pass the truck * * * and pulled over into the left lane.

"I have an opinion that the speed Mr. Bowman was making as he came up behind this farm truck was 55 miles an hour. When Mr. Bowman pulled over into the left lane to pass the truck, he put the car in passing gear. Passing gear is a gear that gives the car a sudden burst of speed; you use it in attempting to pass a car or to take off in a hurry. After he put it in passing gear, there was a car coming down the highway on the same side we were on and he cut the car quickly to the right to get in his lane. * * * When he pulled his car into the right lane the car went into a spin and spun around the highway, and I don't know how it happened to get by the two cars that were coming. It swapped ends, went backwards and twisted around for approximately 300 feet, and then the right wheel hit a culvert intersecting the road on the right and bounced in the air and spun around and went over an embankment on the other side of this inter-

section and hit the bottom and rocked violently from side to side and threw us around in the car, and it was headed back in the direction we were coming when it stopped. At the time it came to a stop, we were out of the highway, off over an embankment. There must have been a shoulder of about three feet and a ditch around six feet deep. When it came to a stop, the automobile was in the bottom of the swamp of water, headed back in the direction we were coming from. When the car first started into this spin, Mr. Bowman said, 'Look out, it is going into a spin.' I have an opinion that the speed of the Bowman car at the time * * * the spinning started was 65 miles per hour. I have an opinion that the speed of the Bowman car at the time it struck the culvert at the end of its spininng was about 35 miles per hour.

"When the car ran in the ditch the passengers in the Bowman car were thrown violently in the car. * * *

"I would say the width of the intersecting road was 12 feet. * * * (T)he car skidded 288 feet from the time it first started into a spin until it came to the intersection."

The plaintiff's testimony concerning the accident was substantially the same as that of her husband. She did testify, however, that, "After the defendant got into the left lane, as soon as he possibly could he jerked the car back into the right lane to keep from hitting the car that was coming toward us. That is when it went into the spin. * * * When the car landed in the ditch it kept rocking and I would hit the baby's chair in the middle of the car. As a result of being thrown from side to side, I got this terrific pain across my back * * *. The pain first struck me when we hit the shoulder down off of the embankment. The pain was caused by a broken back and broken ribs. I had two broken ribs on each side, the left shoulder was torn loose, or the ligaments in it, and the right muscle in the right side. * * *"

The defendant offered no evidence and moved for judgment as of nonsuit which was denied.

After instructing the jury, the court submitted issues of gross negligence and damages, and the issues were answered in favor of the plaintiff. Judgment was entered accordingly and the defendant appeals, assigning error.

Van Winkle, Walton, Buck & Wall; Ramsey, Hill & Smart for plaintiff.

Williams, Williams & Morris for defendant.

DENNY, C.J. The appellant's first thirteen exceptions and assignments of error are directed to the refusal of the court below to strike certain allegations in the complaint. However, in our opinion, the alle-

gations which the defendant sought to have stricken from the complaint were not prejudicial to him. Therefore, these exceptions and assignments of error based thereon are overruled.

Assignments of error Nos. 37 and 38 are directed to the failure of the trial court to sustain defendant's motion for judgment as of nonsuit interposed at the close of plaintiff's evidence and renewed when the defendant rested without offering evidence.

The defendant's motion for judgment as of nonsuit was based on two distinct grounds: (1) That the plaintiff's cause of action was barred by the three-year statute of limitations; and (2) that the plaintiff failed to make out a case of gross negligence as a guest passenger under the Florida statute.

It is true that the accident complained of in which the plaintiff was injured occurred on 30 November 1957 and the plaintiff amended her complaint as set out hereinabove on 15 April 1961. Even so, an examination of the amendment will disclose that no new facts were alleged. The pleader merely characterized the alleged acts theretofore set out in her complaint as constituting gross negligence and willful and wanton misconduct. The amendment did not allege a new cause of action.

"It is generally held that it is not necessary, in order to recover compensatory damages, to allege that the negligence complained of was gross, even where the right to recover depends on the existence of such degree of negligence." 65 C.J.S., Negligence, Section 187 (h), page 901, citing *City of Jacksonville v. Vaughn,* 92 Fla. 339, 110 So. 529.

In the last cited case it is said: "Where a declaration contains allegations charging such a state of facts, the existence of which constitute gross negligence, in cases where it is necessary to aver gross negligence, it is not necessary for the pleader to allege his conclusion that such facts constitute 'gross' negligence. The Court may determine from the allegations of the declaration whether or not gross negligence as a matter of law is sufficiently alleged in the declaration." *Cf. Nix v. English,* 254 N.C. 414, 119 S.E. 2d 220.

Section 320.59 of the Florida Statutes of 1959 reads as follows: "No person transported by the owner or operator of a motor vehicle as his guest or passenger, *without payment for such transportation,* shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or willful and wanton misconduct was the proximate

cause of the injury, death or loss for which the action is brought; provided, that the question or issue of negligence, gross negligence, and willful or wanton misconduct, and the question of proximate cause, and the issue or question of assumed risk, shall in all such cases be solely for the jury * * *." (Emphasis added.)

The leading case defining the term "gross negligence or willful and wanton misconduct," as used in the Florida guest statute, is *Carraway v. Revell, et al.*, Fla., 116 So. 2d 16, in which case the petitioner brought the action for recovery of damages for the death of his son while riding as a passenger in defendants' automobile. The case was tried without a jury and resulted in a verdict in favor of defendants.

The trial judge denied plaintiff's motion for a new trial, assigning as his reason, among others, "that gross negligence in a guest passenger civil action is the same in legal contemplation as culpable negligence in a manslaughter case and that, in order to sustain a finding of liability in a guest passenger case, there must be that degree of negligence which would be sufficient to support a manslaughter conviction where there is a death involved."

On appeal to the district court, it approved the action of the trial court in an exhaustive opinion and, among other things, said: " * * * (T)he law has established that the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages, or damages resulting from gross negligence or wilful and wanton misconduct under the guest statute. * * *"

The Supreme Court of Florida said: "We agree with the district court (112 So. 2d 75) 'that the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages,' but we do not agree with the remainder of the court's holding, *viz.*: 'or damages resulting from gross negligence or wilful and wanton misconduct under the guest statute.' This is too broad a leap."

The Court further quoted from the case of *Franklin v. State*, 120 Fla. 686, 163 So. 55, 56, which held: " 'Gross negligence' and 'culpable negligence' are not necessarily synonymous, though culpable negligence might be gross negligence and gross negligence might be culpable negligence."

The Court also pointed out that there is a distinction between gross negligence and willful and wanton misconduct, although the Court had held otherwise in a number of earlier decisions. *O'Reilly v. Sattler*, 141 Fla.770, 193 So. 817; *Jackson v. Edwards*, 144 Fla. 187, 197 So. 833; *DeWald v. Quarnstrom*, Fla., 60 So. 2d 919. The Court said: "We hold that a guest under the statute may not lawfully recover from an

owner or operator of a vehicle for simple or ordinary negligence; that he may recover for gross negligence which is that kind or degree of negligence which lies in the area between ordinary negligence and wilful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter. In doubtful cases, the question of whether such negligence is ordinary or gross is, as we have heretofore held, one which under appropriate instructions should be submitted to the jury." The case was remanded to the lower court for further proceeding in accord with the Court's opinion.

In the case of *Bridges v. Speer,* Fla., 79 So. 2d 679, the Court said: "From the very beginning, the courts have encountered great difficulty in attempts to define any clear and distinct line to separate simple negligence from gross negligence. The difficulty is inherent in the question itself because it relates to different degrees of similar conduct. Perhaps no rule can ever be devised which will definitely separate one from the other. * * * We think the rule which would more nearly solve the problem than any other would be one which recognized that simple negligence is that course of conduct which a reasonable and prudent man would know *might* possibly result in injury to persons or property, whereas gross negligence is that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property. * * *"

In *Douglass v. Galvin,* Fla., 130 So. 2d 282, the plaintiff was a guest passenger in the defendant's sport car. Defendant was driving the car on Old Combee Road, which was asphalt, 16 to 18 feet wide, and had a wavy contour; the shoulders were in poor condition. The road was straight for a distance of about nine-tenths of a mile. There were no signs warning of a curve or specifying any speed. The defendant, however, had been over this road once or twice before. The road curved to the right. Defendant, after turning on this road, proceeded at a speed of from 60 to 65 miles an hour. When he came to the curve he did not apply his brakes, but "down-shifted." The left wheels went off the pavement on the left or outside curve, the car having slowed down to 50 or 55 miles an hour. The car ran off the highway, turning over twice, injuring the plaintiff. The trial resulted in a verdict for plaintiff and upon appeal the judgment was affirmed. The Court cited and quoted with approval the quoted portions set out hereinabove from the opinion in *Carraway v. Revell, supra,* and the above quoted portion from the opinion in *Bridges v. Speer, supra.*

The Supreme Court of Florida, in considering cases involving Florida's guest statute, has repeatedly said that each case must stand or fall on its own facts.

In the case of *Myers v. Korbly,* Fla., 103 So. 2d 215, the accident occurred between 11:00 and 12:00 p.m. at a curve on Bayshore Boulevard near Inman Avenue in Tampa. The speed was 40 miles per hour. The road surface was dry and the boulevard was well lighted. The defendant's son was 16 years of age and was driving defendant's Ford sedan on Bayshore Boulevard. The driver entered the boulevard after stopping at a traffic signal and then traveled in a southerly direction for two or three blocks. The car failed to negotiate a curve after sliding 61 feet to the westerly curve of the roadway, left the boulevard, slid another 76 feet to a palm tree with which it collided, then slid another 61 feet to a second palm tree which was uprooted and broken. The Court, in affirming the verdict for the plaintiff in this case, quoted with approval from the case of *Cadore v. Karp,* Fla., 91 So. 2d 806, as follows: "We think that, in the circumstances here, the jury could have found that Mr. Karp failed to exercise that degree of 'slight care' which is the equivalent of 'gross negligence.' *Faircloth v. Hill, supra* (Fla., 85 So. 2d 870). So it was error to withdraw the case from the jury and direct a verdict for the defendant * * *."

Ordinarily, speed alone will not be deemed sufficient to support a finding of gross negligence or willful and wanton misconduct. However, the jury had the right to consider all the facts and circumstances involved at the time of this collision, including speed. The evidence tends to show that the defendant's car was traveling 65 miles an hour at the time the defendant was confronted with an approaching car from the opposite direction in the lane in which the defendant was traveling in his effort to pass the farm truck. The approaching car was only about 150 feet from the defendant when he cut his car quickly to the right to get in the right lane, allegedly causing it to spin, and that it skidded about 288 feet. The jury had the further right to consider the condition of the road, the heavy rain, the poor visibility, and the passing of the farm truck without ascertaining whether or not such passage could be made in safety; and when so considered, we think the evidence was sufficient to warrant its submission to the jury and to support a finding that the defendant failed to exercise that degree of "slight care" which is held in the Florida cases to be the equivalent of "gross negligence." *Cadore v. Karp, supra; Faircloth v. Hill,* Fla., 85 So. 2d 870. See also *Sea Crest v. Burley,* Fla., 38 So. 2d 434; *Brown v. Roach,* Fla., 67 So. 2d 201; *Myers v. Korbly, supra; Reynolds v. Aument,* Fla., 133 So. 2d 562; *Cole v. Morse,* 85 N.H. 214, 155 A. 694; *Hollander v. Davis,* 120 F. 2d 131.

Whether the conduct of an automobile driven under given circumstances constitutes gross negligence, is generally a question of fact for the jury. *Smith v. Turner,* 178 Va. 172, 16 S.E. 2d 370.

In *Grand Trunk R. Co. v. Ives,* 144 U.S. 408, it is said: "What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court."

In the case of *Wilson v. Eagle* (Dist. Ct.), Fla., 120 So. 2d 207, cited by the defendant, the court held the allegations of the complaint were insufficient to meet the test for a statement of a cause of action under the guest statute. Also, in the case of *Godwin v. Ringley* (Dist. Ct.), Fla., 126 So. 2d 163, the evidence tended to show that the accident was caused by the unfamiliarity of the defendant with the power steering of his newly acquired automobile. The court held the evidence fell short of the test prescribed to establish gross negligence. Likewise, in the case of *DeWald v. Quarnstrom, supra,* cited and relied upon by the defendant, the case was decided during the era prior to the decision in *Carraway v. Revell, supra,* when the Florida court had not abandoned the view that "gross negligence" and "willful and wanton misconduct," appearing in the Florida automobile guest statute, were synonymous. It must be conceded that prior to the decision in the *Carraway* case, the decisions of the Florida Court interpreting the provisions of the Florida guest statute were in hopeless conflict. University of Florida Law Review, Volume 11, 1958, page 287, *et seq.* These cases, however, in our opinion, are not controlling on the factual situation in the instant case. These assignments of error are overruled.

Even so, in our opinion, the contract entered into between the plaintiff and her husband with the defendant, which required the plaintiff and her husband to pay one-half of the gas and oil expense of the trip from Morganton, North Carolina, to Florida and return, constituted payment within the meaning of the Florida guest statute. Consequently, we think, in the trial below, the plaintiff was required to assume a greater burden than the Florida statute requires.

In the case of *Teders v. Rothermel,* 205 Minn. 470, 286 N.W. 353, the plaintiff, the defendant, and two others planned a motor trip from Omaha, Nebraska, to Florida and return in defendant's car. There was an advance agreement that each would pay one-fourth of the gas and oil. Accordingly, each of the four did contribute to a fund from which these expenses were paid. In Florida the plaintiff was injured in a collision caused by defendant's negligence. The Minnesota Court, in construing the Florida guest statute, said: "To be within its reach the rider in the car of another must not only be 'guest or passenger,' but also riding 'without payment for such transportation.' It is significant that the thing determinative is not 'hire' or 'compensation,' but 'payment.' 'Compensation,' accurately used, means payment in money, or

other benefit, which will compensate in the strict sense, that is, make even, or be measurably the equivalent of that for which it is given. *Kerstetter v. Elfman, supra* (327 Pa. 17, 192 A. 663). 'Hire' might apply only where both machine and driver are hired for the occasion.

"The words of the Florida law can properly be given no such narrow scope. Payment is all that is required. The amount of money or other thing constituting the payment need not compensate or make even, nor need it be given, in the technical sense, as 'hire' of driver and car. Any sum agreed upon as payment and paid, as under the facts presented by these pleadings, amounts to payment for transportation so as to prevent application of the statute."

Likewise, in *Katz v. Ross,* 117 F. Supp. 523, the plaintiff and his wife accompanied the defendant and his wife from Pittsburgh, Pennsylvania, to Florida. The plaintiffs agreed to pay $100.00 to the defendant as part of the cost of operating the defendant's car on the trip, and did pay the agreed amount to defendant. Plaintiffs were injured in an accident which occurred near New Smyrna Beach, Florida. The court submitted to the jury the question whether or not the plaintiffs did pay for their transportation. The jury returned a verdict in favor of plaintiffs and awarded them damages. On appeal, the Third Circuit Court of Appeals, 216 F. 2d 880, affirmed the judgment of the district court.

The general rule is stated in Anno: Automobile — Guest or Passenger, 10 A.L.R. 2d 1351, *et seq.,* at page 1373: "Where the agreement that the occupant should contribute to the cost of operating the car was entered into before the start of the trip, or so as to make him legally obligated for such contribution, or where it otherwise appears that the transportation was given in consideration of such contribution, it has generally been held, under the 'payment' statutes, that the occupant is entitled to the ordinary care owed to a passenger for hire," citing cases from many jurisdictions.

On the other hand, in the last cited authority, at page 1376, it is stated: "However, a merely incidental or gratuitous contribution to trip expenses will not constitute 'payment' within an automobile guest statute entitling the occupant of an automobile to the exercise of ordinary care for his safety." *McDougald v. Couey,* 150 Fla. 748, 9 So. 2d 187; *Yokom v. Rodriguez,* Fla., 41 So. 2d 446. See also *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11 (applying the South Carolina statute); *Morse v. Walker,* 229 N.C. 778, 51 S.E. 2d 496 (applying the Virginia statute).

Appellant's assignments of error Nos. 18, 19 and 20 are to the admission of evidence, over defendant's objection, as to nursing, medical, hospital and other expenses incurred as a result of plaintiff's injuries,

without these items having been pleaded as special damages. The defendant likewise assigns as error that portion of the charge appearing in parentheses as follows: "The court instructs you that the measure of damages, if you reach that question, is as follows: If the plaintiff is entitled to recover at all she is entitled to recover as damages one compensation in a lump sum, for all of her injuries, past, present, and prospective, in consequence of the defendant's acts and conduct, as previously defined to you by the court. (These damages are understood to embrace indemnity for actual loss of time, nurses, medical expenses, loss from inability to perform any of her ordinary duties.)"

The plaintiff alleged in her complaint that by reason of her injuries she had been forced to undergo painful and prolonged medical treatments; to wear splints on account of her broken ribs, and to wear a steel and leather cast (brace), which reached from her neck to her hips, continuously for five months, and during the daytime for a year thereafter; that since she was injured she has been totally disabled to work, and that she has been advised that her injuries are permanent.

We think the rule applicable to damages in this case, and to the admission of evidence as to the cost of nurses, medical expenses, hospital bills, loss of time, *et cetera,* is well stated in *Sparks v. Holland,* 209 N.C. 705, 184 S.E. 552: "The third assignment of error is to the court's permitting the plaintiff to testify as to the amount of the hospital bills paid by him when there was no specific allegation in the complaint as to such bills. The complaint alleges 'that by reason of the carelessness and negligence of the defendant, which was the proximate and sole cause of plaintiffs' injury, * * * the plaintiff has been damaged in the sum of $3,500.' A liberal interpretation of this allegation would permit the proof of hospital bills paid in connection with the injuries complained of since 'in this class of cases the plaintiff is entitled to recover as damages one compensation for injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money.' " See also *Helmstetler v. Duke Power Co.,* 224 N.C. 821, 32 S.E. 2d 611; *Mintz v. R.R.,* 233 N.C. 607, 65 S.E. 2d 120; *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163. These assignments of error are overruled.

We concede that some of the additional assignments of error point out what might be termed technical errors; however, we do not think any prejudicial error has been shown that would justify a new trial.

In the trial below, we find

No error.

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

GERTRUDE BULLUCK v. HERBERT LONG.

(Filed 28 March, 1962.)

1. Trial § 33—

Even though the parties waive a recapitulation of the evidence, the court is under duty to declare and explain the law in its relation to the various aspects of the evidence and to point out, respectively, for each side the facts presented by his evidence which would justify an affirmative and would justify a negative answer to the issue in controversy.

2. Automobiles § 46—

A charge on the question of whether defendant was exceeding the speed which was reasonable and prudent under the circumstances then existing which merely gives the contentions of plaintiff as to what facts would constitute excessive speed under the circumstances and defendant's contentions that other facts would not, without appropriate instructions to the jury as to what facts, if found by the jury, would or would not amount to negligence in this respect, and failing to charge that a violation of the provisions of G.S. 20-141(a) (c) would constitute negligence *per se, is held* insufficient.

3. Same—

A charge on the question of sudden emergency which states the doctrine and defendant's contentions in respect thereto and that he was entitled to the benefit thereof, but which fails to give contentions of plaintiff with respect to this doctrine and which fails to declare and explain the law arising on the evidence in respect thereto, is insufficient.

4. Trial § 33—

G.S. 1-180 places a mandatory duty upon the trial court to declare and explain the law arising on every substantial feature of the case, and a bare declaration of the law in general terms with a statement of the respective contentions of the parties, is insufficient, and failure of the court to comply with the requirements of the statute is prejudicial.

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

APPEAL by plaintiff from *Bundy, J.*, November 1961 Civil Term of EDGECOMBE.

Civil action to recover damages for personal injuries.

This is a summary of the relevant allegations of fact of the complaint:

N. C. Highway 43 runs in an easterly direction from Rocky Mount to Pinetops, and about two miles east of the city limits of Rocky Mount it has a sharp curve. It was raining on the night of 3 October 1960, and the road was slick. On that night a Studebaker automobile of plaintiff's husband was parked on the south shoulder of the highway facing in a westerly direction toward Rocky Mount. Plaintiff under the direction of her husband drove a Mercury automobile on the

south shoulder of the highway flush with the rear bumper of her husband's automobile to push it off and get it started. When plaintiff's husband was preparing to get in the Studebaker for the plaintiff to begin pushing it off with the Mercury, a tractor-trailer was approaching on the highway from the east and the defendant driving a Chevrolet automobile on the highway was approaching from the west coming around the curve in the rain at a speed of about 55 miles an hour. When defendant's automobile was about 150 yards away, plaintiff's husband went to the front of the Studebaker and began waving a railroad signal light. Defendant drove his automobile off the highway and onto the south shoulder thereof, crashing into the front of the Studebaker, and knocking it back into the Mercury in which plaintiff was sitting. As a result of which plaintiff was painfully injured.

Defendant was negligent in four respects, which proximately caused plaintiff's injuries: One, he drove his automobile on a highway at a speed greater than was reasonable under the existing circumstances, in violation of G.S. 20-141(a). Two, he drove his automobile at an excessive rate of speed on a rainy night without keeping a proper lookout. Three, he failed to remain on the hard-surfaced highway, but pulled off onto the dirt shoulder, when he saw, or in the exercise of reasonable care he should have seen, the two automobiles on the shoulder of the highway and the signal light on the shoulder. Four, he failed to put on his brakes and reduce his speed to avoid striking plaintiff after he saw or should have seen the warning signal light, or if he applied his brakes, his brakes were defective or his tires slick so he could not stop.

Defendant's answer makes a general denial of all the allegations of the complaint, except it admits the residence of the parties, and except as admitted in the further answer and defense.

This is a summary of the relevant allegations of fact of defendant's further answer and defense:

About two miles east of Rocky Mount, N. C. Highway 43 curves to the right. On the night of 3 October 1960 defendant was driving a Chevrolet automobile, belonging to a lady he subsequently married, at a lawful speed east on this highway. When he rounded the curve, he saw an automobile in the ditch on the south side of the highway, and a person standing on the paved part of the highway ahead of him waving a signal light. Because of this waving signal light he started to slow down and turn off the highway onto the south shoulder. A Studebaker was parked on the south shoulder headed west without lights. By reason of the waving signal light, he was unable to see the Studebaker until he turned off onto the south shoulder almost at the point it was parked.

Plaintiff's husband, Joseph Z. Bulluck, in waving the signal light, so as to cause defendant or other motorist traveling east reasonably to believe that there was great danger ahead, created a dangerous situation, which plaintiff's husband knew, or in the exercise of due care should have known, would cause defendant or any other motorist traveling east to turn off the paved part of the highway onto the south shoulder where he, Joseph Z. Bulluck, had parked his Studebaker without lights, and such negligence on the part of plaintiff's husband was the proximate cause of plaintiff's injuries. Plaintiff in driving her husband's Mercury onto the left shoulder and stopping it behind the Studebaker under her husband's direction, when she knew the Studebaker because of weak batteries had no lights and no flares to show its position, and when she knew the Studebaker would obscure the lights of the Mercury, was guilty of contributory negligence, which is pleaded as a defense. If defendant was guilty of negligence proximately causing plaintiff's injuries, which he denies, then plaintiff's husband's negligence was also a proximate cause of plaintiff's injuries operating jointly to cause her injuries, and defendant has a right to have Joseph Z. Bulluck's liability determined in this action. If defendant was negligent, which he denies, the negligent act of plaintiff's husband in waving the signal light was imputable to plaintiff, because plaintiff and her husband were engaged in a joint enterprise in pushing off the Studebaker, and this constituted contributory negligence on plaintiff's part, which is pleaded as a defense.

And further answering the complaint defendant alleges that Joseph Z. Bulluck was guilty of negligence in waving the signal light on the paved part of the highway when he had parked his Studebaker on the south shoulder without lights and plaintiff was guilty of parking the Mercury behind the Studebaker so it would obscure its lights, and as a result of their concurring negligence he drove off the highway onto the south shoulder crashing into the Studebaker. As a result thereof he sustained severe injuries. Whereupon, he prayed that Joseph Z. Bulluck be made a party defendant, and that he recover damages from them for his injuries.

Whereupon, by order of court Joseph Z. Bulluck was made a party defendant, and was served with process.

Then Joseph Z. Bulluck, by his attorneys, Battle, Winslow, Merrell, Scott and Wiley, filed a motion to strike and a demurrer to the answer, further answer and defense, and counterclaim, and to the order making him an additional defendant, and specified his grounds for the demurrer. Then plaintiff made a motion to strike certain portions of the further answer and defense, and demurred to the alleged counterclaim against her.

Judge Copeland at the September 1961 Civil Term denied Joseph Z. Bulluck's motion to strike in its entirety and overruled his demurrer to the counterclaim of the original defendant, and Joseph Z. Bulluck excepted and appealed. Judge Copeland at the same term entered a similar order as to plaintiff's motion to strike and demurrer.

Plaintiff filed a reply to the original defendant's further answer and defense and counterclaim denying that she was negligent.

Joseph Z. Bulluck filed an answer denying practically all of the original defendant's further answer and defense and counterclaim. His answer contains what he calls a second further answer to the counterclaim of the original defendant, in which he alleges the original defendant was guilty of negligence in the same language as alleged in the complaint, and that if he was guilty of negligence, which he denies, then the original defendant was guilty of contributory negligence, which he pleads as a defense. Then he further alleges that the original defendant was guilty of negligence in the operation of his automobile in the same language as used in the complaint, that the Studebaker and the Mercury were owned by him, and the original defendant's negligence proximately caused damages to his two automobiles in the amount of $922.00, and caused him to lose time from his work and incur traveling expenses to procure medical treatment for his wife in the sum of $316.43, and he prays that he recover these amounts from the original defendant.

This is a summary of plaintiff's evidence.

A state highway, with pavement 20 feet wide, runs between the towns of Rocky Mount and Pinetops. About 11:45 o'clock p. m. on 3 October 1960 Joseph Z. Bulluck, husband of plaintiff, was driving his Studebaker automobile on this highway from Rocky Mount in the direction of Pinetops, following an automobile which had forced him, to avoid a collision, off the street onto the sidewalk in Rocky Mount. About two miles from Rocky Mount the automobile in front turned off into a driveway, and its lights were turned off. Bulluck passed by, and at the next driveway he turned around and started back in the direction of Rocky Mount. The automobile he was following backed toward the highway and into a ditch on the south side of the highway. Bulluck turned his automobile to the left, and parked 34 inches from the highway on the dirt south shoulder of the highway near the automobile in the ditch, which was between him and Rocky Mount. He went to the automobile in the ditch, and found in it one Millard, who was drunk. Bulluck got Millard in his, Bulluck's, automobile, but he could not start it because his battery had failed. Bulluck went across the highway to a house, and telephoned plaintiff, his wife, who arrived at the scene in ten minutes driving his Mercury automobile. Pursuant

to his directions plaintiff drove the Mercury automobile onto the south shoulder of the highway about 34 inches from the pavement of the highway, and parked it directly behind his Studebaker so as to be in a position to push it off. After Bulluck had "lined up" his wife behind for pushing and given her instructions how to push, he started to the left door of the Studebaker. He looked east toward Pinetops, and saw a tractor-trailer coming around a curve. He looked west toward Rocky Mount, and saw defendant Herbert Long's automobile approaching about 300 yards away. It was a bad night and raining hard. The lights of the Mercury were shining directly into the rear of the Studebaker, and were not reflected on the highway.

Bulluck walked directly in front of his Studebaker on the south shoulder, and began waving crossways a railroad signal lantern that gave a white light. Long passed the tractor-trailer about 30 feet west of where the Studebaker was parked, and as Long passed the tractor-trailer, he drove his automobile off the pavement of the highway onto the south dirt shoulder and into the front of the Studebaker—"the right front of each car, headlight to headlight." Long came around a curve about 55 miles an hour. Bulluck "was back-tracking up the path" when the collision occurred, and was about four feet away at the moment of the collision. In the collision the Mercury was pushed back about 30 feet, and as a result plaintiff sustained personal injuries. The collision occurred in the open country, where the speed limit is 60 miles per hour.

Later that night in a hospital defendant Long told a highway patrolman he was traveling east from Rocky Mount at a speed of about 55 miles an hour, that he saw something in the road, lights, and thinking there had been a bad accident in the road, he slowed down, started skidding, and went off onto the shoulder on his right, and he was somewhere in the vicinity of about 100 feet of where the collision occurred when he noticed some danger.

Joseph Z. Bulluck testified that he heard defendant Long say, "he did not see my car and that I was waving a lantern and that he did not apply his brakes to stop."

Mrs. Jean Bulluck saw defendant Long that night when he was carried from an elevator to the emergency room of a hospital. He was real bloody, and she could smell beer or whisky or something strong.

This is a summary of defendant Long's evidence, which consists of his testimony alone.

About 11:30 or 11:40 o'clock p.m. he was driving a Chevrolet automobile, belonging to a woman he subsequently married, on the Rocky Mount-Pinetops highway about two miles east of Rocky Mount. It was raining and dark. He was driving about 50 miles an hour.

He testified:

> "On that night I had gotten off work late and was coming home at about 11:30 when I rounded the curve and I did not see any cars anywhere and then I saw a flash of light in the road. I met some lights from a—Bulluck has said it was a tractor-trailer truck—I do not know, I could not tell, and somebody standing in the road waving a light, and I saw out of the edge of my headlights the Nash automobile that was in the ditch and then somebody waving a light up there, and I thought there had been an accident in the highway, so I put my foot on the brakes and started to slow down and pull over to the right side of the road. I pulled over and I hit something, I did not know what it was until I woke up in the hospital that morning about 4 o'clock and asked the nurse what had happened. I did not see any cars other than the Nash Rambler I testified to seeing in the ditch."

On that night he had drunk two cans of beer, one about 7:00 o'clock and another about 9:00 o'clock. In his opinion he was traveling about 35 to 40 miles an hour at the moment of impact. The pavement was wet and he didn't want to skid out of control, so he "eased" on his brake pedal, and "eased" to the right. There is very little stretch of road after you come out of the curve before you reach the scene of the collision. He did not know there is as much as 150 yards.

At the close of all the evidence the trial court sustained the motion of plaintiff and the defendant Joseph Z. Bulluck for a judgment of involuntary nonsuit as to the cross action and counterclaim filed against them by defendant Long, and entered judgment to that effect, which is incorporated in the one judgment the court rendered.

Then the judgment contains this language:

> "Upon the sustaining of the motion of nonsuit as to the counterclaim and cross action of the defendant Herbert Long, the defendant Herbert Long moved that the counterclaim of the Third Party Defendant Joseph Z. Bulluck be dismissed and the Court being of the opinion that the motion of the Third Party Defendant for judgment of nonsuit of the original defendant's counterclaim and cross action was tantamount to a voluntary nonsuit on the part of the Third Party Defendant, Joseph Z. Bulluck, to his own counterclaim;
>
> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the counterclaim of Joseph Z. Bulluck, third party defendant, against Herbert Long, original defendant, be, and

it is hereby dismissed as in case of a voluntary nonsuit, without prejudice."

Two issues were submitted to the jury: One, was the plaintiff injured by the negligence of the defendant Herbert Long, as alleged in the complaint? Two, what amount, if any, is the plaintiff entitled to recover? The jury answered the first issue No, and did not get to the second issue. Whereupon, the court entered one judgment, incorporating in it what is set forth in the two preceding paragraphs, and decreeing that plaintiff recover nothing of the defendant Herbert Long, and that she be taxed with the costs.

From this judgment plaintiff appealed to the Supreme Court.

From that part of the judgment allowing the motion of plaintiff and the defendant Joseph Z. Bulluck for judgment of involuntary nonsuit as to the cross action and counterclaim of defendant Long against them, defendant Long appealed to the Supreme Court.

The record contains no assignments of error on the part of defendant Long. Defendant Long served no statement of case on appeal on plaintiff and defendant Joseph Z. Bulluck. Defendant Long's brief is signed as brief for the appellee, has no reference as to any appeal by him, and ends with this language:

> "Appellee maintains that the lower Court did not err in the conduct of the trial of this cause. The verdict speaks the truth in this case. The jury was present to hear all of the evidence, weighed it carefully, and found for the defendant. The appellee prays the Court that the judgment of the lower Court be affirmed."

Under those circumstances counsel in the trial court for defendant Joseph Z. Bulluck have filed no brief in this Court.

Spruill, Thorp, Trotter & Briggs and Charles T. Lane for plaintiff Gertrude Bulluck, appellant.

Fountain, Fountain, Bridgers & Horton and George M. Britt for defendant Herbert Long, appellee.

PARKER, J. All of the thirteen assignments of error by the appellant Gertrude Bulluck, except two formal ones, relate to the court's charge to the jury. The eleven assignments of error to the charge are that the trial judge failed in his duty, as required by G.S. 1-180, to relate and apply the law to the variant factual situations having support in the evidence, and they specify wherein they aver these eleven assignments of error fail to comply with the duty imposed on the judge by G.S. 1-180. For instance, the judge failed to charge that a violation of the

provisions of G.S. 20-141 would constitute negligence *per se*, and failed to state facts, which if found by the jury from the evidence would constitute a basis for finding the defendant Long guilty of negligence in violating the provisions of the statute; and further that the judge failed to comply with the provisions of G.S. 1-180 in stating in detail the facts which would constitute a basis for finding that defendant Long was faced with a sudden emergency and was entitled to the benefit of that doctrine, but neglected to state to the jury facts which would constitute a basis for their finding that defendant Long was not entitled to the benefit of that doctrine; and further that in respect to plaintiff's other allegations of negligence and evidence offered by her in respect thereto, which are specified in the assignments of error, the judge failed to declare and explain the law arising on the evidence in the case, and to explain the application of the law thereto.

The parties waived a recapitulation of the evidence by the court, and the jury was so informed. But, "such waiver did not relieve the court of the duty to declare and explain the law arising on the evidence of the respective parties." *Brannon v. Ellis*, 240 N.C. 81, 81 S.E. 2d 196.

Upon the first issue—was the plaintiff injured by the negligence of the defendant Herbert Long, as alleged in the complaint—the trial judge correctly stated the law as to the burden of proof, and gave a general definition of the constituent elements of actionable negligence. He then stated "one act of negligence that the plaintiff complains of is that the defendant was operating his motor vehicle at the time and place in question, it being somewhere around midnight, you will remember the exact time, at a speed greater than that which was reasonable and prudent under the circumstances." He then repeated or read the provisions of G.S. 20-141(a) and (c), but he did not instruct the jury that a violation of these parts of the statute, or of either of them, constituted negligence *per se*, *Cassetta v. Compton*, 256 N.C. 71, 123 S.E. 2d 222, though he did say if one drove at a speed greater than is reasonable and prudent under the existing circumstances, he violated the speed statute. He then briefly stated the contentions of plaintiff and defendant Long as to these provisions of the statute, and immediately thereafter charged as follows: "As to whether the speed that the defendant was driving at that time and place was in excess of the speed which was reasonable and prudent under those conditions is for you to determine, remembering that the burden of proof is upon the plaintiff to satisfy you as to this particular complained act of negligence, that the defendant was negligent in that particular and that such negligence was the proximate cause of the defendant's car

striking the Studebaker of the plaintiff's husband on the shoulder of the highway and knocking it into the car in which she was sitting."

The judge then charged as to the duty of a motorist to keep a proper lookout, and a failure to do so is negligence. And then charged that a person driving an automobile is required to keep it under proper control, and if he fails to do so he is guilty of negligence; and then "the third allegation of negligence is that the plaintiff (sic) failed to remain on the hard surface and pulled off onto the dirt shoulder when he saw or, in the exercise of reasonable care, should have seen the two cars and the signal light on the shoulder of the road, and that he also failed to put on brakes and reduce his speed sufficiently to avoid striking the plaintiff after he saw or should have seen the warning light. So you see that these, the third and fourth allegations, have to do with this second one of reasonable lookout and keeping his automobile under proper control." He then stated contentions of the plaintiff and defendant Long in respect to the duty to keep a proper lookout and to keep an automobile under proper control. He next charged, "But, it is for you to determine under the evidence, weighing the evidence carefully and the contentions of both sides carefully, whether under the situation that existed there the defendant was keeping a proper lookout, whether under those conditions he used reasonable care in seeing the cars on the highway and the signal light, and whether he failed to put on brakes and reduce his speed sufficiently to avoid striking the cars on the shoulder of the road, taking into consideration all the facts and circumstances in the case." He then charged "the failure to use brakes when such would have prevented a collision is negligence." He next charged: "Now, these are the particular acts of negligence of which the plaintiff contends, and it is for you to find from the evidence whether the defendant was guilty of one or more of these acts of negligence complained of by the plaintiff, remembering that the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that the defendant was negligent in one or more of these particulars, and that the burden is on the plaintiff further to satisfy you, if you do find by the greater weight of the evidence that the defendant was negligent in one or more of these particulars, you must further find by the greater weight of the evidence that such negligence was the proximate cause of the injury to the plaintiff, as that term has been defined to you."

He then charged the defendant contends he was faced with a sudden emergency with the light being waved before him, and under the circumstances then existing he did what any reasonable man faced with like circumstances would have done, and that he was not negligent. He then gave a special prayer for instructions of defendant Long as

to sudden emergency, charged the doctrine of sudden emergency, and charged at length defendant Long's contentions in respect thereto to the effect he was faced with a sudden emergency and was entitled to the benefit of this doctrine. However, the judge gave no contentions of plaintiff in respect to this doctrine.

He then charged again as to burden of proof, the doctrine of sudden emergency, and stated there is no statute or law which prohibits the parking of an automobile on the left shoulder of a highway completely off the traveled portion. He next charged defendant was under a duty to ascertain his position on the highway and to know where he was, irrespective of any assumption he might have had as to where another automobile was, and instructed the jury where a motorist is unable to see ahead of him, it is his duty to reduce his speed in accord with his ability to see, and it is his duty to stop if necessary.

He concluded his charge on the first issue in these words: "Now, gentlemen, summarizing with respect to that issue, if you find from the evidence and by its greater weight that the defendant was negligent in one or more of the particulars alleged, and that such negligence was the proximate cause of the plaintiff's injuries, then it would be your duty to answer the first issue Yes. If you fail to so find, then it would be your duty to answer that issue No."

In respect to the defendant Long's alleged violation of the provisions of G.S. 20-141(a) and (c), the trial judge did not charge the jury that a violation of these parts of the statute, or either of them, was negligence *per se*, and his charge contains no formula or rule to aid the jury in determining which of the circumstances in respect thereto would or would not constitute negligence. The judge simply charged in respect to these provisions of the statute as to the plaintiff's contention that certain facts would make the speed at which defendant was driving his automobile in excess of what was reasonable and prudent under the circumstances then existing, and the defendant's contention that other facts would not, and that it was for the jury to determine whether the defendant was driving at that time and place at a speed in excess of what was reasonable and prudent under the conditions; but without appropriate instructions how could the jury know whether the facts as found did or did not amount to negligence as defined by the statute.

In respect to the part of the charge as to a sudden emergency, the judge stated the defendant contends he was faced with a sudden emergency with the light being waved before him, gave a special prayer for instructions of defendant Long as to sudden emergency, stated the doctrine of sudden emergency, and charged at length defendant Long's contentions in respect thereto, and his contention that he was entitled to the benefit of this doctrine. The judge gave no contention of plain-

tiff in respect to this doctrine, and did not declare and explain the law arising upon plaintiff's evidence in respect to this doctrine.

A reading of the charge as a whole leads us to the conclusion that the judge did not declare, explain, and apply the law to the evidence bearing on the substantial and essential features of the case.

The provisions of G.S. 1-180 require that the trial judge in his charge to the jury "shall declare and explain the law arising on the evidence given in the case," and unless this mandatory provision of the statute is observed "there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented." *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375. A bare declaration of the law in general terms and a statement of the contentions of the parties are not sufficient to meet the statutory requirement. *Glenn v. Raleigh,* 246 N.C. 469, 98 S.E. 2d 913; *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331, where 14 of our cases to that effect are cited.

This Court said in *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484: "The judge must declare and explain the law 'as it relates to the various aspects of the testimony offered.' *Smith v. Kappas, supra.* By this it is meant that the statute requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' 53 Am. Jur., Trial, section 509."

The chief purpose of a charge is to aid the jury to understand clearly the case and arrive at a correct verdict. For this reason, the Court has consistently held that G.S. 1-180 confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error, and this is true even without prayer for special instructions. *Westmoreland v. Gregory,* 255 N.C. 172, 120 S.E. 2d 523; *Lewis v. Watson, supra; Smith v. Kappas, supra.* In the charge here most of the evidence was stated in the contentions of the parties. Where no evidence is stated except in the contentions of the parties that does not meet the requirements of G.S. 1-180. *Brannon v. Ellis, supra,* and the cases there cited.

When the charge given to the jury in the court below is scrutinized in the light of these principles, it is indisputably clear that the trial judge failed to declare and explain the law arising upon the evidence given in this case, and that the plaintiff is entitled to a new trial of her action against defendant Long, and it is so ordered.

New trial for plaintiff.

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

EDITH P. JOYNER v. REESE B. JOYNER.

(Filed 28 March, 1962.)

1. Divorce and Alimony § 18; Judgments § 2—

In an action for divorce, or for alimony without divorce, it is not required that a motion therein for alimony *pendente lite* be heard in the county during the term, but the judge holding the courts of the district may, after notice, hear the motion in chambers in any county of the district.

2. Divorce and Alimony § 22; Judgments § 2—

A husband who attends and participates in the hearing to determine the right to the custody of a child of the marriage, held outside the county, but in the district, by the judge regularly holding the courts of the district, is bound by the judgment.

3. Divorce and Alimony § 24; Appeal and Error § 12—

An appeal from order awarding custody of a child of the marriage to the wife removes the cause from the Superior Court to the Supreme Court, and the Superior Court thereafter is *functus officio* until the remand of the cause. The Superior Court is without jurisdiction, pending the appeal, to punish the husband for contempt, and its findings in regard to the wilful violation of the order are a nullity. However, the question of the wilful violation of the custody order may be investigated by the Superior Court after the cause has been remanded to that Court.

4. Same—

In the absence of *supersedeas*, order directing the husband to provide support of a child of the marriage may be enforced pending appeal by execution against defendant's property.

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

APPEAL by defendant from *Bundy, J.*, October 31, 1961, NASH Superior Court, in Chambers.

The plaintiff, the wife, instituted this civil action against the defendant, the husband, for alimony without divorce, for counsel fees, and for custody of Ricky Joyner, age nine, the only child of the parties. The plaintiff, by verified complaint, alleged the defendant, over a long period of time, had been guilty of cruel and inhuman treatment, (giving details) which made her condition intolerable and her life burdensome. The facts alleged, if found to be true, are sufficient to state a cause of action for divorce *a mensa et thoro*. The plaintiff, by motion in the cause, applied for a *pendente lite* award of support for herself and her child, and for its custody. The motion was made returnable before Judge Bundy, regularly holding the courts of the Seventh Judicial District, at Tarboro in Edgecombe County. The hearing was adjourned and the motion actually heard at Wilson in Wilson County

on October 25, 1961, all in the Seventh Judicial District. The evidence at the hearing included the verified pleadings and numerous affidavits by both parties. The order was signed October 31, 1961.

Judge Bundy made detailed findings of fact and from them concluded: "The conduct of the defendant has been such as to render the life of the plaintiff burdensome and her condition intolerable . . . The defendant owns property of the approximate value of $30,000 and earns from his business approximately $5,000 per year. . . . and the court finds as a fact the plaintiff is a fit and suitable person to have the care and custody of said child." The court ordered the defendant to pay to the plaintiff $150 per month for the support of herself and the child whose custody, subject to visitation rights, was awarded to her. Plaintiff's counsel was awarded $150 as attorney's fees.

The defendant entered many objections and exceptions to the findings of fact and the award of alimony *pendente lite* and custody. On November 3, the defendant surrendered to the plaintiff the custody of the child and at the time paid into the clerk's office $150 for the use and benefit of the plaintiff and the child. On November 7, 1961, the defendant served notice of his appeal from the order making the award. This is designated as the defendant's first appeal.

On November 29, 1961, the plaintiff filed an affidavit that the defendant had violated the court's custody order by forcibly taking the child from the plaintiff's custody. Judge Bundy issued a show cause order requiring the defendant to appear in chambers at Nashville and show cause why he should not be attached for contempt. At the show cause hearing Judge Bundy, among other findings, made the following:

> "10. The defendant has acted in a wilful and contemptuous manner and has wilfully and contemptuously violated the order of October 31, 1961, and that he is, at the date of this hearing, in wilful contempt of the said order and in wilful contempt of this court.
>
> "11. That defendant has appealed from the order of October 31, 1961, to the Supreme Court of North Carolina, and that prior to the date of this hearing he has filed his appeal with the Clerk of the Supreme Court of North Carolina, and that defendant contends that, pending the said appeal, this court is FUNCTUS OFFICIO and is without authority to make any further orders in the above entitled action pending the aforesaid appeal to the Supreme Court."

Whereupon Judge Bundy concluded the appeal took away his authority to make any further order and dismissed the show cause pro-

ceeding. Both parties gave notice of appeal. The defendant filed his case on appeal. The plaintiff failed to prosecute hers. This is defendant's second appeal.

Cooley and May, By Harold D. Cooley for defendant appellant.
L. L. Davenport for plaintiff appellee.

HIGGINS, J. Without merit is the defendant's appeal from the order awarding to the plaintiff for herself and the child alimony *pendente lite,* counsel fees, and custody of Ricky Joyner. The complaint states a cause of action for divorce *a mensa et thoro.* Evidence of the plaintiff's need, her suitability for the child's custody, and the defendant's ability to pay is plenary. The amount of the award is certainly not excessive. G.S. 50-16. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226. Untenable are the objections that Judge Bundy held hearings in Tarboro and Wilson. In each instance the defendant and counsel were given notice and without objection appeared and participated in the hearings. While these In Chambers proceedings were outside Nash County, where the action was pending, nevertheless they were held in the same judicial district and by the judge regularly assigned to preside over the courts of that district. In so far as the alimony *pendente lite* and counsel fees for the plaintiff are concerned, the hearing could be held on proper notice anywhere in the judicial district. "The present statute (The Code, § 1291) (now G.S. 50-15) provides that the motion may be heard and determined in or out of term, and certainly the wife in such case ought not to be left to starve till the judge, or his successor, shall come to the county. The motion is ancillary and not a motion for judgment on the merits, or a motion in the cause, strictly speaking, and hence it can be heard anywhere in the district." (citing cases) *Moore v. Moore,* 130 N.C. 333, 41 S.E. 943.

In so far as custody is concerned, the defendant, having attended and participated in the hearing in the district before the judge regularly holding the courts, is bound by the judgment entered. *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Heuser v. Heuser,* 234 N.C. 293, 67 S.E. 2d 57; *Pate v. Pate,* 201 N.C. 402, 160 S.E. 450. The *Griffin* case involved custody alone.

Pending the defendant's appeal to this Court from Judge Bundy's order allowing alimony and counsel fees and fixing custody, the plaintiff filed a verified motion in the cause, stating the defendant had wilfully violated the order both as to the payment of alimony and as to the custody of the child. Judge Bundy ordered the defendant to appear and show cause why he should not be held in contempt. At the

hearing Judge Bundy found the defendant had wilfully violated the order and was in wilful contempt. Nevertheless he concluded that because the appeal was then pending he had no power to punish for contempt and dismissed the show cause proceeding. Both parties gave notice of appeal. The defendant, only, brought the record of the show cause proceeding here, designating it as his second appeal.

Our decisions appear to be uniform in holding an appeal to this Court removes a cause from the superior court which is thereafter without power to proceed further until the cause is returned by the mandate of this Court. *Lawson v. Lawson,* 244 N.C. 689, 94 S.E. 2d 826; *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559; *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384; *Lawrence v. Lawrence,* 226 N.C. 221, 37 S.E. 2d 496; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Ragan v. Ragan,* 214 N.C. 36, 197 S.E. 554; *Vaughan v. Vaughan,* 211 N.C. 354, 190 S.E. 492; *Page v. Page,* 167 N.C. 346, 83 S.E. 625. "The general rule is universally recognized that a duly perfected appeal or writ of error divests the trial court of further jurisdiction of the cause in which the appeal has been taken. The jurisdiction over the cause is transferred to the appellate court." 3 Am. Jur., Appeal and Error, § 528.

Judge Bundy was correct in holding that the superior court was divested of jurisdiction by the appeal. Consequently the findings of wilful violation of the *pendente lite* order for the payment of alimony and counsel fees were without authority and are void. However, with respect to the money judgments, the appeal does not stay execution against the defendant's property for the collection of the judgment unless a stay or *supersedeas* is ordered. The appeal stays contempt proceedings until the validity of the judgment is determined. But taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court.

In a custody case, the court acquires jurisdiction of the child as well as the parent. The child thus becomes a ward of the court. The court's duty to its ward should not be held in abeyance pending appellate review. Does jurisdiction to see that the child is properly cared for remain in the superior court after the appeal, or does the appeal transfer the jurisdiction to the appellate court? Am. Jur., 17A, Divorce and Separation, § 814, p. 11, and A.L.R. 163, p. 1323, deal with the question in almost identical terms. "Jurisdiction . . . of custody of children, . . . pending appeal . . . This question usually has arisen in respect of the enforcement or modification, pending appeal, of the order or decree of the trial court. In some jurisdictions the appellate court has

exclusive jurisdiction concerning custody during the pendency of the appeal. (Citing many cases, including *Page v. Page, supra.*) Contrary to the foregoing rules, it is held in other jurisdictions that the power to make or enforce custody orders pending an appeal . . . is in the trial court." A third view is that the question of which court has jurisdiction depends upon whether a stay or *supersedeas* has been granted. *Gotthelf v. Fickett,* 37 Ariz. 322, 294 P. 837, on rehearing 37 Ariz. 413, 294 P. 840. The North Carolina cases fit into the general rule that appeal removes the entire proceeding to the Supreme Court and leaves the superior court *functus officio* until the cause is remanded. This seems to be true even in custody cases both as to the order of custody and as to allowance for the child's support. "There is another reason especially arising out of the status of the case during appeal; under the circumstances of this case the judge was *functus officio,* his authority over the matters involved having ended with the appeal from the order of June 2, which took the case out of his jurisdiction." *Cameron v. Cameron, supra.* "The appeal from the order allowing support *pendente lite* for the child took the case out of the jurisdiction of the superior court. Pending the appeal the judge was *functus officio.* Hence the adjudication of contempt and the order of imprisonment are void and of no effect." *Lawrence v. Lawrence, supra.*

However, as in the case of a wife's alimony *pendente lite,* the allowance for the child may be enforced by execution against the defendant's property pending appeal unless stay or *supersedeas* is ordered. Surely, however, some more adequate provision should be made for the child during the legal battle of its parents. Frequently it is months after an appeal is taken until the record is seen here.

The contempt proceeding in this case was void. The findings of wilful violation are likewise void. The order allowing alimony, counsel fees, and custody, challenged by the first appeal, is affirmed. The order dismissing the contempt proceeding from which the defendant takes the second appeal, is likewise affirmed. However, the finding of wilful contempt is a nullity. The superior court having been deprived of jurisdiction by the appeal, and the proceeding consequently without effect, nevertheless the question of the wilful violation of the court's order may be investigated by the superior court when the case is remanded to that court. The defendant's motion suggesting diminution of the record is allowed. The plaintiff's motion to dismiss the appeal is denied. The defendant will pay all costs.

Affirmed.

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

STATE v. MACK B. THOMPSON.

(Filed 28 March, 1962.)

1. Criminal Law § 159—

Exceptions not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 99—

On motion to nonsuit, the evidence must be taken in the light most favorable to the State and it is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom.

3. Intoxicating Liquor § 13c—

Evidence tending to show that 21 pints of whiskey were found on premises owned and operated by defendant as a supper club and that the whiskey was found on the floor of the kitchen near the refrigerator, with circumstantial evidence raising the inference that whiskey was being sold to patrons of the club, *is held* sufficient to be submitted to the jury on the question of defendant's constructive possession of the whiskey for the purpose of sale. G.S. 18-32.

4. Criminal Law § 101—

If there is substantive evidence of each essential element of the offense charged, defendant's motion to nonsuit is correctly denied regardless of whether the State's evidence is direct or circumstantial, or both, and whether circumstantial evidence excludes every reasonable hypothesis of innocence is a question for the jury.

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

APPEAL by defendant from *Clark, J.*, March Criminal Term 1961 of ALAMANCE, docketed and argued as No. 721 at Fall Term 1961.

Criminal prosecution on warrant charging that defendant, on December 17, 1960, unlawfully and wilfully "did have and keep in his possession illegal intoxicating liquors, to wit: 21 pints tax paid whiskey for the purpose of sale, located in the Orange Bowl Supper Club, Mebane, N. C., contrary to the form of the statute . . ."

Upon trial *de novo* in the Superior Court (on appeal by defendant from conviction and judgment in the General County Court of Alamance County), the only evidence was that offered by the State. It consists of the testimony of John Crabtree and Wade Montgomery, each a Deputy Sheriff of Alamance County, and tends to show the facts stated below.

On December 17, 1960, and prior thereto, defendant was the owner of premises on which he operated a place of business known as the Orange Bowl Supper Club. The business was conducted in "a long building," in which there was a dance hall, tables, a piccolo, a stage, dressing rooms, and a kitchen. There was "a bar type structure in

the dance floor," with a counter approximately twenty to thirty feet long. A door behind the counter "leads in the kitchen." The kitchen had a window "about four or five feet wide where they put orders through."

On the night of December 17, 1960, the officers, under authority of a warrant therefor, searched the said premises. In brown paper bags, sitting on the floor of the kitchen near the refrigerator, there were twenty-one full (sealed) pints of different kinds of tax-paid whiskey. In a five-gallon bucket (used as a trash can) under the end of the kitchen table, there were five or more empty whiskey bottles, "with the odor of whiskey in them," and a number of small paper cups. Numerous "whiskey cups, about 3-oz. paper cups," were "at the end of the table," and "five empty bottles and cups (were) out under the counter."

When the search was made, "there was one man at the counter and there were some musicians on the stage and several people were back at the door." Defendant was not on the premises when the search was made. Later, he stated "he had gone to get his cook."

Deputy Sheriff Montgomery testified: "He (defendant) came up twice while his case was pending in County Court and wanted to know if it would be satisfactory with us if he would plead guilty to illegal possession and we said that was up to the Court whether they would accept it or not."

The jury found the defendant "Guilty as charged in the warrant," and judgment was pronounced as appears in the record. Defendant excepted and appealed.

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

Walter D. Barrett, M. Hugh Thompson and William A. Marsh, Jr., for defendant appellant.

BOBBITT, J. The only assignment of error brought forward and discussed in defendant's brief is based on his exception to the overruling of his motion for judgment as in case of nonsuit. Hence, all other assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, *810.*

The only question presented by a motion under G.S. 15-173 for judgment as in case of nonsuit is whether the evidence is sufficient to require submission to the jury. *S. v. Green,* 251 N.C. 40, 110 S.E. 2d 609. In passing on such motion, "the evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable

inference to be drawn therefrom." *S. v. Corl,* 250 N.C. 252, 108 S.E. 2d 608.

Clearly, if the twenty-one pints of whiskey were in the actual or constructive possession of defendant, there was ample evidence to support the verdict. G.S. 18-32; *S. v. Rogers,* 252 N.C. 499, 114 S.E. 2d 355, and cases cited.

Defendant contends the evidence is insufficient to support a finding that the twenty-one pints of whiskey were in defendant's constructive possession.

As to what constitutes constructive possession, *Varser, J.,* in *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600, said: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual." This statement has been quoted with approval in later cases, *e.g., S. v. Harrelson,* 245 N.C. 604, 606, 96 S.E. 2d 867. It is stated in *S. v. Taylor,* 250 N.C. 363, 366, 108 S.E. 2d 629: ". . . if nontaxpaid whiskey is on a person's premises with his knowledge *and consent,* he has constructive possession thereof while it remains on premises under his exclusive control."

Even so, defendant contends the circumstantial evidence upon which the State relies is insufficient to show defendant had constructive possession of the twenty-one pints of whiskey in that the facts shown are not inconsistent with defendant's innocence.

In *S. v. Stephens,* 244 N.C. 380, 383, 93 S.E. 2d 431, this Court, in opinion by *Higgins, J.,* said: "We are advertent to the intimation in some of the decisions involving circumstantial evidence that to withstand a motion for nonsuit the circumstances must be inconsistent with innocence and must exclude every reasonable hypothesis except that of guilt. We think the correct rule is given in *S. v. Simmons,* 240 N.C. 780, 83 S.E. 2d 904, quoting from *S. v. Johnson,* 199 N.C. 429, 154 S.E. 730: 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict.

What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

Under the rule stated in *S. v. Stephens, supra,* and approved in later decisions, this Court is of opinion, and so decides, that there was substantial and therefore sufficient evidence to support a finding that the twenty-one pints of whiskey were in the constructive possession of defendant and to support a verdict of guilty. Hence, defendant's motion for judgment as in case of nonsuit was properly overruled.

In *S. v. Hunt,* 253 N.C. 811, 117 S.E. 2d 752, cited by defendant, decision was based on a materially different factual situation.

No error.

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

MADGE CHERRY DAVIS v. SADIE CHERRY SINGLETON.

(Filed 28 March, 1962.)

1. Venue § 3—

An action against an executor or administrator must be instituted in the county in which the personal representative qualified unless there is statutory provision to the contrary, and an action is against the personal representative in his official capacity within the meaning of the rule if it involves a claim against the estate, settlement of the accounts of the personal representative, or the distribution of the estate. G.S. 1-78.

2. Same—

In an action by one beneficiary under a will against the other beneficiary thereunder alleging that plaintiff is entitled to one half a specified sum which had been bequeathed to the parties, and that defendant beneficiary, after filing her final account as executrix, had failed and refused to deliver to plaintiff her one-half interest, *is held* not an action against defendant in her representative capacity, and the denial of defendant's motion to remove, as a matter or right, to the county in which she qualified, is without error.

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

APPEAL by defendant from *Bundy, J.,* September Term 1961 of NASH.

Plaintiff instituted this action June 9, 1961, in the Superior Court of Nash County, and in her complaint alleges:

"1. The plaintiff is a resident of Nash County, North Carolina.

"2. The defendant is a resident of Beaufort County, North Carolina.

"3. On the 17th day of August 1959, Claud T. Cherry died in and a resident of Beaufort County, North Carolina, leaving a duly attested Will which was thereafter admitted to probate in Beaufort County by the Clerk of the Superior Court of that County on the 21st day of September 1959.

"4. Under the terms of said last will of Claud T. Cherry, one-half of his entire estate was given to the plaintiff, Madge Belle Davis, who was his half-sister, and one-half was given to the defendant, Sadie Dott Singleton, who was also his half-sister, '. . . for the terms of their natural lives' with remainder to the 'descendants of the body' of said sisters. Said Will further provided: 'If either of my said half-sisters should die without leaving descendants of her body, then I desire that such property as would have gone to the descendants of said half-sister, shall go absolutely and in fee simple to the heirs of said half-sister.' The plaintiff, therefore, is now entitled to the possession and use of one-half of the entire estate that the said Claud T. Cherry owned at the time of his death for the term of her natural life.

"5. At the time of his death, said Claud T. Cherry had on deposit in a savings account in The Bank of Washington, Washington, N. C., the sum of $9,280.74. The funds in this bank account, though carried in the name of 'C. T. Cherry or Sadie Cherry Singleton,' and though perhaps subject to the order of said Sadie Cherry Singleton during the lifetime of said Claud T. Cherry, were at all times the sole and separate property of Claud T. Cherry during his entire lifetime and passed under his Will at his death. Claud T. Cherry did not own any other personal property of significant value at his death and therefore, under the Will, the plaintiff was entitled to receive one-half of said bank account as her distributive share of his personal estate.

"6. Following the death of said Claud T. Cherry and the administration of his estate by the defendant as Executrix, the defendant appropriated all of the funds in said bank account to her own use and enjoyment, and refused and failed and now refuses and fails to deliver over to the plaintiff the one-half of this account which she was and is entitled to receive, although the plaintiff has repeatedly demanded the payment of same.

"7. The plaintiff is entitled to have and recover of the defendant the sum of $4,640.37, plus interest thereon from the date the administration of the estate of Claud T. Cherry was concluded, as her distributive share of her said brother's personal estate.

"WHEREFORE, the plaintiff prays that she have and recover of the defendant the sum of $4,640.37, with interest thereon from the date of the filing of the Final Account by the Administratrix of the Estate of Claud T. Cherry, and that she have such other and further relief as to the Court may appear just and proper."

Defendant moved, pursuant to the provisions of G.S. 1-83, that the action be removed to Beaufort County for trial. In her motion, defendant asserts the action is removable under the provisions of G.S. 1-78 for that, "while she is not named as Executrix in the caption," it appears from the allegations of the complaint that "the action is in fact against her in her official capacity as Executrix of the estate of Claud T. Cherry."

Defendant excepted to and appealed from the court's order denying her said motion.

Rodman & Rodman for defendant appellant.
Spruill, Thorp, Trotter & Biggs for plaintiff appellee.

BOBBITT, J. The sole question presented on this appeal is whether the court erred in denying defendant's motion that this action be removed to Beaufort County for trial.

G.S. 1-78 requires that all actions against executors and administrators in their official capacity, unless otherwise provided by statute, be instituted in the county where the letters testamentary or letters of administration are issued. *Wiggins v. Trust Co.*, 232 N.C. 391, 61 S.E. 2d 72, and cases cited; McIntosh, N. C. Practice and Procedure, Second Edition (Wilson), § 804.

Plaintiff alleges defendant appropriated to her own use certain funds; that these funds were owned solely by Claud T. Cherry and constituted assets of his estate; and that plaintiff, to whom Cherry left "one-half of his entire estate," is entitled to recover from defendant, individually, one-half of the amount of the funds so appropriated by defendant.

Sadie Cherry Singleton, individually, is named as sole defendant in the summons and in the caption of the complaint. In paragraph 6 of the complaint, in a subordinate clause, plaintiff refers to "the administration of his (Claud T. Cherry's) estate by the defendant as Executrix." Too, plaintiff prays that "she have and recover of the defendant the sum of $4,640.37, with interest thereon from the date of the filing of the Final Account by the Administratrix of the Estate of Claud T. Cherry." Except as stated, the complaint contains no reference to defendant's status, now or formerly, as executrix or as

administratrix. Plaintiff's brief states: "The suit is, therefore, against the defendant individually and not in a representative capacity."

In *Montford v. Simmons*, 193 N.C. 323, 136 S.E. 875, cited and stressed by defendant, the record shows the action was instituted in Harnett County against J. W. Burton, Administrator of the estate of William Montford, deceased, and certain individuals. Burton was a resident of and qualified as such administrator in Onslow County. In the summons, caption and complaint, Burton was designated as such administrator. The plaintiffs asserted that they were, and the individual defendants were not, entitled to certain insurance funds collected by said administrator and then held by him for distribution to the persons lawfully entitled thereto. It was held that plaintiffs' action was against J. W. Burton, Administrator of the estate of William Montford, deceased, in his official capacity; and that said administrator, pursuant to C.S. 465, now G.S. 1-78, was entitled, as a matter of right, to have the action removed to Onslow County.

"The action is against the representative in his official capacity if it: (a) asserts a claim against the estate; (b) involves the settlement of his accounts; or (c) involves the distribution of the estate." McIntosh, *op. cit.*, § 804; *Montford v. Simmons, supra.*

Plaintiff's action is to recover as beneficiary under Claud T. Cherry's will. Unquestionably, if she had instituted such action against defendant as executrix or as administratrix of the estate of Claud T. Cherry, such action, whether maintainable or not, would have been an action against an executrix or administratrix in her official capacity. However, plaintiff did not institute such action.

Whether the complaint alleges facts sufficient to constitute a cause of action against defendant, individually, is not presented by this appeal. The question now presented relates solely to venue.

True, the fact that an executor or administrator is sued, and the defendant is named as such executor or administrator in the summons, caption and complaint, does not entitle such defendant to an order of removal if the complaint discloses the alleged cause of action is not against such executor or administrator *in his official capacity.* See *Roberts v. Connor*, 125 N.C. 45, 34 S.E. 107, where, in an action against "H. G. Connor, Executor of A. Branch, Deceased, Doing Business as Branch & Co., Bankers," the defendant's motion for removal was denied. But where plaintiff's action is against defendant, individually, and not against her as executrix or as administratrix in an official capacity or otherwise, whether, upon the facts alleged, plaintiff has a cause of action against the personal representative of the Claud T. Cherry estate, is not presented for decision. Suffice to say, plaintiff, in this action, has not sued such personal representative.

Defendant contends, and rightly so, that *Rose v. Patterson,* 218 N.C. 212, 10 S.E. 2d 678, cited and stressed by plaintiff, is readily distinguishable, and present decision is not based thereon. There, the action was against M. K. Patterson, individually, to recover the amount of a judgment previously obtained against M. K. Patterson, as executrix of the estate of A. S. Patterson, deceased. The plaintiff's action was based on C.S. 59, now G.S. 28-61, which provides: "All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent." He alleged he was entitled to recover from M. K. Patterson, individually, the amount of his established claim against the A. S. Patterson estate for that M. K. Patterson, as sole beneficiary under A. S. Patterson's will, "received from herself as executrix of said estate and has taken into her possession and holds the same as her own, assets sufficient to pay off and discharge the debt owing to plaintiff."

Based on the fact that plaintiff, in this action, has not sued the executrix or administratrix of the estate of Claud T. Cherry in an official capacity or otherwise, the order of the court below is affirmed.

Affirmed.

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

HELEN ELIZABETH PULLEY v. CHARLIE HERBERT PULLEY.

(Filed 28 March, 1962.)

1. Appeal and Error § 60—

A decision on appeal that defendant's confessed judgment for alimony would support proceedings for contempt upon defendant's wilful refusal to pay alimony in accordance with the judgment, and that the judgment is binding on defendant in the absence of fraud, mistake, or oppression, becomes the law of the case, and the lower court properly thereafter issues an order to show cause in accordance with the direction of the decision.

2. Divorce and Alimony § 21—

The court's findings to the effect that defendant had wilfully refused to pay alimony as directed in a confessed judgment *is held* supported by the evidence, and the findings support the order of the court that defendant be confined in the county jail for a period of 30 days, with provision that defendant could purge himself of contempt by payment of the alimony then due into the office of the clerk of the Superior Court.

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

PULLEY *v.* PULLEY.

APPEAL by defendant from *Bone, J.*, January Term 1962 of ONSLOW.

This is an appeal from an order entered pursuant to a hearing upon an order directing the defendant to show cause why he should not be held and punished as for contempt for failure to comply with a confessed judgment entered on 11 July 1958, directing that he pay a stated sum, to wit, $62.50 on the 3rd and 18th days of each and every month from the 3rd day of July 1958, to the plaintiff for her support and maintenance.

This case is before us a second time. On the first appeal, *Pulley v. Pulley,* 255 N.C. 423, 121 S.E. 2d 876, an order of the lower court dismissing the plaintiff's motion to show cause why the defendant should not be held in contempt for failure to comply with the terms of said confessed judgment, was reversed, and the lower court was directed to issue a show cause order as prayed for in the plaintiff's motion and to have a hearing thereon.

A show cause order was issued and duly served on the defendant. The hearing was held on 17 January 1962 before his Honor, Bone, J., regularly assigned to hold the courts of the Fourth Judicial District and presiding at the January Term 1962 of the Superior Court of Onslow County.

The court found that the defendant had not paid any sum whatsoever to the plaintiff, as required in the confessed judgment entered on 11 July 1958, since paying her the sum of $62.50 on 3 December 1960; that the defendant has wilfully failed and refused to comply with said judgment, and is now in arrears in his payments due the plaintiff under said judgment in the sum of $1,625.00 up to and including 17 January 1962; and that the defendant's failure to comply with said judgment is not due to any financial inability on his part, but was caused and is solely due to his intentional, persistent and wilful purpose to avoid compliance with the terms of said judgment. The court entered the following order:

"IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the defendant, Charlie Herbert Pulley, on account of his wilful failure and refusal to comply with the judgment in this cause, be and he is hereby adjudged in contempt of this Court and that the said Charlie Herbert Pulley be punished for his contempt and, as punishment therefor, IT IS ORDERED that the said Charlie Herbert Pulley be confined in the common jail of Onslow County for the period of 30 days."

It was further ordered that the defendant could purge himself of this contempt by payment of the sum of $1,625.00 into the office of the Clerk of the Superior Court of Onslow County, which sum would be in full payment of alimony due the plaintiff up to and including

the 17th day of January 1962, pursuant to the provisions of said confessed judgment.

The facts in this case were set out in detail in the opinion on the former appeal, including the relevant parts of the separation agreement executed by the parties on 11 July 1958 and a verbatim copy of the confessed judgment. Hence, we deem it unnecessary to repeat them herein.

The defendant appeals from the order entered in the court below, assigning error.

A. Turner Shaw, Jr.; Ellis, Godwin & Hooper for plaintiff.
Jones, Reed & Griffin for defendant.

DENNY, C.J. The appellant on this appeal seeks to have us review and reconsider substantially the identical questions presented and decided on the former appeal with respect to the validity of the confessed judgment and the right to have its terms enforced by contempt proceedings. He contends that the court below committed error in not holding that such judgment was merely a consent judgment and not enforceable by contempt proceedings. These questions were considered and determined in the former appeal and decided adversely to the defendant. The opinion became the law of the case and the lower court was bound thereby. *Glenn v. City of Raleigh,* 248 N.C. 378, 103 S.E. 2d 482; *Hayes v. City of Wilmington,* 243 N.C. 525, 91 S.E. 2d 673; *Bruce v. O'Neal Flying Service,* 234 N.C. 79, 66 S.E. 2d 312; *Maddox v. Brown,* 233 N.C. 519, 64 S.E. 2d 864.

In the former opinion, *Parker, J.,* speaking for the Court, said: "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 court below, in issuing the order to show cause and in having a hearing thereon, merely followed the directive of this Court in its former opinion.

The remaining question is whether there is sufficient evidence to support the ruling on the court's finding that the defendant's failure to comply with the judgment ordering him to pay the stated sums according to the terms of the confessed judgment to the plaintiff for her support and maintenance, was wilful.

The defendant has not contended that he has been or that he is now financially unable to make these payments. The court below, after hearing the evidence of the plaintiff and the defendant and the arguments of counsel, among other things, found that, on 11 July 1958, when the defendant signed the confession of judgment herein and the judgment was entered on the defendant's confession of judgment, he fully understood what he was signing and the effect of same; "that he understood that the payments referred to in the said confession of judgment and judgment were to continue so long as he and the plaintiff lived and would continue whether or not he obtained a divorce from the plaintiff * * *."

The court further found that before the confessed judgment was signed, the Clerk of the Superior Court inquired as to whether or not defendant knew that if he confessed judgment he would be liable for contempt if he failed to pay the amounts set out in the confessed judgment and the judgment entered pursuant thereto; that the defendant said he understood the judgment and further stated that it had been explained to him by the attorney.

In our opinion, the evidence is sufficient to support the findings of the court below and that such findings are sufficient to support the order entered, and we so hold.

The order adjudging the defendant in contempt, and imposing a prison sentence, and providing that the defendant may purge himself of the contempt in the manner prescribed in the order, is

Affirmed.

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

W. A. AYCOCK AND G. W. AYCOCK v. NORFOLK-SOUTHERN RAILWAY COMPANY.

(Filed 28 March, 1962.)

1. Animals § 1; Railroads § 11—

A railroad company may not be held liable for injuries to cattle which break through the owner's fence and eat vegetation on the right-of-way, which had been sprayed by the railroad company with a poisonous weed-killer, nor may the railroad company be held under duty to seek out and notify adjacent landowners of the time it proposes to spray weed killer on its right-of-way.

2. Appeal and Error § 41—

Where nonsuit would have to be sustained even though all of the evidence offered by plaintiffs were admitted, the exclusion of part of plaintiffs' evidence cannot be prejudicial.

APPEAL by plaintiffs from *Stevens, J.*, August 1961 Term, WAYNE Superior Court.

The appellants, in their brief, succinctly state their case: "The defendant Railroad Company sprayed a highly poisonous weed-killer upon its right of way at a point where its tracks crossed farm lands owned by the plaintiffs. The plaintiffs maintained pastures on both sides of the tracks adjacent to the right of way in which they regularly keep cattle. The weed-killer, sodium arsenate, produces a 'new mown hay' type of odor when sprayed on vegetation which is attractive to cattle. The plaintiffs' cattle broke out of the pasture, went upon the right of way and ate the poisoned grass. Fifty-eight of the cattle died as a result of the poisoning. The plaintiffs instituted this action for the recovery of damages ($8,000) alleging negligence on the part of the defendant in spraying poison upon the right of way. The court refused to admit certain evidence offered by the plaintiffs and granted the defendant's motion of nonsuit made at the close of the plaintiffs' evidence."

One of the plaintiffs offered to testify the defendant had not given prior notice of its intention to treat its right of way with chemicals. The plaintiffs excepted to the court's rulings and judgment, and appealed.

James N. Smith, F. Ogden Parker, J. Faison Thomson, Jr., for plaintiffs, apepllants.

Lucas, Rand & Rose, By Z. Hardy Rose for defendant appellee.

HIGGINS, J. The evidence fails to show that any poisonous spray was deposited on plaintiffs' pasture as in *Bivins v. R.R.*, 247 N.C. 711,

102 S.E. 2d 128. On the contrary, the evidence affirmatively shows the cattle broke out of the pasture in which the plaintiffs had them enclosed, wandered upon the defendant's right of way upon which the defendant, as a means of clearing its right of way, had sprayed toxic chemicals. In using the poisonous spray the defendant was under the duty to use reasonable precaution to see that the poison did not damage crops and livestock on adjacent lands. The railroad is not charged with the duty of guarding the right of way against trespassing cattle.

The rule of liability is stated in 3 C.J.S., pp. 1329 and 1330: "In the absence of a statute to the contrary, an owner of property, who is not guilty of gross or wanton negligence, is not liable for injuries to trespassing animals from conditions existing on his property." The rule is differently stated in 2 Am. Jur., pp. 782, 783: "The owner of land, inclosed or uninclosed, is not in general bound to keep his premises safe for the trespassing animals of others. If, in the ordinary use of the property, harm befalls them, their owner, by permitting them to roam at large, is held to have assumed the risk of such injury, and so is denied any right of action on that account." This Court has recognized the rule and followed it in *Morrison v. Cornelius*, 63 N.C. 346.

The plaintiffs' evidence disclosed that the cattle were confined in a grazing boundary in which clover and other grass provided excellent pasture. This pasture was enclosed by fence in good repair, and recently inspected by the plaintiffs. There is nothing in the evidence to charge the defendant with notice the cattle were likely to break the enclosure and trespass on its right of way. The plaintiffs knew the defendant used chemicals in its maintenance work. In fact, the plaintiffs allege on a prior occasion defendant's agent had notified plaintiffs of the intended use of toxic spray, but that it negligently failed to do so on this occasion. The plaintiffs did not live on the farm. The defendant is not under a duty to search out and notify each adjacent landowner of the time it proposes to spray the weeds and brush growing near its tracks. A landowner may assume the practice will be followed as the need requires.

The assignments of error relating to the admission of evidence are nonprejudicial. If the court had admitted all the plaintiffs offered, and some of it was clearly inadmissible, nevertheless nonsuit would have been required. The judgment of the court below is

Affirmed.

STATE v. ED WATKINS.

(Filed 28 March, 1962.)

1. Perjury § 3—

An indictment for subornation of perjury should charge that defendant did unlawfully, wilfully, and feloniously procure another to wilfully and corruptly commit perjury, and an indictment which fails to charge that defendant procured such person to wilfully and corruptly commit perjury is fatally defective. G.S. 15-146.

2. Same—

If the State contends that defendant committed perjury or subornation of perjury in regard to testimony in separate prosecutions, the better procedure is to obtain a separate bill of indictment as to each charge.

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

APPEAL by the State from *Bundy, J.*, November Criminal Term 1961 of NASH.

This is a criminal action in which defendant Ed Watkins was charged with subornation of perjury in a bill of indictment reading as follows: "That ED WATKINS late of the County of Nash, on the 22nd day of August, in the year of our Lord one thousand nine hundred and sixty-one, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously did procure Billy Eason to commit perjury upon the trial of an action in Superior Court of Nash County wherein the State of North Carolina was plaintiff and Ed Watkins was defendant, the same being case number 9263 on the Criminal Superior Court Docket of Nash County, by falsely asserting on oath that he, the said Billy Eason and Robert Shoemaker had not delivered 13 cases of whiskey or any other amount of whiskey, to Ed Watkins at his home on Holden Street in Raleigh, North Carolina, or any other place and that he, Billy Eason, was not guilty of the crimes of breaking, entering, larceny, and receiving, as alleged in bill of indictment No. 9283, Nash County Superior Court the said matter so testified to as aforesaid being material to said issue being tried in said action, knowing said statement or statements to be false or being ignorant whether or not said statements were true, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Before entering a plea to the bill of indictment, the defendant through his counsel moved to quash said bill of indictment. The motion was granted and the State appealed to the Supreme Court, assigning error.

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

J. C. Keeter, Malcolm B. Seawell for defendant.

DENNY, C.J. We think G.S. 15-146 requires that an indictment for subornation of perjury should charge that the defendant did unlawfully, wilfully, and feloniously procure another to wilfully and corruptly commit perjury; that said indictment should designate the court and the nature of the case wherein the alleged perjury occurred, and to set out either the false statement or statements defendant is alleged to have procured another to make, or that the defendant knew said statement or statements to be false, or that he was ignorant as to whether or not such statement or statements were true. *S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401.

It will be noted that the bill of indictment in this case does not charge defendant Ed Watkins with procuring Billy Eason to wilfully and corruptly commit perjury.

An examination of the record in the case of *S. v. Lucas,* 247 N.C. 208, 100 S.E. 2d 366, in which this Court held that the bill of indictment had been drawn in conformity with the requirements prescribed in G.S. 15-145 and G.S. 15-146, discloses that the bill charged the defendant "did unlawfully, wilfully, and feloniously procure one J. D. Stancil wilfully and corruptly (to) commit the felony of perjury," *et cetera.*

Furthermore, if there was subornation of perjury or perjury committed in connection with case No. 9283, in which Billy Eason alone was charged with breaking, entering, larceny, and receiving, it would be the better practice to obtain a separate bill of indictment as to such charge.

We think the motion to quash should be upheld.

The Solicitor may procure a proper bill of indictment or such bills of indictment as the facts may warrant.

Affirmed.

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

STATE OF NORTH CAROLINA v. OSCAR FRANKLIN BROADWAY.

(Filed 28 March, 1962.)

1. Indictment and Warrant § 9—

A warrant charging that defendant did unlawfully and wilfully violate a municipal ordinance by operating a motor vehicle on the public highway in the municipality while under the influence of intoxicants "contrary to the ordinance and against the statute in such case made and provided" *is held* sufficient to charge defendant with the violation of G.S. 20-138, and the reference to the unspecified ordinance will be deemed harmless surplusage.

2. Criminal Law § 154—

Failure of appellant to group the exceptions upon which he relies and incorporate them in the record immediately before or after the signature to the case on appeal warrants dismissal except when appellant challenges the jurisdiction of the lower court or asserts other vitiating error appearing on the face of the record.

3. Criminal Law §§ 16, 18—

Where a mayor's court is given the jurisdiction of a justice of the peace, it may bind a defendant charged with an offense beyond its jurisdiction over to the county court, and the county court which is given jurisdiction of warrants returned to the court by committing magistrates, acquires jurisdiction, and the Superior Court acquires jurisdiction upon appeal from the county court.

APPEAL by defendant from *Cowper, J.*, December 1961 Term of GREENE.

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

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

PER CURIAM. Rule 19 (3) of this Court requires an appellant to group the exceptions on which he relies and incorporate them in the record "immediately before or after the signature to the case on appeal." A failure to comply with this rule by express language warrants a dismissal.

Appellant has not complied with the rule. On the last page of his brief he attempts to enumerate asserted errors. The appeal would be dismissed except for the argument that the Superior Court never acquired jurisdiction. The challenge to that court's jurisdiction prevents a dismissal.

Trial was had in the Superior Court on a warrant issuing from the mayor's court of Snow Hill charging defendant "did unlawfully and wilfully violate an Ordinance of the Town of Snow Hill to wit: Ordi-

nance No. , Article , Section , by operating a motor vehicle on the public highways and in The Town of Snow Hill while under the influence of intoxicating liquors, contrary to the said Ordinance, against the Statute in such case made and provided, and against the peace and dignity of the said Town and State." This was sufficient to charge the defendant with a violation of G.S. 20-138. A violation of that statute subjects defendant to punishment in excess of that which a justice of the peace may impose. G.S. 20-179; N. C. Constitution, Art. IV, sec. 27.

The mayor's court of Snow Hill was created by c. 368 Private Laws 1909. Sec. 3 of that Act provides: "That the mayor of the town of Snow Hill is hereby constituted a special court, with all the jurisdiction, power and authority in criminal causes that is now or may hereafter be given to justices of the peace." The mayor, on 6 December 1960, made this order: "After hearing the evidence in this case, it is adjudged that the defendant ..... Bound over to County Court."

The county court of Greene County was established pursuant to the provisions of c. 406 P.L.L. of 1915. The minutes of that court show: This cause was, on 17 January 1961, continued to 24 January 1961. Several subsequent continuances were ordered. On 28 March 1961 defendant, through his counsel, entered a plea of not guilty. There was a verdict of guilty and judgment based thereon. From that judgment the defendant appealed to the Superior Court. This cause was heard in the Superior Court on the warrant issued by the mayor.

Defendant correctly asserts the jurisdiction of the Superior Court was derivative, and if the county court of Greene County had no jurisdiction, the Superior Court had no right to hear his appeal from that court. His position is that the county court of Greene County had no jurisdiction because it could only hear and determine guilt based on warrants issued from that court. Sec. 5 of the Act creating that court provides: "That all trials of criminal actions in said court shall be upon warrants issued by the clerk of said county court upon complaint under oath as is now provided by law for the issuing of warrants by justices of the peace, and upon warrants returned to said court by committing magistrates in said county as herein provided." Since the Act establishing the mayor's court of Snow Hill gave it the jurisdiction of a justice of the peace, it was the duty of the mayor, when hearing criminal charges contained in a warrant beyond his jurisdiction, to act as a committing magistrate, G.S. 15-86, and discharge defendant, G.S. 15-94, or, as the mayor did in this case, bind him over to a court having jurisdiction of the offense charged. G.S. 15-95. The county court of Greene County had jurisdiction concurrent with

the Superior Court "of all persons charged with the commission of misdemeanors in Greene County." sec. 4, c. 406 P.L.L. 1915.

Since the county court for Greene County had jurisdiction to hear and determine the question of defendant's guilt, it follows that the Superior Court on appeal from the judgment rendered by that court had jurisdiction.

No error.

LEWIS VAN LEUVEN v. AKERS MOTOR LINES, INC., A CORPORATION.

(Filed 28 March, 1962.)

Appeal and Error § 39—

Where the Justices are equally divided in opinion, one Justice not participating, the order of the Superior Court appealed from will be affirmed, without becoming a precedent.

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

PLAINTIFF'S appeal from *Patton, J.*, August 14, 1961, "B" Regular Civil Term, MECKLENBURG Superior Court.

According to the allegations and evidence, the plaintiff owns a house and lot on Little Rock Road, a State highway in Mecklenburg County. The lot, which is 115 feet in width, is subject to a highway easement extending 30 feet from the center of the highway. The right of way covers the hard surface, the shoulder, and the ditch line of the highway for the width of plaintiff's lot. The plaintiff installed a pipe or culvert to carry surface drainage along the ditch line and constructed a fill over the pipe for entrance and exit purposes between the house and the highway.

The defendant is a corporation engaged in freight transportation by motor trucks. In connection with its business it has constructed terminal facilities at a cost of $840,000 near the plaintiff's house. The operation of the terminal requires sewer facilities. The defendant obtained permission from, and approval of, the State Highway & Public Works Commission and the Public Health Service to lay a small sewer line underground along the shoulders of the highway from the terminal to a disposal plant already in operation. Plaintiff's lot is in the line. After the defendant began installing the line, the plaintiff instituted this acton for a permanent order restraining the installation through his

lot. Judge Clarkson issued a temporary order which, upon hearing, was dissolved. After motions and hearing, the plaintiff was allowed to amend his complaint which he did by alleging the line actually had been constructed through his frontage without his authority and over his objection. He demanded a mandatory order requiring the defendant to remove the line. He did not request damages. After hearing, Judge Patton sustained a demurrer to the evidence and dismissed the action. From the order to that effect, the plaintiff appealed.

Parker Whedon for plaintiff appellant.

L. B. Hollowell, Helms, Mulliss, McMillan & Johnston, By Fred B. Helms for defendant appellee.

PER CURIAM. The Justices participating are equally divided on the question whether the mandatory order should be issued compelling the defendant to remove the sewer line already installed on the plaintiff's lot. Therefore, the decision of the Superior Court denying the mandatory injunction is affirmed without the decision becoming a precedent. *Sharp, J.*, while Superior Court Judge, heard a preliminary motion in this proceeding, and for that reason does not participate in this decision.

Affirmed.

HAROLD P. WATTS AND WIFE, JANICE B. WATTS, v. PAMA MANUFACTURING COMPANY.

(Filed 11 April, 1962.)

1. Negligence § 1; Nuisance § 1—

Nuisance and negligence are distinct torts, and while the same act or omission may constitute negligence and a private nuisance *per accidens*, a nuisance *per accidens* may be created or maintained without negligence.

2. Nuisance § 2—

If the operation of facilities on the lands of one person is unreasonable under the circumstances of the particular case and the noise and vibration attendant such operation cause substantial damage in interfering with the use and enjoyment of the lands of another, such operation constitutes a nuisance *per accidens* as an intentional non-trespassory invasion of the rights of the other, regardless of the absence of negligence or the degree of care exercised to avoid injury.

3. Same—

An unintentional interference with the use and enjoyment of the lands of another constitutes a nuisance *per accidens* if the conduct resulting in such interference is negligent, reckless or ultrahazardous.

4. Same—

The operation of a lawful enterprise is not a private nuisance as a matter of law.

5. Same—Determination of whether operation of lawful business constitutes nuisance per accidens.

Whether noise and vibration incident to the normal operation of defendant's lawful business constitutes a nuisance *per accidens* in intentionally interfering with plaintiffs' use and enjoyment of their lands depends upon whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider defendant's operations reasonable under the facts of the particular case, considering the character of the neighborhood, the nature, utility and social value of defendant's operation, the nature, utility, and social value of plaintiffs' use and enjoyment which have been invaded, the suitability of the locality for defendant's operation, the suitability of the locality for the use plaintiffs make of their property, the nature, extent and frequency of the harm to plaintiffs' interests, priority of occupation as between the parties, and other considerations arising upon the evidence.

6. Same—

In order for plaintiffs to be entitled to recover for a nuisance *per accidens* occasioned by noise and vibration incident to the operation of a lawful business by defendant, plaintiffs must sustain substantial damage and not injuries amounting to mere inconvenience or annoyance, since if there is no damage there can be no nuisance.

7. Same— Evidence held sufficient to be submitted to the jury in action to recover for nuisance per accidens.

Plaintiffs' evidence to the effect that they owned and resided in a house some forty feet from defendant's textile plant, that no interference in the use and enjoyment of their property was experienced before defendant re-equipped the plant and installed much heavier machinery and new air-conditioning equipment, but that thereafter the noise from the plant greatly disturbed plaintiffs in their home, and the vibrations emanating from the machinery shook the house, causing its foundations on the side next to the mill to sink, the walls to crack and come out of line, the moulding to pull away from the walls, dishes to clatter, etc. *is held* sufficient to withstand defendant's motion for nonsuit in this action to recover for a nuisance *per accidens*.

8. Appeal and Error § 20—

A defendant may not complain on his appeal that the lower court placed the burden on plaintiff to prove as a part of his cause of action an unnecessary and irrelevant element.

9. Nuisance § 2—

In this action to recover for an intentional nontrespassory invasion

of the use and enjoyment of plaintiffs' land, a charge which fails to instruct the jury as to what matters were to be considered in determining whether defendant's operations were unreasonable, must be held for prejudicial error.

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

APPEAL by defendant from *McConnell, S.J.*, September 1961 Civil Term of GASTON.

This is an action to recover damages for injury to property allegedly caused by a private nuisance *per accidens.*

The complaint is summarized as follows:

Plaintiffs own a house and lot on Rankin Lake Road in Gaston County. They have occupied the house as a home at all times since its construction in 1957. It is located a short distance from defendant's textile plant. In 1960 defendant re-equipped the plant and installed much heavier machinery and new air-conditioning equipment. The new machinery and air-conditioner are in almost continuous operation each week, and the noise and vibration from the operation have caused great damage and loss of value to plaintiffs' property. The house vibrates and shakes and will eventually be completely destroyed. Plaintiffs demanded that defendant cease the injurious operation, but defendant refused. Plaintiffs have been damaged in the sum of $8500.

Plaintiffs do not seek injunctive relief.

Defendant, answering, denies the material allegations of the complaint.

Plaintiffs' evidence tends to show:

The manufacturing plant was constructed more than 20 years ago. Until 1959 it was used for the manufacture of hosiery and was known as Wisteria Hosiery Mill. Defendant took over in the late summer of 1959 and converted it to the manufacture of greige goods. New machinery, three times as large and heavy as that formerly used, was installed. A new unit was attached to the air-conditioning tower. There are no other manufacturing plants on the Rankin Lake Road. Plaintiffs are uncertain whether the plant is in an industrial zone or not. There are other dwellings nearby; the nearest is about 100 feet farther from the plant than plaintiffs' house. Plaintiffs' house was built in 1957. It is a one-story frame building and has three rooms, a bath, and a back porch. At the nearest point it is 42 feet from defendant's plant and 45 feet from the air-conditioning tower. Prior to the operation by defendant of the new machinery and equipment plaintiffs suffered no annoyance and no injury to their property. After defendant began operating the heavy machinery and new air-conditioning

equipment the noise greatly disturbed plaintiffs and their house began to vibrate and shake. The mill was in operation almost constantly, beginning at 11:00 o'clock P.M. Sunday night and continuing for 6 or 6 1/2 days each week. Occupants of the house could feel movement and vibration. The television antenna bounced; ash trays and dishes clattered and moved; bottles and other articles moved and fell off the commode in the bath room; water leaked around the commode. Windows and doors were kept closed in all seasons to reduce noise so that occupants might converse on the telephone and sleep at night. Moulding pulled away from the walls; hardwood floors became uneven and opened; walls were out of line and developed cracks as wide as a finger; doors rattled. The roof pulled away from the chimney and water came in and stained the walls. The roof had to be repaired. The foundation sank about two inches on the side next to the mill and about one inch on the front. Additional pillars were placed under the house for support. Protests to defendant's foreman were ignored. The amount of damage ranges from $2000 to $3500.

Defendant offered no evidence. Plaintiffs elected to ask for permanent damages.

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

"1. Are the plaintiffs owners of the property described in the Complaint? Answer: Yes.

"2. Did the defendant, Pama Manufacturing Company, maintain and operate its mill referred to in the Complaint so as to create a nuisance as alleged, to the time of the trial? Answer: Yes.

"3. If so, did the nuisance created and maintained by the defendant cause damage to the plaintiffs' property? Answer: Yes.

"4. What amount of permanent damages, if any, are the plaintiffs entitled to recover of the defendant? Answer: $1200.00."

Judgment was entered in accordance with the verdict.

Defendant appeals.

Mullen, Holland & Cooke and Robert E. Gaines for plaintiffs.

Hollowell & Stott for defendant.

MOORE, J. Defendant first assigns as error the denial of its motion for nonsuit. The gist of its argument on this assignment is that there is no evidence that defendant "operated in such a way to occasion more noise and vibration than necessarily results from operation of other plants of like nature and character." It calls attention to the undisputed testimony of the male plaintiff and his father, on cross-examination, that they had worked at a knitting mill, the Beaunit

Mill in Lowell, Gaston County, and that the machines used and the manner of operating were similar to those of defendant.

Defendant cites *Mewborn v. Rudisill Mine, Inc.*, 211 N.C. 544, 191 S.E. 28, as authority for its position. In that case plaintiffs sued, on the theory of private nuisance *per accidens*, to recover damages for injuries to persons and property resulting from noises, vibrations and glaring lights occasioned by the operation of a gold mine. Plaintiffs also asked for injunction to abate the nuisance. While it does not appear in the opinion, the record on file in this Court shows that plaintiffs alleged, among other things, that defendant applied and exploded unnecessarily large loads of dynamite, used an unnecessarily large bell, and there were noises, vibrations and lights not necessary to the operation of the mine. The record also shows that defendant averred that the ore was being extracted "under the most approved methods," and offered evidence tending to show its operation met the safety requirements of the Department of Labor, was modern and in accordance with approved methods, was the same as in other comparable gold mines and in keeping with good mining practice. The jury found that the operation did not constitute a nuisance, and there was judgment for defendant. The trial judge charged the jury, in part, that "the operation of a mine must occasion more noise and vibration than necessarily results from the operation of other plants of like kind and character, operated as a reasonably prudent man or miner would operate them under like circumstances, in order to constitute such operation a nuisance." The judgment was affirmed on appeal. The foregoing portion of the charge was not specifically in question and was not discussed in the opinion. The question raised and discussed was whether the judge should have charged, and did sufficiently charge, that the location of the mine and its operation at night were matters to be considered by the jury on the nuisance issue; and it was held that the judge "did, in effect, so instruct the jury." The charge covered many principles not stated in the above excerpt, and other tests were also imposed for the guidance of the jury. The opinion states generally that, considering the charge as a whole, there was no error in the instructions on the nuisance issue, but there is no indication that this Court intended to adopt the portion of the charge quoted above as a general criterion for determining whether or not the operation of a lawful enterprise is a nuisance *per accidens*. In the *Mewborn* case it is obvious that the action, in a substantial degree, involved an alleged nuisance based on *negligent* operation. The excerpt from the charge quoted above, and relied on by defendant, might, under apposite pleadings and in limited circumstances, be a determinative test where the alleged nuisance involves *negligent* oper-

ation. But the instant action is not based on negligent operation of the mill. Plaintiffs allege intentional conduct amounting to a nuisance *per accidens* by reason of *unreasonable* operation. The language relied on by defendant is not a decisive test in the case at bar.

Negligence and nuisance are distinct fields of tort liability. The same act or omission may constitute negligence and also may give rise to a private nuisance *per accidens,* and thus the two torts may coexist and be practically inseparable. But a private nuisance *per accidens* may be created or maintained without negligence. Indeed, most private nuisances *per accidens* are created or maintained, and are redressed by the courts without allegation or proof of negligence. A person is subject to liability for an intentional non-trespassory invasion of an interest in the use and enjoyment of land when his conduct is *unreasonable* under the circumstances of the particular case; a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous. An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when the person, whose conduct is in question as a basis of liability, acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct. A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury. *Morgan v. Oil Co.,* 238 N.C. 185, 77 S.E. 2d 682; *Andrews v. Andrews,* 242 N.C. 382, 88 S.E. 2d 88.

In *negligence* actions the common usage in a business, as to installations, equipment, and manner of operation, is a proper matter for consideration in determining whether or not reasonable care has been exercised in a particular case, but it does not furnish a test which is conclusive or controlling, and negligence may exist notwithstanding the means and methods adopted are in accordance with those customary in the business. 65 C.J.S., Negligence, s. 16, p. 404; *Grant v. Bottling Co.,* 176 N.C. 256, 97 S.E. 27. Negligence is not a factor in the instant case according to the pleadings and evidence; plaintiffs allege intentional conduct amounting to private nuisance *per accidens.* Whether the use of property to carry on a lawful business, creating noise and causing vibrations, amounts to a nuisance depends upon the facts and circumstances of each particular case. *Clinic & Hospital v. McConnell,* 236 S.W. 2d 384 (Mo. 1951). The question is whether or not the use is unreasonable. "Negligence, wrong business methods, improper appliances, and the like may bear upon, but do not control, the question of reasonable use." *McCarty v. Natural Carbonic Gas Co.,* 81 N.E. 549 (N.Y. 1907).

"The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas,* meaning, in essence, that every person should so use his own property as not to injure that of another." *Morgan v. Oil Co., supra.*

The operation of a lawful enterprise is not a private nuisance *per se, i.e.,* as a matter of law. *State v. Brown,* 250 N.C. 54, 108 S.E. 2d 74; *Causby v. Oil Co.,* 244 N.C. 235, 93 S.E. 2d 79; *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396; *Pake v. Morris,* 230 N.C. 424, 53 S.E. 2d 300. And the fact that a lawful enterprise produces noise and causes vibrations does not render it a private nuisance *per se.* But noise and vibrations emanating from the operation of a lawful enterprise may constitute it a private nuisance *per accidens, i.e.,* in fact. 39 Am. Jur., Nuisances, ss. 48 and 52, pp. 333 and 335; *Freidman v. Keil,* 166 A. 194 (N.J. 1933); *Cunningham v. Wilmington Ice Mfg. Co.,* 121 A. 654 (Del. 1923); *Meyer v. Kemper Ice Co.,* 158 S. 378 (La. 1935).

Intentional private nuisances *per accidens* are those which become nuisances by reason of their location, or by reason of the manner in which they are constructed, maintained or operated. *Morgan v. Oil Co., supra.* It is the *unreasonable* operation and maintenance that produces the nuisance. *King v. Ward,* 207 N.C. 782, 178 S.E. 577. And for liability to exist there must be a *substantial* non-trespassory invasion of another's interest in the private use and enjoyment of property. *Morgan v. Oil Co., supra.* "It must affect the health, comfort or property of those who live near. It must work some substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property." *Pake v. Morris, supra; Duffy v. Meadows,* 131 N.C. 31, 42 S.E. 460.

"The precise limits of one's right to do as he pleases with his own property are difficult to define. The use must be a reasonable one, and the right implies and is subject to a like right in every other person. One cannot use his property so as to cause a physical invasion of another person's property, or unreasonably to deprive him of the lawful use and enjoyment of the same, or so as to create a nuisance to adjoining property owners . . . and any unreasonable . . . use which produces material injury or great annoyance to others, or unreasonably interferes with their lawful use and enjoyment of their property, is a nuisance which . . . will render him liable for the consequent damage." 39 Am. Jur., Nuisances, s. 16, pp. 297, 298.

"The jarring of a person's premises, or the causing of vibration therein, may be a nuisance under some circumstances. However, vibration from proper acts done in an appropriate locality is not necessarily a nuisance, entitling an adjoining property owner to relief, but, if the vibration is excessive and unreasonable, producing actual physi-

cal discomfort and annoyance to persons of ordinary sensibilities, it may be a nuisance. Vibrations in order to give rise to damages must be such as interfere with a substantial right." 66 C.J.S., Nuisances, s. 21, p. 772. The same general rule applies with respect to noise. *ibid.* s. 22, pp. 772-774.

In the case at bar it is not controverted that plaintiffs are the owners of the house and lot referred to in the complaint, nor that defendant's knitting mill is a lawful enterprise. In order for plaintiffs to make out a *prima facie* case, on the second or nuisance issue, they must present evidence tending to show: (1) that the operation of the mill by defendant produced *unreasonable* noise and vibration under the circumstances existing, and (2) that because of such unreasonable noise and vibration there was *substantial* injury and loss of value to plaintiffs' house and lot.

The mere fact that an invasion of another's interest in the use and enjoyment of land is intentional does not mean that it is unreasonable. Fundamentally, the unreasonableness of intentional invasion is a problem of relative values to be determined by the jury in the light of the circumstances of the case. The question is not whether a reasonable person in plaintiffs' or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Regard must be had not only for the interests of the person harmed but also for the interests of the defendant, and for the interests of the community. Restatement of the Law of Torts, Vol. 4, s. 826, Comments a. and b., pp. 241, 242. What is reasonable in one locality and in one set of circumstances may be unreasonable in another. The circumstances which are to be considered by the jury in determining whether or not defendant's conduct is unreasonable include: the surroundings and conditions under which defendant's conduct is maintained, the character of the neighborhood, the nature, utility and social value of defendant's operation, the nature, utility and social value of plaintiffs' use and enjoyment which have been invaded, the suitability of the locality for defendant's operation, the suitability of the locality for the use plaintiffs make of their property, the extent, nature and frequency of the harm to plaintiffs' interest, priority of occupation as between the parties, and other considerations arising upon the evidence. No single factor is decisive; all the circumstances in the particular case must be considered. *McCarty v. Natural Carbonic Gas Co., supra; Clinic & Hospital v. McConnell, supra.*

". . . (A)ccording to the weight of authority, the fact that a person voluntarily comes to a nuisance by moving into the sphere of its in-

jurious effect, or by purchasing adjoining property or erecting a residence or building in the vicinity after the nuisance is created, does not prevent him from recovering damages for injuries sustained therefrom, . . . especially where, by reason of changes in the structure or business complained of, the annoyance has since been increased. . . . But while priority of occupation is not conclusive as to the existence of a nuisance, it is to be considered with all the evidence, and the inference drawn from all the facts proved, in determining whether the use of the property is unreasonable." 39 Am. Jur., Nuisances, s. 197, pp. 472, 473.

Before plaintiffs may recover the injury to them must be substantial. By substantial invasion is meant an invasion that involves more than slight inconvenience or petty annoyance. The law does not concern itself with trifles. Practically all human activities, unless carried on in a wilderness, interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. Each individual in a community must put up with a certain amount of annoyance, inconvenience or interference, and must take a certain amount of risk in order that all may get on together. But if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted. Restatement of the Law of Torts, Vol. 4, s. 822, Comments g. and j., pp. 229 and 231.

In the light of the foregoing pertinent legal principles, we are of the opinion that plaintiffs' evidence is sufficient to withstand defendant's motion for nonsuit. Since there must be a new trial we refrain from a further analysis and discussion of the evidence.

The court's general legal instructions on the second issue are taken almost *verbatim* from, and include all that portion of the charge set out in, the opinion in *Mewborn v. Rudisill Mine, Inc., supra.* In summary and as the final instruction on the second issue the judge stated: ". . . (I)f the jury shall find from the evidence and by its greater weight, the burden being upon the plaintiff, that the maintenance and operation of the defendant's mill occasioned more noise and vibration than necessarily resulted from a reasonable operation of other plants of like kind and character, and that such noise and vibration were excessive or unreasonable in degrees, or of such character to produce physical discomfort and injury to the property of the plaintiff, which could have been avoided but for such excessive or unreasonable operation, as I have defined them, and as alleged in the Complaint, then, Gentlemen of the Jury, the court instructs you that if you find all of this by the greater weight of the evidence, that that would

amount to a nuisance, and it would be your duty to answer the second issue 'Yes.' If you fail to so find by the greater weight of the evidence, it will be equally your duty to answer the second issue 'no.' " Thus, to be entitled to a favorable verdict, plaintiffs were required to meet two tests: (1) To show that defendant's operation occasioned more noise and vibration than necessarily resulted from a reasonable operation of other plants of like character, and (2) that the noise and vibration caused by defendant's operation were unreasonable in degree. The first test has no relation to the allegations of the complaint or the evidence. That an unnecessary and irrelevant burden was placed on plaintiffs is a matter of which defendant may not complain. This is especially true since defendant has contended that the first test was applicable. But the prejudicial feature of the instruction, as to defendant, is the failure of the court, anywhere in the charge, to give the jury rules or directions for determining unreasonableness of operation, that is, what matters were to be considered in making the determination in a case such as the one at bar. Since we have already discussed this phase of the law above, no further statement is necessary here.

In passing, we think the submission of the third issue was confusing. It is necessarily embraced in the second issue. If there is no damage to plaintiffs, there is no nuisance; and the damage must be substantial. However, there was no exception to the submission of the issue.

For the reason stated there must be a

New trial.

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

STATE OF NORTH CAROLINA v. GEORGE MITCHNER.

(Filed 11 April, 1962.)

1. Abortion § 3—

In a prosecution under G.S. 14-45, an actual miscarriage of the woman is not a necessary element of the offense, and while proof of pregnancy is essential, it is not necessary that the foetus should have quickened.

2. Homicide § 1—

If death results from an unlawful abortion or attempted abortion of a pregnant woman, it is a culpable homicide even though done at the woman's request.

3. Homicide § 15—

In a prosecution under an indictment charging an unlawful homicide, resulting from an unlawful abortion upon a pregnant woman, testimony that while the woman was *in extremis* she made repeated statements that she knew she was going to die, and that death ensued, *is held* sufficient predicate for the admission of her declarations that an abortion had been performed upon her and as to the name of the person who had performed the abortion.

4. Homicide § 20; Criminal Law §§ 65, 101— Evidence identifying defendant as perpetrator held sufficient to be submitted to jury.

In a prosecution for unlawful homicide resulting from an illegal abortion, evidence that the woman died as a result of an abortion, with testimony of the woman's dying declarations that her friend had hired a man from a certain city to perform the abortion, and her later declarations as to the name of the man who performed the abortion, together with evidence that defendant of the same name was from the city referred to, and evidence permitting the reasonable inference that after defendant had been brought to her hospital room she identified *him* as the man who had performed the criminal abortion upon her, and that defendant so understood, *is held* sufficient to be submitted to the jury as to the identity of defendant as the perpetrator of the crime.

5. Homicide § 15—

Where deceased made the declarations while she was in the hospital, the fact that she was given drugs from time to time to relieve the pain while she was in the hospital, that at times her mind was confused, and the fact of discrepancies in her dying declarations, all relate to the weight to be given by the jury to her declarations and not to the competency of the testimony.

6. Criminal Law § 65—

The identity of names, in the absence of any proof to the contrary, is some evidence of the identity of the person, especially when the identity of the person by name is corroborated by other facts and circumstances in evidence.

7. Criminal Law § 126—

The motion to set aside the verdict for lack of evidence is properly overruled when the State's evidence is of sufficient probative force to sustain the verdict.

APPEAL by defendant from *Cowper, J.*, November 1961 Term of WAYNE.

Criminal prosecution on an indictment charging the defendant did feloniously kill and murder Mildred Hargrove.

Before the introduction of evidence the solicitor announced he would ask only for a verdict of guilty of manslaughter.

Plea: Not Guilty. Verdict: Guilty of Manslaughter.

From a judgment of imprisonment, defendant appeals.

T. W. Bruton, Attorney General, for the State.
Earl Whitted, Jr., and Arthur L. Lane for defendant appellant.

PARKER, J. Defendant introduced no evidence in his behalf. He assigns as error the denial by the trial court of his motion for judgment of involuntary nonsuit made at the close of the State's evidence.

The State's evidence shows these facts:

Mildred Hargrove on 31 May 1960 was admitted as a patient in Wayne Memorial Hospital in the city of Goldsboro. Dr. William Trachtenberg, a licensed physician, and Dr. Winfield Thompson, a surgeon, examined her within 24 hours after her admission in the hospital, and diagnosed her condition as a pelvic and abdominal peritonitis with severe infection resulting from an abortion which had become infected. Although she was operated on in the hospital five or six days later, was given large doses of medicine and drugs to combat the infection, and received constant medical care by doctors and nurses, she died in the hospital on 5 August 1960. Dr. J. A. Maher, a pathologist at the hospital, performed an autopsy upon her dead body, and testified that, in his opinion, the cause of Mildred Hargrove's death was a septic abortion that caused infection of the lining of the uterus and of the tissues around it resulting in dissolution of adjacent tissue of the intestines causing holes therein and leakage of intestinal contents into the abdomen. Dr. Maher also testified he found no evidence of the embryo, but did find placental tissue, that is afterbirth.

She suffered severe pain in the hospital, and was given drugs to moderate or numb it. Dr. William Trachtenberg testified: "She was not always lucid and clear. There were times you would walk through the hall and a lot of times she would be yelling and shouting in pain, mentally confused at times, and many times I heard her say, 'I am dying,' or, 'I'm going to die.' At that time she had every reason to believe she was going to die. I felt the same way."

She told a number of witnesses, "I am going to die, I can't live in this condition." Dr. Winfield Thompson testified, "in my opinion she was going to die."

Mrs. Bettie Siltzer, a registered nurse in the hospital, testified Mildred Hargrove told her, "I know I am going to die." Mrs. Siltzer testified that following this statement, "she [Mildred Hargrove] said that her boy friend, Willie Simmons, had hired a man from Durham to perform an abortion on her. She said this man performed an abortion on her before entering the hospital. She said the abortion took place in her home." Mrs. Siltzer testified further that on another occasion in the hospital she heard Mildred Hargrove tell T. W. Garris, an officer of the city of Goldsboro as follows: "Willie Simmons hired a

man from Durham and paid him $150.00; that the man came from Durham one night, and Willie Simmons took her small daughter off riding, and he performed the operation. She said he had a rubber catheter. . . . She told him where the rubber tube was." Garris left the hospital room, and later that day returned there with a rubber tube. Mildred Hargrove said, "Mrs. Siltzer, that's what the man used to do the abortion."

T. W. Garris testified: "She [Mildred Hargrove] said Willie Simmons got a man from Durham to perform this abortion. I asked her what his name was and she said she didn't know, he never did call him anything but 'Dock,' never told her what his name was. She said she could identify him if she could see him. I called Durham in regard to anyone they knew up there. Later I found there was a man came down with George Mitchner when the abortion was performed." Garris found a rubber tube behind the medicine cabinet in Mildred Hargrove's house, carried it to the hospital, showed it to Mildred Hargrove, and asked her if that was all he used to perform the abortion. She replied, yes. Garris received a picture of George Mitchner from the police department, apparently of Durham. He carried it to the hospital, showed it to Mildred Hargrove, and asked her if she had ever seen anybody like that. If Mildred Hargrove gave any reply, the record does not show it.

James Sasser, a deputy sheriff of Wayne County, went to Durham, and returned with George Mitchner. Sasser testified as follows: "Captain Carter and I took the defendant [Mitchner] to the hospital to the room occupied by Mildred Hargrove and asked Mildred if she knew us. She said she did, and called us by name. We asked if she could recognize the man with us, referring to George Mitchner. That is all I know about it. After taking him to the hospital, we brought him to jail and placed him inside."

This is the entire testimony of Archie Carter, captain of the plain-clothes department of the city of Goldsboro police department for 20 or more years, on direct examination:

"The only thing I did in connection with this case after George Mitchner was brought from Durham, Mr. Sasser and I carried him to the hospital to the room occupied by Mildred Hargrove. After talking with Mildred, in his presence, after a conversation with Mildred in his presence, I asked George if he had anything he wanted to say and he got over close to Mildred and asked Mildred if she was sure."

This is Captain Carter's entire testimony on cross-examination:

"Mildred never did admit it, neither did she deny it. I explained to George on the way to the hospital why we were taking him to the

hospital. As we wanted him to be faced with his accuser. After she made the statement, George asked her if she was sure."

Robert Gilliam, accompanied by his wife a sister of Mildred Hargrove, and his sister-in-law, visited Mildred Hargrove in the hospital on Monday prior to her death on Friday. Mildred Hargrove was critically ill. She said: "I am going to die; I am going to leave you all sometime this week. . . . I can't live in this condition." She referred to her stomach and the pain she had been having. Gilliam testified: "She said, 'a man did it and you all get that man.' I asked her who was it? She said, 'it was a man with Willie Simmons, George Mitchner. George Mitchner is the man,' she said performed the abortion."

Marion Gilliam, wife of Robert Gilliam and sister of Mildred Hargrove, testified to similar statements made by Mildred Hargrove, when she was present with her husband on the Monday before her sister's death on Friday. Marion Gilliam said Mildred Hargrove, while in the hospital, continued to say she was going to die. Marion Gilliam testified: "I heard her mention the name George Mitchner several times. About the second or third week she was in the hospital she called his name. She said, 'whatever you all do, get that man, because he told me he was a doctor and knew what he was doing.' "

About two weeks after Mildred Hargrove was admitted in the hospital she told Margaret Daniels she couldn't live, and that George Mitchner performed the abortion. Margaret Daniels testified: "A short time before she died, she said, 'The last thing you all do, get that George Mitchner, because he said he was a doctor and knew what he was doing.' "

Dr. J. A. Maher testified in detail as to how a rubber tube can be used to produce an abortion.

G.S. 14-45 provides, *inter alia,* if any person shall use any instrument upon any pregnant woman, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, he shall be guilty of a felony. This statute is designed "primarily for the protection of the woman." *S. v. Jordon,* 227 N.C. 579, 42 S.E. 2d 674.

An actual miscarriage is not a necessary element of the offense condemned by G.S. 14-45. *S. v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281; 1 Am. Jur., Abortion, sec. 12.

In a prosecution for a violation of G.S. 14-45, proof of pregnancy is essential. However, a woman may be pregnant within the meaning of this statute, though the foetus has not quickened. *S. v. Hoover, supra,* and the authorities there cited.

This Court said in *S. v. Swinney,* 231 N.C. 506, 57 S.E. 2d 647: "It is generally held that when an act is in violation of a statute intended

and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute may be held liable for manslaughter, and under some circumstances of murder."

When death results from an abortion or attempted abortion of a pregnant woman, when not necessary to save the life of the woman or that of the unborn child or to protect the health of the woman, it is a culpable homicide, even though done at the woman's request, but to what grade of unlawful homicide to assign the crime has been the subject of considerable controversy. It is variously classified by decision or statute as murder, manslaughter, or a special statutory offense which does not have any particular name. By application of the felony-murder rule it is held in some states that the defendant is guilty of murder when death results in such cases. Wharton's Criminal Law and Procedure, by Ronald A. Anderson, 1957, Vol. I, p. 525, *ibid,* Vol. II, sec. 749; 26 Am. Jur., Homicide, sec. 196; 40 C.J.S., Homicide, p. 923 and p. 931; Miller, Handbook of Criminal Law, pp. 269-270, p. 286, note 43; Burdick, Law of Crime, Vol. 3, sec. 872.

In Burdick, *ibid,* it is said:

> "As previously stated, where the death of the mother results from an unlawful abortion the homicide is murder, at common law. In the course of time, however, due to the reluctance of juries to convict of murder in such cases, English judges permitted verdicts of manslaughter to be returned when the evidence showed that the accused did not realize that he was committing an act that was dangerous to life or likely to cause great bodily harm, and had no intention of so doing."

S. v. Layton, 204 N.C. 704, 169 S.E. 650, was a criminal prosecution for manslaughter. The reported case states the indictment was for murder of Celia Roberts. The record on file in the office of the clerk of this Court shows the indictment was for manslaughter. Celia Roberts died as a result of a criminal abortion performed upon her. Defendant was convicted as charged, and on appeal no error was found in the trial below. The degree of unlawful homicide in such cases is not mentioned.

There is a very scholarly opinion on this subject in *Worthington v. State,* 92 Md. 222, 48 A. 355, 56 L.R.A. 353, 84 Am. St. Rep. 506. In this case the defendant Worthington was indicted in the criminal court of Baltimore for manslaughter, in causing the death of Amelia A. Miller, through an abortion performed on her by him. He demurred to the indictment on the ground that the death of the woman, resulting from a criminal abortion upon her, is, at common law, murder, and the indictment, if it can at all be regarded as an indictment

for homicide, is defective, because it charges death as the result of the abortion, but charges the defendant with the crime of manslaughter instead of murder. The demurrer was overruled, and defendant was convicted and sentenced to the penitentiary for ten years. The Court of Appeals said they could discover no defect in the indictment, and they thought there was no error in overruling the demurrer. In the opinion the Court said:

> "In *Regina v. Gaylor*, 7 Cox's Criminal Cases, 253, decided in 1857, the indictment was for manslaughter by abortion, and the prisoner was convicted. The evidence showed that the prisoner was clearly guilty of being accessory before the fact to the woman taking the drug with intent to procure an abortion, and the Judge reserved the case for the opinion of the Court of Criminal Appeal. It was heard before POLLOCK, C. B., BRAMWELL and WATSON, BB., and ERLE and WILLES, JJ. ERLE, J., before whom the case was tried, said: 'This would, in my opinion, be murder if she died in consequence of taking that drug. But the *grand jury* found that it was manslaughter. If a man is indicted for manslaughter, and it turns out to be murder, he may be found guilty of manslaughter. In this case I thought he was guilty of murder by administering the drug, and might therefore be convicted of manslaughter.'
>
> "The Judges affirmed the conviction, but without giving their reasons for doing so.
>
> "If the present indictment had been for murder, as it is contended it should have been, there can be no doubt a conviction of manslaughter would have been good; *State v. Flannigan*, 6 Md. 167; *State v. Davis*, 39 Md. 355; so that the defendant is in the singular position of complaining of an indictment because it does not subject him to conviction for a graver offense than that with which he is charged."

In *Peoples v. Com.*, 87 Ky. 487, 9 S.W. 509, the law on this subject is well reviewed. In this case the appellant, Mary A. Peoples, complained of her conviction for manslaughter upon the charge of committing an abortion upon Emma Wendelkin, resulting in her death. The Court of Appeals affirmed the judgment. A petition for rehearing was overruled. 87 Ky. 497, 9 S.W. 810.

S. v. Stephens, 244 N.C. 380, 93 S.E. 2d 431, was a criminal prosecution upon an indictment charging the defendant with the murder of his wife. The jury returned a verdict of guilty of manslaughter. This Court found no error in the trial, and closed its opinion with these words:

"The facts and circumstances point strongly to the crime of murder.

"Evidence of manslaughter is lacking. The defendant, however, cannot complain that 'the jury, by an act of grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed.' "

There is no exception to the admission of evidence, or to the exclusion of any evidence. The indictment here is for unlawful homicide, not an abortion, and the dying declarations of Mildred Hargrove are clearly competent, because the death of Mildred Hargrove is the subject of the indictment, and the circumstances of her death the subject of her declarations. *S. v. Layton, supra; Worthington v. State, supra,* and an elaborate note on dying declarations as evidence in the volume of L.R.A., where the *Worthington* case is reported.

The State has offered plenary evidence tending to show that Mildred Hargrove was a pregnant woman, that a criminal abortion was performed upon her, and that she died as a result of a septic, criminal abortion. The crucial question is, does the State have sufficient evidence to carry the case to the jury that the defendant performed the criminal abortion. Defendant candidly states in his brief: "It is admitted that there was evidence introduced at the trial [from] which a jury might reasonably conclude that Mildred Hargrove died as a result of some criminal abortion, but there was no evidence produced at the trial (either direct or circumstantial) from which a jury might reasonably conclude that the State had presented evidence which identified the defendant as the person that performed the abortion on Mildred Hargrove."

The pertinent facts and circumstances from the evidence pointing to the accused may be summarized as follows: One, the dying declaration of Mildred Hargrove to Mrs. Bettie Siltzer, that her boy friend, Willie Simmons, had hired a man from Durham to perform an abortion on her, and that this man performed an abortion on her in her home before she entered the hospital. Two, the dying declaration of Mildred Hargrove on another occasion to T. W. Garris, an officer of the city of Goldsboro, in the presence of Mrs. Siltzer, that Willie Simmons hired a man from Durham and paid him $150.00, that this man came from Durham one night and performed the operation with a rubber catheter. Three, the repeated dying declarations of Mildred Hargrove that defendant George Mitchner was the man who per-

formed the criminal abortion on her. Four, James Sasser, a deputy sheriff of Wayne County, went to Durham and returned with defendant. Five, Sasser and Archie Carter, a police officer of Goldsboro, carried defendant to the room in the hospital where Mildred Hargrove was. After a conversation with Mildred Hargrove in defendant's presence—the record does not disclose what was said during this conversation—Carter asked the defendant if he had anything he wanted to say, and he got over close to her, and asked her if she was sure, and then Carter testified on cross-examination, "after she made the statement, George asked her if she was sure." Six, a legitimate inference may be deduced from the evidence, that the defendant's name is George Mitchner, and he is from Durham.

These facts not favorable to the State appear in the evidence: One, Mildred Hargrove told T. W. Garris, an officer of the city of Goldsboro, she didn't know the name of the man who performed the criminal abortion on her, Willie Simmons never told her what his name was, he never called him anything but Dock. Two, she told Garris she could identify him if she could see him. Garris received a picture of George Mitchner from the police department, apparently from Durham, though on this point the record is not definite, and showed it to Mildred Hargrove, and asked her if she had ever seen anybody like that. If she gave any reply, the record does not show it. Three, when Mildred Hargrove was confronted with defendant in the presence of Sasser and Carter, there is nothing in the record to show what Mildred Hargrove said, though the record shows defendant asked her if she was sure, and it further shows she "never did admit it, neither did she deny it." Four, in the hospital Mildred Hargrove was not always lucid and clear, she was mentally confused at times.

The discrepancy and contradiction in Mildred Hargrove's dying declarations, to-wit, that the person who performed the criminal abortion on her was George Mitchner, and that she didn't know his name, go to the weight of her testimony and are for the jury, and do not justify a nonsuit. *Brafford v. Cook*, 232 N.C. 699, 62 S.E. 2d 327; *Keaton v. Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93; *Com. v. Turner*, 224 Mass. 229, 112 N.E. 864, an abortion case. In the *Turner* case, the Court said: "It is true that she made contradictory statements as to the person responsible for her pregnancy but the change of names in the accusation went to the weight and not to the competency of the evidence when submitted to the jury."

This Court said in *S. v. Herren*, 173 N.C. 801, 92 S.E. 596: "This identity of names, nothing else appearing, furnishes evidence of the identity of person. 'Identity of name is prima facie evidence of iden-

tity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary.' Citing authority."

This is said in 65 C.J.S., Names, sec. 15, b., (2):

> "In general, identity of names raises a presumption, or an inference of fact, of identity of person, or it is prima facie evidence or it is, according to the decisions, presumptive evidence, or some proof or evidence, of identity of person. . . . The presumption or inference of identity of person from identity of names is not conclusive; it is prima facie only and may be disputed or rebutted. . . . Also, it has been held that at best the presumption is a weak one, and that it is liable to be shaken by the slightest proof of facts or showing of circumstances which produce a doubt of identity. . . . The presumption or inference is strengthened or augmented where the name is unusual or uncommon, where both the surnames and the given names are identical, where there is similarity of residence. . . ."

To the same effect see 20 Am. Jur., Evidence, p. 203, *et seq.*, G. IDENTITY OF PERSON FROM IDENTITY OF NAME, sections 204, 206.

When the officers carried defendant to the hospital room where Mildred Hargrove was, they asked her "if she knew us" and "she said she did, and called us by name." The officers then had a conversation with her in defendant's presence. After that Carter asked defendant "if he had anything he wanted to say and he got over close to Mildred and asked Mildred if she was sure," and the evidence further shows, "after she made the statement, George asked her if she was sure." It would seem that defendant's question "if she was sure," following immediately after the conversation of the officers with Mildred Hargrove in his presence, permits the reasonable inference that she identified him as the man who performed the criminal abortion upon her, and that he so understood it. According to the record defendant made no other statement.

The evidence is sufficient in probative value to warrant, but not compel, the jury to find that defendant George Mitchner was the person who performed the criminal abortion on Mildred Hargrove, which resulted in her death from a septic abortion, and to warrant the submission of the case to the jury.

Defendant in his brief has expressly abandoned his assignment of error to the denial of the trial court to quash the indictment.

All other assignments of error, except formal ones, are to the court's charge to the jury. They have been carefully examined, and are overruled. They present no new question, and merit no discussion.

The charge contains no expression of opinion on the facts by the trial judge.

Whether the death of a woman resulting from a criminal abortion performed upon her in violation of G.S. 14-45 is murder and not manslaughter is not presented on this appeal, for the simple reason that defendant was convicted of manslaughter.

The assignment of error to the court's refusal to set the verdict aside for lack of evidence is overruled. The evidence for the State is not strong, but it is of sufficient probative force to sustain the verdict. Mildred Hargrove's repeated declarations in the hospital that George Mitchner performed the abortion on her are impressive. The sublimest poet and dramatist of the English tongue has expressed, in King John, Act V, scene 4, the common feeling that the utterances of a dying person are free from all ordinary motives to mis-state:

> Melun. "Have I not hideous death within my view,
> Retaining but a quantity of life,
> Which bleeds away, even as a form of wax
> Resolveth from his figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here and live hence by truth?"

In the trial below we find
No error.

L. E. STEWART AND WIFE, NONIE D. STEWART; FANNIE BESSIE POPE (WIDOW), ANNIE S. SMITH (WIDOW), EVELYN S. WILSON (WIDOW), NANCY S. COLLINS (DIVORCED); WILLIE STEWART AND WIFE, BANNA D. STEWART; RAYMOND STEWART AND WIFE, FRANCES GREGG STEWART; EARL STEWART (SINGLE); ROBERT YATES AND WIFE, LILLIAN C. YATES; CLAUDE YATES AND WIFE, VERGIE W. YATES; MARTHA RONEY AND HUSBAND, LEM RONEY; ANNIE WOOSLEY AND HUSBAND, W. JESSE WOOSLEY; MILDRED HESTER (WHO IS DIVORCED), EUNICE M. HAMLETT AND HUSBAND, ALEX D. HAMLETT; ROBERT H. MURPHY, JR. AND WIFE, CAROLYN B. MURPHY, THOMAS M. HOBBS; JAMES W. MURPHY AND WIFE, MARY A. MURPHY; NANCY GREY W. COMPTON AND HUSBAND, COY COMPTON, JR. v. GRACE M. McDADE.

(Filed 11 April, 1962.)

STEWART *v.* MCDADE.

1. Trial § 40—

Where the only issues of fact raised by the pleadings relate to whether plaintiffs are all the heirs of deceased and whether defendant executed the instrument in question, two issues addressed respectively to these two questions are sufficient, and, the effect of the instrument being a question of law for the court, are sufficient to support a judgment adjudicating the rights of the parties under the instrument.

2. Contracts § 12; Wills § 66½—

Where the terms of a release of any interest in an estate are unambiguous, the legal affect of the language of the instrument is a question of law for the court.

3. Wills § 66½—

The requirement that parties relying upon a release by a prospective devisee of his share in an estate must prove that the release was not obtained by means of fraud or undue influence, is a policy of the law to protect heirs apparent and to prevent the improvident dissipation by children of a prospective inheritance, and does not apply where the person executing the release is a stranger to the blood of the prospective testator, and in such instance the burden is upon the person signing the release to allege and prove as affirmative defenses, gross want of consideration or fraud or undue influence if he would avoid the effect of the release.

4. Same—

Where a stranger to the blood of the prospective testator has obtained a favored position so that it is apparent that the prospective testator may will property to her, a release of any possible benefit under the will of the prospective testator, executed for a valuable consideration, will be upheld even though the subject of the release is a mere possibility, especially when it appears that the prospective testator lacked mental capacity at the time he executed the will.

5. Insane Persons § 4—

It is the positive duty of a guardian to preserve the estate of his incompetent, and therefore it is proper for the guardian to institute an action to set aside on the ground of mental incapacity a deed executed by his incompetent to the defendant, and where in such action the guardian obtains a reconveyance of the land to the estate and at the same time a release from the defendant of any benefits she might receive by testamentary gift from the incompetent, as a settlement approved by the court, the defendant may not thereafter contend that the guardian was without authority to pay a valuable consideration for such release.

6. Wills § 66½—

A release renouncing any bequest and devise in a purported will of a prospective testator "or any other testamentary disposition" by the prospective testator, is sufficiently broad to cover not only the will then executed by the prospective testator but any other will executed by him.

7. Declaratory Judgment Act § 1—

An action to determine whether defendant executed a release of testamentary benefit from a prospective testator, and the effect of such release, presents a real controversy when the prospective testator has died and a will making testamentary disposition to defendant has been probated, and therefore such action may be maintained under the Declaratory Judgment Act.

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

APPEAL by defendant from *Clark, J.*, March 27, 1961 Civil Term of ORANGE.

This is a civil action instituted pursuant to the Declaratory Judgment Act (G.S., Ch. 1, Art. 26) to determine what right, title or interest, if any, defendant Grace M. McDade has in and to the estate of James Arthur Stewart, deceased, (hereinafter referred to as Stewart).

The allegations of the complaint are summarized as follows: Plaintiffs are all of the heirs at law of Stewart. On 11 January 1952 Stewart conveyed by warranty deed all his real estate, consisting of 177 acres, to defendant, and on the same date executed a paper writing purporting to devise and bequeath all his property to defendant and to name her as executrix. And on 7 August 1952 he executed another purported will to the same effect. On 11 August 1953 Stewart was judicially declared incompetent for want of understanding to manage his affairs, and a guardian was duly appointed for him. On 20 August 1953 the guardian employed counsel to institute an action to set aside the deed from Stewart to defendant on the ground that Stewart lacked mental capacity to execute it. On 24 September 1953 defendant, to terminate litigation, conveyed the real estate back to Stewart, and executed a release, upon a valuable consideration, renouncing her right to qualify under the purported will, and transferring and quitclaiming to the estate of Stewart and to his heirs and their assigns any right she might have under the purported will or any other will made by Stewart. The transaction with respect to the release was approved by the court in a special proceeding instituted for that purpose. Stewart died on 25 May 1959, an inmate of the State Hospital at Butner. The purported will of 7 August 1952 was filed for probate, but defendant did not qualify as executrix. Before the death of Stewart his guardian instituted a proceeding to sell the real estate to make assets to pay debts, but the sale was not consummated because of Stewart's death. Defendant has no interest in Stewart's estate, and the estate is the property of his heirs, subject to the payment of debts and other obligations.

Defendant, answering, admits that she conveyed the real estate back to Stewart to avoid litigation, and that Stewart on 7 August 1952 executed a will which was filed for probate after his death. She denies the other material allegations of the complaint, and specifically denies that she executed the release.

Thereafter defendant demurred on the ground that "the complaint does not state facts sufficient to constitute a cause of action against defendant." The demurrer was overruled.

The parties stipulate the following:

"That on January 11, 1952, James Arthur Stewart executed a deed to the defendant Grace M. McDade, conveying to her his 177-acre tract of land in Orange County . . . and thereafter, on the same date, that is, January 11, 1952, James Arthur Stewart executed a written instrument by which he purported to will, devise and bequeath all of his property, real and personal, to the defendant Grace M. McDade, and to appoint her executrix of his estate.

"That on August 7, 1952, James Arthur Stewart executed another written instrument in which he purported to will and devise all of his property in fee simple to the defendant, Grace M. McDade, and to name her executrix of his estate, which was filed for probate in the Office of the Clerk of the Superior Court of Orange County on June 24, 1959. . . .

"That on August 20, 1953, the law firm of Spears & Hall was duly employed to institute a civil action in the Superior Court of Orange County against the defendant in this action, Mrs. Grace M. McDade, for the purpose of setting aside the deed which James Arthur Stewart had executed on January 11, 1952. . . .

"That on September 24, 1953, in order to terminate this litigation to have her deed set aside, the defendant Mrs. Grace M. McDade executed a deed conveying the 177-acre tract of land back to James Arthur Stewart. . . .

"That James Arthur Stewart died May 25, 1959, seized and possessed of the 177-acre tract of land. . . ."

The instruments and proceedings referred to in the complaint, copies of which were attached thereto as exhibits, were admitted in evidence. Plaintiffs offered evidence tending to show, among other things, execution of the release by defendant, payment of consideration therefor amounting to $2975, and that plaintiffs are all of the heirs at law of Stewart.

Defendant offered evidence tending to show she did not execute the release, she made no agreement with anyone respecting the wills of Stewart, and she received $2600 for deeding the land back to him.

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

"1. Are the plaintiffs all the heirs at law and spouses of heirs at law of James Arthur Stewart, deceased? Answer: Yes.

"2. Did the defendant Grace McDade, for valuable consideration, sign, execute and deliver the instrument (release) dated September 24, 1953, recorded in Deed Book 148 at page 251, in the office of the Register of Deeds of Orange County, and designated as Plaintiffs' Exhibit 'B'? Answer: Yes."

Judgment was entered decreeing:

". . . (T)hat the defendant Grace M. McDade . . . is barred and estopped from claiming or taking any right, title or interest whatever in the estate of James Arthur Stewart, deceased, or under the last will and testament of James Arthur Stewart, deceased, probated and filed in the Office of the Clerk of the Superior Court of Orange County. . . .

". . . (T)hat plaintiffs are all of the heirs at law . . . of James Arthur Stewart, deceased.

". . . (T)hat the Clerk of the Superior Court of Orange County . . . is hereby authorized and directed to proceed with his duties in connection with the administration of the estate of James Arthur Stewart, deceased, as provided by law."

Defendant appeals.

Bonner D. Sawyer; Reade, Fuller, Newsom & Graham for plaintiffs.

Max D. Ballinger for defendant.

MOORE, J. Defendant's assignments of error pose the general question, whether or not the matters decided by the jury's verdict are sufficient predicate for the relief granted by the court in the judgment.

Issues arise on the pleadings, and their formation must have regard to the phases of the evidence pertinent thereto. *Brown v. Daniel*, 219 N.C. 349, 352, 13 S.E. 2d 623. Exclusive of matters settled by stipulation, the only issues of fact raised by the complaint and answer in the case at bar are those which were submitted to and answered by the jury. Defendant set up no affirmative defenses. The execution of the release having been established by the verdict, its force and effect was a question of law for the court.

Defendant contends that, notwithstanding the jury's findings that she executed the release for a valuable consideration, the complaint fails to state facts sufficient to constitute a cause of action and the demurrer should have been sustained.

In the first place, defendant asserts that the subject of the release is a mere possibility and a contract with respect thereto is against public policy and void. Under the old practice an assignment of a mere expectancy of an heir apparent could not be enforced in an action at law. *Cannon v. Nowell,* 51 N.C. 436; *Fortescue v. Satterthwaite,* 23 N.C. 566. But equity gave effect to the assignment of a mere expectancy or possibility as a contract, in the absence of proof of fraud or imposition. *Mastin v. Marlow,* 65 N.C. 695; *McDonald v. McDonald,* 58 N.C. 211. The present rule in this jurisdiction is clearly stated in *Price v. Davis,* 244 N.C. 229, 93 S.E. 2d 93, in which *Denny, J.* (now *C.J.*) discusses the decisions of this Court bearing on the subject. In *Price* the ancestor had four sons and four daughters. For a specified consideration paid by the ancestor each of the four daughters released to him any and all right to share in his estate. There was no contention that the amounts paid the daughters were not fair shares of the estate. It was held that the releases were binding and the daughters were estopped thereby to claim any part of the estate. The principles involved are fully discussed, and the opinion points out that "There is no allegation or contention of bad faith, overreaching or fraud on the part of the ancestor, or disability of any one of the four daughters."

North Carolina follows the majority rule. 35 N.C. Law Rev. 127 (1956). "If fraud and gross inequality are not present, the consideration for the release will usually be held fair even though its amount may later turn out to be an inadequate share of the estate. The burden of proving want of consideration is on the party asserting said want." *ibid.,* p. 131. The majority rule is stated as follows: "Generally, the release of an expectant share to an ancestor, fairly and freely made, in consideration of an advancement or for other valuable consideration, excludes the heir from participation in the ancestor's estate at his death. It is necessary that the person executing the release was at the time competent to contract, that the release was not obtained by means of fraud or undue influence, and that the instrument or transaction in question be sufficient to constitute a release or a contract creating a bar; and the burden of proving want of consideration for the release is on the party asserting such want." 26A C.J.S., Descent & Distribution, s. 622, pp. 656, 657. In the case of *Re Edelman,* 82 P. 962 (Cal. 1905) it is said: "It is true that where the heir sought to transfer or convey his interest in the estate of an ancestor to a third person, equity, before it would give effect to such transfer, required evidence from that third person of the good faith and fairness of the transaction, the very apparent reason being that designing persons should not take advantage of the improvidence or penury or inexperi-

ence of one to strip him of his prospective inheritance. An additional reason was that such a transfer, made without the knowledge of an ancestor, was in a certain sense a fraud upon him. Both these reasons are eliminated, however, and with their elimination the rule ceases, when the release is made to the ancestor himself; for, in the first place, since he has the right absolute to disinherit, he cannot be accused of taking advantage of the heir, and, in the second place, as the release is made to him he is not in ignorance of the fact, and thus could not be deceived into leaving his property to one to whom he never intended it should go. Therefore, where such a release is made to the ancestor the rule requiring the party relying on it to prove its fairness is no longer in force." *A fortiori,* where, as in the instant case, the releasor and expectant devisee is a stranger and not an heir apparent to the anticipated testator, and the release is to the latter or his estate and for a valuable consideration, the burden is upon the former to allege and prove gross want of consideration, fraud or oppression, if estoppel is to be defeated. Defendant herein alleges none of these and pleads no affirmative defense.

The policy of the law, of which defendant speaks, is for the protection of heirs apparent, and against children spending their inheritance before it comes to them. *Price v. Davis, supra; Kornegay v. Miller,* 137 N.C. 659, 50 S.E. 315; *Boles v. Caudle,* 133 N.C. 528, 45 S.E. 835. It does not extend to a stranger. Where, by reason of close association and friendship, a stranger is placed in a favored position with another and it is apparent that the latter might leave the former a legacy, and the former releases to the latter or his estate upon a valuable consideration the expected gift, the release will work an estoppel as to any gift to the stranger under the will of the other, especially when it is strongly suggested that the testator lacked mental capacity to make the will at the time of its execution.

Defendant further contends that it was beyond the scope of the guardian's authority to expend assets of his ward's estate to obtain a release from defendant for the benefit of the heirs. This argument misconceives the nature of the transaction. The guardian has the positive duty to preserve the estate of his ward. In the performance of this duty Stewart's guardian instituted an action to set aside the deed Stewart had made to defendant, for want of mental capacity on Stewart's part to execute a deed. Defendant freely admits that she deeded the property back to end litigation. The execution and delivery of the deed and release by defendant constituted one transaction, all had on the same date. It was hardly to be expected that the guardian, knowing that a purported will had been executed, would merely accept the deed as a final settlement of the matter, when the

deed might be set at naught almost immediately by the possible death of the ward. The transaction was duly approved by the court.

Though the contracting parties did not know that a purported will had been executed on 7 August 1952, the contract is sufficient in terms to release the rights and interests of defendant under any will Stewart might execute. It provides that "the undersigned, Grace M. McDade, does hereby forever renounce any bequest and devise made to her in said purported will or paper writing, or any other testamentary disposition made to her by the said J. A. Stewart at any time, and any right that she may have to qualify as executrix of the Estate of J. A. Stewart, and that she will not at any time in the future make or assert any claim as legatee and devisee of his estate, and does hereby also assign, set over, transfer, release, quitclaim, and convey and does by these presents assign, set over, transfer, release, quitclaim and convey unto the Estate of J. A. Stewart and his heirs and their assigns, all right, title and interest that she may have at any time in the future as legatee and devisee of the said J. A. Stewart in and to any and all personal and real property of which the said J. A. Stewart may die seized and possessed."

Plaintiffs were entitled to have this action determined under the Declaratory Judgment Act. G.S. 1-254. There is a real controversy. The heart of the case is the determination of the effect, meaning and validity of the release and the rights of the parties thereunder. In *Trust Co. v. Henderson*, 226 N.C. 649, 39 S.E. 2d 804, it was held that the court might determine the validity of an assignment by a legatee in a suit by the executor under the Act.

Questions raised by the assignments of error and not discussed herein are without merit and will not be sustained. In the trial below we find

No error.

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

FRENEAU MERRITT BLANKENSHIP v. NANCY PEETE BLANKENSHIP.

(Filed 11 April, 1962.)

1. Divorce and Alimony § 22— Rendition of absolute divorce does not oust the jurisdiction of court in which prior action was pending to adjudicate custody of children.

The wife instituted action for alimony without divorce in the Superior Court of one county, in which she prayed custody of the children of the marriage and in which order for alimony *pendente lite* was entered. Thereafter the husband instituted action for absolute divorce in the general county court of another county, in which action decree of absolute divorce was entered. *Held:* The decree of absolute divorce does not oust the jurisdiction of the court in the wife's action over the children of the marriage or affect the recovery of alimony *pendente lite* accruing prior to the date of the entry of the decree for absolute divorce, and order entered in the court rendering the decree for absolute divorce respecting the custody of the children of the marriage is erroneous. G.S. 50-11 as amended, G.S. 50-16 as amended.

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

APPEAL by defendant from *McLean, J.*, August Civil Term 1961 of BUNCOMBE.

This action was instituted in the General County Court of Buncombe County by the plaintiff husband on 16 February 1960 for absolute divorce from the defendant wife, on the ground of having lived separate and apart for two successive years.

The plaintiff alleged that two children had been born of the marriage, to wit, Catherine Pettway Blankenship (age 4 on 16 February 1960) and Richard Merritt Blankenship (age 3 on 16 February 1960).

The plaintiff further alleged that defendant is not a fit and suitable person to have the care and custody of the minor children born of the marriage, and prayed that he be awarded the custody, care and control of said minor children.

The plaintiff and defendant were married in Wake County, North Carolina, on 10 July 1954. Thereafter, they lived together as husband and wife in Buncombe County, North Carolina, where the two children referred to hereinabove were born.

On 28 January 1958, the plaintiff and defendant separated and since that time the defendant and the minor children born of the marriage have resided in the home of defendant's late father, Dr. C. H. Peete, with her mother in Warrenton, Warren County, North Carolina.

The defendant herein instituted an action for alimony without divorce against the plaintiff herein on 31 January 1958 in the Superior Court of Warren County, North Carolina, entitled *NANCY PEETE BLANKENSHIP v. FRENEAU MERRITT BLANKENSHIP*, and

in said action the husband filed an answer denying the material allegations of the complaint and raising issues of fact for jury determination. A temporary order was entered in the action awarding the wife subsistence and custody of the two minor children *pendente lite.*

The summons in the present action was served on the defendant wife in Warren County on 18 February 1960, and she in apt time made a general appearance and filed answer in which she alleged as pleas in bar: (1) That an action for alimony without divorce filed in Warren County on 31 January 1958 was a prior pending action which involved the question of the custody of the minor children involved therein; and (2) that the order for subsistence and custody *pendente lite* theretofore entered in the action pending in Warren was *res judicata* as to the custody of said children.

The plaintiff herein on 9 June 1960 filed a motion in the Superior Court of Warren County to dismiss the action pending therein for alimony without divorce and for the custody of the minor children born of the marriage between the parties insofar as such action related to custody, on the ground that upon the institution of the divorce action in the General County Court of Buncombe County on 16 February 1960, all other courts were divested of jurisdiction over the matter of custody of the minor children involved. This motion was duly heard in the Superior Court of Warren County on 10 June 1960 and was denied. The defendant husband in open court gave notice of appeal to the Supreme Court from the ruling of the lower court denying his motion. Plaintiff wife having been given the custody of the children under a previous order in the pending action with certain visitation rights of the defendant husband, and the husband having violated prior orders of the court with respect to visitation rights, the court gave the plaintiff wife exclusive custody of the children pending the appeal and denied the husband any visitation rights.

On motion of the wife's counsel to dismiss the appeal in the Supreme Court and to affirm the judgment from which the appeal was taken, the motion was allowed for failure to comply with the rules of the Court in perfecting the appeal and the judgment of the lower court was affirmed at the Fall Term 1960.

On 14 June 1960, judgment was entered in the General County Court of Buncombe County overruling the pleas in bar but holding "that the Superior Court of Warren County having taken jurisdiction of the custody of the two children born of the marriage between the parties and having entered numerous orders in said cause concerning the custody of said children * * * said Superior Court of Warren County has fully acquired jurisdiction of the custody of said children, and that this court does not have jurisdiction with respect to the cus-

tody of said children or any matters related thereto." No exception was taken to this judgment by either party.

Thereafter, on 28 June 1960, this action came on for trial, and upon issues submitted to the jury and answered in favor of the plaintiff, judgment was entered by said General County Court granting plaintiff an absolute divorce from the defendant, which judgment contained the following provision: "2. It appearing to the court from the pleadings filed in this cause and from the testimony given by witnesses that there were born of the marriage between the plaintiff and the defendant two children, Catherine Pettway Blankenship and Richard Merritt Blankenship, and it further appearing that the matter of the custody of said children has heretofore come before this court and the court has entered a judgment herein; that this court is without jurisdiction with respect to the custody of said children, therefore, no orders are entered concerning the custody of said children."

On 24 October 1960, the plaintiff husband filed a motion in this cause praying that the General County Court of Buncombe County take jurisdiction over the matter of the custody of his two minor children born of his marriage to the defendant and grant him absolute custody of said children. The matter came on for hearing on 29 March 1961 and the court concluded as a matter of law, "that the judgment of absolute divorce, granted in this court on June 29, 1960, abated the action for alimony without divorce, under the provisions of the North Carolina Statutes, G.S. 50-11, then pending in the Superior Court of Warren County, North Carolina, as no permanent judgment had been entered prior to the granting of the decree of absolute divorce in this court and that this court is vested with the sole and exclusive jurisdiction in the matter of the custody of the two minor children hereinbefore named." The court then entered judgment as follows: "NOW, THEREFORE, the plaintiff's motion in this cause as to the jurisdiction of the custody of the two minor children born to the marriage of plaintiff and defendant is granted and this cause is retained for further proceedings and orders with respect to the custody of the two minor children, Catherine Pettway Blankenship and Richard Merritt Blankenship."

The defendant appealed to the Superior Court which affirmed the judgment of the General County Court of Buncombe County, North Carolina. Defendant appeals to this Court, assigning error.

W. Paul Young; Lamar Gudger for plaintiff.

Van Winkle, Walton, Buck & Wall, by Herbert L. Hyde; Bryant, Lipton, Strayhorn & Bryant for defendant.

DENNY, C.J. The question posed for determination is whether or not the action for absolute divorce instituted on 16 February 1960 in the General County Court of Buncombe County ousted the jurisdiction of the Superior Court of Warren County to determine the custody of the children born of the marriage in the action instituted in Warren County on 31 January 1958 for alimony without divorce and for the custody of the minor children pursuant to the provisions of G.S. 50-16 as amended by Chapter 925 of the 1953 Session Laws of North Carolina and Chapters 814 and 1189 of the 1955 Session Laws of North Carolina.

In order to reach a decision on the question presented, the former decisions of this Court must be considered in light of the recent amendments to Chapter 50 of the General Statutes of North Carolina relating to divorce and alimony.

Chapter 925 of the 1953 Session Laws of North Carolina amended G.S. 50-16 as follows: "In a proceeding instituted under this Section, the plaintiff or the defendant may ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this Section."

This section was further amended by Chapter 814 of the Session Laws of 1955 to read: "* * * Or she may set up such cause of action as a cross-action in any suit for divorce, either absolute or from bed and board; and the husband may seek a decree of divorce either absolute or from bed and board, in any action brought by his wife under this Section.

"Sec. 1 (a) Provided that this Act shall not apply to pending litigation."

The statute was also amended by Chapter 1189 of the 1955 Session Laws by adding the following provisions: "The court may enter orders in a proceeding under this Section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding.

"In any action instituted by the wife under the provisions of this Section when there is a minor child or children, the complaint in such

action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state."

G.S. 50-11 was amended by Chapter 872 of the 1955 Session Laws of North Carolina by rewriting the second proviso of said section to read as follows: "and, provided further, that except in case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period, a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court *rendered before the rendering of the judgment for absolute divorce.*" (Emphasis added)

Prior to the 1953 and 1955 amendments to G.S. 50-11 and G.S. 50-16, this Court held uniformly that the court in which a divorce action was instituted obtained the exclusive jurisdiction over the custody of the children born of the marriage. *In re Blake,* 184 N.C. 278, 114 S.E. 294; *In re Albertson,* 205 N.C. 742, 172 S.E. 411; *Reece v. Reece,* 231 N.C. 321, 56 S.E. 2d 641. See *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879, which involved no question of conflicting jurisdiction.

Likewise, prior to the 1953 amendment to G.S. 50-16, the right to custody of the children born of the marriage could not be determined in an action for alimony without divorce.

We have not been called upon heretofore to interpret the identical question posed on this appeal.

It will be noted that G.S. 17-39 was amended by Chapter 545 of the 1957 Session Laws of North Carolina and the amendment is now codified as G.S. 17-39.1, which no longer requires the marital status of the parents to be a factor in determining the procedure to obtain custody of a child by *habeas corpus. Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114.

This Court has also held that a judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. G.S. 50-11; *Deaton v. Deaton,* 237 N.C. 487, 75 S.E. 2d 398.

G.S. 50-11, as amended, now provides that a decree of absolute divorce except under certain designated situations "shall not impair or destroy the right of the wife to receive alimony *and other rights provided for her* under any judgment or decree of a court *rendered before the rendering of the judgment for absolute divorce.*" (Emphasis added)

The defendant herein was awarded the custody of her children and support *pendente lite* for herself and children in the case of *NANCY*

PEETE BLANKENSHIP v. FRENEAU MERRITT BLANKENSHIP pending in the Superior Court of Warren County on 28 March 1958 and the cause was retained for further orders.

It is pointed out in pertinent part in G.S. 50-13: "After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent * * *."

There is nothing in the above statute to the effect that institution of a divorce action ousted jurisdiction of another court, previously acquired, to determine the rights of custody of the children of the marriage. It would seem that the 1953 amendment to G.S. 50-16, granting jurisdiction to determine custody in an action for alimony without divorce, creates an additional method whereby the matter of custody may be determined. The provisions added to G.S. 50-16 by Chapter 1189 of the 1955 Session Laws of North Carolina, hereinabove set out, support this conclusion. Certainly, the first paragraph of the 1955 amendment, Chapter 1189, applies only to the support and maintenance of a child or children whose custody was adjudicated under a proceeding instituted pursuant to the provisions of G.S. 50-16 as amended. Therefore, the court first obtaining jurisdiction of the parties would retain the cause.

In *Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E. 2d 790, the question before the court was whether or not a suit for alimony without divorce under G.S. 50-16 was one in which a judgment by default and inquiry might be entered by a clerk of the superior court. It was held that an action under G.S. 50-16 was a divorce action within the purview of G.S. 50-10 which requires that the facts be found by a jury before the entry of a judgment granting a divorce. *Winborne, C.J.,* after tracing the history of the statutory provisions for alimony without divorce in this State, said: "As is shown in the cases cited above, G.S. 50-10 applies to a divorce from bed and board under G.S. 50-7. A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond. See Nelson, Divorce and

Annulment, Vol. 1, p. 17 (2nd Ed.). This is precisely the effect of an action under G.S. 50-16, except that it is only available to the wife.

"* * *

"Indeed, in *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195, *Clark, C.J.,* said, ' * * * Suits for alimony without divorce are within the analogy of divorce laws * * *.' "

Therefore, if, as stated in *Schlagel v. Schlagel, supra,* an action for divorce from bed and board is equivalent to an action for alimony without divorce, it would seem that the custody jurisdiction conferred in both actions would be concurrent in the absence of specific language to the contrary in the statute.

Furthermore, if an action for absolute divorce is instituted and the custody of children born of the marriage is prayed for therein, if the wife is the defendant in such action she is not estopped from bringing an action for alimony without divorce during the pendency of such action. *Beeson v. Beeson,* 246 N.C. 330, 98 S.E. 2d 17. However, under the conclusion we have reached, she could not have the custody of the children born of the marriage adjudicated in the second action. Jurisdiction of the matters relating to custody having been invoked theretofore in the action for divorce, the court in which the divorce action was pending would have exclusive jurisdiction over the question of custody.

All decrees with respect to custody and support of minor children are subject to the further orders of the court. Therefore, we hold that the granting of the absolute divorce dissolving the bonds of matrimony between the plaintiff and the defendant did not divest the Superior Court of Warren County of jurisdiction of the minor children born of the marriage or abate the action with respect to any right of the wife to recover alimony *pendente lite* which accrued prior to the date of the entry of the judgment for absolute divorce, or any "other rights provided for her in any judgment or decree of the court" in the Warren County case, rendered before the rendering of the judgment of absolute divorce. *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867. Therefore, the judgment of the court below is

Reversed.

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

STATE v. ELIAS HART.

(Filed 11 April, 1962.)

1. Criminal Law §§ 51, 55—

It is not required that a hematologist be also a chemist in order to be qualified to give expert testimony as to the effect of given percentages of alcohol in the blood stream of human beings, the witness having testified that he had studied standard works upon the subject, that he had worked under pathologists and senior technicians, and that he had made analyses of samples of blood over a number of years to determine the percentage of alcohol and other elements in the blood stream.

2. Criminal Law §§ 52, 55—

It is competent for a witness qualified as an expert by the court and who has testified as to the percentage of alcohol in a sample of blood which the witness had taken from defendant immediately after the time in question, to testify as to the effect of various percentages of alcohol in the blood stream of human beings, that some humans were appreciably under the influence of alcohol at a certain percentage, while others would not be under the influence until a higher percentage was reached, and that all persons, regardless of size, age, or anything else, would be appreciably under the influence of alcohol at a percentage less than that found in defendant's blood, etc.

3. Criminal Law § 107— Instruction on testimony of expert witness as to effect of various percentages of alcohol in blood stream, held not erroneous.

The charge of the court in recounting the testimony of an expert witness as to the effect of various percentages of alcohol in the blood stream of human beings, given in explanation of the witness' opinion that all persons regardless of age, size, or anything else, would be appreciably under the influence of alcohol if they had a percentage of alcohol in the blood stream even lower than that found in the sample of defendant's blood, *is held* not erroneous in failing to instruct the jury as to how such testimony should be considered in determining the guilt or innocence of defendant of the charge of driving on a public highway while under the influence of intoxicating liquor, since such testimony relates not to the guilt or innocence of defendant but to the credibility of the testimony of the witness that from his analysis of the blood sample taken from defendant and from his personal observation of defendant, defendant was under the influence of some intoxicating beverage.

4. Criminal Law § 159—

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 defendant from *Stevens, J.*, October 1961 Term of LENOIR.

Criminal prosecution for driving an automobile upon a public highway, while under the influence of intoxicating liquor, heard *de novo* on appeal from a conviction in the Municipal-County Court of Lenoir County.

Plea: Not Guilty. Verdict: Guilty.

From a judgment that defendant pay a fine of $150.00 and costs, he appealed.

Attorney General T. W. Bruton and Assistant Attorney General G. A. Jones, Jr., for the State.

White & Aycock, By Thos. J. White and Dan E. Perry for defendant appellant.

PARKER, J. About 9:45 o'clock p.m. on 13 February 1961 R. E. Eubanks, a police officer of the city of Kinston, saw defendant drive his automobile through a red traffic light on North Queen Street in the city at a speed of about 35 miles an hour. Eubanks, who was driving a patrol automobile, turned his automobile and followed defendant. Defendant's automobile was weaving, he jerked the wheel, and almost ran off the road. Thereafter he would go to the center line, and jerk his wheels quick, and come back to the shoulder. Eubanks followed him driving in that manner about three blocks, and stopped him. Eubanks got out of his patrol automobile, and went to defendant's automobile. Defendant lowered his window, and looked at Eubanks. Defendant had a very high odor of alcohol on his breath. Defendant, at Eubank's request, got out of his automobile. He was in a staggering condition. Eubanks found a bottle containing a small amount of whiskey in defendant's automobile. Defendant said he had had two drinks out of the bottle. From Eubanks' observation of, and conversation with, defendant, he formed the opinion defendant was appreciably under the influence of some intoxicating beverage. Eubanks arrested defendant, and carried him to the police station.

E. A. Brooks, a police officer of the city, saw defendant come in the police station with Eubanks. Defendant was in a very staggering condition, his shirt tail was out, and his pants were twisted. He had a strong odor of some alcoholic beverage on his breath. Defendant is crippled with arthritis.

Defendant in the police station, in response to an inquiry by Eubanks, said he wanted a blood test, and signed an application for it. Eubanks carried defendant to a local hospital to have a blood test made by David P. Lutz, who met them there about 9:50 o'clock p. m.

David P. Lutz testified in substance on direct examination: He has been employed at Lenoir Memorial Hospital for almost four years. He is laboratory director, and supervises the analysis of body fluid, which includes the analysis of blood. He has been doing this kind of work for 18 years. Prior to coming to Kinston he was in Public Health in Gastonia, where his work required some analysis, but not pertain-

ing to alcohol. He has been engaged in work in the examination of blood for alcoholic content about nine years. He has had training at the Medical College of Virginia, State College in Raleigh, and Navy School during service. He served in Rowan Memorial Hospital in Salisbury, where at times his work required blood analysis. He has done some studying in the field of analysis of blood for alcoholic content, reading pamphlets, bulletins and books on the subject. He has made hundreds of thousands of blood tests or blood analyses, and estimates he has made between thirteen and fifteen hundred examinations or tests of blood for alcoholic content. At this point the solicitor for the State submitted that Lutz had qualified as an expert in blood analysis. Whereupon, Mr. White, defendant's counsel, at his request was granted permission by the court to ask Lutz some qustions. This is the substance of his testimony in reply to Mr. White's questions: His work is principally that of a laboratory technician for purposes other than alcoholic tests. He runs tests of very many samples of blood for many reasons. The analyses he makes of blood samples for alcoholic purposes represent a small part of his work. He had short courses in medical fields at the Medical College of Virginia; he is not a graduate of that College. He has had three or four short courses the past number of years. By short courses he means one or two weeks. He has been to State College several times for a week or two weeks course. He followed his line of work while he was in the navy during the war. That's the principal training he has had in this work, together with working under pathologists and senior technicians.

At this point in Lutz's testimony Mr. White said: "We will admit that the witness is an expert medical laboratory technician."

The court then held "that the witness is an expert in the field of analysis of body fluids, which includes blood and alcoholic concentration in the blood stream." To this holding defendant did not except.

After this holding by the court, Lutz testified on direct examination, without any objection or exception, in substance: The making of tests for alcoholic content in the blood stream is no more complicated than analyzing blood for any other purpose. He makes analyses for sugar, iron, mineral elements, potassium. The procedures are a little different. He saw defendant, in company with Eubanks, in Lenoir Memorial Hospital on the night of 13 February 1961. He took some blood from the body of the defendant. He later made an analysis of this blood of defendant with respect to alcoholic content, and the result of his test showed point twenty-two (.22) plus. The instrument he has to measure doesn't measure any higher than point twenty-two (.22).

Defendant's first assignment of error is that the court erred in overruling his objections to questions propounded to Lutz by the solicitor

for the State, and to the court's refusal to strike out the answers of the witness to these questions, all of which are the basis of his exceptions numbers one through thirty-two, both inclusive. This is a summary of the challenged testimony: A person is appreciably under the influence of intoxicating liquor, minimum content, at point fifteen (.15). Point fifteen (.15) is a mean average accepted for all persons, at which point they would be under the influence of intoxicating liquor. It has been determined that some persons with as low as point 0-five (.05) and point one-0 (.10) would be under the influence. It is established that at point fifteen (.15) any person would be appreciably under the influence, regardless of age, size, or anything else. There are some things that will slow the entrance of alcohol into the blood stream, for instance greasy or starchy food. If a person on a full stomach were to drink a great quantity of alcohol, a smaller percentage of alcohol would seep into the blood stream than with a person with an empty stomach. At point thirty-five (.35) of alcohol in the blood stream, a person becomes unconscious; at point forty-five (.45) to point five-0 (.50) of alcohol in the blood stream it would be fatal.

Immediately after the giving of this challenged testimony, Lutz testified, without objection, that from his observation of defendant on that occasion, aside from any blood test analysis, it was his opinion that defendant was appreciably under the influence of some intoxicating beverage; he detected on him the odor of an alcoholic beverage.

Lutz testified on cross-examination: "I told the solicitor I made other tests and that while many of them were different one is probably not much more difficult than the other to make. In these tests I make for the doctors I do not undertake to say what effect the condition that I conclude to exist has upon the body of the individual unless the doctor asks me. The doctor is ordinarily the judge of that. This alcoholic determining test is not the only one in which I am called upon to say what effect it has on the human body. There are many of them. I measure some by visual aid, some by mechanical means and some by spectrophotometer."

Defendant's first assignment of error, based upon his exceptions one through thirty-two, presents for decision the question whether Lutz is sufficiently qualified as an expert to testify as to the effects of certain percentages of alcohol in the blood stream of human beings.

We have held in *S. v. Willard,* 241 N.C. 259, 84 S.E. 2d 899; *S. v. Moore,* 245 N.C. 158, 95 S.E. 2d 548; *S. v. Henderson,* 245 N.C. 165, 95 S.E. 2d 594; *S. v. Collins,* 247 N.C. 244, 100 S.E. 2d 489; *Osborne v. Ice Co.,* 249 N.C. 387, 106 S.E. 2d 573; that R. B. Davis, Jr., who was a witness in all these cases, was sufficiently qualified as an expert witness to testify as to the effect of certain percentages of alcohol in

the blood stream of human beings. In the *Willard* case, the trial court found as a fact that R. B. Davis, Jr., is an expert chemist and hematologist. In that case Davis testified he had made a study over a period of time as to the effect of alcohol in the blood stream upon a human being, that he had studied medical and clinical texts on the subject, that the texts he has studied concerning the effect of alcohol on the human being are recognized authorities on the subject, and that from his studies and tests and experience he thinks he is qualified to say how and in what manner alcohol affects the human being. Davis is not a doctor of medicine. Davis made an analysis of Willard's blood. In the *Moore* case, the solicitor for the State submitted R. B. Davis, Jr., to the trial court as an expert hematologist and clinical technologist and technician and chemist. In the *Henderson* case, R. B. Davis, Jr., testified in substantial accord with the testimony given by him in the *Moore* case. The Court in a *per curiam* opinion held that the decision in the *Henderson* case was controlled by the decision in the *Moore* case. In the *Collins* case the trial court held that R. B. Davis, Jr., is an expert as a clinical technologist, chemist, toxicologist and hematologist. In the *Ice Company* case R. B. Davis, Jr., was held to be an expert in chemistry, hematology and clinical technology.

Defendant states in his brief: "At first glance these cases [the five cases above] appear to hold directly *contra* to our appeal," but he contends they are not in point, because in each case Davis qualified as a chemist, and Lutz did not qualify as a chemist. Defendant further states in his brief: "At most, Mr. Lutz could qualify only as an expert hematologist. This, we respectfully submit, is not sufficient." In support of his contention defendant relies on *Tarrock v. City of Kingston*, 279 App. Div. 693, 108 N.Y.S. 2d 16, a wrongful death case. This is all that appears in the brief *per curiam* opinion in this case as to the hematologist: "The court properly excluded the testimony of a hematologist as to a 'recognized standard' by which intoxication is presumed to occur from the percentage of alcohol found in blood. He was not a physician *or otherwise shown qualified from personal experience* to be able to give an opinion which a court would accept on this subject, and the court left it open to the appellant to show by competent proof the effect of the alcohol which the hematologist said he found on examining the blood." Emphasis ours. The Court held that this hematologist was not qualified, but it did not hold that a hematologist by specialized study and personal experience could not qualify to testify as to the effects of certain percentages of alcohol in the blood stream of human beings.

Defendant's counsel admitted that David P. Lutz "is an expert medical laboratory technician." The trial court, without any objection

on defendant's part, held as a matter of fact that David P. Lutz "is an expert in the field of analysis of body fluids, which includes blood and alcoholic concentration in the blood stream."

Webster's Third International Dictionary defines hematology as "a branch of biology that deals with the blood and blood-forming organs," and hematologist as "one that specializes in the study of the blood." The judge's finding in effect is, *inter alia,* that Lutz is an expert hematologist.

Webster's Third International Dictionary defines chemistry, "1 c: a science that deals with the composition, structure, and properties of substances and of the transformations that they undergo . . . 2 a: the composition and chemical properties of a substance . . .," and a chemist "b: one trained in or engaged in chemistry." 14 C.J.S., p. 1103 defines chemistry as "the science that treats of the composition of substances and of the transformations which they undergo."

We know of no case that holds that a properly qualified hematologist cannot testify as to the effects of percentages of alcohol in the blood stream of human beings, unless he is also a chemist, and it would seem that no court would make such a decision.

Lutz has been engaged in work in the examination of blood for alcoholic content about nine years. He has made between thirteen and fifteen hundred examinations or tests of blood for alcoholic content. He has read pamphlets, bulletins and books on the subject. He has had short courses in medical fields at the Medical College of Virginia. He has worked under pathologists and senior technicians. He testified on cross-examination: "In these tests I make for the doctors I do not undertake to say what effect the condition that I conclude to exist has upon the body of the individual unless the doctor asks me. The doctor is ordinarily the judge of that. This alcoholic determining test is not the only one in which I am called upon to say what effect it has on the human body. There are many of them."

It would seem from the evidence before us that Lutz has acquired by study and practical experience sufficient specialized knowledge to testify as to the effects of certain percentages of alcohol in the blood stream of human beings. Knowledge acquired by doing is no less valuable than that acquired by study. It may not be amiss to say, the testimony that Lutz gave in the present case as to the effects of certain percentages of alcohol in the blood stream of human beings is in substantial accord with the testimony of R. B. Davis, Jr., on the same subject as it appears in *S. v. Moore, supra.* The trial judge properly admitted this challenged testimony for the consideration of the jury. Defendant's first assignment of error, based upon his exceptions one through thirty-two, both inclusive, is overruled.

Defendant assigns as error that the judge in his charge stated the challenged evidence as to the effect of percentages of alcohol in the blood stream of a human being, all human beings, some human beings, any human beings. This assignment of error is overruled.

Defendant assigns as error that the court failed to perform the duties required of it by G.S. 1-180, in that it failed "to explain the law and instruct the jury as to in what manner and to what extent the state's evidence regarding the alleged alcoholic content in the blood sample taken from the defendant should be considered by the jury in determining the guilt or innocence of the defendant," and further assigns as error the court failed in its charge to explain the law and instruct the jury as to in what manner and to what extent the state's evidence relating to the effect of percentages of alcohol in the blood stream of a human being, all human beings, and some human beings should be considered by the jury in relating the same to the defendant and in determining the guilt or innocence of the defendant. Defendant has not favored us with any citation of law whatsoever from decided cases or textbooks or anywhere else as to any such law as he contends for in these assignments of error. After diligent search we have found no law as contended for by defendant. In *S. v. Willard, supra,* the Court merely said, "the expert testimony as to the results of test of defendant's blood was admissible on the trial of this case on a charge of driving a motor vehicle while upon the public highways within the State while under the influence of intoxicating beverages." In *S. v. Haner,* 231 Iowa 348, 1 N.W. 2d 91, a prosecution for operating a motor vehicle while intoxicated, a physician, who had qualified as an expert on the subject of intoxication and blood tests, was held competent to testify as to what was accepted by physiologists as the minimum alcoholic content of an intoxicated person's blood. The Court said: "The evidence of Dr. Fee was admissible on the question of intoxication and was entitled to be considered by the jury." The *Haner* case makes no statement of any kind as to any such law as contended for by defendant. The challenged testimony of Lutz was competent for the consideration of the jury, and "as to in what manner and to what extent" it should be considered by the jury in relation to the defendant seems to be in the field of argument and contentions as to Lutz's credibility and as to the bearing of his testimony upon the issue of the guilt or innocence of defendant. These assignments of error are overruled.

The other assignments of error to the charge are not brought forward and discussed in the brief, and are deemed abandoned. Rule 28, Rules

of Practice in the Supreme Court, 254 N.C. 783, 810; *S. v. Strickland*, 254 N.C. 658, 119 S.E. 2d 781.

In the trial below we find

No error.

STATE v. ESLIN HARDING GASKILL.

(Filed 11 April, 1962.)

1. Criminal Law § 155—

Where the record fails to show exceptions to the questions or answers, an assignment of error to the admission of evidence does not properly present the question on appeal.

2. Same; Criminal Law § 139—

Where the jury has convicted defendant of a capital crime with recommendation of life imprisonment, the Supreme Court, because of the gravity of the offense, may consider an assignment of error notwithstanding the failure of appellant to meet the requirements necessary to present the question under the rules governing appeals.

3. Criminal Law § 162—

The admission of testimony of statements made by defendant after his arrest tending to show his presence at the scene and hence his opportunity to have committed the crime will not be held for prejudicial error warranting a new trial, even if partially incompetent, when the facts therein recited are substantially the same as those testified to by other witnesses without objection.

4. Criminal Law § 71—

If defendant wishes to challenge testimony of certain admissions made by him as being incompetent on the ground that they were involuntary, the defendant should raise the question by seeking to examine the witness in the absence of the jury upon a *voir dire*.

5. Same—

Where there is nothing in the record to show that certain admissions made by defendant were involuntary and defendant had requested no *voir dire* in regard thereto, the compentency of such admissions are not affected by evidence tending to show that an unconnected confession of guilt made by defendant some days thereafter, but not offered in evidence by the State, was involuntary.

6. Criminal Law § 164½—

Defendant may not bring out testimony on cross-examination of the State's witnesses and then assert that the admission of the testimony was error, since a defendant cannot invalidate a trial by voluntarily in-

troducing evidence which he might have excluded if the evidence had been offered by the State.

7. Criminal Law § 42; Constitutional Law § 33—

The fact that officers required defendant to surrender for examination the clothing worn by him at the time the crime was alleged to have been committed, and the introduction of evidence that the stains found on the garments were human blood stains, does not invade defendant's constitutional right not to incriminate himself. Constitution of North Carolina, Art. I, sec. 11; Fifth Amendment to the Constitution of the United States.

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

APPEAL by defendant from *Cowper, J.*, October 1961 Criminal Term of ONSLOW.

At the May 1961 Term the grand jury returned a true bill of indictment charging defendant with the rape of Caroline Brinson on 23 March 1961.

The first witness at the trial was the asserted victim. She testified: She worked alone in an insurance office near Jacksonville. The area was rural. Defendant came to her office about 12:30 p.m. and inquired about automobile liability insurance, stating his father was negotiating for the purchase of a secondhand automobile. He was given the requested information. Defendant remained in the outer part of the office after receiving the requested information. After the lapse of some time the victim inquired about the automobile that was to be insured. Defendant then left but returned several minutes later, informing the victim there had been delay in completing the purchase of the car, but his father would come shortly and the policy could then be issued. The victim was working in a portion of the office partioned from the part used by customers. Shortly after 4:00 p.m. she felt a hand on her neck and a knife at her throat. She was forced by defendant to go to the toilet where defendant, threatening her with his knife, and over her protests, forced her to have intercourse with him. She was menstruating. She offered to give defendant her money and her car if he would abandon his efforts to have intercourse. After the crime was consummated, they returned to the office, defendant to the outer portion, the victim to her desk behind the partition. Shortly after the crime was committed, three marines came to the office. Witness managed to inform them a crime had been committed by defendant. She was, when they came in, under a severe emotional strain. One left to call the sheriff. In a few minutes the officers responded to the call of the marine. As soon as they arrived, she ran out and told the officers she had been raped by defendant.

The victim was examined by Dr. Dixon within an hour of the alleged assault. He took a smear which under microscopic examination disclosed mobile sperm. The doctor expressed the opinion: ". . . it is likely it would have been recently put there."

The testimony of the marines corroborated that of the victim.

Defendant offered no evidence.

The jury returned a verdict of guilty, recommending life imprisonment. Judgment was entered in conformity with the verdict, and defendant appealed.

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

J. Kenneth Lee & Harvey E. Beech by Harvey E. Beech for defendant appellant.

RODMAN, J. Defendant, in the trial below, moved for nonsuit for that the State's evidence was insufficient to warrant a conviction. He also excepted to the court's summary of the State's contentions. He has abandoned these exceptions by failure to bring them forward in his brief. These exceptions are manifestly without substance.

Defendant claims prejudicial error warranting a new trial because of the admission of asserted incompetent evidence. This evidence consists of (a) statements made to an officer on the night of the alleged crime, and (b) evidence that stains on clothes worn by defendant on the day of the crime were human blood stains.

Defendant's first assignment of error is directed to more than eleven pages of the testimony of Deputy Sheriff Morton. Part of this testimony appears in the record in the narrative. There is nothing to show any exception taken to the questions or answers when that portion of the testimony was given, nor is there exception to the questions or answers to the remaining portion of the testimony. Manifestly, the assignment does not comply with our rules; but, because of the gravity of the crime of which defendant stands convicted, we treat the question argued as though it were properly presented.

Immediately following the witness's statement that defendant had raped her, defendant was taken in custody and carried to the jail in Jacksonville. An ABC officer, present when the accusation was made, described the appearance of the victim and related the statements made by her in the presence of defendant. He further testified that on the way to the jail: "He (defendant) said if he had anything to do with her, he didn't know anything about it, that he had blacked out. . . . He said he first came into the office to see about some in-

surance, that they were going to buy a car, he and his father." This evidence was admitted without objection.

Deputy Sheriff Morton testified immediately after the ABC officer. He testified without objection at the trial and without assertion here of error to the description of events given by Miss Brinson in the presence of defendant. He was then asked if he talked with defendant. He replied, over defendant's exception, that he had talked with defendant about 7:00 p.m. on the date of the asserted crime. Witness said he informed defendant that defendant would probably be charged with the crime of rape, that defendant did not have to make a statement, but was at liberty to do so if he desired, that witness made no threat or promise of reward. Morton then testified that defendant said he went to the insurance office and asked about insurance on a car which his father was to buy, that he went out of the office and was gone some time, talking to his father. He then returned to the office. He was informed as to the amount of the premiums. "He asked her then who could drive the car and she told him anybody could drive it and it would be covered. Said he turned around in the office and started to the door and didn't get out. That he started having an awful headache. That was the last, he said, he remembered until he came to his senses and he was standing in front of her and has his knife in his hand and the lady was standing across from him and she had money in her hand. He remembered she told him to take the money, and she gave him car keys and to go, but he told her he would not take the money and he didn't want money. He said he felt in his pocket and found the car keys. Said, 'I gave her the car keys back and just as I gave them to her a white man and a colored man came in the place.'" (The two referred to as coming in were marines.) "Just as I was giving her the keys, a white boy and a colored boy came in the place. The lady asked if she could help them. She was in a nervous condition and was very white and her hands were shaking, and her voice was trembling."

Witness testified defendant added: "The Sheriff's officers came up and the lady ran out and was crying and told the officers that I was the one and they arrested me and put me in the car. One of the officers went in the place and talked to the lady and came out; and asked why I raped that lady. I told them I did not rape her. He says he remembered, 'I had my knife in my hand and the lady was standing a few feet from me when I came to my senses. I do not remember having any such with the lady. I must have blacked out.'"

Morton's conversation with defendant took place within three or four hours after the crime is alleged to have occurred. His testimony relating the events of the day as given by defendant is substantially

the same as that of the ABC officer whose testimony was given without objection. Neither of these witnesses purports to testify to an admission by defendant of the commission of the crime. Their testimony is that defendant denied knowledge of any wrongful act, asserting he "blacked out." Both testified to admissions by defendant of his presence and hence the opportunity to commit the crime. To that extent the statements of defendant are corroborative of the testimony of the prosecuting witness.

The admission of evidence, even if incompetent which is merely corroborative and repetitious of other evidence given without objection is not such prejudicial error as to warrant a new trial. *S. v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915; *S. v. Bright,* 237 N.C. 475, 75 S.E. 2d 407; *S. v. Rich,* 231 N.C. 696, 58 S.E. 2d 717; *S. v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648.

Defendant did not ask permission to examine the witness Morton in the absence of the jury to show, if he could, that the statements made on the evening of the 23rd were not in fact voluntary and for that reason incompetent. That is the course he should have pursued if he wished to challenge the evidence offered by the State. *S. v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572.

On cross-examination defendant, apparently for the purpose of discrediting the testimony of the officer or to elicit sympathy for defendant, sought to show: He was taken from the jail in Onslow County where the crime was alleged to have been committed, and carried to the jail in Lenoir, an adjacent county, and subsequently taken to the State's prison in Wake County. Although a warrant charging him with the crime had issued on 24 March while he was in custody, it was not served until after he was returned to Onslow County. He was subjected to repeated questioning during the week he was kept in Raleigh. He was not permitted to communicate with his family or counsel. He finally confessed. He was then returned to Onslow County.

The witness, in response to a question from defendant's counsel concerning defendant's removal from Onslow County, said: "The general public didn't know, and that was the general purpose for taking him from the County, to avoid mob violence."

Notwithstanding defendant developed on his cross-examination that a tape recording was made of the confession while in the State's prison, that confession was not offered in evidence by the State.

Defendant's position is this: The confession made in the State's prison was obtained under duress. Such duress not only makes that confession incompetent but makes any statement by defendant, including those made long prior to the asserted duress, incompetent. In

evaluating defendant's contention, these facts must be borne in mind: (1) There is nothing to indicate duress when the statement of 23 March was made; (2) the State did not offer the confession made in the State's prison, nor did it seek to show that any such confession had been made; (3) there was no finding nor request for a finding with respect to the voluntary nature of the confession.

A defendant cannot invalidate a trial by voluntarily introducing evidence which he might have excluded if that evidence had been offered by the State.

The error now asserted was also alleged as warranting a new trial in *Maynard v. Holder,* 219 N.C. 470, 14 S.E. 2d 415. *Schenck, J.,* said: "Manifestly, such an assignment cannot be sustained. A ruling to the contrary would be to allow appellants to profit by their own wrong." *S. v. Williams,* 255 N.C. 82, 120 S.E. 2d 442; *S. v. Burton,* 256 N.C. 464.

Defendant claims the taking of clothing worn by him on 23 March for chemical analysis, followed by testimony that the stains found on the garments were human blood stains constituted self-incrimination forbidden by North Carolina Constitution, Art. I, sec. 11, and the Fifth Amendment to the United States Constitution. This contention runs counter to State and Federal decisions. No constitutional rights were invaded when the officer required defendant to surrender for examination and analysis the clothing worn by him at the time the crime was alleged to have been committed. *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *S. v. Rogers, supra; S. v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *S. v. Neville,* 175 N.C. 731, 95 S.E. 55; *S. v. Thompson,* 161 N.C. 238, 76 S.E. 249; *People v. Chiagles,* 142 N.E. 583; 32 A.L.R. 676; *Davis v. State,* 57 A. 2d 289; *Commonwealth v. Statti,* 73 A. 2d 688; *State v. Alexander,* 83 A. 2d 441, cert. den. 343 U.S. 908, 96 L. ed. 1326; *Holt v. United States,* 218 U.S. 245, 54 L. ed. 1021; *Weeks v. United States,* 232 U.S. 383, 58 L. ed. 652; *United States v. Kelly,* 55 F. 2d 67, 83 A.L.R. 122; *McFarland v. United States,* 150 F. 2d 593, cert. den. 90 L. ed. 478; Wigmore on Evidence, 3rd ed., sec. 2263.

No error.

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

RANDOLPH B. DENSON AND WIFE, THEO J. DENSON, AND JOYCE D. SMITHDEAL v. JAMES M. DAVIS.

(Filed 11 April, 1962.)

1. Trespass to try Title § 2—

While ordinarily the burden is upon the plaintiffs in an action to try title to realty to prove that they are the owners of the land, where plaintiffs introduce instruments constituting a chain of title from defendant, which instruments are valid on their face, defendant has the burden of proving his asserted invalidity of these instruments, based on matters *dehors* the record, as an affirmative defense.

2. Mortgages and Deeds of Trust § 28—

A charge to the effect that if the trustee and the person making the last and highest bid at a foreclosure sale were both agents of the *cestui* the foreclosure sale is voidable, must be held for prejudicial error in the absence of evidence that the trustee had power to direct foreclosure or stipulate the amount which should be bid, since under such charge the *cestui*, a corporation, could not protect its interests by having an agent buy the property, and the charge fails to present the question whether the parties acted in good faith without any fraud and whether the *cestui* obtained any undue advantage.

3. Mortgages and Deeds of Trust § 35—

If the debtor rents the land from the *cestui* after foreclosure and purchase of the property by the *cestui*, he recognizes the validity of the foreclosure and is estopped thereafter to attack same, and where there is conflict in the evidence as to whether the sum paid by the debtor to the *cestui* after foreclosure was rent or a payment on the purchase price, the issue of ratification of the sale is for the jury.

4. Mortgages and Deeds of Trust § 39—

Where both the validity of the foreclosure sale and the ratification of the sale by the debtor after foreclosure are presented by allegations and evidence the questions should be submitted under separate issues.

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

APPEAL by plaintiffs from *Bundy, J.*, November 1961 Term of EDGECOMBE.

This is an action to try title to two tracts of land in Edgecombe County, one tract containing one acre, the other, 20.9 acres.

Plaintiffs alleged: They were the owners of the two tracts, having acquired them from Virginia-Carolina Chemical Corporation (hereafter V-C). It had acquired title pursuant to a foreclosure deed made by M. L. Cromartie, executed pursuant to the power of sale contained in a deed of trust to him from defendant. Defendant, subsequent to the foreclosure, rented the lands from V-C, thereby recognizing its

title. Defendant has trespassed on the lands since plaintiffs purchased, with threats of continuing trespasses.

Defendant denied the trespass, admitting he was in possession and asserting his possession was rightful. He averred: The purported foreclosure deed executed by Cromartie to V-C was insufficient to divest his title because Cromartie, the trustee, was an employee of V-C, the *cestui que trust* in the deed of trust, and because of such relationship, the instrument securing V-C was in law a mortgage. A mortgagee cannot buy at its sale. The deed from V-C to plaintiffs was a quitclaim deed, thereby putting plaintiffs on notice of the equities existing between V-C and defendant. He denied that he had rented the lands from V-C; but contracted with V-C to repurchase the 20.9 acres and paid $150 on the agreed purchase price. By this contract V-C would continue to own the one-acre tract.

As determinative of the rights of the parties, the court submitted this issue: "As between plaintiffs and defendant are plaintiffs the owners in fee simple of the two tracts of land as described in the Complaint?" The jury answered the issue "No." Judgment was entered on the verdict. Plaintiffs appealed.

Bourne & Bourne by Henry C. Bourne for plaintiff appellant.

Battle, Winslow, Merrell, Scott & Wiley by Robert M. Wiley for defendant appellee.

RODMAN, J. The record evidence shows:

(1) The one acre was, in November 1925, allotted to Maggie Battle Daughtry in the division of the estate of her father, Israel Battle. The other tract was allotted in that division to Jim Battle.

Daughtry and her husband conveyed the one-acre tract to defendant and his wife in 1946. By deed dated 8 December 1953 Maggie Daughtry and husband conveyed the 20.9-acre tract to defendant. This deed recited that Jim Battle had agreed in 1925 to convey it to the Daughtrys. He had not done so. Pursuant to the agreement to purchase, the Daughtrys had taken possession in 1925 and had been in exclusive adverse possession since that date, thereby acquiring good title. Defendant secured the purchase price of the 20.9 acres by deed of trust which was duly recorded. It secured three notes payable in November of the years 1954, 1955, and 1956. This deed of trust has not been cancelled.

(2) On 3 April 1956 defendant and his wife executed a deed of trust to M. L. Cromartie to secure an indebtedness to V-C, payable 1 October 1956. The deed of trust conveyed the land here in controversy, the crops to be grown thereon, and some other personalty. It contained

the usual provisions authorizing the trustee to sell upon default in the payment of the debt secured.

(3) A foreclosure deed dated _____ 1957, acknowledged 26 November 1957, from Cromartie, trustee, to V-C. This deed recites it was executed pursuant to and in compliance with the power of sale contained in the deed of trust to Cromartie. It conveys both tracts for a recited consideration of $1200, the amount bid at the sale.

(4) A deed from V-C to plaintiffs dated 6 January 1960, describing both tracts, for a recited consideration of $1000. The granting clause of the deed reads: ". . . SAID party of the first part . . . has remised, released and quit claimed by these presents doth forever remise, release, and quit claim unto . . . parties of the second part . . . all right, title, claim and interest of the said Virginia-Carolina Chemical Corporation . . ." The habendum reads: "TO HAVE AND TO HOLD the aforesaid tracts or parcels of land, with all privileges and appurtenances thereunto belonging, unto them . . . parties of the second part . . . free and discharged from all right, title, claim, or interest of the said Virginia-Carolina Chemical Corporation, party of the first part, or anyone claiming by, through or under it."

Cromartie, trustee in the deed of trust, a witness for defendant, testified: "I supervise credit and loans . . . Most likely Mr. Delbridge, our dealer negotiated with James Davis for extending the credit secured in that Deed of Trust, submitted it to me and I approved the same for the Virginia-Carolina Chemical Corporation. . . . The loan was never repaid and I foreclosed it. He had had sufficient time to make the payment. I haven't the explicit right to foreclose. I have the right to extend credit and did, but when it comes to foreclosure its different. I was ordered to do that. I foreclosed it. Mr. Clarence Brown, a V-C Fertilizer dealer in Tarboro bid in the property. Mr. Brown was an agent of V-C at the time he bid in the property. At the time I sold the property as Trustee I was an agent of the Virginia-Carolina Chemical Corporation. . . . Mr. Brown is a peanut dealer in Tarboro and sells V-C fertilizer. He buys fertilizer from us and sells it. He is not a subordinate of mine. He was buying for the Virginia-Carolina Chemical Corporation at this sale. The decision to foreclose was made in the Norfolk office and I was instructed to foreclose."

The court charged the plaintiffs had the burden of establishing they were, as alleged, the owners of the land in controversy. This is true in actions to try title when the parties assert title under different sources, but the rule has no application when plaintiff traces title to defendant by instruments valid on their face and the asserted invalidity of these instruments is based on matters dehors the record. The invalidity due to such matters is an affirmative defense, placing

the burden on one who asserts it. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726; *DeBruhl v. Harvey & Son Co.,* 250 N.C. 161, 108 S.E. 2d 469; *Kelly v. Kelly,* 246 N.C. 174, 97 S.E. 2d 872; *Hayes v. Ricard,* 245 N.C. 687, 97 S.E. 2d 105; *Jones v. Percy,* 237 N.C. 239, 74 S.E. 2d 700.

The court told the jury that courts look with jealousy upon the exercise of a power of sale in a mortgage or deed of trust. Then he charged: "Neither the mortgagee nor the trustee is permitted to bid in and purchase the property at his own sale either directly or indirectly but if he does so the sale is not void but voidable and the mortgagor or trustor, the one who executed the mortgage or deed of trust, may set aside such sale or may bring suit to do so, or sue for wrongful foreclosure regardless of good faith or absence of fraud. . . . The law is, and I instruct you that one who is the agent of someone else and acting as agent is acting for his principal, and if one in the employ of someone else, a company or corporation or an individual, sells land at a foreclosure sale then he is the agent if he is doing it for the folks by whom he is employed, then he is the agent and the acts of an agent are the acts of the agent's principal. And one who buys at a foreclosure sale, if he is an agent of the principal, then his acts are his principal's acts, and the one who sells, if he is the trustee, if he is also an employee and agent for the company for whose advantage the sale is made or to pay off an indebtedness to that person, his acts are the acts of the principal, and the law is in this state a trustee who is acting as agent for a cestui que trust, if in doing so he sells land at a foreclosure sale to his employer for whom he is agent then that is a voidable sale. That is also so if another agent for the same principal purchases the property at that sale, the law looking at it that the principal is doing all of it."

Based on the testimony, the court's charge amounted to a peremptory instruction to find for defendant. The fact that defendant's debt was in default, that the parties acted in good faith, and without any fraud, was, according to the court's charge, immaterial. All that was necessary was to show that the trustee was an employee of the *cestui que trust,* that the person who appeared and bid for the property was another agent or employee of the *cestui que trust,* and was acting for his employer in making the bid. The fact that the trustee was without power and authority to direct foreclosure was, under the charge, immaterial. Under the charge, the *cestui que trust,* a corporation, could not, in order to protect its interest, bid for the property.

This charge does not conform to the law as previously declared by this Court. *Graham v. Graham,* 229 N.C. 565, 50 S.E. 2d 294; *Hare v. Weil,* 213 N.C. 484, 196 S.E. 869; *Hill v. Fertilizer Co.,* 210 N.C.

417, 187 S.E. 577; *Elkes v. Trustee Corporation,* 209 N.C. 832, 184 S.E. 826; *Monroe v. Fuchtler,* 121 N.C. 101; see annotation 138 A.L.R. 1013; 59 C.J.S. 979.

Defendant cites, to support the charge as given, *Warren v. Land Bank,* 214 N.C. 206, 198 S.E. 624; *Davis v. Doggett,* 212 N.C. 589, 194 S.E. 288; and *Mills v. Building & Loan Ass'n.,* 216 N.C. 664, 6 S.E. 2d 549. A comparison of the facts in this case with the facts in the cases relied upon by defendant will show the reason for the differing results.

In *Warren v. Land Bank, supra,* the trustee had authorized an agent of the creditor to handle the foreclosure. The notice of sale which the agent published gave no information as to where the sale would be made. As a result, an agent of the creditor was able to purchase the property for less than its fair value. The land bank only bid $2400 for the property, and the day after it got the deed, it sold the land for $3500.

In *Davis v. Doggett, supra,* and *Mills v. Building & Loan Ass'n., supra,* the trustee acted for the creditor in bidding for the property. The vitiating facts in those cases are summarized by *Barnhill, J.,* in the *Mills* case, where he said: "The evidence in this record indicates that the trustee, in fact, acted both for himself, as trustee, and for the creditor, as chief executive officer. He, as the chief executive officer, demanded of himself, as trustee, that the property be foreclosed. As trustee, he advertised and sold. As manager of the creditor, he determined the amount to be bid and directed himself, as trustee, to place a bid in that amount. Then, as trustee, he placed the bid for the creditor and made the sale thereon. Prior to the sale he prepared a memorandum in his own handwriting, which was signed by his subordinate, at his direction, authorizing bids at five separate foreclosure sales to be made on the same date. As to four of these he gave himself discretion to bid from a minimum to a maximum amount. While the written memorandum designates only one amount to be bid at the foreclosure of the instrument under consideration, it cannot be gainsaid that if he had the authority to vest in himself discretionary power prior to the sale, he possessed that same discretion at the sale so that he could have bid more if he deemed it wise to do so."

In the present case defendant's evidence does not show that Cromartie had power to order a foreclosure. There is no suggestion that he had any power to fix the amount which would be bid. In fact he placed no bid on the property.

The court erred in instructing the jury that the creditor could not designate an agent to bid for and purchase property merely because the trustee was also an employee of the creditor.

As the court informed the jury, a purchase by a mortgagee at his own sale is not void. It is merely voidable and can be ratified. When the mortgagor or trustor, with knowledge of the defects, does some act which constitutes a recognition of the validity of the sale, he ratifies the sale. *Fowler v. Insurance Co., ante,* 555; *Wolfe v. Land Bank,* 219 N.C. 313, 13 S.E. 2d 533; *Council v. Land Bank,* 213 N.C. 329, 196 S.E. 483; *Hill v. Fertilizer Co., supra.* It is said in Jones on Mortgages, 8th ed., vol. 3, sec. 2145: "By claiming the right to redeem from a sale, one affirms the validity thereof, and is estopped to assail it." Here there is evidence on behalf of plaintiffs that defendant recognized the title of V-C, assumed the position of tenant for a year, and paid rent. Defendant denies that he rented, but he alleged and testified that he negotiated for a purchase from V-C of a part of the property, that they reached an agreement, and he paid $150 on the purchase price. That agreement, according to him, would leave title to the one-acre tract in V-C, and he, upon payment of the balance, would acquire title to the 20.9 acres.

The burden of establishing a ratification is on plaintiffs.

It would seem impossible to correctly charge on the issue submitted by the court in this case. It is suggested there should be an issue with respect to the validity of the foreclosure and another issue with respect to the ratification of the sale, if it be found that the foreclosure was voidable.

This conclusion renders it unnecessary to determine whether plaintiffs, because of the form of the deed to them, stand in the shoes of V-C, and hence subject to all defenses which defendant could have asserted against V-C, if it had not sold. See *Hayes v. Ricard, supra.*

New trial.

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

ANNABELLE THORNTON THURSTON v. DOC JONES THURSTON.

(Filed 11 April, 1962.)

1. Divorce and Alimony § 16—

In an action for alimony without divorce, allegations that defendant packed his bags, left home, stating at the time that he was moving to Florida to get a "quickie" divorce, *held* proper in implementing the allegations of defendant's wilful abandonment of plaintiff without cause.

2. Divorce and Alimony § 8—

Where the husband wilfully and without cause separates himself from his wife and child, his action constitutes an abandonment within the purview of G.S. 50-7(1) notwithstanding after the abandonment he continues to make voluntary monthly contributions for their support.

3. Divorce and Alimony § 16—

Allegations to the effect that defendant husband wilfully separated himself from his wife and child without just cause state a cause of action for alimony without divorce on the ground of abandonment notwithstanding that it appears from the complaint that the husband continued to make monthly payments for their support, since the wife is entitled to the security of a court order to guarantee her future support as well as that of the child. G.S. 50-16.

4. Divorce and Alimony § 1; Injunctions § 11—

In an action for alimony without divorce, the wife, upon proper allegation and evidence, is entitled to enjoin the husband from instituting or prosecuting an action for divorce in another state until the issues in her action can be finally determined, since a foreign decree of divorce would prejudice her rights not judicially determined before the entry of such decree, the order being directed not against a foreign court but against the husband personally who had been personally served with process.

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

Certiorari on defendant's application to review orders of *Bundy, J.*, and *Copeland, S.J.*, September 1961 Term, WILSON Superior Court.

The plaintiff instituted this civil action on July 20, 1961, for alimony without divorce. She alleged (1) marriage of the parties on September 14, 1935; (2) birth of one child, Leigh, on October 4, 1953; (3) residence of the parties in Wilson from the date of the marriage until October 7, 1960; (4) the defendant wilfully abandoned the plaintiff without cause, removed his personal belongings from the home and announced he was leaving with intent to go to Florida where he might as well get a "quickie" divorce; (5) thereafter he rented an apartment in Jacksonville, Florida, and negotiated for the purchase of a cottage at Jacksonville Beach in that State; (6) the defendant owns property consisting in the main of stock in Thurston Motor Lines of a value in excess of one and one-quarter million dollars and has an annual income in excess of $100,000; (7) the plaintiff is without means of support for herself and the child. In paragraph 19 of the complaint, the plaintiff alleges:

> "Since the abandonment defendant has periodically, about once a month, deposited in a bank to the plaintiff's credit, the sum of $400.00. With the defendant, in addition, paying taxes, insurance,

the expenses of plaintiff's automobile, some servants and numerous other expenses, plaintiff has managed to buy the necessities of life for herself and her daughter, using the automobile, clothing, household furnishings, etc., which she already had. Plaintiff has no assurance or security for the continuance of said payments and they may be discontinued at any moment at the whim of the defendant, and if he succeeds in procuring a divorce, they will certainly be cut off. Plaintiff is vulnerable to instantaneous impoverishment at the will of the defendant."

The plaintiff asked relief as follows: (1) that she be awarded reasonable subsistence and counsel fees, including a *pendente lite* allowance; (2) that the defendant be enjoined and restrained from instituting and prosecuting an action for divorce in any state other than North Carolina pending the final determination of this action.

The defendant, after personal service, filed motions (1) to strike certain allegations of the complaint; (2) to dismiss on demurrer for failure to state a cause of action and for misjoinder of causes; and (3) to dismiss the temporary restraining order.

Pursuant to an order by Judge Bundy, the motions were heard at Wilson on October 5, 1961. At the hearing Judge Copeland allowed in part and overruled in part the motion to strike, overruled the demurrer, and after making extensive findings of fact, entered an order allowing alimony *pendente lite* and counsel fees. With respect to the restraining order, the court found facts and made disposition as follows:

"1. That it appears from the plaintiff's complaint, treated as an affidavit, and not controverted on this record, that the plaintiff and defendant are husband and wife having one child, seven years of age, that the defendant, without just cause or reason, and without adequate provocation on the part of the plaintiff, on October 8, 1960, wilfully and deliberately abandoned his family within the meaning of G.S. 50-7(1).

"2. That there is probable cause that the plaintiff will be able to establish her asserted right to an allowance for subsistence and counsel fees out of the estate or earnings of her husband.

"3. That it appears from the plaintiff's complaint treated as an affidavit and not controverted on this record, that the defendant, immediately after he abandoned the plaintiff, announced to the plaintiff his intention of establishing his residence immediately in the State of Florida, and moved some or all of his personal effects to the State of Florida to a rented apartment and that he has recently purchased or rented a house at Jacksonville Beach,

Florida, representing the same to be his residence; that on October 8, 1960, the defendant made statements to the plaintiff reasonably calculated to lead her to believe, and she does believe, that the defendant intends to bring an action against her in the courts of Florida to divorce the plaintiff; that the plaintiff resides in North Carolina; that Wilson County is the marital domicile; that plaintiff has practically no income of her own and all of her witnesses reside in North Carolina and it would do irreparable harm to the plaintiff if she were forced to defend an action for divorce in a foreign state; that there is reasonable ground for apprehension that the defendant may apply for a divorce in Florida and the plaintiff reasonably fears that a divorce decree granted to the defendant in the State of Florida, prior to the rendition of the final decree in this case, would do her irreparable harm in that such a divorce decree, rendered prior to the final decree in this case, would, under the provisions of G.S. 50-11, destroy the plaintiff's right to any relief and tend to make any judgment in her favor ineffectual.

"4. Irreparable loss, or its equivalent, may reasonably be apprehended unless the temporary restraining order is continued to the final hearing of this case.

"5. The plaintiff has no adequate remedy at law, by which she may protect herself from the defendant's threatened action against her for divorce in a foreign state.

"WHEREFORE, it is now ordered, considered, adjudged, and decreed that the defendant, D. J. Thurston, be and he is hereby enjoined and restrained from instituting or prosecuting any action against the plaintiff seeking to obtain a divorce of the defendant from the plaintiff in any state other than North Carolina until after the final determination of this action.

"Done at Wilson, North Carolina, this 5th day of October, 1961. J. William Copeland, Judge Presiding."

The defendant excepted and appealed.

Lucas, Rand & Rose; Gardner, Connor & Lee, By W. A. Lucas, Raymond M. Taylor for defendant appellant.

Battle, Winslow, Merrell, Scott & Wiley, By F. E. Winslow, John Webb for plaintiff appellee.

HIGGINS, J. The defendant's assignments of error challenge the court's action in (1) refusing to strike additional allegations of the complaint, (2) refusing to sustain the demurrer, (3) entering the order

for alimony *pendente lite,* (4) granting the order restraining the defendant, pending this action, from instituting a suit for divorce other than in the courts of North Carolina.

The defendant's Assignments 1 and 2 cut into each other. The defendant first moved that certain allegations with respect to abandonment be stricken and, second, that his demurrer be sustained upon the ground the complaint does not allege facts to show that the defendant has separated himself from his wife and has failed to provide her and their child with adequate support.

The complaint alleges a wilful abandonment without cause, without consent, and against the wishes of the plaintiff. By way of detail the plaintiff alleges that on October 8, 1960, defendant packed his bags, left the home, stating at the time he was moving to Florida where "he might as well get a quickie divorce."

The defendant is not prejudiced by the court's refusal to grant his motion to strike. The allegations to which he objects do not violate the rules of good pleading. Counsel argue the demurrer should be sustained for that the complaint does not allege failure to provide adequate support and hence fails to allege abandonment. *Justice Bobbitt,* for this Court, in *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296, settled the question against defendant's contentions: "A wife is entitled to her husband's society and to the protection of his name and home in cohabitation. A permanent denial of rights may be aggravated by leaving her destitute or mitigated by a liberal provision for her support, but if the cohabitation is brought to an end without justification and without the consent of the wife and without the intention of renewing it, the matrimonial offense of desertion is complete." (citing authorities)

A defendant may not abandon his wife and defeat an action under G.S. 50-7(1) by making voluntary payments which he may abandon at will. In *Butler v. Butler,* 226 N.C. 594, 39 S.E. 2d 745, the defendant was obligated to make payments but threatened to get a divorce and stop them. The Court said: "This Court is of the opinion that the jurisdiction of the court invoked under G.S. 50-16 is not barred by the separation agreement pleaded, and that within the frame of her present action, the plaintiff may seek such relief as she may be entitled to have. . . . In so far as the jurisdiction of that court is concerned, the husband might have quit the payments at any time he saw fit. She was entitled to the security of a court order." *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923.

A wife's complaint states a cause of action for alimony without divorce under G.S. 50-16 if it alleges separation without providing subsistence, if the husband is drunkard or spendthrift, or "be guilty of

any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board." G.S. 50-7 states the grounds for divorce from bed and board: "(1) If either party abandons his or her family." Thus plaintiff's complaint states a cause of action for alimony without divorce on the ground he has abandoned his family. *McDowell v. McDowell,* 243 N.C. 286, 90 S.E. 2d 544; *Caddell v. Caddell, supra; Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796. On authority of the above and many other cases of like import, the court was required to overrule the demurrer.

The defendant alleges error in granting the order restraining the defendant from instituting a divorce proceeding in a foreign state. The court's findings of fact upon which it based the order are heretofore stated in full. The evidence sustains the findings. In fact, the defendant does not allege lack of evidentiary support. The order is challenged on two grounds, one of which has been disposed of against the defendant by our holding the plaintiff has stated a cause of action.

As a second ground, the defendant contends the plaintiff does not show danger, either real or apparent, that the plaintiff is likely to suffer irreparable injuries. On this subject, Am. Jur., 17A, Divorce and Separation, § 998, p. 182, says: "In accord with the general rules concerning the power of one state to enjoin the commencement or prosecution of an action in another state or country, a court of equity of a state in which the parties have had their matrimonial domicile and in which one of them continues to reside has the power, under appropriate circumstances, to enjoin the other from procuring a divorce in another jurisdiction. The plaintiff in a pending divorce action may, when jurisdiction over the defendant has been obtained, be entitled to an order enjoining the defendant from prosecuting a subsequent action for divorce in another state before the former action is determined."

The order issued by Judge Copeland is not directed against any foreign court. It is not directed against any official of such court. It is directed only against the defendant in this action who has been personally served with process in a proceeding involving the marital rights and obligations of the parties whose domicile has been Wilson County since their marriage in 1935. The purpose of the order is to prevent the defendant from going to a foreign jurisdiction and instituting an action for absolute divorce requiring the plaintiff to contest the action if she is able to find out where it is brought or compelling her to challenge the judgment by overcoming its *prima facie* effect under the full faith and credit clause of the United States Constitution. The defendant should be required to set up and litigate in North Carolina any defense he may have to the action pending here.

Childress v. Motor Lines, 235 N.C. 522, 70 S.E. 558. It would be inequitable for the defendant to be permitted to delay the plaintiff's day in court and defeat any just claim she may be able to establish by acquiring a "quickie" divorce elsewhere. The objections to a restraining order discussed in *Evans v. Morrow,* 234 N.C. 600, 68 S.E. 2d 258, and cases cited, are not present in this action. The equities alleged are sufficient to support the restraining order and to justify the court in continuing it to the hearing.

The orders of the superior court brought here for review by the *writ of certiorari* are

Affirmed.

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

SMART FINANCE COMPANY v. WILLIAM VAL DICK AND BASIL BRENT HAIGLER.

(Filed 11 April, 1962.)

1. Chattel Mortgage and Conditional Sales § 11— Findings held insufficient to support conclusion that loan company surrendered indicia of title so as to estop it from asserting its lien.

A dealer sold a new car to a corporation, free and clear of encumbrances, and executed form 309 of the Department of Motor Vehicles. Thereafter an officer of the corporation executed an assignment of the automobile from the corporation to himself on form 310. The corporate officer then took the forms, which had been attached, to a loan company and procured a loan secured by a chattel mortgage, which was duly registered, and the loan company filled in the form 310 to show the existence and amount of its lien. The corporate officer then detached the form 310 and executed a new form 310, assigning the car to an individual, and gave the individual the form 309 and the second form 310. Defendant claims as a *mesne* purchaser from the individual. *Held:* In the absence of findings that the loan company had any prior dealings with the corporation or corporate officer or had any reason to foresee that the corporate officer would detach the original form 310 from the form 309 in order to perpetrate a fraud, the findings are insufficient to support the conclusion that the loan company was negligent as a matter of law in permitting the corporate officer to have the attached forms 309 and 310 in order that he might obtain certificate of title and license plates for the automobile, and judgment that the loan company was estopped to assert its lien must be vacated, and the cause remanded.

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

APPEAL by plaintiff from *Copeland, Special Judge,* September 18, 1961 Special Non-Jury Civil Term of MECKLENBURG.

Civil action instituted June 17, 1960, in which plaintiff instituted ancillary proceedings in claim and delivery for possession of a Ford Falcon automobile. Process was not served on defendant Dick. Defendant Haigler had possession of the Ford Falcon and process was served on him. The Ford Falcon, after seizure by the sheriff, was returned to Haigler upon his giving bond conditioned as provided by statute. The present controversy is between plaintiff and Haigler.

Plaintiff alleged it is entitled to possession of the Ford Falcon as owner of a chattel mortgage thereon executed by Dick to plaintiff on February 26, 1960, as security for the payment of Dick's note to plaintiff in the amount of $2,274.60, and that Haigler's claim, if any, is subject to plaintiff's said lien.

Answering, Haigler denied the material allegations of the complaint and alleged he purchased the Ford Falcon from Horne Auto Sales, Inc., and is the owner thereof free and clear of lien. As further defenses, Haigler alleged (1) that Dick was not the owner of the Ford Falcon on February 26, 1960, and therefore the purported chattel mortgage held by plaintiff is void, and (2) that plaintiff, on account of matters later incorporated in the court's findings of fact, was estopped to claim any interest in the Ford Falcon.

The parties waived jury trial and agreed that the presiding judge hear the evidence and find the facts "based on the evidence and stipulations entered into between the parties." No evidence appears in the record other than the exhibits referred to in the court's findings of fact. No stipulation as to facts appears in the record.

The court's findings of fact, conclusions of law and judgment are as follows:

> "The plaintiff is a North Carolina Corporation with its principal office in Charlotte, Mecklenburg County, North Carolina.
>
> "2. Subject automobile was sold by Courtesy Motors, Inc. A Dealer's Application and Owner's Application, North Carolina Department of Motor Vehicles form No. 309 (Exhibit 1) was issued by Courtesy Motors, Inc. of Charlotte, North Carolina, on February 26, 1960, assigning and transferring a 1960 6-cylinder Ford Falcon automobile, Motor No. OH123S189926 to Garrett, Wench and Garrett Corporation, Post Office Box 1014, Rock Hill, South Carolina, being the same automobile described in the plaintiff's complaint; the aforesaid form 309 issued by Courtesy Motors, Inc. was complete in all respects and the notary certificates thereon were completed in full.

"3. The aforesaid form No. 309 issued by Courtesy Motors, Inc. on February 26, 1960, in the blank specifying 'Amount of Lien,' stated 'None.'

"4. On February 26, 1960 the defendant William Val Dick, as Vice President of Garrett, Wench & Garrett Corporation executed an assignment of said automobile to himself on North Carolina Department of Motor Vehicles form No. 310 (Exhibit 4). Said assignment was complete in all respects and the notary certificates thereon were completed in full.

"5. Thereafter, the defendant, William Val Dick, executed and delivered to the plaintiff a note and chattel mortgage in the amount of $2,274.60, said chattel mortgage being duly recorded in Book 601-R at Page 600 in the Mecklenburg County Registry, and is dated February 26, 1960, and filed for record March 11, 1960, and secures a note in the principal amount of $2,274.60, and that said chattel mortgage describes a 1960 Four-Door Falcon automobile, Motor No. OH12S189926.

"6. The defendant, William Val Dick, on February 26, 1960, exhibited the aforesaid forms No. 309 and No. 310 to an employee and agent of the plaintiff, Smart Finance Company. Said agent and employee of Smart Finance Company filled in the portion of aforesaid form No. 310 (Exhibit 4) showing a lien in favor of Smart Finance Company in the amount of $2,274.60.

"7. The plaintiff, Smart Finance Company, through its agents and servants, permitted the defendant, William Val Dick, to have the aforesaid Dealer's and Owner's Application issued by Courtesy Motors to Garrett, Wench & Garrett Corporation (Exhibit 1), the assignment of said automobile to himself, and Owner's Application in his name individually (Exhibit 4), in order that he may apply for North Carolina Certificate of Title and license plates for said automobile.

"8. The defendant, William Val Dick, never filed the aforesaid Owner's Application (Exhibit 4) in his name nor the Owner's Application (Form 309) in the name of Garrett, Wench & Garrett (Exhibit 1) with the North Carolina Department of Motor Vehicles.

"9. With the Dealer's Application Form No. 309 issued to Garret, Wench & Garrett Corporation in his possession, which was not retained by the plaintiff, Smart Finance Company at the time the loan was made, the defendant, William Val Dick, on March 29, 1960 detached the assignment to himself (Exhibit 4) from the Dealer's Application (Exhibit 1) and for a valuable consideration, and as an officer of Garrett, Wench & Garrett Corpo-

ration executed another Form 310 (Exhibit 2) which assigned to one Frank Thomas Springer, Jr. the aforesaid Ford Falcon automobile and the defendant, William Val Dick, delivered to the said Frank Thomas Springer, Jr. the aforesaid Dealer's Application issued by Courtesy Motors, Inc. (Exhibit 1), and the aforesaid assignment of said automobile on North Carolina Department of Motor Vehicles form (Exhibit 2); the aforesaid assignment on North Carolina Department of Motor Vehicle Form No. 310 was complete in all respects and the notary certificate thereon was properly completed.

"10. With the aforesaid Owner's Application issued by Courtesy Motors, Inc., North Carolina Department of Motor Vehicles Form No. 309 (Exhibit 1), and the assignment of said automobile to Frank Thomas Springer, Jr., North Carolina Department of Motor Vehicles Form No. 310, by William Val Dick as an officer of Garrett, Wench & Garrett Corporation (Exhibit 2), the said Frank Thomas Springer, Jr. borrowed the sum of $1750.00 from Motor Finance Company, Charlotte, North Carolina, and secured said sum by executing and delivering a Conditional Sales Contract in the principal amount of $2,355.00, which described the aforesaid Ford Falcon automobile.

"11. On April 9, 1960, on North Carolina Department of Motor Vehicles Form No. 310 (Exhibit 2A), the said Frank Thomas Springer, Jr. for a valuable consideration, assigned said automobile to Horne Auto Sales, Inc., of Marshville, North Carolina, which paid in full the aforesaid loan from Motor Finance Company in the amount of $1,770.00; the aforesaid form of North Carolina Department of Motor Vehicles No. 310, assigning said automobile to Horne Auto Sales, Inc. was complete in all respects and all signatures were notarized.

"12. The value of the aforesaid automobile on June 17, 1960 was $1,900.00.

"13. The defendant's predecessors in title, Horne Auto Sales, Inc., purchased subject automobile from Frank Thomas Springer, Jr. on or about April 9, 1960 and paid Springer by means of a check (Exhibit 5) marked 'title attached.' The check thereafter was paid by the bank on which it was drawn. Attached to the check were Exhibits, 1, 2 and 2A. Mr. Horne, President of Horne Auto Sales, Inc., did not examine the above document until approximately one week after April 9, 1960. Thereafter, on April 25, 1960, Horne Auto Sales, Inc. sold subject automobile to the defendant and gave to the defendant, Basil Brent Haigler as indicia of title, a new Dealer's Application (Form 309) showing the

source of ownership as Ford Motor Company, Dearborn, Michigan (Exhibit 3).

"14. The defendant, Basil Brent Haigler, at no time saw or relied upon the Dealer's Application and Owner's Application Form 309 issued by Courtsey Motors, Inc. (Exhibit 1) or the assignment from Garrett, Wench & Garrett Corporation to Springer, and the assignment from Springer to Horne Auto Sales, Inc., Form 310 (Exhibit 2A), as indicia of title to the said automobile but relied on the new Dealer's Application, Form 309, prepared by Horne Auto Sales, Inc. (Exhibit 3) as indicia of title to said automobile.

"15. Horne Auto Sales, Inc., prior to selling the said automobile to the defendant Basil Brent Haigler examined Exhibits 1, 2, and 2A, and relied on the same for its title.

"16. The defendant, William Val Dick, is in default under the terms of said note and chattel mortgage, having never made any payments thereon.

"17. The plaintiff has repeatedly demanded payment of the sum of $2,274.60 from the defendant, William Val Dick, but that the defendant, William Val Dick, has failed and refused to make payment of said balance.

"18. The defendant, Basil Brent Haigler, is in possession of said automobile.

"19. On April 9, 1960, Frank Thomas Springer, Jr. had not purchased North Carolina Registration Plates for said automobile but was driving said automobile with dealer's license tags.

"AND the Court concludes as a matter of law that:

"1. On February 26, 1960 William Val Dick was the owner of the subject automobile and executed a valid mortgage on said automobile to the plaintiff herein.

"2. That the plaintiff is estopped to assert the lien of the mortgage against the defendant because the plaintiff Smart Finance Company was negligent in allowing the defendant William Val Dick to have both forms, 309 and 310, without forwarding the same to the North Carolina Department of Motor Vehicles itself.

"3. That William Val Dick was guilty of violating G.S. 20-71 in altering or forging the Certificate of Title after he received it from Smart Finance Company.

"NOW, THEREFORE it is ORDERED, ADJUDGED and DECREED that the defendant, Haigler, is the owner of the 1960 Four-Door Falcon automobile, Motor No. OH12S189926 free and clear of the plaintiff's mortgage and that the plaintiff is

not entitled to possession of said automobile and that the cost of this action be taxed against the plaintiff."

Plaintiff excepted to "Conclusion of Law No. 2" and to the judgment and appealed.

Bradley, Gebhardt, Delaney & Millette for plaintiff appellant.
J. Max Thomas and Robert D. Potter for defendant appellee.

BOBBITT, J. The sole ground on which the judgment in favor of Haigler is based is Conclusion of Law No. 2, assigned as error by plaintiff, in which the court ruled "(t)hat the plaintiff is estopped to assert the lien of the mortgage against the defendant because the plaintiff Smart Finance Company was negligent in allowing the defendant William Val Dick to have both forms, 309 and 310, without forwarding the same to the North Carolina Department of Motor Vehicles itself."

The court held in Conclusion of Law No. 1, that Dick, on February 26, 1960, was the owner of the Ford Falcon, and that the chattel mortgage to plaintiff, when executed, was valid. Whether the findings of fact support Conclusion of Law No. 1 is not presented by plaintiff's appeal. The *judgment* is wholly in Haigler's favor. Hence, Haigler was not a party aggrieved by the judgment and had no right to appeal therefrom. The circumstances did not require that he except to particular findings of fact or conclusions of law he deemed adverse and erroneous. Even so, in passing upon the question presented by plaintiff's appeal, we must consider plaintiff's chattel mortgage as valid when executed and recorded.

Haigler pleaded equitable estoppel by way of affirmative defense. The burden of proof on that issue is on Haigler. *Peek v. Trust Co.*, 242 N.C. 1, 12, 86 S.E. 2d 745; *Solon Lodge v. Ionic Lodge*, 245 N.C. 281, 289, 95 S.E. 2d 921.

The general principles governing the operation of the doctrine of equitable estoppel are stated by *Johnson, J.*, in *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669. In accord: *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908; *Peek v. Trust Co., supra; In re Will of Covington*, 252 N.C. 546, 114 S.E. 2d 257.

The narrow question presented on this appeal is whether plaintiff was negligent *as a matter of law* and therefore is estopped because it allowed Dick "to have both forms, 309 and 310, without forwarding the same to the North Carolina Department of Motor Vehicles itself."

Courtesy Motors, Inc., a dealer, was not required to obtain a certificate of title for a new car prior to its sale thereof. G.S. 20-79(b).

The face of Exhibit #1 (Form 309) is entitled "DEALER'S APPLI-

CATION," and the reverse side is entitled "OWNER'S APPLICATION," — "For Certificate of Title for the Following Described New Motor Vehicle or Trailer." It appears from the face of Exhibit #1 that Courtesy Motors, Inc., acquired the Ford Falcon, a new car, from Ford Motor Company, on February 25, 1960, and on February 26, 1960, sold and delivered it, free and clear of lien, to Garrett, Wench & Garrett Corporation. It appears from the reverse side of Exhibit #1 that Garrett, Wench & Garrett Corporation on February 26, 1960, executed an application for a certificate of title for the Ford Falcon in which it certified its ownership thereof free and clear of lien. This application was executed in the name of Garrett, Wench & Garrett Corporation "by W. V. Dick, Vice Pres."

When Dick approached plaintiff for a chattel mortgage loan on the Ford Falcon, he exhibited Exhibit #1, discussed above, and also Exhibit #4. Exhibit #4 (Form 310) is entitled "OWNER'S APPLICATION"—"For Certificate of Title for the Following Described Motor Vehicle or Trailer." On the face of Exhibit #4, the application of "William Val Dick" certifies his ownership of the Ford Falcon and asserts he purchased it from "Garrett Wench Garrett Charlotte, N. C." An agent or employee of plaintiff filled in the portion of the application (above the applicant's signature) entitled, "Notice of Lien or Encumbrance," setting forth therein the chattel mortgage lien dated February 26, 1960, securing the payment of $2,274.60 to plaintiff. On the reverse side of Exhibit #4 under the caption "Certificate of Vendor of Former Owner," there appears an assignment of the Ford Falcon to William Val Dick. This assignment was executed in the name of "Garrett Wench Garrett" by "W. V. Dick, Vice Pres."

The findings of fact establish that Dick, on February 26, 1960, executed the chattel mortgage to plaintiff as security for his $2,274.60 note; that the chattel mortgage was "duly recorded" in the Mecklenburg Registry; and that no payment has been made on said $2,274.60 note.

The findings of fact also establish that plaintiff allowed Dick to have possession of Exhibits #1 and #4 "in order that he may apply for North Carolina Certificate of Title and license plates for said automobile," but neither Exhibit #1 nor Exhibit #4 was forwarded to the Department of Motor Vehicles and no certificate of title was ever issued by the Department to Garrett, Wench & Garrett Corporation or to Dick.

When Dick completed his transaction with plaintiff and was allowed to have possession of Exhibits #1 and #4 for the purpose indicated above, Exhibits #1 and #4 were stapled or otherwise fastened

together. The court found that Dick, on March 29, 1960, "detached" Exhibit #4 from Exhibit #1.

If Exhibit #1 had been forwarded to the Department, nothing else appearing, the Department would have issued a certificate of title for the Ford Falcon to Garrett, Wench & Garrett Corporation, as owner, free and clear of lien. Since the asserted negligence of plaintiff consists solely in *its failure* to forward Exhibits #1 and #4 to the Department, the inference may be drawn that the Department, upon receipt of Exhibits #1 and #4, and proof of financial responsibility as required by G.S. 20-309, would have issued to Dick a certificate of title showing plaintiff's chattel mortgage lien.

It is noted that each subsequent assignment referred to in the findings of fact was entered on an *application* form, not on a certificate of title. The only certificate of title was that obtained by Haigler. Haigler obtained this certificate of title by forwarding to the Department Exhibit #3 (Form 309) on which it appeared that Horne Auto Sales, Inc., sold him the Ford Falcon as a new car which it had received from Ford Motor Company, Dearborn, Michigan.

Relevant to the alleged negligence of plaintiff, the only fact established by the court's findings is that plaintiff did not forward Exhibit #1 and (attached) Exhibit #4 to the Department but permitted Dick to have them in order that he might do so. In our opinion, this fact, standing alone, is insufficient to constitute negligence as a matter of law, and we so hold.

If Exhibit #1 and Exhibit #4 had remained attached, their condition when Dick's transaction with plaintiff was completed, these documents disclosed the facts concerning plaintiff's chattel mortgage. To perpetrate the fraud, it was necessary that Dick *detach* Exhibit #4 from Exhibit #1 and thereby conceal the fact that Exhibit #4 had been executed. It is noted that the court, in Conclusion of Law No. 3, held that Dick "was guilty of violating G.S. 20-71 in altering or forging the *Certificate of Title* after he received it from Smart Finance Company." (Our italics) Suffice to say, no certificate of title had been issued when transactions in which Dick was involved were conducted.

There is no finding of fact with reference to plaintiff's prior dealings, if any, with Garrett, Wench & Garrett Corporation or with Dick. Nothing in the findings of fact suggests that plaintiff acted otherwise than in good faith. Moreover, nothing in the findings of fact suggests that plaintiff had any reason to believe or foresee that Dick, in order to perpetrate a fraud, would *detach* Exhibit #4 from Exhibit #1.

Since the evidence and stipulations on which the findings of fact are based are not in the record, we cannot determine whether there was sufficient basis for a finding of fact that plaintiff was negligent.

Suffice to say, the court did not make such finding of fact. Decision is based on the ground that the findings of fact, which deal largely with evidential matters, are insufficient to establish negligence as a matter of law. Hence, on the present record, we need not consider other matters bearing upon Haigler's plea of estoppel. Upon retrial, the relevant facts may be more fully disclosed.

For the reasons stated, a new trial, upon all issues raised by the pleadings, is awarded.

New trial.

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

LOYD L. LAWING, ADMINISTRATOR OF THE ESTATE OF THOMAS WESLEY WEAVER, DECEASED v. T. E. LANDIS AND C. E. LANDIS, TRADING AS LANDIS MOTORS; HENRY CLICK TRUITT; P. & G. CHAIR COMPANY, INC.; GRADY CARROLL, JR.; EDNA WRENN SCARLETT; WILLIAM LAFAYETTE ABERNETHY; HOUSTON DONNELL HAVNEAR; ABERNETHY'S, INC.; AND EDNA WRENN SCARLETT, ADMINISTRATRIX OF THE ESTATE OF RUSSELL WAYNE SCARLETT, DECEASED.

AND

JOHN E. HOUSER, ADMINISTRATOR OF THE ESTATE OF DOUGLASS EVON HOUSER, DECEASED v. T. E. LANDIS AND C. E. LANDIS, TRADING AS LANDIS MOTORS; HENRY CLICK TRUITT; P. & G. CHAIR COMPANY, INC.; GRADY CARROLL, JR.; EDNA WRENN SCARLETT; WILLIAM LAFAYETTE ABERNETHY; HOUSTON DONNELL HAVNEAR; ABERNETHY'S, INC.; AND EDNA WRENN SCARLETT, ADMINISTRATRIX OF THE ESTATE OF RUSSELL WAYNE SCARLETT, DECEASED.

(Filed 11 April, 1962.)

1. Automobiles § 18; Negligence § 3—

Evidence to the effect that when one defendant drove into a dense fog, which had existed for only a short time and only on a short segment of road over and near a stream on an otherwise clear night, he slowed his vehicle to 10 to 15 miles per hour, that a second defendant drove into the rear of the first vehicle with a light impact, and that within a few seconds thereafter a third defendant drove into the rear of the second vehicle with a very heavy impact, *is held* to require the court to charge the jury with respect to the doctrine of sudden emergency as to each defendant.

2. Automobiles § 46—

When the evidence presents the question of sudden emergency on the part of drivers entering unexpectedly into a dense fog, an instruction

on the doctrine of sudden emergency that if the jury should find in respect to each driver that he was confronted with a sudden emergency he would not be held to the wisest choice of conduct but only to that choice which a reasonably prudent person, under similar circumstances, would make, with further instructions that the principle of sudden emergency would not be available to a defendant if such defendant, by his own negligence, brought about or contributed to the emergency, *is held* without error.

APPEAL by plaintiffs from *McLean, J.*, September 1961 Regular Term, CATAWBA Superior Court.

These civil actions were instituted under the wrongful death statute to recover damages which grew out of rear-end collisions involving three vehicles. In short summary the evidence disclosed the following: On the night of February 21, 1961, a truck, loaded with chairs and belonging to P. & G. Chair Company, became disabled on U. S. Highway 64-70 a few miles east of Hickory in Catawba County. The highway is paved. Its two north lanes are for west-bound, and two south lanes are for east-bound traffic. The chair company engaged Landis Motors, Inc., to tow the disabled truck west to Hickory for repairs. At about eleven o'clock at night the wrecker, operated by the defendant Truitt, was attached to the disabled truck, raising the front of the truck about 18″ from the pavement. The defendant Carroll, agent of the Chair Company, was riding with Truitt in the cab of the wrecker during the towing operation. The driving lights of the disabled truck were cut off in order to keep them from blinding Truitt because of their elevated position. The switch which cut off the driving lights, also cut off the tail lights. However, another switch was turned on, displaying four marginal lights on the back of the truck. As the driver of the wrecker was proceeding in the north lane of traffic west toward Hickory, although the weather was clear and the road dry, he suddenly entered an extremely dense fog which blanketed the road near a stream. Truitt reduced the speed to 10-15 miles an hour and after he had proceeded about 100 to 150 yards into the fog there was a slight impact against the rear of the disabled truck; then in a few seconds a second and violent impact.

The evidence disclosed that the first impact was caused when a Chevrolet passenger vehicle, owned by Edna Wrenn Scarlett and driven by Russell Wayne Scarlett, ran into the rear of the furniture truck. The evidence indicated the second impact was caused by the ramming of the rear of the Chevrolet by a Ford Station Wagon owned by William Lafayette Abernethy and Abernethy's, Inc., and driven by the agent, Donnell Havnear. The Chevrolet was crushed between the truck and the station wagon. The plaintiffs' intestates were riding

as guest passengers in the Chevrolet. They, and two others, were killed, and a fifth occupant seriously injured. Various acts of negligent operation, failure to display proper lights, failure to keep a proper lookout and observe road conditions, following too closely, and operating at excessive speed were charged against the various drivers of the three vehicles involved.

At the close of the plaintiffs' evidence, judgments of involuntary nonsuit were entered and the action dismissed as to the Chair Company and Grady Carroll. Issues of negligence were submitted to the jury as to the other defendants. The jury answered these issues in favor of the defendants. From the judgments on the verdicts, the plaintiffs appealed.

Richard A. Williams, Martin C. Pannell for plaintiff Loyd L. Lawing, Administrator appellant.

M. T. Leatherman, Don M. Pendleton for plaintiff John E. Houser, Administrator appellant.

Patton & Ervin for defendant Edna Wrenn Scarlett, Individually and Edna Wrenn Scarlett, Administratrix appellee.

Patrick, Harper and Dixon, By Charles D. Dixon and Bailey Patrick for defendants T. E. Landis and C. E. Landis, Trading as Landis Motors, and Henry Click Truitt, appellees.

Emmett C. Willis, James C. Smathers for defendants William Lafayette Abernethy, Houston Donnell Havnear, and Abernethy's Inc., appellees.

HIGGINS, J. The record, consisting of almost 300 pages, indicates the trial was carefully conducted both by the presiding judge and the participating attorneys. The judgments of nonsuit as to the Chair Company and its agent, Carroll, were entirely proper. In fact, the plaintiffs do not challenge the propriety of these judgments.

The plaintiffs do contend, however, the court committed prejudicial error by "(1) giving all the defendants the benefit of a charge on sudden emergency, and (2) assuming the defendants were entitled to the sudden emergency charge, did the court properly instruct the jury as to what facts would constitute the emergency."

The evidence disclosed a fog of such extreme density as to obscure or almost blot out lights of a motor vehicle except for a very few feet. This condition existed for only a very short distance over or near a stream on an otherwise clear night. A few minutes before, as the wrecker passed over the stream on the way to the disabled truck, there was no fog whatever on the highway. On the return, the driver entered the fog, reduced speed to 10 to 15 miles per hour, and had

proceeded for 100 to 150 yards when slightly bumped by the Chevrolet, and immediately thereafter rammed by the station wagon. Evidence of unlawful speed on the part of either vehicle was lacking. Did not the presence of these three vehicles at the same place, at the same time, all driving west in the fog, require the court to charge the jury with respect to a driver's duty in a sudden emergency?

The court charged:

> "Each defendant contends on his own behalf that he was faced with a sudden emergency that suddenly arose; that he moved into this fog without knowing or without any means of knowing its intensity; and that after being in there, that he used due care to get out under all the circumstances and used due care in the operation of the vehicle under all the circumstances. So, under this principle of sudden emergency, that is if you should find that the defendant was confronted with a sudden emergency and, taking each defendant separately in considering the attendant circumstances under which he was operating his automobile—that defendant would not be held to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. The standard of conduct required in an emergency, as elsewhere, is that of a prudent person; but the Court instructs you, however, that this principle is not available to a defendant, that if such defendant, by his own negligence, has brought about or contributed to that emergency. One who acts in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary prudence, similarly situated, would have made or used."

The charge is sustained by many decisions of this Court, among them the following: *Sparks v. Phipps*, 255 N.C. 657, 122 S.E. 2d 496; *Clark v. Scheld*, 253 N.C. 732, 117 S.E. 2d 838; *Bundy v. Belue*, 253 N.C. 31, 116 S.E. 2d 200. See also, Strong's Index, Vol. 3, Negligence, § 3, p. 445. The charge covers all essential aspects of the case as presented by the pleadings and the evidence. The jury whose duty it was to find the facts, has exonerated all defendants. A careful review and examination of the record fail to disclose any reason why the findings should be disturbed.

No error.

HARVEY BOWEN v. P. M. MURPHREY AND WIFE, GLADYS CARR MURPHREY.

(Filed 11 April, 1962.)

Injunctions § 14; Judgments § 28—

In a suit by lessee to restrain lessor from interfering with his possession, judgment was entered on the final hearing that lessee had neither breached nor abandoned the lease and was entitled to possession and to restrain lessor from interfering with that possession. *Held:* The judgment was a final judgment and lessor is not entitled to maintain a motion in the cause for asserted violation of the lease, since asserted breaches occurring prior to the judgment were concluded by the judgment and asserted breaches occurring subsequent thereto relate to a new cause of action which may not be engrafted upon the action by motion in the cause.

APPEAL by defendant Gladys Carr Murphrey, movant, from an order signed September 18, 1961, at Kinston, N. C., by *Stevens, J.*, Judge presiding in the Eighth Judicial District, denying her motion for injunctive relief. From GREENE.

This action was instituted January 16, 1959, by plaintiff-lessee to restrain defendants-lessors from interfering with plaintiff's possession and use of leased farm lands.

Plaintiff alleged that, notwithstanding his right to possession under the lease and his payment of rental in advance through December 31, 1962, defendants, in particulars set forth, had interfered and were interfering with his farming operations.

Answering, defendants admitted their execution of the lease agreement on which plaintiff based his action. Apart from this, they denied the material allegations of the complaint. As a further defense and as a counterclaim, defendants alleged plaintiff had surrendered the lease to defendant Gladys Carr Murphrey following the crop year 1958, and had forfeited the lease (1) by his failure to pay the agreed rental, and (2) by his failure to comply, in particulars set forth, with obligations imposed on him by the terms of the lease. Defendants prayed that they "be empowered, authorized and permitted to proceed to take possession of the farm lands, and cultivate the same during the year 1959 and coming years."

In a trial before Bone, J., and a jury, at January Term, 1960, the court submitted, and the jury answered, these issues: "1. Has the plaintiff substantially complied with the terms and conditions of the written lease dated December 8, 1954 between the plaintiff and defendant? Answer: Yes. 2. Did the plaintiff abandon said lease and surrender possession of the premises to the defendants as alleged in the answer? Answer: No. 3. Have the defendants wrongfully inter-

fered with plaintiff's possession of the leased premises and interfered with his peaceful enjoyment of the rights given to him under said lease? Answer: Yes."

Neither the evidence nor the court's charge to the jury in said trial is in the record. According to the lease, all rent for the entire term, that is, through December 31, 1962, had become due and payable prior to said trial.

In the judgment entered by Judge Bone, it was ordered, adjudged and decreed "(t)hat the plaintiff is in the rightful possession of the lands and premises described in the aforesaid lease and is entitled to have defendants restrained from interference with such possession," and that the defendants be restrained from interference with plaintiff's possession and farming operations through the year 1962.

Defendants did not appeal from said judgment.

On or about June 28, 1961, defendant Gladys Carr Murphrey filed a verified motion denominated "MOTION IN THE CAUSE." She asserted her codefendant, P. M. Murphrey, was dead. She asserted plaintiff had failed to comply, in particulars set forth, with obligations imposed on him by the terms of the lease. She does not state when these asserted violations by plaintiff, if any, occurred. She moved: "1. That Harvey Bowen be required to comply with the agreement entered into and in accordance with the order entered at the January 1960 Term in the Greene County Superior Court. 2. That the said Harvey Bowen be restrained from permitting trespass, and be required to place Posted signs on the said premises as outlined in said lease. 3. That the said Harvey Bowen be restrained from violations of the lease agreement pending a hearing on the motion in the cause. 4. For such other and further relief as to the Court may seem just, equitable and proper . . ."

Plaintiff, by answer thereto, denied the material allegations of said motion.

Upon hearing, Judge Stevens, "being of the opinion that a motion in the cause is not applicable and cannot be entertained in such way," ordered and adjudged "that the motion designated as a motion in the cause be, and the same is hereby dismissed at the cost of the defendants."

Movant excepted to Judge Stevens' said ruling and order and appealed.

John Hill Paylor for defendant Gladys Carr Murphrey, appellant.
John G. Dawson and K. A. Pittman for plaintiff appellee.

BOBBITT, J. No appeal having been taken therefrom, the judgment entered by Judge Bone at January Term, 1960, became and is a final judgment upon the merits. A judgment has been defined as "the final consideration and determination by a court of the rights of the parties, *as those rights presently exist,* upon matters submitted to it in an action or proceeding." (Our italics) 30A Am. Jur., Judgments § 2. "A final judgment is the conclusion of the law upon the established facts, pronounced by the court." *Whitted v. Palmer-Bee Co.,* 228 N.C. 447, 452, 46 S.E. 2d 109; *Lawrence v. Beck,* 185 N.C. 196, 200, 116 S.E. 424, and cases cited.

A final judgment, which adjudicates upon the merits the issues raised by the pleadings, "estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward." *Bruton v. Light Co.,* 217 N.C. 1, 7, 6 S.E. 2d 822, and cases cited; *King v. Neese,* 233 N.C. 132, 136, 63 S.E. 2d 123, and cases cited; *Hayes v. Ricard,* 251 N.C. 485, 494, 112 S.E. 2d 123.

Movant does not seek to set aside the judgment entered at January Term, 1960, or attack it in any respect. Nor does she seek a modification of the injunction decreed therein. Rather, she moves that she be granted injunctive relief, asserting as grounds therefor the violation by plaintiff of obligations imposed on him by the terms of the lease.

Alleged violations occurring prior to the trial and judgment at January Term, 1960, were either issuable matters contained in the pleadings or material and relevant matters within the scope of the pleadings which defendants, in the exercise of reasonable diligence, could and should have brought forward. As to such alleged violations, movant is bound by said judgment. Indeed, the judgment is based on an express jury finding that plaintiff had substantially complied with the terms and conditions of the lease.

If it be assumed that the alleged violations referred to in the motion or any of them occurred subsequent to the trial and judgment at January Term, 1960, the motion is in substance a complaint in a new cause of action that accrued subsequent to the entry of said judgment. Obviously, the said judgment is not determinative of the rights of the parties in respect of such subsequently accruing cause of action. The court below properly held movant cannot, under the guise of a motion in the cause, engraft upon an action in which final judgment has been entered what is essentially a new and independent cause of action.

Affirmed.

ROBERT B. BYRD, ADMINISTRATOR OF THE ESTATE OF DAVID FRANK, DECEASED, V. PIEDMONT AVIATION, INC., A NORTH CAROLINA CORPORATION; KENNETH BERGSMA AND W. T. CARPENTER, JR., SUCCESSOR ADMINISTRATOR OF THE ESTATE OF JULIUS BERGSMA, TRADING AND DOING BUSINESS UNDER THE NAME "BERGSMA BROTHERS," A MICHIGAN LIMITED PARTNERSHIP.

(Filed 11 April, 1962.)

1. Process § 2—

Statutes authorizing substituted service of process are in derogation of the common law and must be strictly construed.

2. Process § 15—

An airplane is not a "motor vehicle" within the purview of G.S. 1-105, even under the 1955 amendment, and service of process on the Commissioner of Motor Vehicles in an action to recover for the negligent operation of an airplane owned by a non-resident is ineffectual.

APPEAL by defendant, Kenneth Bergsma, from *Riddle, S.J.*, September 11, 1961 Special Civil Term of BURKE.

This is a civil action instituted 12 May 1961. Plaintiff seeks to recover damages for the alleged wrongful death of his intestate resulting from a mid-air collision of two airplanes, in one of which plaintiff's intestate was a passenger.

Plaintiff alleges that defendant, Kenneth Bergsma (hereinafter referred to as Bergsma), is a general partner in a Michigan partnership, trading and doing business under the name of "Bergsma Brothers," that on 20 April 1960, date of the collision, this partnership was doing business in North Carolina and owned the airplane in which plaintiff's intestate was riding at the time of his fatal injury, and that an employee of the partnership was pilot of the partnership airplane at the time of the collision.

Bergsma was, on 20 April 1960, and has been at all times since, a citizen and resident of the State of Michigan. He was neither the operator nor an occupant of either of the airplanes involved in the collision in question.

In this cause summons was issued out of the Superior Court of Burke County, directed to the Sheriff of Wake County, North Carolina, commanding him to serve the summons on the Commissioner of Motor Vehicles for and on behalf of Bergsma. The Sheriff served the summons as directed and made due return thereof to the Clerk of the Superior Court of Burke County. The Commissioner of Motor Vehicles forwarded a copy of the summons and complaint, together with appropriate notice, by registered mail to Bergsma at Grand Rapids, Michigan. These papers were received by Bergsma on 19 May 1961,

at which time registered return receipt was forwarded to the Commissioner of Motor Vehicles and later delivered by him to plaintiff.

On 14 June 1961 Bergsma made a special appearance in the Burke County Superior Court and moved that the purported service of summons be quashed on the ground that the Commissioner of Motor Vehicles is not a proper person on whom service can be made for him in this action.

The court entered an order denying the motion.

Defendant Bergsma appeals.

Stack & Graham and Byrd & Byrd for plaintiff.
Uzzell & DuMont for defendant appellant.

MOORE, J. The court erred in overruling the motion. Plaintiff undertook to serve summons on Bergsma under the provisions of G.S. 1-105 and G.S. 1-106. These statutes provide generally for substituted service of process upon nonresident drivers of *motor vehicles.* "Substituted service of process was unknown to common law, but depends upon statutory authorization. And a strict compliance with the provisions of such statute must be shown in order to support a judgment based on substituted service." *Hodges v. Insurance Co.*, 232 N.C. 475, 476, 61 S.E. 2d 372.

An airplane is not a "motor vehicle" within the purview of G.S. 1-105. That statute provides, in part, that "The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally,

or on his executor or administrator." The words "or at any other place in this State," were added to the original statute by an amendment, S.L. 1955, Ch. 1022. Prior to the 1955 amendment it was clearly the operation of a "motor vehicle" *on the highways of the State* which was deemed equivalent to appointment of the Commissioner of Motor Vehicles as attorney in fact, upon whom service of summons might be had. An airplane is not designed for operation on the highways of the State. Plaintiff contends that the insertion of the words "or at any other place in this State" so enlarged the scope of the statute as to include the operation of a motor-driven plane in the air. We do not agree. The Legislature did not intend to enlarge and extend the meaning of the words "motor vehicle"; it intended only to broaden the area of such vehicular operation to include private ways and places on land not within the confines of public highways. The amendment does not undertake to change the type of vehicle, but merely enlarges the sphere of its operation.

The words used in a statute must be given their natural or ordinary meaning, unless the act itself indicates that a different meaning is intended. *Seminary, Inc., v. Wake County,* 251 N.C. 775, 782, 112 S.E. 2d 528. The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land.

"An airplane is in a class by itself, it has usually been held, in the absence of any express provision on the subject, not to be within the terms 'vehicle,' 'motor vehicle,' 'vessel,' etc. . . ." 6 Am. Jur., Aviation, s. 18, p. 13. "Although the result is always contingent on the particular wording involved, it has been almost invariably held, in the construction of statutes and regulations, that airplanes are not within the terms 'vehicle,' 'motor vehicles,' etc." 165 A.L.R. Anno.—Airplane as "Vehicle" . . . etc., p. 916.

McBoyle v. United States, 283 U.S. 25 (1931), involves the theft of an airplane. Defendant was indicted and convicted under the National Motor Vehicle Theft Act. Referring to the Act the Supreme Court said: "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft."

G.S. 1-105 and G.S. 1-106 have no application in the service of process in the case at bar. The court below will enter an order quashing and declaring void the purported service of summons on defendant Bergsma.

Reversed.

STATE v. WILLIAM FLOYD KNIGHT.

(Filed 11 April, 1962.)

Bastards § 8—

In a prosecution of defendant for wilful refusal to support his illegitimate child, the issue of paternity and wilful refusal to provide support are properly tried in the one prosecution, and defendant's contention that he must be tried first on the issue of paternity and found guilty before he could be tried on the issue of wilful refusal to provide support, is untenable.

APPEAL by defendant from *Shaw, J.,* October 30, 1961, Criminal Term, FORSYTH Superior Court.

This criminal prosecution originated in the Forsyth County Domestic Relations Court upon a warrant charging that on or about the 1st day of February, 1961, the defendant did unlawfully and wilfully fail, refuse, and neglect to provide adequate support for his illegitimate child begotten upon the said Annie Jacqueline Tillman, the name and age of the child being Leigh Roxanne Tillman, born 1/5/61.

The defendant entered a plea of not guilty. From a verdict of guilty, the defendant appealed to the superior court. Before arraignment there the solicitor moved to amend the warrant by inserting the word "born" in front of 1/5/61. The court allowed the amendment. The defendant pleaded not guilty. After a jury trial and a verdict and judgment adverse to the defendant, he appealed.

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

Max D. Ballinger for defendant appellant.

HIGGINS, J. The defendant's counsel noted 87 exceptions during the trial. Sixty of these relate to the charge. The brief consists of approximately 50 pages. The complete story of the case is short. The prosecuting witness testified she and the defendant were both students in the same high school. They began having dates in September, 1959. After the first two or three dates the parties had sexual relations. The prosecutrix testified this relationship continued until about June or July, 1960; that she became pregnant in April, 1960; that the defendant is the father of the child and that she had never had relations with any other person.

The defendant testified, admitting the dates beginning in September, 1959. He testified, however, he never had relations with the prosecuting witness after September of that year and that he is not the father of the child born in January, 1961.

Both the prosecutrix and the defendant offered certain bits of evidence, mostly of their good character, tending to support their respective stories. The defendant admitted that he was strong and able to work, and that he had refused to support the child upon the ground that he was not its father.

In the charge the court reviewed at great length the evidence of all the witnesses and explained in minute detail the law arising on the evidence and the warrant. The jury found: (1) The defendant is the father of the illegitimate child, Leigh Roxanne Tillman, born to Anne Jacqueline Tillman on January 5, 1961. (2) The defendant wilfully neglected and refused to support and maintain said illegitimate child after demand. (3) The defendant is guilty as charged in the warrant. In the argument here, defendant's counsel insisted the defendant's constitutional rights were violated in that he was not first tried on the issue of paternity and, if found to be the father of the child, then and only then, should he be tried in a separate proceeding on the general issue of failure to support. The practice has been to submit separate issues because the paternity need be established only once; whereas, the wilful failure to support after notice and demand is a continuing offense and a trial on that issue involves the failure to support up to the date of the indictment or warrant. Subsequent failure may be the subject of a further prosecution. The defendant's contentions and objections to the trial are without support. Separate issues arising upon the warrant were properly submitted. The trial was in accordance with the usual practice in such cases. *State v. Robinson,* 245 N.C. 10, 95 S.E. 2d 126; *State v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209; *State v. Love,* 238 N.C. 283, 77 S.E. 2d 501; *State v. Ellison,* 230 N.C. 59, 52 S.E. 2d 9; *State v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333; *State v. Spillman,* 210 N.C. 271, 186 S.E. 322.

The record of the trial in the superior court discloses

No error.

STATE v. EUGENE SIMMONS.

(Filed 11 April, 1962.)

1. Criminal Law § 18—

On appeal from an inferior court the jurisdiction of the Superior Court is limited to those criminal charges on which defendant was tried and convicted in the inferior court, and defendant may not be convicted in the Superior Court on a charge not contained in the warrant.

2. Intoxicating Liquor § 1—

The possession of alcoholic beverage on which the apposite taxes have not been paid, G.S. 18-48, the unlawful possession of intoxicating liquor, G.S. 18-2, and the possession of intoxicating liquor for the purpose of sale, G.S. 8-50, are separate and distinct offenses, and where a defendant is convicted in a municipal-county court of unlawful transportation and unlawful possession of non-taxpaid liquor, he may not be convicted in the Superior Court on appeal of possession of intoxicating liquor for the purpose of sale.

APPEAL by defendant from *Burgwyn, S. J.*, December 4, 1961 Special Term of LENOIR.

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

Fred W. Harrison for defendant appellant.

RODMAN, J. Defendant was tried in the Municipal-County Court of Lenoir on a warrant containing two counts. The first count charged defendant "did transport intoxicating liquors in a 1953 Oldsmobile Lic #L.E. 919 in violation of the law." The second count charged defendant "did possess non-taxpaid whiskey in violation of the law." This count cites G.S. 18-48.

Following defendant's plea of not guilty there was a verdict of "Guilty Transporting Non-taxpaid Whiskey." The recorder imposed a prison sentence of eight months, suspended on payment of a fine and costs. — Defendant appealed to the Superior Court.

On the trial in the Superior Court there was evidence from which a jury could find that enforcement officers, with defendant's consent, searched his automobile which was parked on the street in front of his home. In the course of the search they found in the trunk of the car 46 half-gallon jars filled with whiskey. None of the containers had stamps affixed indicating the payment of Federal or State taxes. Defendant denied any claim to the whiskey, saying to the officers he had no knowledge as to how it got in his car.

The court charged the jury: "The only question you are concerned with here is, did this defendant have in his automobile, on the day in question, a certain amount of non-taxpaid whiskey and, if so, did he have it for the purpose of sale?" In concluding his charge the court said: ". . . the State contends that you are to be satisfied beyond a reasonable doubt that he is guilty as charged in this warrant of having in his possession, for the purpose of sale, this intoxicating liquor. If you are so satisfied, you will find the defendant guilty. If you have a reasonable doubt about the case, you should find him not guilty."

The Superior Court on appeal from a judgment of an inferior court is limited to those criminal charges on which defendant was tried and convicted in the lower court. *S. v. Perry,* 254 N.C. 772, 119 S.E. 2d 865; *S. v. Hall,* 240 N.C. 109, 81 S.E. 2d 189, *S. v. Cooke,* 246 N.C. 518, 98 S.E. 2d 885.

Possession of alcoholic beverages on which the taxes imposed by Congress or this State have not been paid is unlawful. G.S. 18-48. This is the crime defined in the second count of the warrant.

Transportation of intoxicating liquors subject to exceptions not here material is forbidden by G.S. 18-2. Prohibited transportation is a misdemeanor. G.S. 18-29. This is the crime charged in the first count.

Possession of intoxicating liquors for the purpose of sale is a crime. G.S. 18-50.

A violation of any of these statutory provisions is a crime separate and distinct from a violation of the other provisions. *S. v. May,* 248 N.C. 60, 102 S.E. 2d 418; *S. v. Cofield,* 247 N.C. 185, 100 S.E. 2d 355; *S. v. Morgan,* 246 N.C. 596, 99 S.E. 2d 764; *S. v. Hall, supra; S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629.

The jury, acting under the instructions given, returned a verdict of "Guilty as charged." Necessarily this means guilty of violating G.S. 18-50, possession for sale.

It is not necessary now to determine whether the verdict in the Municipal-County Court was limited to the first count in the warrant, that is, the charge of illegal transportation; or was sufficient to embrace both counts. Since the warrant in the lower court did not embrace the charge of possession for sale, it necessarily follows that the verdict rendered in the Superior Court and the judgment based thereon are beyond the jurisdiction of the Superior Court, hence have no validity. Defendant, by his appeal from the Municipal-County Court, is entitled to a trial in the Superior Court, limited to the crimes charged and of which he was convicted in the Municipal-County Court.

New trial.

STATE OF NORTH CAROLINA, EX REL. T. W. BRUTON, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, EX REL. JAMES YANDELL v. AMERICAN LEGION POST NO. 113 AND KENNETH WOOTEN.

(Filed 11 April, 1962.)

1. Injunctions § 4—

Ordinarily, injunction will not lie to enjoin the violation of a criminal statute, since prosecution under the statute is usually an adequate remedy.

2. Injunctions § 2; Animals § 7—

Injunction will not lie to restrain an organization from holding or engaging in a rabbit hunt with sticks when there is no evidence to support plaintiff's allegations that defendants plan to sponsor or hold such rabbit hunts in the future. Further, in this case there is no evidence tending to show that the activities sought to be enjoined endanger the health, safety or welfare of the public. G.S. 14-360.

APPEAL by plaintiff from *Crissman, J.*, November Civil Term 1961 of IREDELL.

This action was brought to restrain American Legion Post No. 113 of Harmony, North Carolina, and the defendant Kenneth Wooten, the Commander of said Post, from engaging in or carrying on any rabbit hunts, rabbit chases, or rabbit killings wherein such activities result in the maiming, beating or killing of rabbits by sticks, stones, or by otherwise cruelly and inhumanely beating, maiming and killing rabbits in the State of North Carolina.

This action was originally instituted in Mecklenburg County, North Carolina, by James Yandell, a citizen and resident of said County.

The defendants before filing an answer to the complaint, moved to remove the case to Iredell County for trial on the grounds that the convenience of witnesses and the ends of justice would be promoted thereby; that the defendant American Legion Post No. 113 is an unincorporated association and the defendant Wooten is a citizen and resident of Iredell County; and that all witnesses necessary to the hearing in this matter are residents of Iredell County. The motion was granted for the convenience of witnesses and in the court's discretion.

The plaintiff's evidence tends to show that on 17 December 1960 and for one or more years prior thereto the defendant Legion Post sponsored a rabbit hunt wherein sticks were used to kill rabbits in the field. The hunt in December 1960 was held on the farm of O. G. Templeton and other surrounding farms. Dogs were used to jump or flush the rabbits. Some 75 or 80 people, most of whom were members of American Legion Post No. 113, participated in the hunt. The hunt

was open to members of the Legion Post and their families. Of those present for the hunt, some 12 or 15 were young men under 18 years of age, including a few who were not over 12 or 15 years of age. These young people under 18 years of age were children of members of the defendant Legion Post. Some of these young men participated in the hunt, others did not. The sticks used to kill the rabbits were principally cut from saplings of one to one and one-half inches in diameter and four to four and one-half feet long. Approximately 35 rabbits were killed in the hunt that lasted some six or seven hours. When a rabbit was flushed and ran out into the circle of hunters, it was usually hit on the head and killed instantly, but if not, the hunter immediately picked up the rabbit and hit it with the hand behind its ears, thereby killing the rabbit within a matter of ten or fifteen seconds after it was first hit. There is no evidence of the use of stones by any participant in connection with the killing of any rabbit on this hunt, and the evidence was also to the effect that no rabbit escaped that was hit by a stick.

These rabbits were used for food; they were barbecued and tickets were sold for the barbecue supper and the proceeds used for the Legion Post's Charity Fund.

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

Welling, Welling & Meek for plaintiff.

C. B. Winberry; R. A. Collier, Sr.; R. A. Hedrick; Johnnie Ray Hendren; Arthur S. Beckham, Jr., for defendant.

PER CURIAM. The plaintiff contends that the killing of rabbits by the use of sticks is a violation of G.S. 14-360, which statute provides that a violation thereof is a misdemeanor. The statute reads as follows: "If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor. In this section, and in every law which may be enacted relating to animals, the words 'animal' and 'dumb animal' shall be held to include every living creature; the words 'torture,' 'torment' or 'cruelty' shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death

is caused or permitted; but such terms shall not be construed to prohibit lawful shooting of birds, deer and other game for human food."

The plaintiff further contends that a rabbit is a "useful beast" within the meaning of the above statute, and that the killing of rabbits in the manner described in the evidence was a violation of the statute. If this be conceded, ordinarily the violation of a criminal statute is not sufficient to invoke the equitable jurisdiction of the court. "There is no equitable jurisdiction to enjoin the commission of a crime." *Hargett v. Bell,* 134 N.C. 394, 46 S.E. 749.

It is important to note that the plaintiff offered no evidence tending to support his allegations that these defendants planned to sponsor future rabbit hunts of the character of which he complains. Certainly, the future health, safety and welfare of the public cannot be endangered by what occurred on previous hunts. Completed acts and past occurrences in the absence of any evidence tending to show an intention on the part of the defendants to sponsor or engage in future rabbit hunts to be conducted in the manner complained of in the plaintiff's complaint, will not authorize the exercise of the court's injunctive power. Furthermore, the plaintiff offered no evidence tending to show that the activities sought to be enjoined endangered the health, safety or welfare of the public. Neither did he offer any evidence or raise any question in the trial below tending to show that a criminal prosecution under G.S. 14-360 is not an adequate remedy if, in fact, the defendants are guilty of a violation of that statute.

The judgment of the court below is

Affirmed.

GENE TUNEY JARRETT v. BRADLEY BUCKHART BROGDON, CLINTON CLIFTON FREEMAN AND WINN-DIXIE STORES, INC.

(Filed 11 April, 1962.)

Pleadings § 8; Torts § 3—

Where the driver of one of three vehicles involved in a collision sues the other two drivers and the employer of one of them, a defendant driver may set-up a counterclaim against plaintiff and may allege therein the concurring negligence of plaintiff and the other defendant driver, but he may not set-up a cross-action against such defendant driver, since such cross-action is not germane to plaintiff's cause of action. G.S. 1-123.

APPEAL by defendant Bradley Buckhart Brogdon from *Crissman, J.,* at October 1961 Civil Term of DAVIDSON.

This is a civil action to recover for personal injury and property damage allegedly caused by the joint and concurring negligence of the three named defendants.

The complaint alleges in substance that as a result of the negligence of both drivers the automobile operated by the defendant Brogdon was in collision with a tractor-trailer owned by the defendant Winn-Dixie Stores, Inc. and operated by its employee, the defendant Clinton Clifton Freeman; that immediately thereafter the tractor-trailer collided with the automobile operated by the plaintiff causing the damages complained of. The answer of the defendants Freeman and Stores, Inc. denies any negligence on the part of Freeman and alleges the sole negligence of defendant Brogdon. The answer of Brogdon alleges negligence on the part of Freeman and denies any negligence on his part; alleges contributory negligence on the part of plaintiff and, in addition, sets up a "counterclaim and cross-action" wherein he alleges that the collision between his car and the tractor-trailer was caused by the joint and concurring negligence of plaintiff and the defendants Freeman and Stores, Inc. Defendant Brogdon alleges that he is entitled to recover his damages sustained in the collision from plaintiff and the other two defendants jointly and severally.

The defendants Freeman and Stores, Inc. demurred to the cross-action and moved to strike it from the answer. The demurrer and motion to strike were sustained. The defendant Brogdon appealed.

H. Wade Yates, Miller & Beck for plaintiff.

Walser & Brinkley for defendants Clinton Freeman and Winn-Dixie Stores, Inc. appellees.

DeLapp & Ward for defendant Bradley Buckhart Brogdon appellant.

PER CURIAM. In this case the plaintiff has sued all defendants who could be brought into the action as alleged joint *tort-feasors.* One of the defendants, Brogdon, has filed a counterclaim against the plaintiff and, upon allegations of negligence concurring with that of plaintiff, has attempted to set up a cross-action against his codefendants, Freeman and Stores, Inc., to recover his damages from plaintiff and his codefendants jointly and severally.

This same situation was before the Court in *Wrenn v. Graham, et al,* 236 N.C. 719, 74 S.E. 2d 232, wherein the plaintiff sued the defendant Graham and two corporate defendants. As will appear from the statement of facts in that case: "Defendant Graham, in his answer, after denying any negligence on his part and alleging certain defenses, pleads a 'cross-action' against his codefendants and a 'counterclaim'

against plaintiff. His asserted claim is stated in one cause of action against his codefendants and plaintiff as joint tort-feasors."

As in this case, the defendants against whom the cross-action was filed demurred to the cross-action and moved to strike it. *Barnhill, J.*, later *C.J.*, said (The) "question is this: In an action founded on allegations of negligence, may one of the three defendants file and prosecute a cross-action against his codefendants to recover compensation for personal injuries and property damage which he alleges arose out of and were proximately caused by the same automobile collision out of which plaintiff's cause of action arose? The statute, G.S. 1-123, and our decisions thereunder answer in the negative."

This same question was posed again and answered identically in *Morgan v. Brooks,* 241 N.C. 527, 85 S.E. 2d 869. The question was again answered in *Bell v. Lacey,* 248 N.C. 703, 104 S.E. 2d 833, where *Denny, J.*, now *C.J.*, said: "This Court has uniformly held that where all the joint tort-feasors are brought in by a plaintiff and a cause of action is stated against all of them, such defendants under our statutes, G.S. 1-137 and G.S. 1-138, are permitted to set up in their respective answers as many defenses and counterclaims as they may have arising out of the causes of action set out in the complaint. However, they are not allowed to set up and maintain cross-actions as between themselves which involve affirmative relief not germane to the plaintiff's action. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232. This is so, notwithstanding the fact that the defendants' claim for damages may have arisen out of the same set of circumstances upon which the plaintiff's action is bottomed. The cross-action sought to be maintained by the appellants herein is not germane to the plaintiff's cause of action, and in no aspect is it essential to a complete determination of the plaintiff's cause of action."

Defendant Brogdon is required to set up his counterclaim against the plaintiff if he has one in this action. G.S. 1-135. *Dwiggins v. Bus Co.,* 230 N.C. 234, 52 S.E. 2d 892. And, in stating his counterclaim he may allege the concurring negligence of his codefendant. However as pointed out in *Bell v. Lacey, supra,* this does not authorize the defendant Brogdon to set up a cross-action against his codefendants.

Upon authority of the three cases cited above the order of Judge Crissman is

Affirmed.

BOBBY JAMES WALKER, BY HIS NEXT FRIEND, JONAH WALKER, PLAINTIFF, v. FRED LEE WALKER, DEFENDANT.

(Filed 11 April, 1962.)

1. Automobiles § 49—

Evidence that plaintiff passenger failed to remonstrate with defendant driver concerning his excessive speed, resulting in the accident and injury, *held* not to establish contributory negligence as a matter of law on the part of plaintiff.

2. Insane Persons § 8; Torts § 7—

Evidence of plaintiff's mental incapacity to sign the release from liability executed by him *held* sufficient to take the issue to the jury.

3. Appeal and Error § 35—

Where the charge is not in the record, the denial of defendant's motion for special instructions cannot be held prejudicial.

APPEAL by defendant from *Fountain, S.J.*, November 27, 1961 Civil Term of PERSON.

This is a civil action to recover damages for personal injuries allegedly caused by the actionable negligence of defendant.

The complaint alleges in substance: Plaintiff is mentally incompetent and appears herein by his next friend. On 8 June 1960 he was a guest passenger in an automobile owned and being operated by defendant, his brother. Defendant entered a curve on N. C. Highway 49 at a speed of approximately 80 miles per hour and lost control. The car left the road, struck various objects, and was demolished. Plaintiff was thrown from the car and injured.

Defendant, answering, denies negligence on his part and alleges that plaintiff was contributorily negligent in that he remained in the car and failed to protest to defendant respecting the alleged excessive speed. Defendant also pleads in bar a settlement made with and release executed by plaintiff.

Plaintiff, replying, alleges that the purported release was obtained by duress and undue influence for a grossly inadequate consideration, and that plaintiff lacked sufficient mental capacity to execute a valid release.

The evidence favorable to plaintiff tends to show: Defendant was negligent as alleged and plaintiff's injuries were caused thereby. Plaintiff was frightened by the speed of the car but did not ask defendant, his brother, to reduce speed, for he thought his brother "knowed what he was doing." Plaintiff was 23 years old at the time. He has always lived with his parents. He has had cerebral palsy all his life, is nervous and has a speech impediment. He could learn very little in school and

can hardly read. His parents take care of him, handle his business affairs, make decisions and buy things for him. He makes no contracts without their signatures and has no conception of the value of money. Merchants do not sell him things without calling his father. He is like a child, and cannot do work requiring responsibility. He tried to get jobs but couldn't. He worked a short while under his brother's supervision at a chicken farm. For a long time he has received monthly Welfare payments as a disabled person. His parents endorse the checks. He has severe headaches and at times doesn't know what he is doing. He received a brain injury in the automobile accident and this aggravated his condition. The insurance adjuster talked to his father about a settlement. His father was planning to go to Canada for several weeks, and told the adjuster he wouldn't make a settlement, that plaintiff was not normal and he (the father) didn't want it settled until he returned from Canada, and that plaintiff wasn't capable of attending to that kind of business. While plaintiff's father was in Canada the adjuster made a settlement with and obtained a release from plaintiff. Plaintiff wanted an automobile. He had had his driver's license four years and had driven his father's car. The amount of the settlement was $1500. The adjuster paid the dealer $495 for a 1953 Pontiac and the title was put in the father's name. The adjuster paid medical and hospital bills and gave plaintiff a check for the balance — $461.35. The adjuster told the plaintiff $1500 was all he could get. Plaintiff signed the release, before a notary public, by "touching the pen." His mother was not present, but she signed the release when it was taken to her at the place she worked and when she was told $1500 was all plaintiff could get.

The jury answered the issues of mental capacity, negligence and contributory negligence agreeably to plaintiff's contentions and awarded $1250 damages. Judgment was entered in accordance with the verdict.

Defendant appeals.

Haywood and Denny, George W. Miller, Jr., and R. B. Dawes, Sr., for plaintiff.

Charles B. Wood for defendant.

PER CURIAM. Defendant concedes that plaintiff has made out a *prima facie* case of negligence on the defendant's part, but contends that plaintiff should have been nonsuited for that: (1) plaintiff was contributorily negligent as a matter of law, and (2) the evidence of plaintiff's mental incapacity is not sufficient to support a verdict on that issue.

The evidence tends to show that plaintiff ordinarily relied on members of his family for guidance, supervision and decisions. Under the circumstances of this case his failure to remonstrate with his brother for driving at an excessive speed raises, at most, an issue of contributory negligence for the jury. Contributory negligence as a matter of law does not appear. "Failure of a guest or passenger to remonstrate with the driver when the circumstances are such that a man of ordinary prudence would remonstrate is negligence, and may require the submission of the issue of the contributory negligence of the passenger to the jury, although it ordinarily will not be held to constitute contributory negligence as a matter of law." 1 Strong: N. C. Index, Automobiles, s. 49, p. 301; *Dinkins v. Carlton*, 255 N.C. 137, 120 S.E. 2d 543.

The issue of mental capacity was for the jury. There is more than a scintilla of evidence to support plaintiff's allegation that he lacked sufficient mental competence to execute a binding release. *Mangum v. Brown*, 200 N.C. 296, 156 S.E. 535.

The denial of defendant's motion for special instructions will not be held as error. The charge is not in the record. We have no way of knowing what the charge actually contained.

In the trial below we find

No error.

STATE v. OSBIE NORWOOD DIXON.

(Filed 11 April, 1962.)

1. Criminal Law § 55—

Testimony by a witness, qualified as an expert, that from an analysis of the alcohol content of a sample of blood which the witness took from defendant shortly after the time in question, defendant was under the influence of some intoxicating beverage, *held* without error, the witness having theretofore testified to the same effect without objection.

2. Criminal Law § 156—

An assignment of error to the charge should set forth the part of the charge challenged.

APPEAL by defendant from *Parker, J.*, 30 October 1961 Term of LENOIR.

Criminal prosecution upon an indictment charging defendant on 26 May 1961 with operating a motor vehicle upon the public highways of Lenoir County while under the influence of intoxicating liquor.

Plea: Not Guilty. Verdict: Guilty.

From the judgment imposed, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General G. A. Jones, Jr., for the State.

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

PER CURIAM. The State's evidence shows these facts: About 9:30 o'clock p.m. on 26 May 1961 Sergeant T. M. Martin of the State Highway Patrol drove up behind defendant, who was driving an automobile on West Vernon Avenue toward the city of Kinston. Defendant ran off the shoulder of the street, and pulled back on the street, and ran off the shoulder of the street and back on the street three times. Martin stopped him. Defendant got out of his automobile. He staggered, and said he had been drinking all day. In Martin's opinion, defendant was under the influence of some intoxicating liquor. Martin called Patrolman W. D. Parrish to come, and get defendant.

Defendant said in Parrish's presence: "He knew he probably had too much to be driving, but didn't think he was drunk." Parrish found a full pint of whiskey in defendant's automobile. In Parrish's opinion, defendant was under the influence of some intoxicating liquor. Defendant said he wanted a blood test, and signed a written application to that effect. Parrish carried defendant to a local hospital that night to have a blood test made.

About ten o'clock p. m. that night David P. Lutz in Lenoir Memorial Hospital took a sample of blood from defendant's body. Lutz testified in respect to his qualifications and training, but not in as full a manner as he did in *S. v. Hart, ante* 645, but in the present case he stated this which does not appear in the *Hart* case: "I am a member of the American Medical Technology, also Associated American College of Technologists. I do not have a certificate to operate in North Carolina, but it is not required in North Carolina. In my training I did take a course in chemistry. As to graduating in the field of chemistry — that is chemistry M., but from high school, and that particular chemistry course is the basis in all technical schools. I do not have a certificate from college, but I have a certificate from the hospital where I have completed two years satisfactory training in chemistry and medical technology, clinical laboratory procedures. That's a school within a hospital, Gordon Crowell, Lincolnton, North Carolina, under Lester A. Crowell. He was pathologist and radiologist on the State Board of Examiners." The Court, without objection, held Lutz "is a medical expert technologist, particularly in regard to body fluids, including blood."

Lutz then testified, without objection:

"I do recall seeing Mr. Dixon on or about the 26th of May

1961 at the hospital and I took a blood sample from his body. I made an analysis of the blood with respect to alcoholic content. The result was POINT ONE NINE PER CENT. That is blood content .19%. It means that he is under the influence of alcoholic beverage. A person becomes under the influence of alcoholic beverage as to percentage at POINT ONE FIVE PER CENT. Some persons are under the influence at a lesser percentage point. It would begin at varying degrees, starting at POINT ZERO FIVE PER CENT."

Defendant assigns as error the Court overruling his objection to this question asked by the solicitor:

"Mr. Lutz, based upon your education, training and experience, do you have an opinion satisfactory to yourself as to whether or not the defendant in this case was under the influence of some intoxicating beverage when you took a blood sample from him on May 27th of this year at Lenoir Memorial Hospital?"

Lutz replied: "My opinion is that he was under the influence." This is the sole exception defendant has to the evidence. Lutz had formerly testified, without objection, practically to the same effect. This assignment of error is overruled.

The assignments of error to the charge do not set forth the part of the charge challenged, and do not comply with our rules of practice in the Supreme Court. *S. v. Reel,* 254 N.C. 778, 119 S.E. 2d 876. Further, defendant in his brief does not contend there was error in the charge. Nevertheless, we have read the charge, and find therein no error that would warrant disturbing the trial and judgment below.

No error.

ANNA MAE ALLEN, MILLICENT C. BAILEY, DOROTHY IRENE BALL, C. ELIZABETH BROWN, MARJORIE L. BROWN, WILLIE MAE BROWN, D. L. BRYANT, MARY CALLAHAM, SHIRLEY CARRIKER, EDWARD D. CASEY, E. L. CLOANIGER, JR., W. H. DAVIS, ROY T. ELLIS, JR., E. JUNE JOY, H. L. JUSTICE, R. F. KISTLER, PEGGY McCRANIE, E. E. QUEEN, REBECCA SCHOLL, KATHERINE K. SNAVELY, DOLORES SHEETS, LEE L. STICKLEY, ROBERT R. TATUM, MIRIAM P. THOMPSON, AILEEN E. WARNER AND KATHRYN C. WEISNER, FOR THEMSLEVES AND IN BEHALF OF ALL OTHER EMPLOYEES OF THE SOUTHERN RAILWAY COMPANY HAVING A COMMON INTEREST IN THE SUBJECT MATTER OF THIS ACTION, PLAINTIFFS, AND BICKETT BASS, MARY B. CROSBY, GEORGE D. ATWELL, HAROLD B. HACKNEY,

CELESTIA S. SMITH, CRAVEN SMITH, R. P. POWELL, H. L. NUSSMAN, J. B. NUSSMAN, SR., JOHN W. JORDAN, AND L. J. BYRUM, ADDITIONAL PLAINTIFFS v. SOUTHERN RAILWAY COMPANY, INTERNATIONAL ASSOCIATION OF MACHINISTS, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF BLACKSMITHS, DROP FORGERS AND HELPERS, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, BROTHERHOOD OF RAILWAY CARMEN OF AMERICA, INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA, NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION, AMERICAN TRAIN DISPATCHERS OF AMERICA AND RAILWAY EMPLOYEES' DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, DEFENDANTS.

(Filed 11 April, 1962.)

1. Appeal and Error § 39—

Where, on a petition to rehear, the Justices of the Supreme Court are evenly divided in opinion, one Justice not participating, the judgment will stand without becoming a precedent.

SHARP, J., took no part in the consideration or decision of this appeal.

On petition to rehear.

This action was instituted by named non-union employees of Southern Railway Company for injunctive relief. Plaintiffs allege that they were notified they would be discharged from their jobs if they did not join one of defendant Unions and pay to it fees, dues and assessments, and that this notice was given them pursuant to provisions of a Union shop agreement between the Railway Company and defendant Unions. The provisions of the agreement in question are authorized by the Amendment to the Railway Labor Act of 10 January 1951 (64 Stat. 1 238, 45 U.S.C.A., s. 152, Eleventh). Plaintiffs seek generally to restrain collection from them of any dues, fees or assessments not reasonably necessary and related to collective bargaining.

Blakeney, Alexander & Machen for plaintiffs appellees.

Schoene & Kramer and J. B. Craighill for defendant Unions, appellants.

PER CURIAM. This case was before this Court at the Fall Term 1958. An opinion, delivered by *Bobbitt, J.*, for a majority of the Court was filed at the Spring Term 1959. *Allen v. R. R.*, 249 N.C. 491, 107 S.E. 2d 125. That opinion gives an adequate summary of the pleadings, evidence, issues of fact, preliminary proceedings, and judgment in the trial court. A repetition of these matters and a restatement of the legal questions involved are unnecessary here.

After our decision at the Spring Term 1959, plaintiffs, in apt time, filed a petition to rehear. The petition was allowed on 20 May 1959 by the two Justices to whom it was referred, but the Court deferred rehearing pending decision on appeal in a Georgia case originally captioned *Looper v. Georgia, Southern & Florida Railway Co.*, 213 Ga. 279, 99 S.E. 2d 101, and later captioned *International Association of Machinists v. Street*, 215 Ga. 27, 108 S.E. 2d 796.

The Unions, under 28 U.S.C.A., s. 1257 (1), appealed the latter decision of the Supreme Court of Georgia to the Supreme Court of the United States which, on October 12, 1959, noted probable jurisdiction. 361 U.S. 807, 4 L. Ed. 2d 54, 80 S. Ct. 84. The cause was argued twice in the Supreme Court of the United States, having been reargued on January 17 and 18, 1961. It was decided June 19, 1961. *International Association of Machinists v. Street*, 367 U.S. 740, 6 L. Ed. 2d 1141, 81 S. Ct. 1784.

After the decision of the Supreme Court of the United States in the *Street* case, a rehearing of our former decision, by oral arguments and by briefs, was held.

Before a decision acceptable to and in accordance with the opinion of a majority of this Court was reached, *Winborne, C.J.*, retired from the Court, *Denny, J.*, was elevated to *Chief Justice*, and *Sharp, J.*, was appointed to fill the vacancy on the Court. *Justice Sharp*, formerly a Superior Court Judge, is disqualified and declines to take part in the consideration and decision of this appeal for the reason that she presided at a hearing and entered an interlocutory order in this case at the Superior Court level.

This leaves the Court evenly divided. Three Justices are of the opinion that the judgment of the Superior Court should be affirmed. Three are of the opinion that there was error in the trial below.

The Court being equally divided, the judgment below is affirmed. The judgment appealed from stands, but not as a precedent. *Schoenith v. Realty Co.*, 244 N.C. 601, 94 S.E. 2d 592; *Ward v. Odell*, 126 N.C. 946, 36 S.E. 194.

Affirmed.

SHARP, J., took no part in the consideration or decision of this appeal.

CALVIN C. MASSENBURG v. CLARA FOGG.

(Filed 11 April, 1962.)

1. Courts § 8; Evidence § 1—

It is not required that the Superior Court hear evidence in order to determine that an appeal from a justice of the peace was docketed in the office of the clerk of the Superior Court within the time allowed, since the court may take judicial notice of the entries showing when the appeal was docketed and the date the first court convened after the judgment of the justice of the peace was rendered. A finding that the appeal was docketed in a proper manner will be held to mean that it was docketed within the time allowed.

2. Courts § 8—

G.S. 1-285 has no application to appeals from a justice of the peace to the Superior Court, and the giving of bond for costs is not necessary to perfect such appeal.

APPEAL by plaintiff from *H. R. Clark, J.*, January 1962 Civil Term of WARREN.

This is an appeal from an order denying plaintiff's motion to dismiss an appeal by defendant from a judgment rendered by a justice of the peace in an action instituted by plaintiff as provided in art. 3, c. 42 of the General Statutes.

The record here contains: (1) Plaintiff's "STATEMENT OF CASE ON APPEAL," stating: "Presiding Judge, Heman R. Clark, declined to sign the tendered judgment, and, without hearing any evidence except plaintiff's verified motion, signed an order denying the plaintiff's motion, to which actions the plaintiff excepted, and appealed to the Supreme Court." (2) An affidavit sworn to 9 May 1960. (3) An execution or writ of possession signed by the justice of the peace on 11 May 1960. Numbers 2 and 3 are in the form prescribed by G.S. 42-37. (4) "Defendant gave notice, in open court, of Appeal to Superior Court." This entry is signed by the J. P. (5) Plaintiff's motion, filed at the January 1962 Term to dismiss defendant's appeal. The basis for the motion is the asserted failure (a) to docket the appeal in due time, (b) to give a *supersedeas* bond, and (c) to pay the officers their fees. (6) The order of Judge Clark denying the motion based on his finding "as a fact that the case was filed and docketed in the Office of the Clerk of Superior Court in a proper manner." (7) Plaintiff's appeal, reading: "To the foregoing order, the plaintiff excepts and gives notice of appeal to the Supreme Court." The record does not contain the summons issued by the justice of the peace nor the judgment rendered by him.

Gilliland & Clayton by Theaoseus T. Clayton for plaintiff appellant.
Banzet & Banzet for defendant appellee.

PER CURIAM. Plaintiff has not excepted to the court's finding that the appeal was docketed in the office of the clerk of the Superior Court in a proper manner. We interpret that finding to mean the appeal was docketed at the next term of the Superior Court after the justice of the peace rendered his judgment. The court did not need to hear evidence to establish that fact. The J. P. was required to certify the original papers to the Superior Court. G.S. 42-37.

In hearing the motion, it is to be assumed the court had before it all of the original papers and the docket entries made by the clerk of the Superior Court showing when the papers were filed in the Superior Court. It was not necessary to offer these papers or the docket entries in evidence to establish the date when they were filed and docketed by the clerk. The court could take judicial notice of the entries showing when the appeal was docketed in the Superior Court. *Harrell v. Lumber Co.*, 172 N.C. 827, 90 S.E. 148. The court could take judicial knowledge of the date the first court convened after 11 May.

Defendant was not required, as a condition to his right to appeal to the Superior Court, to give a *supersedeas* bond. The failure to give such bond did not prevent plaintiff from having execution issue on the judgment. G.S. 7-178.

G.S. 1-285 has no application to appeals from a justice of the peace to the Superior Court. The court correctly concluded that defendant was not required to give the bond prescribed by that statute in order to perfect his appeal from the justice of the peace to the Superior Court.

Affirmed.

STATE v. G. B. WHITFIELD.

(Filed 11 April, 1962.)

1. Criminal Law § 100—

Where defendant is not represented by counsel in a prosecution for larceny, his statement at the conclusion of all the evidence that "I don't see how I can be guilty" in view of the fact that the prosecuting witness helped defendant load the chattel on defendant's truck, should be treated as a motion for judgment as in case of nonsuit.

STATE *v.* WHITFIELD.

2. Larceny § 7—

Where the evidence discloses that defendant took the pony of the prosecuting witness under an agreement that defendant was to break the pony, and that defendant was ready, able and willing to return the pony in good condition upon the payment by the prosecuting witness of the expense items incurred in connection with the care and upkeep of the pony, *is held* insufficient to show that the taking by defendant was with felonious intent, and nonsuit should have been entered.

APPEAL by defendant from *Mallard, J.*, October Criminal Term, 1961 of FRANKLIN.

Criminal prosecution on bill of indictment charging that defendant, on or about January 25, 1960, "one black mare pony of the value of one hundred fifty and no/100——Dollars, of the goods, chattels and moneys of one J. W. Pendergrass then and there being found, feloniously did steal by trick and artifice take and carry away," etc.

On or about January 25, 1960, defendant went to the home of J. W. Pendergrass, the prosecuting witness, to purchase a pony or ponies. Defendant, with the assistance of Pendergrass, loaded a young pony, which "had never been broke to ride," on defendant's truck and drove away. To transport the pony, it was necessary to construct a crate or sides on defendant's truck. Defendant had a chain saw in the back of his truck. It was used in cutting some lumber provided by Pendergrass. Pendergrass and defendant cooperated in making the truck suitable for transporting the pony. When he drove away, defendant left the chain saw at Pendergrass' house.

Undisputed evidence showed defendant took the pony and carried it away with the permission and cooperation of Pendergrass. The evidence was conflicting as to the terms of the agreement under which Pendergrass surrendered possession to defendant.

Pendergrass' testimony tended to show there was no sale; that defendant was to take the pony solely to break her; that defendant agreed there would be no charge for this service but Pendergrass, "if (he) wanted," could pay defendant's boy "$5.00 or $10.00"; and that Pendergrass, although in contact with defendant on several later occasions, was unable to obtain possession of the pony or locate her.

Defendant's testimony tended to show Pendergrass sold him the pony for the chain saw, which was valued at $125.00; that the pony has been continuously and is now in defendant's possession; that the pony is in good condition and has been broken; and that he is ready, able and willing to deliver the pony to Pendergrass upon return of the chain saw and payment of expense items incurred in connection with breaking the pony and for her care and upkeep.

Pendergrass testified he had taken out "claim and delivery papers"

to recover the pony, and "had a hearing and something happened," and that he "did not know the result of it."

Defendant was not represented by counsel. The prosecution was conducted by private counsel for Pendergrass.

The jury returned a verdict of guilty. Judgment, imposing a prison sentence, was pronounced. Thereupon, defendant employed counsel and gave "timely notice of appeal"; and, on appeal, assigns errors.

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

John F. Matthews and Edward F. Yarborough for defendant appellant.

PER CURIAM. At the conclusion of all the evidence, defendant stated to the court: "I don't see how I can be guilty when Mr. Pendergrass helped load the pony on the truck." Mindful that defendant was not represented by counsel, the Attorney General concedes, and we think properly so, that defendant's said statement should be treated as a demurrer to the evidence and motion for judgment as in case of nonsuit. Moreover, the Attorney General concedes, and we agree, that the evidence, when considered in the light most favorable to the State, was insufficient to support a finding that, when defendant obtained possession of the pony from Pendergrass, this constituted a taking of the pony by defendant *with felonious intent*. Hence, the judgment of the court below is reversed.

Reversed.

STATE v. CLAUDE FRAY ELLER.

(Filed 11 April, 1962.)

Automobiles § 59— Evidence held insufficient to be submitted to jury on question of culpable negligence.

In this prosecution for manslaughter, evidence tending to show that defendant was confronted with deceased's vehicle approaching rapidly from the opposite direction on defendant's side of the highway, that defendant, when the vehicles reached a point about 75 feet apart, turned sharply to his left in order to avoid a head-on collision, and that at the same time the deceased turned his vehicle to the right and the collision occurred in deceased's proper lane of travel, *is held* insufficient to show either an intentional violation of G.S. 20-146, or an unintentional violation of the statute accompanied by such heedless indifference to the

rights and safety of others as to import criminal responsibility, and nonsuit should have been granted.

APPEAL by defendant from *Armstrong, J.*, December Term 1961 of WILKES.

This is a criminal action in which the defendant was tried upon a bill of indictment charging him with manslaughter.

In the late afternoon of 9 August 1961, the defendant, operating a tractor-trailer owned by Piedmont Mountain Freight Lines, Inc., in a southerly direction on North Carolina Highway No. 16, approximately 2.6 miles west of North Wilkesboro, was involved in a collision with a 1952 Dodge automobile being driven by Jonah Lee Stone, deceased, and traveling in a northerly direction.

The State's evidence consisted primarily of testimony by the State Highway Patrolman who investigated the collision. He testified that the debris from the accident was located approximately 1-1/2 feet to the left of the center lane of the highway in deceased's lane of travel; that broken skid marks extended from near the point of impact in a northerly direction on defendant's side of the road for a distance of approximately 36 feet; that the right front portion of the tractor-trailer and the left front portion of the 1952 Dodge automobile were extensively damaged; that the defendant stated to him that the accident occurred in the following manner: The defendant, traveling at a speed of 30 miles per hour, had just negotiated a curve to his right when he observed a 1952 Dodge driven by the deceased approaching from the opposite direction and in his (defendant's) lane of travel. The deceased continued in defendant's lane of travel at a speed of 50-55 miles per hour until the vehicles reached a point about 75 feet apart. Defendant then turned the tractor-trailer sharply to the left in order to avoid a head-on collision. At the same time deceased turned to the right and a collision occurred in the deceased's proper lane of travel. The road at the point of collision was 22 feet wide with four-foot shoulders.

The defendant's evidence tended to corroborate his statements to the State Highway Patrolman as to the speed and location of the vehicles immediately prior to the accident.

From a verdict of guilty and the judgment imposed, the defendant appeals, assigning error.

Attorney General Bruton, Asst. Attorney General Charles D. Barham, Jr., for the State.

McElwee & Hall for defendant.

PER CURIAM. The Attorney General concedes that there was not sufficient evidence of culpable negligence adduced in the trial below to warrant its submission to the jury.

We concur in the view of the Attorney General. The evidence fails to show an intentional violation of G.S. 20-146 or an unintentional violation of this statute, accompanied by such recklessness or irresponsible conduct, or heedless indifference to the rights and safety of others, as to import criminal responsibility. *S. v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491; *S. v. Roop,* 255 N.C. 607, 122 S.E. 2d 363.

The judgment below is

Reversed.

WILKO CORPORATION AND CAVALIER INSURANCE CORPORATION v. S. C. HARRISON AND MRS. S. C. HARRISON.

AND

IVAN FOSTER v. S. C. HARRISON AND MRS. S. C. HARRISON.

(Filed 11 April, 1962.)

APPEALS by plaintiffs from *Crissman, J.,* January 1962 Term, WILKES Superior Court.

These cases grew out of a collision between a tractor-trailer unit owned by The Wilko Corporation and driven by Ivan Foster, and a Chevrolet pickup truck owned by S. C. Harrison and driven by his wife, Mrs. S. C. Harrison. The accident occurred about noon on Highway No. 601, near Yadkinville. Both drivers were proceeding south on a straight highway approximately 20 feet wide. The weather was fair and the road was dry and free of traffic.

As Mrs. Harrison attempted to pass the tractor-trailer the right side of the pickup and the left side of the tractor-trailer came in contact near the center of the highway. The pickup was slightly damaged. The tractor-trailer ran over an embankment and was almost totally destroyed. Both drivers received some injuries. Each claimed to have been on the proper side of the road. Each claimed the other had crossed to the improper side and had caused the accident.

The corporate plaintiff claimed damages to its equipment and cargo in the sum of $16,600. The individual plaintiff claimed damages of $50,000 as the result of his personal injuries. The defendants set up counterclaim of $100 damage to the vehicle and $1,000 for Mrs. Harrison's injuries. The court submitted proper issues, all of which were answered in favor of the defendants. The jury awarded Mr. Harrison

$100 for damages to the pickup, and Mrs. Harrison $400 for her injuries. From judgments in accordance with the verdict, the plaintiffs appealed.

Larry S. Moore, McElwee & Hall, By John E. Hall, for plaintiffs, appellants.

Julius A. Rousseau, Jr., Hudson, Ferrell, Petree, Stockton, Stockton & Robinson, By R. M. Stockton, Jr., for defendants, appellees.

PER CURIAM. The only eyewitnesses to the accident were the two drivers. Their testimony was conflicting. The court reviewed the evidence, explained the law arising thereon, and gave proper instructions as to the burden of proof on each of the issues. Nothing in the record indicates the jury could have been confused or misled. The case involved a simple question: Which driver crossed over into the other's traffic lane, thus causing the collision? The jury resolved the conflict in favor of the defendants. In the record, we find

No error.

VETCO CONCRETE COMPANY v. TROY LUMBER COMPANY.

(Filed 18 April, 1962.)

1. Quasi-Contracts § 1—

The rule that there can be no implied contract with reference to a matter which is the subject of an express contract extends to instances in which goods or services which benefit one person are furnished under an express contract with another and in reliance upon the credit of such other, in which event there can be no implied promise to pay, based on the theory of unjust enrichment, on the part of the person benefited.

2. Same—

Plaintiff's evidence tended to show that he furnished building materials on order of a construction company, that plaintiff did not know that a part of the material was used in the construction of houses on lots owned by a lumber company until after the account was in arrears, that no agreement was ever made with the lumber company to pay for the materials, and that the materials were not sold in reliance on the credit of the lumber company. *Held:* Nonsuit should have been entered in plaintiff's suit against the lumber company, since the express contract excludes any implied contract with reference to the same subject matter.

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

APPEAL by defendant from *Crissman, J.*, May 1st Civil Term 1961 of FORSYTH.

This appeal was docketed in the Supreme Court as case No. 394 and argued at the Fall Term 1961.

The plaintiff instituted this action on 15 April 1959 to recover a balance due on account for concrete products alleged to have been sold and delivered to defendant Troy Lumber Company, a corporation, between the dates of 1 December 1955 and 18 April 1956, under an express contract between the plaintiff and the defendant.

The defendant filed an answer to the complaint denying the express contract and pleading the three-year statute of limitations as to all items alleged to have been sold by the plaintiff and delivered to the defendant prior to three years before the institution of this action.

The plaintiff thereafter amended its complaint alleging an implied contract resulting in unjust enrichment of the defendant by reason of the fact that the materials sold and delivered by the plaintiff were used in the construction of residences on real estate owned by the defendant and that the defendant benefited from such materials so used.

The defendant answered denying the implied contract and again pleading the three-year statute of limitations on all materials sold and delivered prior to three years before 15 April 1959.

Plaintiff's evidence established that the materials were sold and delivered under an express contract to Fore-Taylor Building Company for use in the construction of dwelling houses located in Cedar Forest Estates in or near Winston-Salem, North Carolina. Some of the lots upon which these residences were erected were owned by Fore-Taylor Building Company and some were owned by Troy Lumber Company. Fore-Taylor Building Company was a North Carolina corporation with its principal office in Charlotte, North Carolina (now liquidated), and Troy Lumber Company was and is a North Carolina corporation with its principal office in Troy, North Carolina. Plaintiff's evidence further established that F. L. Taylor owned stock in both corporations and was an officer of both corporations.

The president of Vetco Concrete Company testified that the materials involved were delivered pursuant to telephone orders from the office of Fore-Taylor Building Company; that the witness was familiar with the property to which the materials were delivered and did not inquire as to ownership of the property until sometime later; that the witness did not learn that the Troy Lumber Company was the record owner of some of the lots to which materials were delivered until after the account was well overdue. "I'd say four or five months after the final shipment was when I found out that the property was not in

Fore-Taylor's name." Upon acquiring the information that Troy Lumber Company owned some of the lots, the plaintiff corporation for the first time mailed to the defendant Troy Lumber Company a copy of the statement of the balance due. The plaintiff received no response from Troy Lumber Company. "I did not take any action with respect to contacting Troy Lumber Company directly after we had ascertained that these lots were owned by the defendant Troy Lumber Company, with the exception that we mailed them a copy of the statement before we placed the lien against the property. * * *

"My company shipped merchandise for use on lots other than those for which we have brought this suit. I didn't ascertain by whom those lots were owned. * * * I usually don't care who owns the lots, when the statements are paid promptly. I only became interested if the account became overdue. I don't recall that I ascertained who owned the other lots to whom we made these shipments other than the lots concerning which we had brought this suit. * * *" This witness further testified to the fact that each statement and delivery ticket for the materials in question carried the notation, "Sold to Fore and Taylor," and that the materials were not sold on the credit of Troy Lumber Company.

In November 1956, Paul L. Barnes, president of the plaintiff, met with representatives of Fore-Taylor Building Company with respect to the balance due his company in the sum of $4,110.62. Barnes testified: "At that time I had learned that Troy Lumber Company owned the lots with respect to which this suit was brought. Mr. Taylor was present at that meeting in November * * *."

Mr. Robbins, office manager of the plaintiff, testified that the materials on the Cedar Forest Project were furnished at the request of the Fore-Taylor Building Company; that, "When a house was sold in the Cedar Forest Project, we would receive a check paying off either a particular lot or group of lots, when sales were made. This check would be for the amount of cement which the Fore-Taylor Building Company calculated as going into those particular houses. As each house was sold, we received a check at about the time of the sale or shortly thereafter."

The evidence discloses that on 9 October 1956, plaintiff filed a notice and lien for materials furnished against Troy Lumber Company and Fore-Taylor Building Company against Lots Nos. 3, 7, 8, 20 and 24, shown on the map of Cedar Forest Estates, Section 3, of a plat recorded in Plat Book 17, page 38, in the office of the Register of Deeds of Forsyth County, which lots were owned by Troy Lumber Company, and against Lot No. 22, shown on the aforesaid map, the property of Fore-Taylor Building Company.

The evidence further discloses that in December 1956, Fore-Taylor Building Company made a payment to plaintiff on the $4,110.62 account, reducing the amount due to $2,729.30, the amount for which this action was brought.

The defendant moved for judgment as of nonsuit at the close of plaintiff's evidence. The motion was denied.

The defendant's evidence discloses that by deed dated 1 August 1955, Fore-Taylor Building Company conveyed ten lots in Cedar Forest Estates to Troy Lumber Company, which deed was duly recorded in the office of the Register of Deeds of Forsyth County, North Carolina. Thereafter, Troy Lumber Company executed a deed of trust to Archie C. Walker, trustee, and Wachovia Bank and Trust Company, dated 2 August 1955, conveying the aforesaid ten lots in Cedar Forest Estates as security for a loan in the amount of $150,000. This deed of trust was recorded on 11 August 1955 in the office of the Register of Deeds of Forsyth County. The note executed to the bank was endorsed by Lee P. Fore, Betty B. Fore, F. L. Taylor and Alliene Taylor. On 25 April 1957, the above loan being in default, the trustee called upon the endorsers to pay the balance due thereon in the amount of $39,300, plus certain interest. The trustee foreclosed the deed of trust and F. L. Taylor bid in the foreclosed property, liquidated it, and paid the balance due the bank.

The evidence tends to show that no part of the proceeds from the $150,000 loan was expended by or on behalf of Troy Lumber Company. The bank required the checks withdrawing such funds to be signed by Lee P. Fore and Clement Williams. Mr. Fore ran the Fore-Taylor Building Company, but the official position of Mr. Williams is not disclosed.

F. L. Taylor testified that he is president of Troy Lumber Company, and that he owned fifty per cent of the stock in Fore-Taylor Building Company; that Fore-Taylor Building Company built seventy or eighty houses in the Winston-Salem area; that "Troy Lumber Company furnished some of the lumber on those houses. We did not furnish most of it. * * * (W)e furnished, I would say, the greater portion of the framing * * *. * * * I ran Troy Lumber Company * * *. I was interested in selling all the lumber I could to Fore-Taylor Company. We were paid for some of the lumber. * * * Troy Lumber Company pledged * * * or mortgaged the lots for the benefit of Fore-Taylor Building Company. * * * Troy Lumber Company did not receive any of the proceeds of the sale of the ten lots which were deeded to it by Fore-Taylor Building Company when they were sold. * * *"

When the houses constructed by the Fore-Taylor Building Company were sold, except those foreclosed under the aforesaid deed of

trust, they were financed through FHA loans and the proceeds from those sales were received by Fore-Taylor Building Company.

The defendant renewed its motion for judgment as of nonsuit at the close of all the evidence, which motion was again denied.

The case was submitted to the jury on the theory of the defendant's breach of an implied contract and the jury answered the issues in favor of the plaintiff. From the judgment on the verdict the defendant appeals, assigning error.

Weston P. Hatfield for plaintiff.
David H. Armstrong for defendant.

DENNY, C.J. The defendant assigns as error the refusal of the court below to sustain its motion for judgment as of nonsuit at the close of all the evidence.

The plaintiff's evidence establishes unequivocally that all the materials furnished by it which went into the construction of residences built on defendant's lots were furnished pursuant to an express contract between the plaintiff and the Fore-Taylor Building Company, a corporation. The plaintiff's evidence goes further and affirmatively establishes the fact that the materials were not sold on the credit of Troy Lumber Company.

It is equally clear from plaintiff's evidence that the plaintiff never entered into any agreement with the defendant to pay for the materials it furnished Fore-Taylor Building Company. Moreover, it never knew that the defendant Troy Lumber Company owned any of the lots on which Fore-Taylor Building Company constructed residences until all the materials had been sold and delivered to Fore-Taylor Building Company and the account was four or five months past due.

It is a well established principle that an express contract precludes an implied contract with reference to the same matter. *Supply Co. v. Clark,* 247 N.C. 762, 102 S.E. 2d 257; *Jenkins v. Duckworth & Shelton, Inc.,* 242 N.C. 758, 89 S.E. 2d 471; *Crowell v. Air Lines,* 240 N.C. 20, 81 S.E. 2d 178; *McLean v. Keith,* 236 N.C. 59, 72 S.E. 2d 44; *Manufacturing Co. v. Andrews,* 165 N.C. 285, 81 S.E. 418, Ann. Cas. 1916A 763; *Lawrence v. Hester,* 93 N.C. 79; *Klebe v. United States,* 263 U.S. 188, 68 L. Ed. 244; 12 Am. Jur., Contracts, Section 7, page 505; 17 C.J.S., Contracts, Section 5, page 321, *et seq.*

It is stated in 12 Am. Jur., Contracts, Section 7, page 505: "There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be

implied where there is an express one existing," citing, among other cases, *Manufacturing Co. v. Andrews, supra,* and *McLean v. Keith, supra.* It is further stated in a footnote that, "Perhaps it is more precise to state that where the parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law.

"The same rule has been applied to benefits conferred under a special contract with a third person. When there is a contract between two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods. *Walker v. Brown,* 28 Ill. 378, 81 Am. Dec. 287; *Massachusetts General Hospital v. Fairbanks,* 129 Mass. 78, 37 Am. Rep. 303; *Sullivan v. Detroit, Y. & A.A. R. Co.,* 135 Mich. 661, 98 N.W. 756, 64 L.R.A. 673, 106 Am. St. Rep. 403."

The case of *Supply Co. v. Clark, supra,* is directly in point. There, the defendant's son, Floyd Clark, engaged John F. Smith, to furnish labor and materials necessary to construct a house on land owned by the defendants. The plaintiff furnished materials pursuant to any agreement with Smith. The plaintiff never entered into an agreement with the defendants to pay for the materials furnished, nor did it discuss the subject with them until after the materials were purchased by Smith and used by him in the construction of the house. This Court held, under these facts, that there was no implied contract under which the defendants were liable for the value of the materials furnished by the plaintiff. This Court stated: " * * * (W)hatever contract was made with the plaintiff with respect to the purchase of these materials was made with Smith and not with the owners of the property.

"This Court, in the case of *Manufacturing Co. v. Andrews,* 165 N.C. 285, 81 S.E. 418, Ann. Cas. 1916A 763, said: ' * * * (I)t is a well recognized principle that there can be no implied contract where there is an express contract between the parties in reference to the same subject-matter.' *Lawrence v. Hester,* 93 N.C. 79." The Court affirmed the judgment of nonsuit entered in the trial below.

In the case of *Massachusetts General Hospital v. Fairbanks, supra,* the Court said: "The evidence did not justify any inference that the defendant became liable to the plaintiff for her board and support. The plaintiff having received her under the express contract with Towne and Wright to pay the plaintiff, there was no implied contract on her part to pay anything. There is no room for an implied contract where an express contract exists. * * * If A. contract with B. to furnish board at his expense to fifty men in his employ, and B. furnishes it, there is no implied contract on the part of the boarders to pay

each for his own board. And this, not because they are employed by A., but because the board was furnished on A.'s promise to pay for it. In the numerous cases in which the question has arisen to whom was credit given, no express contract in writing, absolute in its terms, existed, and in the absence of such express contract the effort was to ascertain from the facts surrounding the transaction, to whom credit was given, as an element in determining with whom the contract was made * * *."

Likewise, in *Walker v. Brown, supra,* there was an express contract with third parties to do certain demolition work and to make certain excavations. An action was brought against Walker, plaintiff in error, and a judgment was obtained against him. On appeal, the Supreme Court of Illinois said: "The error in this whole proceeding arises upon the assumption, that the plaintiff in error might become liable, under the implication of law, that he should pay the reasonable worth of services, beneficial to him, bestowed upon his property, with his knowledge and acquiescence, notwithstanding such services were rendered under an express agreement with another person.

"An express contract, executory in its provisions, must totally exclude any such implication. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive, or promise."

In the instant case, the plaintiff having proved an express contract with Fore-Taylor Building Company for the purchase of the materials used in the construction of houses in Cedar Forest Estates, it was error for the court to submit the case to the jury on the theory of an implied contract on the part of the defendant to pay for materials sold and delivered to another under an express contract.

The defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

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

DAISY LEE JOHNSON v. WILLIAM T. BASS, III, A MINOR, APPEARING HEREIN BY HIS GUARDIAN AD LITEM ROBERT G. WEBB; WILLIAM T. BASS, JR.; VERNON HUGHES CLIFTON, AND WALTER HARRY BURGESS

AND

MILDRED JOHNSON, A MINOR, APPEARING HEREIN BY HER NEXT FRIEND DAISY LEE JOHNSON v. WILLIAM T. BASS, III, A MINOR, APPEARING HEREIN BY HIS GUARDIAN AD LITEM ROBERT G. WEBB; WILLIAM T. BASS, JR.; VERNON HUGHES CLIFTON, AND WALTER HARRY BURGESS.

(Filed 18 April, 1962.)

1. Automobiles §§ 41g, 43— Evidence of concurring negligence causing collision at intersection of highway held for jury.

Plaintiffs were passengers in a truck and were injured when the truck, traveling along a servient street in an easterly direction, was involved in a collision at an intersection with a tractor-trailer traveling north on a six lane dominant highway. The evidence tended to show that the driver of the truck stopped before entering upon the intersection, then drove across the three southbound lanes of the dominant highway and across the three foot median separating the northbound and southbound lanes, and across the first of the three northbound lanes, and was struck by the tractor-trailer. The driver of the tractor-trailer testified that when he was about a block from the intersection he saw the truck, but, assuming that the truck would stop before crossing the northbound lanes, did not apply his brakes or slacken speed. The evidence further tended to show that the eastern or outside lane of the northbound lanes was free of traffic but that the driver of the tractor-trailer did not turn from the middle lane. *Held:* The evidence is sufficient to be submitted to the jury on the question of concurring negligence of the drivers of the vehicles, and motions of the driver of the tractor-trailer and his employer for nonsuit should have been denied.

2. Automobiles § 17—

Failure of a motorist traveling along a servient street or highway to stop before entering an intersection with a dominant street or highway is not negligence or contributory negligence *per se* but is evidence of negligence to be considered with all other evidence in the case in determining whether such motorist is negligent or contributorily negligent G.S. 20-158(a), as amended.

3. Same—

Where the three northbound lanes and the three southbound lanes on a six-lane highway are separated by a three-foot median, the crossing of such highway by another street or highway constitutes but a single intersection.

4. Same—

The driver of a motor vehicle along a dominant street or highway is nevertheless under duty to exercise due care toward traffic approaching on an intersecting street or highway, and must not exceed a speed which is reasonable and prudent under the conditions, must keep his vehicle under control, keep a reasonably careful lookout, and take such action

as an ordinarily prudent person would take to avoid collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered.

5. Appeal and Error § 38—

Exceptions not brought forward and discussed in the brief are deemed abandoned. Rule of the Supreme Court No. 28.

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

APPEAL by defendants Bass from *Copeland, Special Judge,* September-October Term 1961 of WILSON.

These civil actions were consolidated for trial.

Plaintiffs, in their respective complaints, seek to recover for injuries sustained in a motor vehicle collision resulting from the alleged negligence of William T. Bass, III, while driving a truck owned by defendant William T. Bass, Jr., which collided with another vehicle.

On motion of defendants William T. Bass, III, appearing herein by his guardian *ad litem* Robert G. Webb, and William T. Bass, Jr., Vernon Hughes Clifton and Walter Harry Burgess were made additional parties defendant in each of said actions pursuant to the provisions of G.S. 1-240. The defendants Bass answered the complaints of the plaintiffs and set up a cross-action in each case for contribution against the additional defendants.

Plaintiffs were passengers in the cab of the 1947 Chevrolet truck owned by defendant William T. Bass, Jr. and driven by his son, the defendant William T. Bass, III. The Bass truck was proceeding east on the main street in the town of Lucama, North Carolina, on 16 August 1960, and was in the process of crossing the six lanes of U. S. Highway No. 301 when it was in collision with a tractor-trailer unit owned by the additional defendant Clifton and driven by his agent defendant Burgess.

The evidence tends to show that the Bass truck stopped at a stop sign just west of the intersection of the main street in the town of Lucama and U. S. Highway No. 301; it then proceeded slowly across all three southbound lanes of said highway and the median strip and across the westernmost northbound lane of Highway 301. The driver of the tractor-trailer was proceeding in a northerly direction in the middle lane of the three northbound lanes. The median strip between the north and southbound lanes was approximately three feet wide.

Defendant Burgess testified for the plaintiffs as follows: "After I saw Mr. Bass' truck stop, I saw his truck start across the highway. He wasn't going very fast, just easing on across. * * * At the point of the impact, I was in the middle lane of the northbound traffic lanes. As to what I did when I saw him pull off from his stopped position, I

kept going, because I thought he was just pulling on across those lanes there and was waiting for me to get by. I don't know exactly how far I was in feet from the intersection when I saw him stop — probably about a block * * *."

On cross-examination, he further testified: "I never did apply my brakes before the collision. I did not apply my brakes until after the collision. From the time I saw the Bass boy stop at the Stop sign, up until the collision, I could see his truck all of the time. His truck eased on across the Southbound three lanes and across the median strip and across the inside lane of the northbound lane before there was any collision. I watched it make all of that movement.

"I slowed up when I came into Lucama. The speed limit before you come into Lucama is 50 miles an hour, and I was staying within the speed limit. As I came into Lucama, I slowed to about 40 miles an hour. From the time I slowed to about 40 miles an hour when I first entered Lucama, until the very moment of this collision, I don't think I slowed my vehicle any more until after the collision. * * *"

Defendants Bass offered testimony tending to show that the Bass truck stopped at the intersection of Lucama's main street and U. S. Highway No. 301; that the driver of the truck pulled across the southern lanes in low gear; that he approached the center lane of the three northern lanes when an occupant of the Bass truck who was standing in the back of the truck, hollered: "There's a truck." The Bass truck was stopped when it was hit. The evidence further tends to show that the approaching truck driven by defendant Burgess was traveling about 50 miles an hour. The easternmost lane of the three northern lanes was open, but the driver of the tractor-trailer did not leave the middle lane until after the collision.

At the close of the evidence the additional defendants moved for judgment as of nonsuit. The motion was allowed and the defendants Bass excepted. Defendants Bass also moved for judgment as of nonsuit at the close of the evidence and the motion was denied.

The issues submitted to the jury were answered in favor of the plaintiffs, and judgments were entered thereon. The defendants Bass appeal, assigning error.

Finch, Narron, Holdford & Holdford for plaintiffs.

Ruark, Young, Moore & Henderson; Gardner, Connor & Lee for original defendants.

Lucas, Rand & Rose for additional defendants.

DENNY, C.J. The appellants assign as error the granting of the

motion for judgment as of nonsuit made by additional defendants Clifton and Burgess.

In our opinion, the evidence in this case, taken in the light most favorable to the original defendants, is sufficient to go to the jury on the question of the joint and concurrent negligence of the original and the additional defendants. *Blalock v. Hart,* 239 N.C. 475, 80 S.E. 2d 373, and cited cases. See also *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450, and *King v. Powell,* 252 N.C. 506, 114 S.E. 2d 265.

This assignment of error is sustained and the judgment as of nonsuit as to the additional defendants is reversed.

Appellants' assignment of error No. 29 is to the following portion of his Honor's charge to the jury with respect to the provisions of G.S. 20-158 (a): "The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto *and yield the right of way to vehicles operating on the designated main traveled or through highway and approaching said intersection.* * * * And the court instructs you that the violation of that statute is negligence per se, as the court has previously instructed you." (Emphasis added)

The court, however, did not read to the jury the remainder of the provisions of G.S. 20-158 (a) which reads as follows: "No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

The italicized portion of the above statute which was read to the jury was inserted therein by Chapter 913 of the 1955 North Carolina Session Laws.

The appellees contend that the statute as now written does not make a failure to stop at a stop sign negligence *per se,* but that a failure to yield the right of way to vehicles operating on the main traveled or through highway and approaching said intersection is negligence *per se.*

Chapter 295 of the 1955 North Carolina Session Laws, now codified as G.S. 20-158.1, provides as follows: "The State Highway and Public Works Commission, with reference to State highways, and cities and towns with reference to highways and streets under their juris-

diction, are authorized to designate main traveled or through highways and streets by erecting at the entrance thereto from intersecting highways or streets, signs notifying drivers of vehicles to yield the right of way to drivers of vehicles approaching the intersection on the main traveled or through highway. Notwithstanding any other provisions of this Chapter, except Section 20-156, whenever any such yield right of way signs have been so erected, it shall be unlawful for the driver of any vehicle to enter or cross such main traveled or through highway or street unless he shall first slow down and yield the right of way to any vehicle in movement on the main traveled or through highway or street which is approaching so as to arrive at the intersection at approximately the same time as the vehicle entering the main traveled or through highway or street. No failure to so yield the right of way shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to yield the right of way may be considered with the other facts in the case in determining whether either party in such action was guilty of negligence or contributory negligence. * * *"

In view of the statutory provisions set out herein and the decisions of this Court, we hold that the failure to stop at a stop sign and yield the right of way is not negligence *per se*, but it is evidence of negligence that may be considered with other facts in the case in determining whether a party thereto was guilty of negligence or contributory negligence. *Wooten v. Russell*, 255 N.C. 699, 122 S.E. 2d 603; *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E. 2d 429; *Primm v. King*, 249 N.C. 228, 106 S.E. 2d 223; *Johnson v. Bell*, 234 N.C. 522, 67 S.E. 2d 658; *Lee v. Chemical Corp.*, 229 N.C. 447, 50 S.E. 2d 181; *Nichols v. Goldston*, 228 N.C. 514, 46 S.E. 2d 320; *Hill v. Lopez*, 228 N.C. 433, 45 S.E. 2d 539; *Sebastian v. Motor Lines*, 213 N.C. 770, 197 S.E. 539.

It is well to note that the intersection involved in the instant case was a single intersection, the median strip or area between the north and southbound lanes being only 36 inches wide and not 30 feet wide as was the case in *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900, in which case we held there were two intersections. The defendant William T. Bass, III, the driver of the Chevrolet truck, entered the intersection when the driver of the tractor-trailer was approximately one block south of the intersection. Furthermore, according to the testimony of the driver of the tractor-trailer, the Bass truck was crossing the median strip about the time he approached the intersection. Therefore, there seems to be no dispute about the fact that the Bass truck entered the intersection first and crossed at least four of the six lanes and the median strip before the collision occurred.

Moreover, as stated in the case of *Blalock v. Hart, supra,* " * * * (T)he driver on a favored highway protected by a statutory stop sign * * * does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar cicumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. * * *"

In our opinion, the defendants Bass are entitled to a new trial, and it is so ordered.

Since there must be a new trial for the reasons pointed out herein, it is not necessary to consider or discuss the remaining assignments of error.

The defendants Bass have not brought forward and discussed their assignment of error to the failure of the court below to sustain their motion for judgment as of nonsuit made at the close of all the evidence; hence, it will be deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. at page 810. Even so, we concur in the ruling of the court below on such motion.

New trial.

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

MILWAUKEE INSURANCE COMPANY v. McLEAN TRUCKING COMPANY.

(Filed 18 April, 1962.)

1. Appeal and Error § 21—

A sole assignment of error to the judgment does not present the sufficiency of evidence to support the findings of fact but only whether error of law appears on the face of the record proper, which includes whether the findings are sufficient to support the judgment and whether the judgment is regular in form.

2. Appeal and Error § 22—

The findings of fact will be presumed to be supported by evidence in the absence of exceptions to the findings.

3. Appeal and Error § 49—

Where the findings of fact are insufficient to support the judgment dismissing the action, the judgment must be reversed.

4. Insurance § 86; Parties § 1—

The destruction of insured property by a tortious act gives rise to a single indivisible cause of action, and when the insurer has paid the entire loss he is subrogated to the rights of the insured either by agreement in the contract or by equitable subrogation, and becomes the real party in interest with the sole right to maintain an action against the tort-feasor for the loss. G.S. 1-57.

5. Same; Judgments § 29—

Where a tortious act results not only in the loss of insured property, but also damage to the truck transporting the insured property and the death of the driver of the truck, and the insurer pays the entire loss of cargo, judgment for the recovery of damages to the truck and for the wrongful death in an action by the truck owner and the personal representative of the deceased driver does not bar insurer from thereafter maintaining an action against the tort-feasor for the value of the insured cargo.

APPEAL by plaintiff from *Walker, S.J.*, 4 December 1961 Civil Term of FORSYTH.

On 27 July 1958 a tractor-trailer unit owned by David V. Miller, d/b/a Interstate Motor Lines, and driven by its employee, Joe Washington Scott, Jr., and a tractor-trailer unit owned by McLean Trucking Company and driven by its employee, William Lester Oliver, collided on Virginia Highway 304 near the town of South Boston. Miller and McLean Trucking Company were common motor carriers. The tractor-trailer unit and its equipment owned by Miller were damaged, and its cargo of used furniture was destroyed by a fire resulting from the collision. The plaintiff here, Milwaukee Insurance Company, had insured Miller under its policy No. IM63579, Motor Truck Merchandise Floater, against damage or loss to this cargo of used furniture being transported by Miller as a common motor carrier.

On 31 July 1958 Miller instituted in the Guilford County Superior Court, High Point Division, a civil action against McLean Trucking Company and Oliver its driver seeking recovery in the sum of $8,250.00 for damages to his tractor-trailer unit and equipment, and recovery in the sum of $1,681.00 for destruction of the cargo of used furniture he was transporting. His complaint does not allege the ownership of the used furniture or that it was insured.

In this collision Joe Washington Scott, Jr., the driver of Miller's tractor-trailer, was killed. His administrator instituted suit in the same court against McLean Trucking Company and Oliver its driver for damages for his intestate's death.

In both cases defendants denied negligence on their part, pleaded contributory negligence of Joe Washington Scott, Jr., by way of defense, and pleaded counterclaims.

The two cases were consolidated for trial, and tried at 22 June 1959 Civil Term of Guilford Superior Court, High Point Division, by Thompson, S.J., and a jury. This stipulation appears in the record:

> "IT IS STIPULATED that at the trial of the prior action entitled '*David V. Miller, d/b/a Interstate Motor Lines, v. McLean Trucking Company, et al.,*' the plaintiff Miller, at the close of all the evidence, took a voluntary nonsuit as to that portion the plaintiff set forth in the complaint and the prayer therein respecting the damage, if any, to the cargo in the sum prayed for in the complaint of $1,681."

The jury awarded damages of $27,000.00 in the wrongful death case, and damages of $4,000.00 to Miller for injury to his tractor-trailer unit and its equipment. Judgment was entered in accord with the verdict. Upon appeal to the Supreme Court, No Error was found in the trial. *McCombs v. Trucking Co.* and *Miller v. Trucking Co.*, 252 N.C. 699, 114 S.E. 2d 683.

The present action was brought on 11 May 1961 by plaintiff, Milwaukee Insurance Company, to recover from defendant for the loss of the cargo of used furniture entirely destroyed by fire resulting from the aforesaid collision on 27 July 1958, which cargo was insured by it as set forth above, and which collision was caused by the alleged actionable negligence of defendant. Plaintiff alleges in Paragraph XI of its complaint:

> "As a result of said collision and the ensuing damage to the cargo being transported by the plaintiff's insured, David V. Miller, plaintiff was called upon to pay and paid on behalf of David V. Miller to the shippers of said furniture the entire loss sustained by said shippers as a result of the destruction of said cargo, to-wit, $1,661.75, and plaintiff is the only real party in interest with respect to an action to recover damages for the destruction of said cargo."

Defendant by answer and motion pleaded the former final judgment in Miller's action against it as an absolute bar to the maintenance of the present action, and prayed its dismissal. Defendant in its answer alleged that Miller in the prior action chose to prosecute only a part of his claim, notwithstanding he then had legal title to the entire claim, that he took a voluntary nonsuit at the close of all the evidence as to the loss of cargo, that the present plaintiff is subro-

gated only to the rights of its insured Miller, and is in privity with him, and to allow plaintiff to maintain this suit would constitute the splitting of a single indivisible cause of action.

At the hearing of defendant's motion before Judge Walker plaintiff introduced in evidence, without objection, the record in the prior action of *Miller v. McLean Trucking Company.*

Defendant introduced in evidence "the following PORTION OF ARTICLE IX OF THE COMPLAINT filed by *Milwaukee Insurance Company v. McLean Trucking Company,* in the prior action, wherein Milwaukee Insurance Company submitted to a judgment of voluntary nonsuit:

> "'. . . plaintiff stands in privity with the said David V. Miller with respect to the right to recover damages from the defendant; . . .'"

Judge Walker entered a judgment sustaining defendant's plea in bar, and dismissing the action. From this judgment, plaintiff appeals.

Haworth, Riggs, Kuhn & Haworth, By John Haworth for plaintiff appellant.

Spry & Hamrick, By Claude M. Hamrick for defendant appellee.

PARKER, J. Plaintiff has only one assignment of error, and that is to the signing and entering of the judgment and to the judgment. Plaintiff has no exception to Judge Walker's findings of fact.

Judge Walker's judgment recites near its beginning: "It appearing to the court that in this action the plaintiff seeks recovery of a sum of money, which plaintiff alleges it paid certain shippers of cargo by virtue of a policy of cargo insurance issued to one David V. Miller . . . , which cargo was alleged to have been destroyed in a collision between the motor vehicles of the said David V. Miller and the defendant, McLean Trucking Company." Plaintiff's complaint alleges it has "paid on behalf of David V. Miller to the shippers of said furniture the entire loss sustained by said shippers as a result of the destruction of said cargo, to-wit, $1,661.75, and plaintiff is the only real party in interest with respect to an action to recover damages for the destruction of said cargo."

So far as this appeal is concerned Judge Walker's crucial findings of what he terms facts, but which in reality are findings of fact and conclusions of law, are in substance: Miller in the prior action chose to prosecute only a part of his claim, notwithstanding he then had legal title to and introduced evidence concerning the entire claim. Plaintiff in this action is subrogated only to the rights of its insured Miller, and

is in privity with him. If plaintiff were permitted to maintain its action arising out of the same collision upon the same facts relied on by Miller in the prior action, it would constitute a multiplicity of suits and the splitting of a single indivisible cause of action. The final judgment in *Miller v. McLean Trucking Company* constitutes a bar to the maintenance of the present action.

Where insured property is destroyed or damaged by the tortious act of another, the right of action accruing to the injured party is for an indivisible wrong—and a single wrong gives rise to a single indivisible cause of action. *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231; *Insurance Co. v. Motor Lines, Inc.,* 225 N.C. 588, 35 S.E. 2d 879; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686, 64 A.L.R. 656; *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426, Ann. Cas. 1917 A. 1302; 1 Am. Jur. 2d, Actions, sec. 127.

Where insured property is destroyed or damaged by the tortious act of another and *the insurance paid the owner of the property covers the loss in full,* the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation of the owner's indivisible cause of action against the tort-feasor. The rationale of this rule is, the insurance company in such case is entitled to the entire recovery in the action, and must be regarded as the real party in interest by virtue of G.S. 1-57, which states explicitly "every action must be prosecuted in the name of the real party in interest." *Herring v. Jackson,* 255 N.C. 537, 543, 122 S.E. 2d 366, 371-2; *Insurance Co. v. Gas Co.,* 247 N.C. 471, 101 S.E. 2d 389; *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457; *Burgess v. Trevathan, supra; Insurance Co. v. Motor Lines, Inc., supra; Underwood v. Dooley, supra; Insurance Co. v. Lumber Co.,* 186 N.C. 269, 119 S.E. 362; *Powell v. Water Co., supra; Cunningham v. R. R.,* 139 N.C. 427, 51 S.E. 1029.

Plaintiff's one assignment of error is to the judgment. That raises the question whether an error of law appears on the face of the record proper. This includes the question whether the facts found by the judge are sufficient to support the judgment, and whether the judgment is regular in form. Such an assignment of error does not bring up for review the evidence upon which the findings of fact are based. In the absence of an exception to the findings of fact, the findings of fact are presumed to be supported by the evidence, and are binding on appeal. *Webb v. Gaskins,* 255 N.C. 281, 121 S.E. 2d 564; *Goldsboro v. R. R.,* 246 N.C. 101, 97 S.E. 2d 486; *Suits v. Insurance Co.,* 241 N.C. 483, 85 S.E. 2d 602; *Hoover v. Crotts,* 232 N.C. 617, 61 S.E. 2d 705; Strong's N. C. Index, Vol. 1, Appeal and Error, § 21, where numerous cases are cited.

Defendant states in its brief: "The insurance contract was between

the insurance company and Miller and not with the shippers of the cargo." The insurance policy is not in the record. There is a recital in the judgment to the effect that it appears in this action plaintiff alleges it paid certain shippers of cargo by virtue of a policy of cargo insurance it issued to David V. Miller, d/b/a Interstate Motor Lines. There is nothing in the findings of fact to indicate the entire coverage provided by this policy. In the complaint in this action it is called a "Motor Truck Merchandise Floater" policy. Defendant states in its brief: "In the present case the insurance company paid only a portion of the loss sustained in the collision." This statement in the brief finds no support in the findings of fact. Defendant further states in its brief: "It should also be noted that since Miller was a common carrier and a bailee for hire, his responsibility for the loss of cargo would be to the shippers, thus giving to him a special interest in recovery for its loss."

The general rule is that upon payment of a loss, pursuant to the terms of its contract of insurance, the insurer, or insurers in the case of coinsurance, are entitled to be subrogated *pro tanto* to any right of action which the insured may have against a third party whose negligence or wrongful act caused the loss. The right of an insurer to be thus subrogated to the rights of the insured may be either the right of conventional subrogation—that is, subrogation by agreement between the insurer and the insured—or the right of equitable subrogation, by operation of law, upon the payment of the loss. *Smith v. Pate, supra; Underwood v. Dooley, supra; Insurance Co. v. R. R.*, 179 N.C. 255, 102 S.E. 417; *Cunningham v. R. R., supra;* 29A Am. Jur., Insurance, sec. 1719.

If the contract of insurance of plaintiff here covered the cargo alone, and if the plaintiff here, pursuant to the terms of its contract of insurance, has paid Miller and the owners of the cargo destroyed in the collision an amount that covers the loss in full prior to the trial of the case of *Miller v. McLean Trucking Company and Oliver* at 22 June 1959 Civil Term of Guilford Superior Court, High Point Division, Miller would have no right to recover in that trial for such loss, because "every action must be prosecuted in the name of the real party in interest," G.S. 1-57, and under such circumstances plaintiff would be "the real party in interest," and a recovery for such loss must be in a suit brought by plaintiff in its name to enforce its right of subrogation of the indivisible cause of action against the alleged tort-feasors. Under such circumstances, if such existed, Miller in his trial could only take a voluntary nonsuit or suffer an involuntary nonsuit. "Where, however, the insurance company has fully compensated its insured for all damages he has sustained, the insured no

longer is the real party in interest. No right of action vests in him. The insurer is the real and only party interested in the result and hence the only party that can maintain the action." *Smith v. Pate, supra.*

The trial judge's so-called finding of fact, "Miller in the prior action chose to prosecute only a part of his claim, notwithstanding he then had legal title to and introduced evidence concerning the entire claim," is a conclusion of law or a mixed finding of fact and conclusion of law.

We are of opinion, and so hold, that the findings of fact in the judgment are insufficient to support the judgment dismissing plaintiff's action.

Plaintiff has filed in this Court a motion to amend its complaint by striking therefrom Paragraph XI, and inserting in lieu thereof the following:

> "As a result of said collision and the ensuing damage to the cargo being transported by the plaintiff's insured, David V. Miller, plaintiff was called upon to pay and paid on behalf of David V. Miller to the shippers of said cargo the entire loss sustained by said shippers as a result of the destruction of said cargo, to-wit, One Thousand Six Hundred Sixty One and 75/100ths ($1661.75) Dollars; the shippers of said cargo, namely Furniture Dealers Supply Company and Ideal Chair Company, Incorporated, were the owners of said cargo and David V. Miller neither had nor owned any interest in said cargo; payment under its policy of cargo insurance was made by plaintiff to Furniture Dealers Supply Company by its draft Number M24631 dated January 7, 1959 in the sum of $1536.00 payable to 'David B. [sic] Miller t/a Interstate Motor Lines, and Furniture Dealers Supply Company' and to Ideal Chair Company, Incorporated by its draft Number M66992 dated January 7, 1959 in the sum of $125.75 payable to 'David B. [sic] Miller t/a Interstate Motor Lines and Ideal Chair Company, Incorporated' (copies of said drafts and the endorsements thereto being hereto attached and incorporated by reference herein); the policy of cargo insurance whereunder said losses were paid contained no deductible provision and plaintiff is the only real party in interest with respect to an action to recover damages for the destruction of said cargo."

This motion is denied without prejudice. Plaintiff may apply to the trial court below, pursuant to the provisions of G.S. 1-163, for permission to so amend his complaint.

The judgment below is

Reversed.

KATHRYN PHILLIPS, BY HER NEXT FRIEND, W. R. PHILLIPS v PEPSI-COLA BOTTLING COMPANY AND ED OWENS.

(Filed 18 April, 1962.)

1. Negligence § 5—

The doctrine of *res ipsa loquitur* applies only when there is an injury which ordinarily does not occur without negligence on someone's part, and the instrumentality causing the injury is under the exclusive control of defendant.

2. Negligence § 21—

There is no presumption of negligence from the mere fact of accident and injury.

3. Food §§ 1, 2—

Res ispa loquitur does not apply to the falling of a bottled drink from a cardboard container while being carried by the purchaser from the retailer's store to the purchaser's home.

4. Evidence § 3—

It is a matter of common knowledge that bottled carbonated drinks are frequently put in paper cardboard containers for the convenience of purchasers in carrying them from the retailer's store.

5. Food §§ 1, 2—

The fact that while the purchaser was carrying a cardboard carton containing bottled drinks from the retailer's store to her home, one of the bottles fell to the sidewalk and broke or exploded, resulting in a piece of the glass cutting plaintiff's leg, *is held* insufficient to make out a case against the retailer or manufacturer for breach of implied warranty that the cardboard container was reasonably fit for its purpose, there being no evidence of any defect in the carton or that its bottom was rotten, or, if rotten, why it was in that condition.

APPEAL by plaintiff from *Fountain, S.J.*, November 27, 1961 Term of PERSON.

Plaintiff for a cause of action alleges: Corporate defendant manufactures and sells to merchants for resale Pepsi-Cola, a bottled drink. It supplies the merchants with cartons which their customers can use in transporting the bottled drink. The cartons have a handle at the top and space for six bottles. Plaintiff purchased from defendant Owens, a retail merchant supplied by his codefendant, six bottles of Pepsi-Cola. Shortly after she left the store, one bottle suddenly fell through the bottom of the container, striking the pavement, and exploded. Her leg was cut by a fragment of this bottle. Defendants, by selling said cartons of Pepsi-Cola, represented to the public that the same were in good condition, free from defect, and safe to carry by the handle. Notwithstanding such representations, defendants negli-

gently sold the carton of Pepsi-Cola "with a defective, poorly constructed and rotten bottom in said container." Defendants knew, or, in the exercise of due care, should have known, that the container was defective.

Defendants, by separate answers, denied negligence or warranty with respect to the condition of the carton used by plaintiff, specifically denying they furnished plaintiff with the carton from which the bottle fell.

At the conclusion of the evidence, defendants' motions for nonsuit were allowed. Plaintiff appealed.

R. B. Dawes and James E. Ramsey for plaintiff appellant.

Reade, Fuller, Newsom & Graham, by A. H. Graham, Jr. and Josiah S. Murray, III for Bottling Company, and Charles B. Wood for Ed Owens.

Rodman, J. Plaintiff testified: "I bought six Pepsi-Colas and they were in a Pepsi-Cola carton which had a handle on it." We treat this as meaning the bottled drinks were in the carton when the purchase was made, notwithstanding the testimony of plaintiff's adult companion: "I am not sure whether Mr. Owens gave them a carton."

Plaintiff testified: "I carried the Pepsi-Cola in my right hand and carried ice cream in a paper bag in my other hand. I was carrying the carton by its handle. I walked out of the store and down in front of Mr. Mundy's store, then I heard something like a shot and then I felt a pain in my leg . . ." Mundy's store is only a short distance from the store of Owens. Mundy testified: "Just as she got in front of my store, a bottle dropped out of the carton like a shot and exploded."

The complaint is seemingly bottomed on the theory that defendants have negligently failed to perform a duty owing to plaintiff. Manifestly plaintiff's testimony is insufficient to establish negligence unless the mere fall of the bottle from the container brings into play the doctrine of *res ipsa loquitur,* imposing on defendants the duty of explaining how and why the bottle fell. "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." *Jackson v. Gin Co.,* 255 N.C. 194, 120 S.E. 2d 540. "There is no presumption of negligence from the mere fact that there has been an accident and an injury." *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610. The breaking or explosion of a bottled drink in the possession of the injured party is not sufficient to create a *prima facie* case of

negligence. *Styers v. Bottling Co.*, 239 N.C. 504, 80 S.E. 2d 253; *Enloe v. Bottling Co.*, 208 N.C. 305, 180 S.E. 582; *Lamb v. Boyles*, 192 N.C. 542, 135 S.E. 464; *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135.

Plaintiff argues here that she is entitled to recover from the defendants upon an implied warranty that the carton which she used to transport the bottled drinks was in fact fit for that purpose. There is no evidence as to the kind of container. Was it metal or wood or paper? It is common knowledge that bottled drinks of the kind purchased by plaintiff are frequently put in paper or cardboard containers for convenience in transportation. If it be assumed that the container which plaintiff used was of that character, the evidence is still devoid of any explanation as to why the bottle fell. True, plaintiff alleges that it fell because of a "rotten bottom." But there is nothing to establish that fact, nor is there anything to explain why the bottom, if rotten, was in that condition. There is evidence by one of plaintiff's witnesses that the bottled drinks were taken from an icebox and put in the container.

The fact that a bottle fell to the pavement from a container which plaintiff was handling is no more sufficient to establish breach of a warranty as to the condition of the container than it is to establish negligence in the manufacture. *Prince v. Smith*, 254 N.C. 768, 119 S.E. 2d 923.

Affirmed.

JAMES LINUS GODWIN v.
HARLEYSVILLE MUTUAL CASUALTY COMPANY.

(Filed 18 April, 1962.)

1. Automobiles § 4; Sales § 3—

Where a person pays a sum in cash, executes a conditional sales contract for the balance of the purchase price, and applies for a certificate of title and obtains possession of the vehicle, title to the vehicle passes notwithstanding that the conditional sales contract is not filled out as to the number and amount of installment payments.

2. Insurance § 57; Evidence § 27—

The persons covered by an automobile liability insurance policy must be determined by construction of the policy provisions, and therefore testimony of the purchaser of a car that the dealer told him that he would be covered by the dealer's insurance until the dealer procured insurance for him, is properly excluded.

8. Insurance § 57—

A person injured as a result of the negligent operation of an automobile, who has recovered an unsatisfied judgment against the driver of the car, cannot recover against the insurer in a garage liability insurance policy when at the time of the accident title to the car had passed from the dealer to the driver.

APPEAL by plaintiff from *Gwyn, J.*, October 23, 1961 Civil Term of STANLY.

Plaintiff seeks to recover under the provisions of a garage liability insurance policy issued by defendant to Ben Brewer, trading as Brewer Motor Company, hereafter referred to as Brewer.

Plaintiff alleges he, a passenger, sustained personal injuries December 24, 1958, by reason of the negligent operation of a 1953 Mercury by one Paul Jonah Hinson; that the car was then owned by Brewer; that Hinson, as a prospective purchaser thereof, was operating the car with the permission of Brewer; that he recovered a judgment for $11,000.00 in a prior action against Hinson; and that he, as a person insured under the provisions of said policy, is entitled to recover from defendant the amount of said judgment and the additional sum of $1,405.83, to wit, the amount he incurred within one year from the date of accident for necessary medical, surgical, ambulance and hospital expenses.

Answering, defendant alleged, *inter alia*, that Hinson had purchased the 1953 Mercury from Brewer prior to December 24, 1958, and was the owner and in exclusive possession thereof when plaintiff was injured.

At the conclusion of plaintiff's evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Ernest H. Morton, Jr., for plaintiff appellant.
Carpenter, Webb & Golding for defendant appellee.

PER CURIAM. Plaintiff's evidence, consisting principally of Hinson's testimony, tends to show Hinson purchased the 1953 Mercury from Brewer on December 18, 1958, at the agreed price of $575.00, payable $150.00 cash and the balance in monthly installments either for twelve months or eighteen months; that Hinson then paid the $150.00 and obtained immediate possession; that, on December 19, 1958, Hinson, who was then eighteen years of age, and also his mother, signed a conditional sales contract as purchaser of the 1953 Mercury, but, pending final arrangements as to financing the unpaid balance, the number and amount of the installment payments were not then

inserted; that Hinson, on December 19, 1958, also signed as purchaser an application for a certificate of title; that Hinson had the exclusive possession and use of the 1953 Mercury from December 18, 1958, until the wreck on December 24, 1958, and continued to use it thereafter; and that, in response to inquiry by the investigating officer on the occasion of the wreck, Hinson asserted his ownership of the 1953 Mercury.

Judge Gwyn was of opinion, and we agree, that, notwithstanding the precise number and amount of the installments covering the balance of the purchase price had not been determined, all the essential elements of the sale by Brewer to Hinson had been completed, and on December 24, 1958, when plaintiff (Hinson's passenger) was injured, Hinson, not Brewer, was the owner as well as the operator of the 1953 Mercury.

Defendant's liability, if any, depends upon the provisions of the policy issued by it to Brewer. Hence, plaintiff's assignment of error directed to the court's exclusion of Hinson's testimony that Brewer told him, in substance, that Hinson would be driving on his (Brewer's) insurance until he procured insurance for Hinson, is without merit.

It is noted that Hinson was the sole defendant in plaintiff's said prior action.

Since plaintiff's evidence is insufficient to support a finding that Brewer was the owner of the 1953 Mercury on December 24, 1958, it is insufficient to support a recovery by plaintiff under the provisions of the garage liability insurance policy issued by defendant to Brewer. Hence, the judgment of involuntary nonsuit is affirmed.

Affirmed.

CARLOS A. REYNOLDS v. JAMES ROY HAYES AND JACKIE DEAN HAYES, ORIGINAL DEFENDANTS; AND S. W. MILLER, ADDITIONAL DEFENDANT.

(Filed 18 April, 1962.)

APPEAL by defendant Jackie Dean Hayes from *Armstrong, J.*, at October-November 1961 Term of WILKES.

Plaintiff instituted this civil action against defendants James Roy Hayes and Jackie Dean Hayes to recover for personal injuries which he sustained while riding as a passenger in the automobile owned by James Roy Hayes and operated by his son, Jackie Dean Hayes, when it was in a collision with a patrol car operated by the additional defendant State Highway Patrolman S. W. Miller.

Plaintiff alleged that his injuries resulted proximately from the negligence of Jackie Dean Hayes; that the automobile was owned and maintained by James Roy Hayes as a family-purpose automobile and was being operated at the time by his minor son within the scope of that purpose. The defendants denied these allegations, alleged that the collision was caused solely by the negligence of S. W. Miller, and filed a cross-action for contribution against Miller in the event plaintiff should recover from either of them.

Evidence for the plaintiff and the additional defendant Miller tended to show that about midnight on 16 December 1960, plaintiff was a passenger in the automobile of James Roy Hayes which was being driven by his son, the defendant Jackie Dean Hayes, in an easterly direction down hill on Second Street in the town of North Wilkesboro; that at the bottom of the hill Second Street entered B Street or Main Street, which runs approximately north and south, to form a "T" intersection; that Second Street enters Main Street on a deep curve going south. This curve is referred to in the evidence as a "90 degree angle". For traffic going south after entering Main Street from Second Street the curve is banked to the left and the right-hand portion is lower than the left-hand portion. Traffic islands in the intersection separate the lanes of traffic. Main Street is a 2-lane street, for traffic going north and south. In the northwest curve of the intersection there is located the Super Service filling station. Patrolman Miller, after having had his gas tank filled at the north pump near the intersection of Main and Second Streets, pulled around the south pump at the western edge of Main Street and seeing nobody coming pulled into the street, crossed the center line and headed northeast on Main Street. At this point his car was struck in the left center by the Hayes car. According to Miller he was crossing the center line of Main Street when he first saw the Hayes car which was then between the two islands in the intersection, and from 150 to 175 feet away. Plaintiff's evidence further tends to show that defendant Jackie Dean Hayes entered the intersection at 70 miles per hour; that he lost control of the car as he attempted to traverse the curve to the south and collided with the Miller car when his car slid to the left in the wrong lane beyond the island; that the collision knocked the patrol car some distance and inflicted injury upon the plaintiff.

The defendants' evidence tends to show that the defendant Jackie Dean Hayes was married and maintained his own home and automobile; that he had borrowed his father's personal automobile while his own car was being repaired; that he approached the intersection at the rate of 35 to 40 miles per hour; that when he got to the bottom of the hill, and as he was entering the intersection, he noticed the

patrol car leaving the gas pump of the Super Service filling station; that the car had no lights on and pulled out into Main Street directly into the path of the Hayes car as it approached; that the sudden application of his brakes pulled him to the left causing the front of his car to collide with the left side of the patrol car which was then directly across the road.

The jury found that the plaintiff was injured by the negligence of Jackie Dean Hayes, exonerated the additional defendant Miller and James Roy Hayes from any liability, and awarded damages against Jackie Dean Hayes alone.

Ralph Davis for plaintiff appellee.

McElwee & Hall, Larry S. Moore for cross defendant appellee.

W. G. Mitchell, Kurt R. Conner for defendant Jackie Dean Hayes, appellant.

PER CURIAM. There was ample evidence to withstand the motion of defendant Jackie Dean Hayes for judgment as of nonsuit. The jury, upon competent evidence and proper instructions, found that the negligence of Jackie Dean Hayes was the sole proximate cause of the collision and the resulting injury to the plaintiff. No prejudicial error appears.

However, this Court had difficulty in visualizing the intersection and area involved in this collision. No diagram, map, or reproduction of the blackboard drawing used to illustrate the testimony of the witnesses in the trial below accompanied the case on appeal. The witnesses had varying ideas of the directions. What was south to the plaintiff was east to some of the witnesses. Without the diagram to which the witness referred, statements in the record that the point of impact or debris was "right along in here" are unintelligible. We suggest to counsel that their interest and ours will be better served if appropriate diagrams in cases such as this accompany the case on appeal.

In the trial below we find

No error.

SARAH HUGHES McCRANIE BY HER NEXT FRIEND, CHARLES H. McCRANIE v. ALBERT WILSON CROWDER.

(Filed 18 April, 1962.)

APPEAL by defendant from *Gwyn, J.*, September 1961 Civil Term, ANSON Superior Court.

The plaintiff, by her father as next friend, instituted this civil action against the defendant to recover for personal injury and damage to her 1950 DeSoto automobile allegedly caused by the actionable negligence of the defendant who, by answer, denied negligence and by cross action alleged the collision between his Oldsmobile and the plaintiff's DeSoto resulted from the plaintiff's sole negligence which proximately caused his personal injury and damage to his vehicle.

The complaint alleged that plaintiff was driving west on Highway No. 74 in Anson County and "while attempting to make a left turn from said highway approximately in front of the Peachland Public School, the defendant, also traveling west on said highway, negligently and recklessly drove his motor vehicle into the plaintiff's motor vehicle, causing the plaintiff severe personal injury . . . and property damage."

The defendant, by answer and counterclaim, alleged: " . . . suddenly and without warning an automobile was driven from a parking area on the north side of Highway No. 74 onto said highway and directly into the path of the defendant's motor vehicle, so that it was necessary for him to turn onto the left-hand side of the highway to avoid a collision . . . when suddenly and without warning the motor vehicle being driven by the plaintiff, . . . turned to the left-hand side of the highway . . . into the path of the defendant's vehicle, so that it was impossible for the defendant to avoid a collision, . . ."

Each party offered evidence tending to support the allegations made in his pleading. The court submitted issues of negligence, contributory negligence, and damages which the jury answered in favor of the plaintiff. From the judgment on the verdict, the defendant appealed.

Brock & McLendon, By Walter E. Brock for plaintiff appellee.

Taylor, Kitchin & Taylor, By H. P. Taylor, Jr., for defendant appellant.

PER CURIAM. The evidence of the parties was sharply conflicting. Each party claimed to have observed the rules of the road. Each claimed the other violated them. The jury resolved the conflict by ac-

cepting the plaintiff's version and found the defendant's negligence caused the accident. The record does not disclose any reason sufficient in law to disturb the result of the trial.

No error.

APPENDIX.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

The following amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar at a regular quarterly meeting on April 13, 1962 and are as follows:

Amend Article IX by striking out all of paragraph (a) of Section 2, as appears in 253 N.C. 821 beginning line 27, and substituting in lieu thereof the following:

"(a) At the quarterly meeting of the Council at which a hearing of the accused attorney is ordered, the Council shall name and designate a trial committee of not less than three Councilors. If the accused attorney does not elect to be heard by a trial committee designated by the Supreme Court of North Carolina or demand a trial in the Superior Court at a regular term for trial of civil cases by a judge and jury, or by written agreement of all parties, trial by jury being waived and facts being found by the judge, as provided by Chapter 84-28 and these regulations, the trial committee named and designated by the Council shall be the trial committee for the hearing of the charges preferred against such accused attorney, and shall sit at the hearing and preside over all proceedings had thereat. The names of the Councilors designated by the Council for such purpose shall not be made public or disclosed to the accused attorney until the time within which such accused attorney may elect to be tried by a trial committee designated by the Supreme Court or a trial by jury in the Superior Court as provided by statute shall have expired.

"If such accused attorney exercises his right to be tried by a trial committee designated by the Supreme Court or demand a trial in the Superior Court, as provided by statute, such election shall automatically discharge as trial committee Councilors as theretofore designated by the Council, and thereafter, the accused attorney shall be notified by the Secretary of the Council the personnel of such trial committee appointed by the Supreme Court or certification shall be made to the Clerk of the Superior Court of the county in which such person shall reside if he resides in this state, or to the Clerk of the Superior Court of Wake County if he does not reside in this state, as the case may be.

"The trial committee hearing the charges against the accused attorney, whether it be the committee appointed by the Supreme

Court or by the Council, shall proceed under the rules and regulations adopted by the Council and the statutory provisions governing such hearings."

Amend Article IX by striking out all of paragraph (b) of Section 2, as appears in 253 N.C. 822 beginning line 9, and substituting in lieu thereof the following:

"(b) As expeditiously as possible following the adjournment of such quarterly meeting of the Council at which a hearing of the accused attorney was ordered a verified written complaint shall be formulated by the Council, or under its direction, showing in separate paragraphs the nature and substance of all charges preferred against such accused attorney, and approved by the Council.

"The complaint shall be accompanied by a notice, notifying said attorney that he may, pursuant to the provisions of Chapter 84-28 of the General Statutes of North Carolina, elect to be heard before a trial committee appointed for that purpose by the Council, or a trial committee designated by the Supreme Court, or demand a trial in the Superior Court at a regular term for the trial of civil cases by a judge and a jury or by written agreement of all parties, trial by jury be waived and the facts found by the judge; further notifying said attorney to make his election in his answer; and further notifying said attorney that upon his failure to do so, he shall be conclusively deemed to have waived his right to such election and will be heard by a trial committee appointed by the Council.

"The complaint and notice shall be served by the Sheriff of the county in which said attorney resides, by delivering to him two copies of said notice and complaint. The Secretary of the Council shall pay to such Sheriff for such service, from the funds of the North Carolina State Bar such fees as may be allowed in his county for the service of summons in civil actions."

Amend Article IX by striking out all of paragraph (c) of Section 2, as appears in 253 N.C. 822 beginning line 31, and substituting in lieu thereof the following:

"(c) The attorney, within thirty (30) days immediately following service of notice and statement of charges upon him as hereinbefore provided, may file a verified answer to the charges set out in said complaint, the original of which and two copies

thereof shall within said period, be filed in the office of the Secretary of the North Carolina State Bar. Every material allegation of the verified complaint not controverted by the answer or to which no answer is made, for the purpose of the action, shall be taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary."

Amend Article IX by striking out all of paragraph (d) of Section 2, as appears in 253 N.C. 823 beginning line 19, and substituting in lieu thereof the following:

"(d) The trial committee appointed by the Council, or the Supreme Court, as the case may be, following the filing of the answer by the accused attorney, if an answer be filed, and if no answer be filed, then following the expiration of the time for filing answer, shall proceed to hear the charges preferred against the accused attorney as promptly as possible in order that the ends of justice may be served, and the rights of the accused attorney and of the public generally may be fully protected and preserved. The Chairman of the trial committee shall set a time and place for said hearing, and thereafter, not less than ten (10) days prior to the date thereof, the Secretary of the North Carolina State Bar shall cause notice of the time and place of such hearing to be given said accused attorney by certified or registered mail."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar,

This the 2nd day of May, 1962.

/s/ Edward L. Cannon
Edward L. Cannon, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by The Council of The North Carolina State Bar, it is my opinion that the same com-

plies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 2 day of May, 1962.

/s/ Sharp, J.
For the Court

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 2nd day of May, 1962.

/s/ Sharp, J.
For the Court

APPENDIX.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS.

The following amendments to the Rules and Regulations of the Board of Law Examiners and of The North Carolina State Bar have been duly adopted by the Board of Law Examiners and recommended to the Council of The North Carolina State Bar, and the Council of the North Carolina State Bar, at a regular quarterly meeting did unanimously adopt the same and the recommendation of the Board of Law Examiners regarding said Rules as follows:

1. Amend the Rules Governing Admission to the Practice of Law in the State of North Carolina, appearing 243 N.C. Reports 785, Rule 3, appearing on said page and line 3 under Rule 3, by deleting the words "90 days" and inserting in lieu thereof the words "March 1" and by deleting in line 3 period after word "examination" and substituting a comma therefor and adding the words "beginning with the year 1963."

2. Amend Rule 8, appearing 243 N.C. 788, second paragraph of Rule 8, line 5 in said paragraph, by placing a period after the word "session." and deleting the words "conducted by that school."

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 18th day of April, 1962.

/s/ Edward L. Cannon
Edward L. Cannon, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules of the Board of Law Examiners as adopted by The Council of The North Carolina State Bar, it is my opinion that the same complies with a

permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto — Chapter 84, General Statutes.

This the 2nd day of May, 1962.

/s/ Sharp, J.
For the Court

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules of The Board of Law Examiners and the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 2nd day of May, 1962.

/s/ Sharp, J.
For the Court

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ANALYTICAL INDEX

ABATEMENT AND REVIVAL

§ 13. Death of Party and Survival of Actions Relating to Realty.

A right of action for wrongful cutting of timber survives the death of the owner of the land and vests in his personal representative, but as to timber cut subsequent to the death of the owner the right of action vests exclusively in his heirs or devisees. *Paschal v. Autry*, 166.

ABORTION

§ 1. Nature and Elements of Offense in General.

If death results from an unlawful abortion or attempted abortion of a pregnant woman, it is culpable homicide even though done at the woman's request. *S. v. Mitchner*, 620.

§ 3. Offense of Causing Miscarriage of, Injury to, or Distruction of Pregnant Woman.

In a prosecution under G.S. 14-45, an actual miscarriage of the woman is not a necessary element of the offense, and while proof of pregnancy is essential, it is not necessary that the foetus should have quickened. *S. v. Mitchner*, 620.

ACTIONS

§ 5. Where Plaintiff's Wrongful Act Constitutes Basis of Action or Claim.

Where wife feloniously slays husband, equity will decree that she hold rents and profits from land theretofore held by entireties as trustee for husbands' distributees. *In re Estate of Perry*, 65.

ADOPTION

§ 2. Parties and Consent of Natural Parents.

That the child sought to be adopted had been abandoned more than six months prior to the institution of the adoption proceedings does not relate to jurisdiction but merely obviates the necessity that the parents, surviving parent, or guardian of the child sought to be adopted be made a party to the proceeding. If the surviving parent is a party, a finding that he had abandoned the child obviates the necessity of his consent to the adoption. *Hicks v. Russell*, 34.

§ 5. Validity and Attack of Decrees.

Where the surviving parent is a party to a proceeding for adoption by the maternal grandparents, and such surviving parent fails to file answer and deny that he had abandoned his children as alleged in the petition, the clerk upon the hearing of a motion for decree of adoption by default, properly determines whether an abandonment had taken place, and when there is no appeal from the decree of adoption based upon the clerk's finding upon supporting evidence that the parent had abandoned the child, the surviving parent is irrevocably bound by the order and judgment and may not thereafter challenge the validity thereof, G.S. 48-28. *Hicks v. Russell*, 34.

The provision of G.S. 48-28 permitting a natural parent or guardian to attack a decree of adoption does not obtain when such parent or guardian is a party to the adoption proceeding. *Ibid.*

ADVERSE POSSESSION

§ 21. Pleadings and Burden of Proof.

Defendant in an action in trespass to try title may not rely on the defense that he had acquired title to a part of the *locus in quo* by adverse possession when he does not allege such offense. *Paschal v. Autry*, 166.

AGRICULTURE

§ 11. Marketing Quotas and Cards.

The findings of fact by the Review Committee in proceedings for the allotment of marketing quotas are conclusive on appeal when supported by competent evidence, and in the absence of exceptions to the Committee's findings, such findings will be presumed supported by competent evidence. *Mason v. Renn*, 49.

Where the owner of a farm sells a part thereof but fails to have the crop allotments divided between the respective tracts for more than ten years, and the records of the farm at the time of the sale have been destroyed in accordance with applicable regulations, and there are no reliable records or evidence upon which the facts and conditions existing at the time of the sale may be determined, the County Committee, upon request of the purchaser for reconstitution, properly divides the allotments on the basis of the conditions existing at the time of the sale. *Ibid.*

The County Committee properly uses the cropland method in redetermining allotments instead of the contribution method when the request for redetermination is made by the purchaser of a part of the farm more than six years subsequent to the acquisition of the farm by the seller and there is no evidence that the tract purchased had any allotments at the time it was acquired by the seller. *Ibid.*

The ascertainment of the cropland acreage of the respective tracts by the County Committee upon request by the purchaser of a part of the farm for reconstitution of the crop allotments for the respective tracts, *is held* not erroneous as a matter of law upon the present record. *Ibid.*

ANIMALS

§ 1. Rights of Owner for Injury to Domestic Animals.

A railroad company may not be held liable for injuries to cattle which break through the owner's fence and eat vegetation on the right-of-way, which had been sprayed by the railroad company with a poisonous weed-killer, nor may the railroad company be held under duty to seek out and notify adjacent landowners of the time it proposes to spray the weeds and brush on its right-of-ways with poison. *Aycock v. R.R.*, 604.

§ 7. Cruelty to Animals.

Injunction will not lie to restrain an organization from holding or engaging in a rabbit hunt with sticks when there is no evidence to support plaintiff's allegations that defendants plan to sponsor or hold such rabbit hunts in the future. Further, in this case there is no evidence tending to show that the activities sought to be enjoined endanger the health, safety or welfare of the public. *Yandell v. American Legion*, 691.

APPEAL AND ERROR

§ 1. Appellate Jurisdiction in General — Theory of Trial.

The theory of trial in the lower court must prevail in considering the appeal. *Doub v. Hauser*, 331.

Matters not adjudicated in the lower court are not presented on appeal. *Roberts v. Bottling Co.*, 434.

Where it is decided on appeal that motion to nonsuit was correctly denied but a new trial is awarded on other exceptions, the Supreme Court will refrain from discussing the evidenece except to the extent necessary to show the reasons for the conclusion reached. *Mason v Gillikin*, 527.

§ 3. Judgments Appealable.

Where the court grants plaintiff's motion to dismiss defendant's cross-action, over defendant's exception and notice of appeal, and the trial of plaintiff's cause continues, and thereafter a mistrial is ordered in plaintiff's cause upon the inability of the jury to agree on a verdict, the order of mistrial does not disturb the prior nonsuit of the cross-action, and such nonsuit must be considered as a final judgment from which an appeal lies, notwithstanding the failure of the court to implement by formal judgment its ruling on the motion to dismiss the cross-action. *Gillikin v. Mason*, 533.

§ 5. Substitution of Parties.

Where a corporation acting as executor has merged subsequent to the institution of the action, the new corporation should be substituted as a party. *Paschal v. Autry*, 166.

§ 12. Jurisdiction and Powers of Lower Court after Appeal.

The Superior Court is without authority to modify an order while an appeal therefrom is pending. *Creech v. Creech*, 356.

An appeal from order awarding custody of a child of the marriage to the wife removes the cause from the Superior Court to the Supreme Court, and the Superior Court thereafter is *functus officio* until the remand of the cause, and correctly holds that it is without jurisdiction, pending the appeal, to punish the husband for contempt, and its findings in regard to the wilful violation of the order are a nullity. However, the question of the wilful violation of the custody order may be investigated by the Superior Court after the cause has been remanded to that Court. *Joyner v. Joyner*, 588.

In the absence of *supersedeas*, order directing the husband to provide support of a child of the marriage may be enforced pending appeal by execution against defendant's property. *Ibid.*

§ 17. Certiorari to Preserve Right to Review.

Certiorari is allowed in this State only upon vote of a majority of the members of the Supreme Court in conference, and when the Court has decided that defendant had not been guilty of laches in prosecution of the appeal and that the appeal is meritorious, and grants *certiorari*, it is irrelevant and impertinent for opposing counsel to contend in the brief that *certiorari* should not have been allowed. *Therrell v. Freeman*, 552.

§ 19. Form of and Necessity for Objections, Exceptions and Assignments of Error in General.

An assignment of error unsupported by an exception duly taken and preserved will not be considered on appeal, and an exception appearing only in the notice of appeal is ineffectual. *Hicks v. Russell*, 34.

An assignment of error not supported by an exception duly appearing in the record will not be considered. *Logan v. Sprinkle*, 41; *Construction Co. v. Crain and Denbo, Inc.*, 110; *Vance v. Hamilton*, 557.

Exceptions which appear nowhere in the record execpt in the purported assignments of error are ineffective. *Cratch v. Taylor*, 462.

Such of appellant's exceptions as he desires to preserve must be grouped in the assignments of error, and the assignments must refer to the exceptions and give the page of the record where they may be found. *Balint v. Grayson*, 490.

An assignment of error should present the error relied on without the necessity of going beyond the assignment itself. *S. v. Burton*, 464; *Balint v. Grayson*, 490.

§ 20. Parties Entitled to Object and False Exception.

A defendant may not complain on his appeal that the lower court placed the burden on plaintiff to prove as a part of his cause of action an unnecessary and irrelevant element. *Watts v. Mfg. Co.*, 611.

§ 21. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An appeal itself constitutes an exception to the judgment and presents for decision whether the facts found support the judgment. *Logan v. Sprinkle*, 41; *Cratch v. Taylor*, 462.

The absence of exception in the record does not preclude review since the appeal itself will be considered an exception to the judgment, presenting the face of the record for review for errors of law appearing thereon. *Mason v. Renn*, 49; *Balint v. Grayson*, 490.

A sole exception to the judgment presents the questions whether error of law appears on the face of the record, which includes whether the facts found by the trial court are sufficient to support the judgment. *Trust Co. v. Buchan*, 142; *Paschal v. Autry*, 166; *Vance v. Hampton*, 557; *Ins. Co. v. Trucking Co.*, 721.

§ 22. Exceptions and Assignments of Error to Findings of Fact.

An exception to the judgment and each finding of fact and each conclusion of law incorporated therein is a broadside exception which presents for review only whether the facts found support the judgment, and an exception may not be aided by the assignment of error. *Hicks v. Russell*, 34.

A sole exception to the findings of fact, conclusions of law and judgment, without any particular exception to any specific finding, presents for review only whether the court's conclusions of law are supported by its findings. *Logan v. Sprinkle*, 41.

In the absence of a request for a particular finding of fact, appellant may not object to the failure of the court to find such fact. *Ibid.*

Where there are no effective exceptions to the findings of fact, it will be presumed that the findings are supported by competent evidence and are binding on appeal. *Cratch v. Taylor*, 462; *Ins. Co. v. Trucking Co.*, 721.

A notation in the notice of appeal that appellant excepts to each finding of fact and conclusion of law in conflict with his contentions is a broadside exception and does not bring up for review the findings of fact or the evidence upon which they are based. *S. v. Burell*, 288.

APPEAL AND ERROR—*Continued.*

§ 35. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted.

The Supreme Court is bound by the record and may not indulge in speculation as to matters or stipulations *dehors* the record. *Equipment Co. v. Hertz Corp.*, 277.

The Supreme Court must assume that the record is true and complete. *Redden v. Bynum*, 351.

Where the charge is not in the record, the denial of defendant's motion for special instructions cannot be held prejudicial. *Walker v. Walker*, 696.

§ 38. The Brief.

Exceptions not brought forward and discussed in the brief are deemed abandoned. *Johnson v. Bass*, 716.

§ 39. Presumptions and Burden of Showing Error.

The burden is upon appellants to show error amounting to a denial of some substantial right. *Rubber Co. v. Distribution*, 561.

Where the Justices are equally divided in opinion, the order of the Superior Court appealed from will be affirmed, without becoming a precedent. *Leuven v. Motor Lines*, 610; *Allen v. R.R.*, 701.

§ 40. Harmful and Prejudicial Error in General.

A new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial and harmful. *Rubber Co. v. Distributors*, 561.

§ 41. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where several witnesses have testified from their observations as to the excessive speed of defendant's car at or immediately before the accident, the admission of plaintiff's testimony as to such speed, being merely cumulative, will not be held prejudicial even if it be conceded that plaintiff's opinion was based in part upon what a patrolman told plaintiff as to the distance her vehicle was pushed by defendant's car after the collision rather than plaintiff's own knowledge of the physical facts at the scene of the accident. *Bullin v. Moore*, 82.

Evidence striken on appellant's objection is not ordinarily prejudicial. *S. v. Burton*, 464.

Where nonsuit would have to be sustained even though all of the evidence offered by plaintiffs were admitted, the exclusion of part of plaintiffs' evidence cannot be prejudicial. *Aycock v. R.R.*, 604.

§ 42. Harmless and Prejudicial Error in Instructions.

Incorrect instructions upon a material aspect of the case must be held for prejudical error notwithstanding that in other portions of the charge the principle is correctly stated, since the jury could not know which of the conflicting instructions is correct. *Rogers v. Thompson*, 265; *Mitchell v. White*, 437.

A portion of the charge excepted to must be considered with the remainder of the charge and construed in context in determining whether the excerpt was or was not prejudicial. *Newton v. McGowan*, 421.

An exception to the failure of the court to charge as to admissions in the pleadings and evidence, a request for such instructions having been with-

APPEAL AND ERROR—*Continued.*

drawn, cannot be sustained when the record fails to disclose specifically the admissions referred to, there being no prayer for special instructions in accordance with legal requirements. *Rubber Co. v. Distributors*, 561.

§ 45. Error Cured by Verdict.

Where the rights of the parties are determined by the answer of the jury to prior issues, alleged error relating to a subsequent issue cannot be prejudicial. *Bullin v. Moore*, 82.

§ 46. Review of Discretionary Matters.

Even thought an order lies in the discretion of the court, if the court acts arbitrarily or beyond the bounds of its discretion, its act amounts to a gross abuse of discretion. *S. v. Birchhead*, 494.

§ 47. Review of Orders Relating to Pleadings.

The refusal to strike allegations from the complaint will not be disturbed when no prejudice resulted to defendant therefrom. *Kiser v. Bowman*, 565.

§ 49. Review of Findings or Judgment on Findings.

The findings of fact of the trial court are conclusive on appeal if supported by competent evidence. *Construction Co. v. Crain and Denbo, Inc.*, 110.

Where, upon the hearing of a motion to set aside an order there is abundant and competent evidence to sustain a finding by the court, the fact that other evidence of doubtful competency was also admitted is not ground for disturbing the result, since it will be presumed that incompetent evidence was disregarded by the court in making its decision. *In re Simmons*, 184.

A statement in the lower court that the petition and order for extension of time to file complaint substantially complied with G.S. 1-121 will be treated as a conclusion of law subject to review and not a finding of fact. *Roberts v. Bottling Co.*, 434.

§ 50. Review of Equity Proceedings.

Upon appeal from an order continuing a temporary restraining order to the hearing, the Supreme Court does not decide the ultimate questions and issues raised by the pleadings, but only whether or not there was error in continuing the temporary restraining order pending trial on the merits. *Conference v. Creech*, 128.

On appeal in injunctive cases the Supreme Court may review the findings, but but it will be presumed that the judgment entered below is correct and the burden is upon appellant to assign and show error. *Ibid.*

Even though the Supreme Court has the right to review the evidence and find facts on appeal in a proceeding in equity, where there is not sufficient evidence in the record to enable the Court to safely and adequately find a material fact, the cause will be remanded for specific findings necessary to support a judgment. *Trust Co. v. Buchan*, 142.

§ 51. Review of Orders on Motions to Nonsuit.

Where defendant introduces evidence, only the motion to nonsuit made at the close of all the evidence will be considered. *Ammons v. Britt*, 248.

In an action for negligence nonsuit entered without assigning the legal ground therefor must be sustained if the evidence fails to show negligence on the part of defendant or if it affirmatively discloses contributory negligence as a matter of law on the part of plaintiff. *Carter v. R.R.*, 545.

APPEAL AND ERROR—*Continued.*

§ 53. Petitions to Rehear.

Where petition to rehear is allowed and the Justices are evenly divided in opinion upon the rehearing, the judgment of the lower court will be affirmed without becoming a precedent, notwithstanding that intial decision reversed the judgment of the lower court. *Allen v. R.R.*, 701.

§ 54. New Trials.

A new trial will be awarded when a cause has been submitted to the jury upon an erroneous theory of liability. *McCraw v. Llewellyn*, 213.

§ 55. Remand.

Even though the Supreme Court has the right to review the evidence and find facts on appeal in a proceeding in equity, where there is not sufficient evidence in the record to enable the Court to safely and adequately find a material fact, the cause will be remanded for specific findings necessary to support a judgment. *Trust Co. v. Buchan*, 142.

Where it is apparent on the face of a record proper that the judgment adjudicates matters not presented by the pleadings, adjudicates causes which the parties to the action cannot maintain, and that necessary parties were not joined, the cause will be remanded. *Paschal v. Autry*, 166.

§ 60. Law of the Case.

Where there is no exception by any of the parties to the adjudication of a particular matter presented for decision, the appeal being directed solely to other provisions of the judgment, that part of the judgment to which there are no exceptions becomes the law of the case and is binding upon the parties. *Keesler v. Bank*, 12.

A decision on appeal that defendant's confessed judgment for alimony would support proceedings for contempt upon defendant's wilful refusal to pay alimony in accordance with the judgment, and that the judgment is binding on defendant in the absence of fraud, mistake, or oppression, becomes the law of the case, and the lower court properly thereafter issues an order to show cause in accordance with the direction of the decision. *Pulley v. Pulley*, 600.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant.

An A.B.C. law enforcement officer who sees a person aiding in the illegal manufacture of intoxicating liquor may arrest such person without a warrant, G.S. 15-41, since such A.B.C. officer, while acting within his county has the same powers and duties as are vested in the sheriff of the county. *S. v. Taft*, 441.

§ 6. Resisting Arrest.

An indictment charging that defendant did unlawfully and wilfully resist a public officer while discharging and attempting to discharge a duty of his office is fatally defective to charge the official duty the designated officer was discharging or attempting to discharge. *S. v. Dunston*, 203.

A law enforcement officer appointed by a county board of alcoholic control, while acting in the county in the discharge of his duties, is a "public officer" within the meaning of G.S. 14-223, and when such officer attempts to arrest a person whom the officer sees in the process of illegally manufacturing liquor,

ARREST AND BAIL—*Continued*

the fact that such officer's superior turns over the prosecution for violation of the liquor laws to the Federal Courts does not constitute such officer a voluntary agent of the Federal Government so as to preclude the prosecution of such person under the statute for resisting such officer's attempt to arrest him. *S. v. Taft*, 441.

§ 11. Wrongful Arrest.

Allegations to the effect that a law enforcement officer maliciously swore out a warrant and arrested plaintiff, without allegation of any defect in the warrant or that, if the warrant were defective, the officer was not authorized to arrest plaintiff without a warrant under G.S. 15-41, are insufficient to state a cause of action against the officer either for false imprisonment or false arrest. *Greer v. Broadcasting Co.*, 382.

ATTORNEY AND CLIENT

§ 5. Liabilities of Attorney to Client.

An attorney is not liable to his client against whom judgment has been rendered for any negligence in the conduct of the litigation if the client had no meritorious defense to the action. *Masters v. Dunstan*, 520.

Finding of want on meritorious defense on motion to set aside judgment is not *res judicata* in action by client for negligence of attorney in permitting default judgment to be taken. *Ibid.*

§ 7½ Interference with Contract by Third Person.

Plaintiff attorney's evidence was to the effect that he had a contract with an injured person to collect compensation for the injuries, that defendant insurer, its agent, and its appraiser, induced the injured person to breach the contract, and that upon her request as to the amount owing for services theretofore rendered, plaintiff named a sum and gave her a release upon payment of such amount. Plaintiff's evidence further disclosed that thereafter the injured party told plaintiff what had transpired, and made a new contract with plaintiff identical with the original, plaintiff then instituted suit for the injured party, obtained a settlement and received his contractual portion of the sum paid. *Held:* The execution of the second contract constituted a novation and substituted the new contract for the old, and therefore plaintiff may not maintain any action against defendants for wrongfully inducing the injured party to breach the original contract. *Fowler v. Ins. Co.*, 555.

AUTOMOBILES

§ 4. Title, Certificates of Title, Sale and Transfer of Title.

The title to an automobile purchased from a dealer in this State must be determined by the laws of this State. *Bank v. Rich*, 324.

Where a dealer gives a nonresident purchaser an application for title for the automobile purchased, but reacquires possession of the car from the nonresident upon notice of dishonor of the check given in payment, and thereafter sells the car to a resident, any estoppel of the dealer to claim the vehicle free from the lien of a mortgage executed in reliance on the certificate of title issued to the nonresident pursuant to the application for title, would not bind the resident if he is an innocent purchaser for value without notice, and, upon his evidence that he was such an innocent purchaser, the court should charge the jury as to his rights. *Ibid.*

AUTOMOBILES—*Continued.*

Where a person pays a sum in cash, executes a conditional sales contract for the balance of the purchase price, and applies for a certificate of title and obtains possession of the vehicle, title to the vehicle passes notwithstanding that the conditional sales contract is not filled out as to the number and amount of installment payments. *Godwin v. Casualty Co.*, 730.

§ 7. Attention to Road, Look-out and Due Care in General.

A red flag properly displayed during the daylight hours is a recognized method of giving warning of danger to travelers along a highway. *Equipment Co. v. Hertz Corp.*, 277.

Traveling at excessive speed, failing to keep a proper lookout, or failing to maintain reasonable control of the vehicle constitutes a violation of G.S. 20-141(c), and is negligence. *Redden v. Bynum*, 351.

§ 8. Turning and Turning Signals.

It is negligence for the operator of a motor vehicle to turn left when a reasonably prudent person would realize in the exercise of due care that such movement could not be made in safety under the circumstances. *Scarborough v. Ingram*, 87.

It is negligence *per se* for a motorist either to turn left on the highway without first ascertaining that the movement can be made in safety, or to turn left without giving the statutory signal. *Mitchell v. White*, 437.

§ 11. Lights.

The violation of the statutory requirement in regard to lighting devices to be used by motor vehicles operating at night constitutes negligence as a matter of law. *Scarborough v. Ingram*, 87.

§ 13. Skidding.

The mere skidding of an automobile does not imply negligence but may form the basis for liability when the skidding results from some fault of the operator amounting to negligence. *Redden v. Bynum*, 351.

§ 15. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

The right of a motorist to assume that a vehicle approaching from the opposite direction will obey the law and yield one-half of the highway is not absolute and may be qualified by the particular circumstances existing at the time, and a motorist may not indulge this assumption when he sees, or by the exercise of due care should see, that the approaching vehicle is out of control. *Redden v. Bynum*, 351.

§17. Right of Way at Intersections.

Under G. S. 20-158(a) the erection of stop signs on an intersecting highway or street is a method of giving the public notice that traffic on one is favored over the other and that a motorist facing a stop sign must yield the right of way. *Kelly v. Ashburn*, 338.

Where a stop sign has been erected at a street or highway before an intersection, there is a rebuttable presumption of fact that such sign had been erected pursuant to lawful authority. *Ibid.*

The right of a motorist to rely upon the assumption that traffic approaching along an intersecting street will yield the right of way when he knows that a stop sign had been erected upon the intersecting street is not lost because

such sign had been removed prior to the accident when such motorist has neither actual nor constructive notice that the sign had been removed, and when the evidence is sufficient to present this question, an instruction preceding his rights solely upon the law governoring the right of way at an intersection at which no stop sign had been erected, is error. *Ibid.*

Where a motorist who is unfamiliar with an intersection approaches it along a street upon which a stop sign had been erected but had been removed, his rights in entering the intersection must be judged by the rule of care of an ordinarily prudent man under the circumstances confronting him, unaffected by the fact that a stop sign had been erected upon the street upon which he was traveling. *Ibid.*

Failure of a motorist traveling along a servient street or highway to stop before entering an intersection with a dominant street or highway is not negligence or contributory negligence *per se* but is evidence of negligence to be considered with all other evidence in the case in determining whether such motorist is negligent or contrtibutorily negligent. *Johnson v. Bass*, 716.

Where the three northbound lanes and the three southbound lanes on a six-lane highway are separated by a three-foot medium, the crossing of such highway by another street or highway constitutes but a single intersection. *Ibid.*

The driver of a motor vehicle along a dominant street or highway is nevertheless under duty to exercise due care toward traffic approaching on an intersecting street or highway, and must not exceed a speed which is reasonable and prudent under the conditions, must keep his vehicle under control, keep a reasonably careful lookout, and take such action as an ordinarily prudent person would take to avoid collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered. *Ibid.*

§ 18. Sudden Emergency.

Evidence to the effect that when one defendant drove into a dense fog which had existed for only a short time and only on a short segment of road over and near a stream on an otherwise clear night, he slowed his vehicle to 10 to 15 miles per hour, that the second defendant drove into the rear of the first vehicle with a light impact, and that within a few seconds thereafter the third defendant drove into the rear of the second vehicle with a very heavy impact, *is held* to require the court to charge the jury with respect to the doctrine of sudden emergency as to each defendant. *Lawing v. Landis*, 677.

Party confronted with sudden emergency is not held to wisest choice of conduct but only that choice which reasonably prudent man under the circumstances would have made. *Ibid.*

§ 25. Speed in General.

The operation of a motor vehicle at a speed greater than is reasonable and prudent under the conditions then existing is negligence *per se* notwithstanding that such speed may not exceed the applicable statutory limit, G.S. 20-141(a) (c), and while plaintiff remains under the burden of proving that such violations was a proximate cause of the accident in which he was injured, an instruction that the violation of the statute should not constitute negligence *per se* but only a circumstance for consideration with other circumstances in evidence upon the question of due care, must be held for error. *Cassetta v. Compton*, 71.

AUTOMOBILES—*Continued.*

Since a motorist must exercise care commensurate with the danger so as to keep his vehicle under control, a speed of 35 to 40 miles per hour on a highway covered with ice and snow may be excessive. *Redden v. Bynum*, 351.

§ 30½. Speed Competition.

Each person voluntarily engaging in a speed competition is liable as a joint *tort-feasor* for any resulting injuries regardless of whether his car inflicts the injury. *Mason v. Gillikin*, 527.

§ 32. Bicycles and Tricycles.

Where the evidence permits the inference that a child on a tricycle had entered a street from a driveway on the east side of the street and was on the west side of the street south of the projected southern line of the driveway at the time the driver of a vehicle traveling north struck the child, and the driver testifies that she did not see the child prior to the collision, the court should instruct the jury as to the driver's duty to decrease-speed in the exercise of due care if the driver saw or should have seen the periolus position of the child on or near the street in time for precautionary action, and an instruction that a speed greater than was reasonable and prudent under the conditions then existing would not constitute negligence *per se* must be held prejudicial upon the evidence. *Cassetta v. Compton*, 71.

§ 35. Pleadings.

Allegations held insufficient to state defense of contributory negligence. *Maynor v. Pressley*, 483.

§ 37. Relevancy and Competency of Evidence in General.

Evidence that a defendant drove at an unlawful speed or engaged in a speed competition at a different time and place than the occasion in suit, in order to be admissible must be accompanied by evidence from which the jury may reasonably infer that the speed or race continued to the scene of the accident, nor may the admission of such evidence be upheld as tending to show identity, proximity, or knowledge when there is no controversy as to the identity of the drivers or the place of the accident. *Corum v. Comer*, 252.

A witness may not testify that defendants were "racing", since this would be opinion evidence invading the province of the jury. *Mason v. Gillikin*, 527.

Plaintiff may not cross-examine defendant as to other unconnected accidents. *Ibid.*

§ 41b.1. Sufficiency of Evidence of Negligence in Engaging in Speed Competition.

Circumstantial evidence that defendants were engaging in speed competition held sufficient to take the question to the jury. *Mason v. Gillikin*, 527.

§ 41c. Sufficiency of Evidence of Negligence in Passing Vehicles Traveling in Opposite Direction.

Evidence that defendant was driving some 40 miles per hour on a highway covered with ice and snow, that plaintiff's vehicle, in attempting to pull up a grade, had skidded to its left so that the front part of plaintiff's vehicle was in defendant's lane of travel, that it was in this position, stationary or barely moving, when defendant was some four hundred feet away, and that defendant did not slacken speed and struck plaintiff's vehicle on its right side, *is held* sufficient to be submitted to the jury on the question of defendant's negligence. *Redden v. Bynum*, 351.

Testimony as to skid marks, the location of the respective vehicles after the collision and of other physical facts at the scene, together with testimony of statements of one defendant after the accident and testimony of the other defendant upon the trial, *is held* insufficient to show or raise a reasonable inference that either defendant failed to keep his car on his right side of the highway or failed to yield one half the highway to the car driven by intestate in the opposite direction, and therefore nonsuit was correctly entered in plaintiff's action based upon defendants' violation of the statutes. *Parker v. Flythe*, 548.

§ 41g. Sufficiency of Evidence of Negligence in Intersection Accident.

Evidence tending to show concurring negligence of drivers causing intersection accident, the one in failing to stop in obedience to a stop sign and the other in failing to avoid the accident after he should have apprehended that the first was not going to stop. *Johnson v. Bass*, 716.

§ 41d. Sufficiency of Evidence of Negligence in Passing Vehicles Travel- in Same Direction.

The evidence viewed in the light most favorable to plaintiff tended to show that plaintiff gave plainly visible signals to his intentiton to turn left from the highway into a private driveway and that notwithstanding such signals the following vehicle attempted to pass after plaintiff had already started his turn, resulting in the collision which set fire to the truck plaintiff was driving, and that plaintiff was badly burned in the fire. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligence. *Rogers v. Thompson*, 265.

Evidence that one defendant, while traveling at excessive speed, in attempting to pass the car preceeding him, drove to his left and struck a third car which was standing on its side of the highway, headed in the opposite direction, *is held* sufficient to to be submitted to the jury on the issue of such defendant's negligence. *Mason v. Gillikin*, 527.

Evidence *held* for jury on question of motorists' negligence in driving to left to pass preceding car and hitting third car which was standing on highway headed in the opposite direction on its right of highway. *Gillikin v. Mason*, 533.

§ 41h. Sufficiency of Evidence of Negligence in Turning.

Evidence tending to show that defendant was operating his vehicle at night without the lighting devices required by statute and that he attempted to turn into a driveway at a time when he saw or could have seen the lights of plaintiff's vehicle following him so closely that a reasonably prudent person would have realized the turn could not be made in safety, *is held* sufficient to be submitted to the jury on the issue of negligence. *Scarborough v. Ingram*, 87.

§ 41m. Sufficiency of Evidence of Negligence in Striking Children.

The evidence in this case, considered in the light most favorable to plaintiffs, *is held* sufficient to require the submission to the jury of the issue of negligence of defendant driver in striking a child riding a tricycle on the street. *Cassetta v. Compton*, 71.

Plaintiff's evidence that their intestate, a six-year old child, was standing on the shoulder of the road waiting to cross immediately prior to the accident and that at such point the child could have been seen by a motorist some five hundred yards away, *is held* to take the issue of negligence to the jury upon the question whether defendant, in the exercise of due care, could and should

AUTOMOBILES—*Continued.*

have seen the child in a perilous position at a time when she could and should have taken steps to avoid the injury, notwithstanding testimony of a witness for defendant that the child ran into the street without stopping and collided with the right side of defendant's vehicle. *Ammons v. Britt*, 248.

§ 42b. Nonsuit for Contributory Negligence in Entering Highway from Driveway.

Evidence *held* not to show contributory negligence as a matter of law in backing onto south portion of highway from driveway after seeing that no traffic was approaching from the east, but only vehicle approaching from west on its side of highway. *Gillikin v. Mason*, 533.

§ 42d. Nonsuit for Contributory Negligence in Hitting Stopped or Parked Vehicle.

Evidence tending to show that plaintiff was traveling within the statutory maximum speed limit, that defendant's truck was traveling ahead of him at night without lighting devices required by statute, that defendant's truck had a flat bottom, presenting a minimum area to be picked up by the lights of a following vehicle, and was of dark color, and that plaintiff's car struck the rear of defendant's vehicle as it slowed and had started to make a left turn into a driveway, *is held* not to show contributory negligence as a matter of law on the part of plaintiff. *Scarborough v. Ingram*, 87.

§ 42j. Nonsuit for Negligence in Failing to Keep Vehicle on Right and in Passing Vehicle Traveling in Opposite Direction.

Evidence tending to show that plaintiff was traveling some 10 to 15 miles per hour upon a highway covered with ice and snow, that in attempting to ascend a grade she pressed the accelerator slightly and skidded to the left into defendant's lane of travel, and that her tires, while worn, still had tread on them, *is held* not to disclose contributory negligence as a matter of law. *Redden v. Bynum*, 351.

§ 43. Sufficiency of Evidence of Concurring Negligence and Nonsuit for Intervening Negligence.

Evidence of concurring negligence causing collision at intersection of highway held for jury. *Johnson v. Bass*, 716.

§ 45. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance.

Evidence that plaintiff, confronted with an oncoming vehicle while attempting to pass a line of traffic, cut in between two of the vehicles in the line of traffic and in doing so lost control, crossed to the right shoulder, then cut back to the left, at which time the truck driven by defendant struck the rear of his vehicle, causing it to veer again to the left and into the path of the oncoming vehicle, *is held* not to raise the issue of last clear chance, since an act cannot be relied on both as constituting negligence and as constituting the basis for the doctrine of last clear chance. *Gunter v. Winders*, 263.

§ 46. Instructions in Auto Accident Cases.

Instruction on duty not to exceed speed which is reasonable under circumstances held prejudicial. *Cassetta v. Compton*, 71.

Charge held not to require defendant to establish that plaintiff was guilty of each of the acts relied on as constituting contributory negligence in order

to answer that issue in the affirmative, and was not erroneous in this respect. *Scarborough v. Ingram*, 87.

An instruction placing the burden upon defendant to prove conjunctively plaintiff's violation of both the statutory requisities in making a left turn in order to warrant an affirmative answer to the issue of contributory negligence must be held for prejudicial error. *Mitchell v. White*, 437.

A charge on the question of whether defendant was exceeding the speed which was reasonable and prudent under the circumstances then existing which merely gives the contentions of plaintiff as to what facts would constitute excessive speed under the circumstances and defendant's contentions that other facts would not, without appropriate instructions to the jury as to what facts, if found by the jury would or would not amount to negligence in his respect, and failing to charge that a violation of the provisions of G.S. 20-141(a) (c) would constitute negligence *per se*, *is held* insufficient. *Bullock v. Long*, 577.

A charge on the question of sudden emergency which states the doctrine and defendant's contentions in respect thereto and that he was entitled to the benefit thereof, but which fails to give contentions of plaintiff with respect to this doctrine and which fails to declare and explain the law arising on the evidence in respect thereto, is insufficient. *Ibid.*

§ 47. Liability of Driver for Injury to Guest or Passenger.

"Gross negligence" within the purview of the Florida statute requiring a showing of gross negligence in order for a gratuitous guest to recover against the driver of a car is not synonymous with culpable negligence in the law of crimes, but gross negligence lies between ordinary negligence and culpable negligence and may be defined as a course of conduct from which a reasonable and prudent man would know that injury to person or property would probably and most likely result. *Kiser v. Bowman*, 565.

Whether the driver of a car is guilty of gross negligence so as to constitute the basis for recovery by a gratuitous guest is ordinarily a question for the jury, and each case must be determined in accordance with its particular facts. *Ibid.*

Evidence held sufficient to be submitted to the jury on the question of defendant's guilt of gross negligence. *Ibid.*

Under the Florida statute, a guest passenger who pays, in accordance with previous agreement, one-half of the cost of gasoline and oil for the trip is not a gratuitous passenger. *Ibid.*

§ 49. Contributory Negligence of Guest or Passenger.

Allegations that defendant driver had drunk some beer and that plaintiff encouraged defendant to drive plaintiff on a trip, without allegation that at the time defendant driver lacked capacity to drive or that plaintiff, with knowledge of such incapacity, voluntarily exposed himself to the danger of riding with defendant when he should have foreseen that injury might result, *held* insufficient to allege contributory negligence on the part of plaintiff. *Maynor v. Pressley*, 483.

Evidence that plaintiff passenger failed to remonstrate with defendant driver concerning his excessive speed, resulting in the accident and injury, *held* not to establish contributory negligence as a matter of law on the part of plaintiff. *Walker v. Walker*, 696.

AUTOMOBILES—*Continued.*

§ 52. Liability of Owner or Employer for Driver's Negligence in General.

Where the evidence discloses that the agent of one defendant was driving its truck for the transportation of its goods to another defendant, the mere fact that such other defendant was the intended recipient of the goods is insufficient to be submitted to the jury upon such other defendant's liability for the driver's negligence under the doctrine of *respondeat superior*, and such other defendant's motion to nonsuit must be sustained on appeal notwithstanding that the motion to nonsuit was not prosecuted on the ground of the insufficiency of the evidence of agency. *Equipment Co. v. Hertz Corp.* 277.

§ 54f. Sufficiency of Evidence on Issue of Respondeat Superior.

Where it is admitted that the corporate defendant is the registered owner of the vehicle involved in the collision, but there is no evidence or allegation that the individual defendant was operating the vehicle on the occasion in question or that the individual defendant was the employee or agent of the corporate defendant, nonsuit of the corporate defendant must be allowed. *Redden v. Bynum*, 251.

Proof of registration or admission of ownership of the vehicle involved in a collision constitutes *prima facie* evidence that the driver was the agent of the owner in such operation, and is sufficient to support but not to compel an affirmative finding on the issue of agency, but nevertheless plaintiff has the burden of alleging and proving agency, and therefore the court must submit the issue of agency to the jury, and the submission of the question under the issue of negligence, so that the jury must find either that both defendants are liable or that neither is liable, is not proper, and an affirmative finding by the jury will not support a judgment against the principal. *Mitchell v. White*, 437.

§ 59. Sufficiency of Evidence and Nonsuit in Homicide Prosecutions.

In this prosecution for manslaughter, evidence tending to show that defendant was confronted with deceased's vehicle approaching rapidly from the opposite direction on defendant's side of the highway, that defendant, when the vehicles reached a point about 75 feet apart, turned sharply to his left in order to avoid a head-on collision, and that at the same time the deceased turned his vehicle to the right and the collision occurred in deceased's proper lane of travel, *is held* insufficient to show either an intentional violation of G.S. 20-146, or an unintentional violation of the statute accompanied by such heedless indifference to the rights and safety of others as to import criminal responsibility, and nonsuit should have been granted. *S. v. Eller*, 706.

§ 64. Reckless Driving.

If in one continuous operation of his vehicle a motorist violates either G.S. 20-140(a) or 20-140(b), or both, he is guilty of but a single offense of reckless driving. *S. v. Lewis*, 430.

§ 72. Sufficiency of Evidence in Prosecutions for Drunken Driving.

Conflicting evidence as to whether the defendant was under the influence of intoxicating beverage at the time he was apprehended operating a motor vehicle on a State highway is properly submitted to the jury in a prosecution under G.S. 20-138. *S. v. Stroud*, 458.

BANKS AND BANKING

§ 1. Control and Regulation in General.

A bank organized and created under the status of this State has only such powers and duties as are expressly granted by statute or are fairly incidental thereto. *Sparks v. Trust Co.*, 478.

§ 2. Representation by Officers and Agents.

Allegations that the manager of a branch of a bank withheld from circulation bad checks in a large sum for a depositor, without allegations that the managing officers of the bank had any knowledge that he was so withholding checks, *are held* insufficient to state a cause of action against the bank, since the acts of the manager were *ultra vires*, and the bank is not chargeable with notice thereof, such acts not having been done in the interest of the bank. *Sparks v. Trust Co.*, 478.

§ 3. Deposits and Duty to Depositors in General.

A bank is not under duty to warn a prospective investor of the financial condition of a depositor of the bank. *Sparks v. Trust Co.*, 478.

Allegations to the effect that an investor went to an officer of the bank and disclosed his plans to borrow money to erect a building to be leased to a certain person, that the officer of the bank was withholding bad checks of such person in a large amount which if released would result in insolvency of such person, and that the bank officer failed to disclose to the investor the fact of such person's insolvency, *is held* insufficient to state a cause of action against the bank, since the bank was under no duty to disclose the financial condition of one of its depositors. *Ibid.*

BASTARDS

§ 8. Issues and Verdict in Prosecutions for Wilful Refusal to Support.

In a prosecution of defendant for wilful refusal to support his illegitimate child, the issue of paternity and wilful refusal to provide support are properly tried in the one prosecution, and defendant's contention that he must be tried first on the issue of paternity and found guilty before he could be tried on the issue of wilful refusal to provide support, is untenable. *S. v. Knight*, 687.

BOUNDARIES

§ 1. General and Specific Descriptions.

The fundamental rule in the ascertainment of the boundaries of the land described in a deed is the intent of the parties, and a general description may not enlarge the specific description when the specific description is sufficient to identify the land which the deed purports to convey. *Carney v. Edwards*, 20.

§ 2. Courses and Distances and Calls to Natural Objects.

A call to a natural object will prevail over courses and distances, and a call to a line of an adjacent tract is a call to a natural object within the purport of the rule when such line is known and established. *Carney v. Edwards*, 20.

§ 5. Junior and Senior Deeds.

A junior conveyance cannot be used in locating the lines called for in a prior conveyance. *Carney v. Edwards*, 20.

BOUNDARIES —*Continued.*

§ 7. Nature and Essentials of Processing Proceedings.

Where the location of the corner of an adjacent tract is necessary in order to establish the boundaries of the deed involved in the action, the owner of the adjacent tract should be made a party. *Carney v. Edwards*, 20.

§ 8. Processioning Proceedings — Questions of Law and of Fact.

What are the boundaries called for in the description of a deed is a question of law to be declared by the court, where they are located is a question of fact. *Carney v. Edwards*, 20.

§ 9. Sufficiency of Description and Admissibility of Evidence Aliunde.

Where the iron stake marking a corner has been removed subsequent to the execution of the deed, and such corner, if located in accordance with courses and distances, would patently include land not owned by grantor, the missing corner may be established *aliunde* the description by parol testimony of disinterested witnesses as to the location of the line and corner at the time the deed was executed, including testimony as to the location of the corner in a contemporaneous survey even though the survey is not referred to in the deed, and when the description in the deed can thus be made certain, it is controlling. *Carney v. Edwards*, 20.

BUILDING AND LOAN ASSOCIATIONS

§ 1. Operation.

Both under the common law and provisions of statute stockholders have a right to know the names of their associates for the purpose of conducting an effective campaign in preparation for a stockholders' meeting, G.S. 55-37(a) (3), G.S. 55-64, which right extends to the stockholders of a building and loan association, G.S. 55-3(a), and mandamus is expressly authorized to compel compliance, G.S. 55-37(b). *White v. Smith*, 218.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. Cancellation and Rescession of Instruments for Fraud.

A purchaser may rescind a sale for fraud or may affirm the sale and sue for the damage resulting from the fraudulent representations, measured by the difference in value of the *res* if it had been as represented and its actual value. *Horne v. Cloninger*, 102.

In order to obtain relief from the contract on the ground of fraud a party must show a false factual representation made with knowledge of its falsity or in culpable ignorance of its truth or falsity, with fraudulent intent, and that the misrepresentation was material and reasonably relied upon. *Davis v. Davis*, 468.

Ordinarily, a person who signs a written instrument without reading it when he has opportunity to do so understandingly is bound thereby, and may avoid the legal consequences of the instrument only by showing that he executed it in reliance on false representations or under special circumstances, and that a person of ordinary prudence would have so executed the instrument under like conditions, and the failure of the court to charge the jury in regard to whether a person of ordinary prudence would have executed the instrument under the same or similar circumstances must be held for prejudicial error. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS—*Continued*

§ 8. Pleadings.

Allegations that insurer's agent misrepresented the instrument related only to her medical and hospital bills, that she was told that the doctor was demanding payment and she had no means to pay, that at the time she executed the release she was sick and suffering pain resulting from the injuries negligently inflicted, and that she did not read the instrument because of these facts and could not have understood it if she had attempted to read it, are *held* sufficient to charge that the release was obtained by fraud. *Davis v. Davis*, 468.

§ 10. Sufficiency of Evidence and Nonsuit.

Evidence that release was obtained by fraud held sufficient to be submitted to jury. *Davis v. Davis*, 468.

CARRIERS

§ 7. Shipping Facilities.

A carrier is required to provide equality of rights and facilities for shippers of goods who request service under substantially similar circumstances and conditions, and exigencies of competition do not justify discrimination between shippers. *Utilities Com. v. R.R.*, 359.

It is unlawful for a carrier to refuse to provide reciprocal switching facilities between private or assigned sidings of shippers on the lines of such carrier and the terminal interchange tracks jointly owned with competing carriers when such refusal is predicated upon the percentage of a shipper's freight which it transported by competing line-haul carriers, and an order of the Utilities Commission requiring such carrier to furnish switching facilities to all shippers similarly situated, the cost of the switching operations to be absorbed by the line-haul carrier, is a lawful exercise of authority by the Commission. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES

§ 8. Rights of Parties under Unregistered Instruments.

A nonresident gave a worthless check to a dealer in this State in payment of an automobile and took the vehicle to the state of his residence. Thereafter the vehicle was returned to the dealer in this State upon his demand, and the dealer then sold it to a resident purchaser without notice. *Held:* The resident purchaser is afforded protection under G.S. 44-38.1, and the contention that he was not protected by the statute because he was not a grantor, mortgagor, or conditional sales vendee from the nonresident purchaser, is untenable. *Bank v. Rich*, 324.

§ 9. Registration and Lien Instruments Executed in Another State.

A nonresident gave a worthless check to a dealer in this State for an automobile which he took to the state of his residence and had certificate of title issued showing that the vehicle was free from liens. Thereafter he transferred the title to his brother who procured a loan secured by a chattel mortgage. The car was returned to the dealer in this State upon demand, and the dealer thereafter sold it to a resident purchaser for value without notice. Title was thereafter issued to the brother showing the lien, which constituted registration under the laws of such other state. Va. code 46-70; 46-71. *Held:* Upon

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued*

the return of the vehicle to this State it became subject to our laws requiring registration of liens, and the resident purchaser acquired title free from the lien which was not then registered in such other state. *Bank v. Rich*, 324.

§ 11. Agency of Mortgagor to Sell and Estoppel of Mortgagee to Assert Lien.

Findings held insufficient to support conclusion that loan company surrendered *indicia* of title so as to estop it from asserting its lien. *Finance Co. v. Dick*, 669.

CONSPIRACY

§ 2. Actions for Civil Conspiracy.

Where the complaint in an action for malicious prosecution alleges that defendants agreed and conspired together to libel and slander plaintiff, the rules governing the admissibility of evidence in prosecutions for criminal conspiracy are ordinarily applicable, and words and deeds of each conspirator in furtherance of the common purpose may be proved against both, and motion of one defendant to strike allegations relating to the conduct of the other is properly refused. *Greer v. Broadcasting Co.*, 382.

§ 3. Nature and Elements of Criminal Conspiracy.

Since the agreement to do an unlawful act is the offense of conspiracy, where the evidence shows an agreement to commit a particular felony it is immaterial that the offense actually committed pursuant to the conspiracy was a misdemeanor that the victim was a person other than the one first intended. *S. v. Terrell*, 232.

§ 6. Sufficiency of Evidence and Nonsuit.

Since the agreement to do an unlawful act constitutes the offense of conspiracy, where the evidence tends to establish an agreement to commit larceny by trick from a named person, the fact that the evidence may tend to show that title and the constructive possession of the property was in another when the conspiracy was consummated does not warrant nonsuit for variance. *S. v. Terrell*, 232.

CONSTITUTIONAL LAW

§ 2. Construction of Constitutional Provisions.

In the construction of the Constitution all cognate provisions are to be considered and construed together to effectuate the will of the people as expressed in the instrument. *Thomas v. Board of Elections*, 401.

§ 4. Persons Entitled to Raise Constitutional Questions, Waiver and Estoppel.

Only those whose personal, property, or constitutional rights are injuriously affected or threatened by a statute may challenge its constitutionality, and where a retailer does not make it appear that he had suffered any monetary damage by the method used in determining his right to recoup the tax from his customers, he is not in a position to challenge the constitutionality of the statute on the ground that the method of recoupment resulted in unjust discrimination between retailers. *Canteen Service v. Johnson*, 155.

CONSTITUTIONAL LAW—*Continued*

§ 6. Legislative Powers in General.

Public policy is within exclusive province of the General Assembly. *S. v. Hales*, 27; *Power Co. v. Membership Corp.*, 62.

§ 9. Executive Powers.

When a vacancy occurs in the office of Lieutenant-Governor, the powers, duties and emoluments of the office devolve upon the President of the Senate who shall discharge the duties and powers of the office of Lieutenant-Governor for the unexpired portion of the term to which the Lieutenant-Governor was elected. *Thomas v. Board of Elections*, 401.

§ 10. Judicial Powers.

Whether the law as written and interpreted by the courts should be changed is a legislative and not a judicial question. *Harding v. Thomas & Howard Co.*, 427.

§ 11. Police Power in General.

The Legislature in the exercise of the inherent police power of the State may define and punish any act as a crime provided the statute has some sub-

The Legislature in the excise of the inherent police power of the State may define anp punish any act as a crime provided the statute has some substantial relation to the evil sought to be supressed, and the expediency of the enactment is within the province of the Legislation. *S. v. Hales*, 27.

§ 30. Due Process in Trial of Persons Accused of Crime.

The phrase "law of the land" as used in Article I, § 17, of the State Constitution and "due process of law" as used in the Federal Constitution are interchangeable terms. *S. v. Hales*, 27.

§ 33. Right of Defendant Not to Incriminate Self.

The fact that officers required defendant to surrender for examination the clothing worn by him at the time the crime was alleged to have been committed, and the introduction of evidence that the stains found on the garments were human blood stains, does not invade defendant's constitutional right not to incriminate himself. *S. v. Gaskill*, 652.

§ 34. Right Not to Be Twice Put in Jeopardy.

The fundamental principal that no person can be twice put in jeopardy of life or limb for the same offense comes within the purview of Art. I, Sec. 17 of the State Constitution. *S. v. Birckhead*, 494.

CONTRACTS

§ 12. Construction and Operation of Contracts in General.

The interpretation given the agreement by the parties themselves prior to controversy will be given weight in construing the instrument. *Construction Co. v. Crain and Denbo, Inc.*, 110.

The primary purpose in construing a contract is to ascertain the intention of the parties. *Realty Co. v. Batson*, 298.

Ambiguity in a written contract is to be construed against the party who prepared the writing. *Ibid.*

CONTRACTS—*Continued.*

Where there is no ambiguity in language of agreement its legal effect is question of law for the courts. *Stewart v. McDade*, 630.

§ 16. Conditions Precedent, Concurrent and Subsequent.

Conditions precedent are not favored by the law, and whether a condition is precedent and must be performed before the contract comes into existence, or whether it is a condition concurrent or subsequent, depends upon the intention of the parties, which is to be determined in the light of the circumstances of the case, the nature of the contract, and the relation of the parties, together with other evidence competent on the question of intent. *Construction C. v. Crain and Denbo, Inc.*, 110.

§ 19. Novation.

The execution of a new contract in regard to the entire subject matter of the old constitutes a novation. *Fowler v. Ins. Co.*, 555.

§ 21. Performance, Substantial Performance and Breach.

Evidence held to support finding that breach of contract was not waived and that such breach entitled contractor to take over project under terms of the agreement and sue for loss. *Construction Co. v. Crain and Denbo, Inc.*, 110.

Performance of the contract in accordance with the plans and specifications does not preclude the asertion of breach of faulty construction and workmanship, or for failure to perform the the work in accordance with the standards of workmanship required by the municipality when their requirement is also written into the contract. *Realty Co. v. Batson*, 298.

§ 23. Waiver of Breach.

A party to a contract may excuse or waive nonperformance of a condition by the other party to the agreement, but waiver is a question of intent and does not obtain unless intended by the one party and so understood by the other, or one party has so acted as to mislead the other, and the question of intent to excuse nonperformance is ordinarily a question of fact and may rarely be inferred as a matter of law. *Construction Co. v. Crain § Denbo, Inc.*, 110.

Latent defects in construction and workmanship in underground work is not waived by acceptance of the work in the honest but mistaken belief that the work had been satisfactorily performed. *Realty Co. v. Batson*, 298.

§ 26. Competency and Relevancy of Evidence.

Although one contract is incompetent to prove execution of another contract, it may be competent to corroborate circumstances surrounding parties. *Doub v. Hauser*, 331.

§ 29. Measure of Damages for Breach of Contract.

Where, as a result of breach of contract by the subcontractor, the contractor takes over the performance of the work, the contractor is entitled to recover the sums expended by it in the performance of the work and the profit it would have realized except for the breach by the subcontractor. *Construction Co. v. Crain and Denbo, Inc.*, 110.

Where the contractor takes over the project upon breach of the subcontract by the subcontractor, and sues for the resulting damages, the allowance of all on-the-job overhead of the contractor as an item of damage precludes the allowance, in addition, of a percentage of the contractor's general overhead ex-

CONTRACTS—*Continued.*

penses, it being provided in the subcontract that the general overhead expenses of the contract should be paid from its profits, and loss of profits being recovered by the contract as a separate item. *Ibid.*

While interest should not ordinarily be allowed upon a claim for unliquidated damages, the tendency is to allow interest on the amount ascertained as damages for breach of contract, and it is at least within the discretion of the trial court in a trial by the court under an agreement of the parties to allow interest on the amount of damages ascertained by it from the date of demand by the injured party. *Ibid.*

§ 31. Right of Action for Wrongful Interference with Contractual Rights by Third Person.

A wrongful interference by a third person with a contract for personal services gives rise to a cause of action in favor of a party to the contract. *Fowler v. Inc. Co.*, 555.

But if the parties to the contract thereafter enter into a novation, the novation constitutes a substitution and precludes suit for interference with the original contract. *Ibid.*

CONTROVERSY WITHOUT ACTION

§ 2. Statement of Facts, Hearing and Judgment.

Where more than one inference can be drawn from facts stipulated by the parties, the court has the authority to find the ultimate determinative facts from the evidentiary facts stipulated. *Canteen Service v. Johnson*, 155.

CORPORATIONS

§ 4. Rights, Duties and Authority of Stockholders.

A stockholder has the right to know the names of other stockholders for the purpose of conducting an effective campaign in preparation for a stockholder's meeting, which right may be enforced by *mandamus*. *White v. Smith*, 218.

§ 5. Right of Stockholders to Maintain Action.

Distributees of a deceased stockholder may not maintain an action against the officers of the corporation for mismanagement of the corporation resulting in the bankruptcy of the corporation and the worthlessness of the stock constituting a part of the assets of the estate when neither the trustees in bankruptcy nor the corporation is a party and there is no allegation of demand upon and refusal of the corporation or the trustee in bankruptcy to institute the action. *Parrish v. Brantley*, 541.

COSTS

§ 3. Taxing of Cost in Discretion of Court and Apportionment of Costs.

Where judgment is rendered partly in favor of plaintiff and partly in favor of two defendants, taxation of the costs as between plaintiff and these defendants rests within the discretion of the court. *Membership Corp. v. Light Co.*, 56.

COURTS

§ 8. Appeals from Justices of the Peace to Superior Court.

It is not required that the Superior Court hear evidence in order to determine that an appeal from a justice of the peace was docketed in the office of the clerk of the Superior Court within the time allowed. *Massenburg, v. Fogg*, 703.

G.S. 1-285 has no application to appeals from a justice of the peace to the Superior Court, and the giving of bonds for costs is not necessary to perfect such appeal. *Ibid.*

§ 20. What Law Governs — Laws of this and other States.

Where a contract of insurance is negotiated and executed in the state in which insured is a resident, such policy will be construed in accordance with the laws of that state in an action in this State on a claim arising here, since the *lex loci* governs the substantive provisions of the agreement. *Roomy v. Ins. Co.*, 318.

Title to an automobile purchased from a dealer in this State must be determined by the laws of this State. *Bank. v. Rich*, 324.

CRIMINAL LAW

§ 1. Nature and Elements of Crime in General.

The Legislature in the exercise of the inherent police power of the State may define and punish any act as a crime provided the statute has some substantial relation to the evil sought to be supressed, and the expediency of the enactment is within the province of the Legislature. *S. v. Hales*, 27.

A criminal statute must be sufficiently definite in its terms to give notice of the proscribed conduct to a citizen of ordinary understanding and intelligence and enable the court to apply its provisions and a defendant to formulate his defense, but within this limitation only reasonable certainty is required, since a statute must be formulated to apply to variant factual situations to arise in the future. *Ibid.*

Statute prescribing shoplifting and providing that the fact of concealment of goods upon the person while in the store should be *prima facie* evidence that the concealment was wilfull, is valid. *Ibid.*

§ 2. Intent; Wilfullness.

The General Assembly may make the doing of a proscribed act a crime irrespective of intent, and whether intent is an element of a statutory offense must be determined from the language of the statute in view of its manifest purpose and design. *S. v. Hales*, 27.

"Wilfull" means voluntary, intentional, purposeful, and deliberate, without authority and in violation of law. *Ibid.*

§ 5. Mental Capacity.

Defendant's mental incapacity to know the nature and quality of his acts or incapacity to distinguish between right and wrong is a defense to a charge of crime. *S. v. Johnson*, 449.

§ 9. Aiders and Abettors.

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally without regard to any previous confederation or design. *S. v. Taft*, 441.

CRIMINAL LAW—*Continued.*

§ 16. Jurisdiction — Degree of Crime.

A mayor's court which has been given the jurisdiction of a justice of the peace has authority to bind a defendant charged with an offense beyond the mayor's jurisdiction over to the recorder's court. *S. v. Broadway*, 608.

§ 17. Jurisdiction — State and Federal Courts.

Where the United States Government has not accepted jurisdiction over lands acquired by it for a housing project for military and civilian personnel at a military base by filing a notice of such acceptance with the Governor of the State, 40 U.S.C.A. § 255, the Federal Courts have no jurisdiction to try a defendant for an offense committed within such area, there being no other manner prescribed by the laws of the State by which the Federal Government might accept jurisdiction. *S. v. Burell*, 288.

Where the Federal Government has not accepted jurisdiction over crimes committed on lands acquired by it for a housing project for its military and civilian personnel connected with a military base, G.S. 104-7 will not be interpreted as ousting the jurisdiction of the State courts to try offenses committed within such area, since such construction would lead to the absurd result of creating a *hiatus* and an unwarranted diminution of the State's sovereignty in contravention of public policy. *Ibid.*

§ 18. Jurisdiction on Appeals to Superior Court.

Where a mayor's court is given the jurisdiction of a justice of the peace, it may bind a defendant charged with an offense beyond its jurisdiction over to the county court, and the county court which is given jurisdiction of warrants returned to the court by committing magistrates, acquires jurisdiction, and the Superior Court acquires jurisdiction upon appeal from the county court. *S. v. Broadway*, 608.

On appeal from an inferior court the jurisdiction of the Superior Court is limited to those criminal charges on which defendant was tried and convicted in the inferior court, and defendant may not be convicted in the Superior Court on a charge not contained in the warrant. *S. v. Simmons*, 688.

§ 19. Transfer of Cause to Superior upon Demand in Superior Court for a Jury Trial.

Where, upon defendant's demand for a jury trial in the recorder's court, the cause is transferred to the Superior Court under provisions of statute, and the defendant is tried in the Superior Court upon a duly returned indictment, the fact that upon the trial in the Superior Court the judge inadvertently refers to the trial as upon a "warrant" instead of indictment does not prejudice defendant, and does not support a contention that defendant was tried in the Superior Court upon the original warrant. *S. v. Stroud*, 458.

Where prosecutions are transferred from the recorder's court to the Superior Court upon defendant's demand for a jury trial, the jurisdiction of the recorder's court is ousted and the Superior Court acquires original jurisdiction of the charges and properly tries defendant upon bills of indictment found by the grand jury and not upon the original warrants. *S. v. Peede*, 460.

§ 26. Former Jeopardy.

Jeopardy attaches when a defendant in a criminal prosecution is placed on trial on a valid indictment or information before a court of competent jurisdiction after arraignment and after plea, and after a competent jury has been empaneled and sworn. *S. v. Birckhead*, 494.

CRIMINAL LAW—*Continued.*

Where the same act constitutes a violation of two statutes and, in addition to any common elements, an additional fact must be proven in each which is not required in the other, the offenses are not the same in law and in fact, and conviction or acquittal in the one will not support a plea of former jeopardy in the other, but when only one of the offenses requires the proof of an additional fact, so that evidence necessary to sustain a conviction of such offense would necessarily be sufficient to sustain conviction in the other the first is a higher degree of the second, and the principle of former jeopardy applies. *Ibid.*

In this prosecution for assault with intent to commit rape the prosecuting witness testified to the fact of penetration and the trial judge thereupon ordered a mistrial solely for the purpose of permitting the solicitor to charge defendant with rape. *Held:* In the prosecution for rape growing out of the same act, defendant's plea of former jeopardy should have been allowed. *Ibid.*

§ 32. Burden of Proof and Presumptions.

The presumption of innocence does not preclude the General Assembly from providing by statute that the proof of certain facts should be *prima facie* evidence of an ultimate fact provided there is a rational connection between the facts proven and the ultimate fact presumed. *S. v. Hales*, 27.

The burden of proving an alibi does not rest upon defendant, but evidence of an alibi is to be considered by the jury only in determining whether from all of the evidence the jury is satisfied of defendant's guilt beyond a reasonable doubt. *S. v. Allison*, 340.

Defendant's plea of not guilty puts the burden on the State to prove beyond a reasonable doubt every essential element of the crime charged. *S. v. Cooper*, 372.

§ 42. Articles and Clothing Found Near Scene or in Defendant's Possession.

Evidence that stains on clothing worn by defendant at time crime was alleged to have been committed were human blood stains, held competent. *S. v. Gaskill*, 652.

§ 43. Maps and Photographs

Where photographs are identified as accurate representations of the scene of the crime by the witness, the photographs are competent in evidence for the purpose of enabling the witness to explain his testimony, and a general objection to the admission of the photographs in evidence cannot be sustained. *S. v. Carter*, 99.

§ 51. Question of Experts.

It is not required that hematologist be also a chemist in order to testify as to percentage of alcohol in blood sample taken from defendant. *S. v. Hart*, 645.

§ 52. Examination of Experts.

An expert may testify as to basis for his conculsion in order to give jury information upon which to judge weight to be given his testimony. *S. v. Hart*, 645.

§ 55. Blood Tests.

It is competent for a witness qualified as an expert by the court and who has testified as to the percentage of alcohol in a sample of blood which the

witness had taken from defendant immediately after the time in question, to testify as to the effect of various percentages of alcohol in the blood stream of human beings, that some humans were appreciably under the influence of alcohol at a certain percentage, while others would not be under the influence until a higher percentage was reached, and that all persons, regardless of size age, or anything else, would be appreciably under the influence of alcohol at a percentage less than that found in defendant's blood, etc. *S. v. Hart*, 645.

Testimony by a witness, qualified as an expert, that from an analysis of the alcohol content of a sample of blood which witness took from defendant shortly after the time in question, defendant was under the influence of some intoxicating beverage, *held* without error, the witness having theretofore testified to the same effect without objection. *S. v. Dixon*, 698.

§ 62. Evidence as to Sanity of Defendant.

An expert may testify from his personal observation and examination of defendant over a considerable period of time as to his opinion that, although defendant in general knew the difference between right and wrong, defendant for some specific event or thing could not distinguish right from wrong and could not do so at the time he was admitted to the hospital for observation, since such testimony would reasonably permit a jury to make an inference of insanity at the time of the commission of the offense charged. *S. v. Johnson*, 449.

§ 65. Evidence of Identity by Names or Sight.

The identity of names, in the absence of any proof to the contrary, is some evidence of the identity of the person, especially when the identity of the person by name is corroborated by other facts and circumstances in evidence. *S. v. Mitchner*, 620.

§ 71. Confession.

If defendant wishes to challenge testimony of certain admissions made by him as being incompetent on the ground that they were involuntary, the defendant should raise the question by seeking to examine the witness in the absence of the jury upon a *voir dire*. *S. v. Gaskill*, 652.

Where there is nothing in the record to show that certain admissions made by defendant were involuntary and defendant had requested no *voir dire* in regard thereto, the compentency of such admissions are not affected by evidence tending to show that an unconnected confession of guilt made by defendant some days thereafter, but not offered in evidence by the State, was involuntary. *Ibid.*

§ 87. Consolidation of Indictments for Trial.

Where the record justifies the conclusion that after the jury had been impaneled and prosecution begun upon one bill of indictment other bills of indictment were consolidated for trial therewith, a new trial will be awarded even though the indictments might have been properly consolidated initially, since the defendant must be afforded opportunity to plead to the counts consolidated and to pass upon the impartiality of the jury upon such counts. *S. v. Dunston*, 203.

Where there is but a single defendant charged in separate indictments with crimes of the same class, it is not necessary to the discretionary power of the court to consolidate the indictments for trial that all the evidence of guilt of one of the offenses be competent as to each of the others, and upon consoli-

dation the separate bills will be treated as separate counts in one bill. *S. v. White*, 244.

In exercising its discretion to consolidate separate indictments against the same defendant for trial the court should consider whether the offenses are so separate in time and place and so distinct in circumstance as to render a consolidation unjust and prejudicial, and the court should not exercise its discretionary power solely for the purpose of saving time. *Ibid.*

Defendant was charged in four separate indictments with receiving stolen goods of a value of more than $100.00, knowing them to have been stolen, there being little more than a year between the first and fourth occasions but only 51 days between the third and fourth occasions, and the goods having been received from the same person on the first three occasions. All four offenses were uncovered by a single investigation. *Held:* There was no abuse of discretion in consolidating the indictments for trial. *Ibid.*

§ 90. Admission of Evidence Competent for Restricted Purpose.

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. *S. v. Casper*, 99.

§ 97. Argument and Conduct of Counsel.

Even though any comment by the solicitor upon the failure of defendant to testify is improper, such impropriety is cured when the court categorically instructs the jury that defendant's failure to testify should not be construed in anywise to his prejudice and that the jury should disregard any statements relating to defendant's failure to testify. *S. v. Lewis*, 430.

§ 99. Consideration of Evidence on Motion to Nonsuit.

On a motion to nonsuit, the evidence must be taken in the light most favorable to the State and it is entitled to the benefit of every reasonable intendment thereon and every reasonable inference therefrom. *S. v. Thompson*, 593.

§ 100. Necessity for Motion to Nonsuit and Renewal.

Where defendant is not represented by counsel in a prosecution for larceny, his statement at the conclusion of all the evidence that "I don't see how I can be guilty" in view of the fact that the prosecuting witness helped defendant load the cattle on defendant's truck, should be treated as a motion for judgment as in case of nonsuit. *S. v. Whitfield*, 704.

§ 101. Sufficiency of Evidence to Overrule Nonsuit.

The unsupported testimony of an accomplice is sufficient to support conviction in this State if it satisfies the jury of guilt beyond a reasonable doubt. *S. v. Terrell*, 232.

The fact that a six-year-old child, the victim of the offense charged, is uncertain in his testimony as to the time or particular day the offense charged was committed, goes to the weight of the testimony rather than its admissibiliy, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed, there being sufficient evidence that defendant committed each essential act of the offense. *S. v. King*, 236.

If there is substantive evidence of each essential element of the offense charged, defendant's motion to nonsuit is correctly denied regardless of whether the State's evidence is direct or circumstantial, or both, and whether

circumstantial evidence excludes every reasonable hypothesis of innocence is a question for the jury. *S. v. Thompson*, 593.

Evidence identifying defendant as perpetrator of criminal abortion resulting in death held sufficient to overrule nonsuit. *S. v. Mitchner*, 620.

§ 106. Instructions on Burden of Proof and Presumptions.

An instruction to the effect that if the jury should find beyond a reasonable doubt from the evidence that one of defendants was guilty of acts constituting the crime, that the jury should convict him and also the other defendants, is prejudicial as to such other defendants. *S. v. Harvell*, 104.

An instruction placing the burden upon defendant to prove an alibi must be held for prejudicial error notwithstanding that in other portions of the charge the correct rule is given that defendant does not have the burden of proving an alibi but that evidence of an alibi should be considered by the jury in determining whether the jury is convinced of the fact of guilt beyond a reasonable doubt from all of the evidence in the case. It is also error to charge that evidence of an alibi be "consistent" with all the other evidence instead of "considered" with all the other evidence. *S. v. Allison*, 240.

Correct form of instruction on alibi, *S. v. Spencer*, 487.

§ 107. Statement of Evidence and Application of Law Thereto.

Where defendants offer evidence of an alibi, the recapitulation of defendants' evidence that they were at a place other than the place at which the offense was committed is not sufficient, but it is incumbent upon the court to instruct the jury as to the legal effect of their evidence as to an alibi, it being a substantive feature of the case. *S. v. Spencer*, 487.

It is the duty of the court to charge the jury as to the law upon all substantial features of the case arising upon the evidence without a special request. *Ibid.*

Instruction on testimony of expert witness as to effect of various percentages of alcohol in blood stream, held not erroneous. *S. v. Hart*, 645.

§ 108. Expression of Opinion by Court on Evidence in Charge.

While the statement of contentions by the court will not be held for error as containing an expression of opinion on the evidence merely because the court necessarily takes more time in stating the contentions of one party than the other, when the court gives the State's contentions in detail and then points out the evidence which the State contends supported its contentions, but gives the defendant's contentions only in brief, general terms and completely ignores the defendant's evidence upon which defendant's contentions were based, defendant's exception to the charge must be sustained. *S. v. King*, 236.

§ 112. Charge on Contentions of Parties.

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to stake the contentions of one party it must also give equal pertinent contentions of the opposing party. *S. v. King*, 236.

§ 116. Additional Instructions after Initial Retirement of Jury.

In a prosecution for reckless driving and speeding a verdict of "guilty of careless driving" is not responsive and is not a permissible verdict, and therefore the court correctly refuses to accept such verdict and properly orders the jury to retire again and return a proper verdict. *S. v. Lewis*, 430.

CRIMINAL LAW—*Continued*

§ 120. Acceptance or Rejection of Verdict.

Where the verdict is unresponsive and incomplete, the court may refuse to accept it and have the jury redeliberate. *S. v. Lewis*, 430.

§ 121. Arrest of Judgment.

Where it appears on the face of the record that an indictment or a court therein is fatally defective, the Supreme Court will arrest the judgment thereon *ex mero motu*. *S. v. Dunston*, 203.

The fact that a defective indictment has been amended and resubmitted to the grand jury and then found a true bill will not support a motion in arrest of judgment. *S. v. King*, 236.

§ 122. Discretionary Power of Trial Court to Set Aside Verdict or Order Mistrial.

In cases less than capital the court in the exercise of its sound discretion may order a mistrial before verdict, without the consent of defendant, for physical necessity or for necessity of doing justice, and the court need not support its order by findings of fact. *S. v. Birckhead*, 494.

Where it is apparent from the record that the court ordered a mistrial on an indictment charging assault with intent to commit rape solely in order that defendant might be indicted and prosecuted for rape, and that there was no interference on the part of defendant or from any other source, there is no necessity for ordering a mistrial in the "furtherance of justice" within the purview of the discretionary power of the court to order a mistrial, and the court's act in so doing constitutes an abuse of discretion. *Ibid.*

§ 126. Motions to Set Aside Verdict as Being Contrary to Evidence.

The motion to set aside the verdict for lack of evidence is properly overruled when the State's evidence is of sufficient probative force to sustain the verdict. *S. v. Mitchner*, 620.

§ 139. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases.

Where the jury has convicted defendant of a capital crime with recommendation of life imprisonment, the Supreme Court, because of the gravity of the offense, may consider an assignment of error notwithstanding the failure of appellant to meet the requirements necessary to present the question under the rules governing appeals. *S. v. Gaskill*, 652.

§ 151. Conclusiveness of Record.

The Supreme Court is bound by the record as filed. *S. v. Allison*, 240; *S. v. Kea*, 492.

§ 154. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An assignment of error which fails to present the error relied on without the necessity of going beyond the assignment itself is ineffective. *S. v. Burton*, 464.

Failure of appellant to group the exceptions upon which he relies and incorporate them in the record immediately before or after the signature to the case on appeal warrants dismissal except when appellant challenges the jurisdiction of the lower court or asserts other vitiating error appearing on the face of the record. *S. v. Broadway*, 608.

CRIMINAL LAW—*Continued*

§ 155. Objections and Exceptions to Evidence and Motions to Strike.

Where all of the evidence of a particular character is stricken except evidence first elicited by defendant on cross-examination, with respect to which there is no objection or exception, defendant cannot complain. *S. v. Burton*, 464.

Where the record fails to show exceptions to the questions or answers, an assignment of error to the admission of evidence does not properly present the question on appeal. *S. v. Gaskill*, 652.

§ 156. Exceptions and Assignments of Error to Charge.

An assignment of error to the charge should set forth the part of the charge challenged. *S. v. Dixon*, 698.

§ 159. The Brief.

Exceptions not brought forward and discussed in the brief are deemed abandoned. *S. v. Thompson*, 593; *S. v. Hart*, 645.

§ 161. Harmless and Prejudicial Error in Instructions.

An exception to the charge will not be sustained when the charge considered in its entirety is free from prejudicial error. *S. v. Taft*, 441.

Conflicting instructions on a material aspect of the case must be held prejudicial. *S. v. Kea*, 492.

§ 162. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Testimony of statements made by defendant after his arrest tending to show his presence at the scene and hence his opportunity to have committed the crime will not be held for prejudicial error warranting a new trial, even if partially incompetent, when the facts therein recited are substantially the same as those testified to by other witnesses without objection. *S. v. Gaskill*, 652.

§ 164. Whether Error Relating to One Count Alone is Prejudicial.

Where the jury convicts the defendant of murder in the socond degree, asserted error in submitting the question of defendant's guilt of murder in the first degree is rendered harmless. *S. v. Casper*, 99.

Where the indictment contains two counts and the verdict clearly convicts defendant upon one of the counts and but a single judgment warranted by such count is imposed, any doubt as to whether the verdict constituted a conviction on the other count is immaterial. *S. v. Lewis*, 430.

§ 164½. Invited Error.

Defendant may not bring out testimony on cross-examination of the State's witnesses and then assert that the admission of the testimony was error, since a defendant cannot invalidate a trial by voluntarily introducing evidence which he might have excluded if the evidence had been offered by the State. *S. v. Gaskill*, 652.

§ 167. Review of Findings and Discretionary Orders.

The discretionary power of the trial judge to order a mistrial is not unlimited, and if the court acts arbitrarily and beyond the bounds of its discretion, the act amounts to a gross abuse of discretion. *S. v. Birckhead*, 494.

CRIMINAL LAW—*Continued*

§ 173. Post Conviction Hearing.

Where a defendant in a post-conviction hearing attacks the validity of his conviction on two separate grounds, and, after remand of a favorable determination for defendant upon one of the grounds, advises the court through his counsel that he had abandoned the other ground, which had been determined adversely to him on the prior hearing, the judgment on the second hearing, affirmed on appeal, is conclusive as to both grounds, since a party will not be allowed to try a cause or proceeding piecemeal. *S. v. Burell*, 288.

DAMAGES

§ 2. Compensatory Damages in General.

While interest should not ordinarily be allowed upon a claim for unliquidated damages, the tendency is to allow interest on the amount ascertained as damages for breach of contract, and it is at least within the discretion of the trial court in a trial by the court under an agreement of the parties to allow interest on the amount of damages ascertained by it from the date of demand by the injured party. *Construction Co. v. Crain and Denbo, Inc.*, 110.

§ 3. Damages for Personal Injury.

Allegations that by reason of her injuries plaintiff had been forced to undergo painful and prolonged medical treatments, to wear splints and a cast by reason of broken ribs and back, and that she had been advised her injuries were permanent, *is held* sufficient basis for the admission of evidence and a charge by the court as to nursing, medical, and hospital bills. *Kiser v. Bowman*, 565.

§ 7. Direct and Remote, Sole and Contributing Cause.

The evidence tended to show that plaintiff was driving a truck transporting liquid petroleum gas, that defendants' vehicle sideswiped plaintiff's truck, immediately resulting in a fire under the meter box on the left side, that plaintiff stopped his truck and ran to the rear to close the valve under the truck in order to prevent an explosion, and that while he was closing the valve the entire truck fas engulfed in flaming gas and plaintiff was severely burned. The evidence further tended to show that plaintiff might have run from the truck and escaped injury. *Held:* Plaintiff's act in closing the valve in order to prevent an explosion which would have destroyed the truck and also endangered plaintiff's life and the lives of possible bystanders was a normal response to the stimulus of an extremely dangerous situation created by defendants' negligence, and therefore plaintiff's injuries were proximately caused by defendants' negligence, and nonsuit was correctly denied. *Rogers v. Thompson*, 265.

§ 8. Mitigation of Damages.

An injured party is under duty to minimize the resulting damages if he can do so with reasonable exertion or trifling expense, but the burden of proving failure of the injured party to take reasonable steps to minimize the loss is on the party asserting such failure, and nonsuit on the ground that the entire loss could and should have been avoided may not be allowed on movant's evidence unless such evidence establishes such failure so clearly that no other reasonable inference may be drawn therefrom. *Construction Co. v. Crain and Denbo, Inc.*, 110.

DAMAGES—*Continued*

Evidence held not to show arbitrary refusal of injured party to execute substitute contract which would have avoided loss. *Ibid.*

DEATH

§ 5. Competency of Evidence in Actions for Wrongful Death.

In action to recover for wrongful death, evidence that defendant had theretofore been convicted in a criminal action for the slaying of plaintiff's intestate is incompetent, and therefore allegations in the complaint as to such prior plea or conviction are irrelevant and should be stricken on motion aptly made. *Trust Co. v. Pollard*, 77.

DECLATORY JUDGMENT ACT

§ 1. Nature and Grounds of Remedy.

An action to determine whether defendant executed a release of testamentary benefit from a prospective testator, and effect of such release, presents a real controversy when the prospective testator has died and a will making testamentary disposition to defendant has been probated, and therefore such action may be maintained under the Declaratory Judgment Act. *Stewart v. McDade*, 630.

DEEDS

§ 19. Restriction Covenants.

Where the owner of a development sells one of the eight lots therein subject to residential restrictions and thereafter conveys six of the lots subject to the residential restrictions with the exception that the purchaser of the six lots might construct a motel thereon, *held*, a motel is a commercial purpose which violates the residential restrictions, and the owner, by abandoning the general scheme of development for residential purposes, waives the right as against the purchaser of the one lot to enforce the restrictions. *Logan v. Sprinkle*, 41.

Where the owner of a subdivision abandons the scheme of residential development as to a particular part therof and thereafter the character of that particular part as fell as the character of the adjacent land outside the development, is changed from residential to commercial purposes, other grantees of lots in the subdivision may not enforce the restrictive covenants against a grantee of a lot in that particular part, and the court properly considers the change in condition in the immediate area within as well as without the development in determining the rights of the grantees to enforce the covenants *inter se*. *Ibid.*

DESCENT AND DISTRIBUTION

§ 1. Nature of Titles by Descent in General.

A right of action to recover for the wrongful cutting and removal of timber from land does not abate upon the death of the owner of the land, G.S. 1-74, G.S. 28-172, and such right of action as to timber cut prior to the death of the owner vests in his personal representative and may not be maintained by the heirs, subject to exception when there is no administration, but upon the death

DESCENT AND DISTRIBUTION—*Continued*

of the owner, title to his lands vests in his heirs or devisees and therefore the right to recover damage for timber cut after the death of the owner must be brought by them and cannot be maintained by the personal representative. *Paschal v. Autry*, 160.

§ 6. Wrongful Act Causing Death as Precluding Inheritance.

Where wife feloneously slays husband, equity will decree that she hold rents and profits from lands formerly held by entirieties as trustee for husband's distributees. *In re Estate of Perry*, 65.

DIVORCE AND ALIMONY

§ 1. Jurisdiction and Pleadings in General.

In an action for alimony without divorce, the wife, upon proper allegation and evidence, is entitled to enjoin the husband from instituting or prosecuting an action for divorce in another state until the issues in her action can be finally determined, since a foreign decree of divorce would prejudice her rights not judicially determined before the entry of such decree, the order directed not against a foreign court but against the husband personally who had been personally served with process. *Thurston v. Thurston*, 663.

§ 8. Abandonment.

Where the husband wilfully and without cause separates himself from his wife and child, his action constitutes an abandonment within the purview of G.S. 50-7.1 notwithstanding that after the abandonment he continues to make voluntary monthly contributions for the support. *Thurston v. Thurston*, 663.

§ 16. Alimony without Divorce.

In the wife's action for alimony without divorce, the husband's allegations of adultery on the part of the wife, set up as a defense, are deemed denied without the necessity of a relply. *Creech v. Creech*, 356.

In an action for alimony without divorce, allegations that defendant packed his bags, left home, stating at the time that he was moving to Florida to get a "quickie" divorce, *held* proper in implementing the allegations of defendant's wilful abandonment of plaintiff without cause. *Thurston v. Thurston*, 663.

Allegations to the effect that defendant husband wilfully separated himself from his wife and child without just cause state a cause of action for alimony without divorce on the ground of abandonment notwithstanding that it appears from the complaint that the husband continued to make monthly payments for their support, since the wife is entitled to the security of a court order to guarantee her future support as well as that of the child. *Ibid.*

§ 18. Alimony and Subsistance Pendente Lite.

An allowance of subsistence and counsel fees to the wife *pendente lite* and an allowance to her of monthly support for the child of the marriage in her custody, will not be disturbed on appeal when supported by the court's findings of fact, notwithstanding that definite details as to the earnings of the husband were not available, the amounts being reasonable upon the facts found and the order being subject to modification upon motion. *Harrell v. Harrell*, 96.

Where the husband alleges adultery on the part of his wife as a defense in her action for alimony without divorce, and offers evidence in support thereof

DIVORCE AND ALIMONY—*Continued*

upon the hearing of the wife's motion for alimony *pendente lite*, it is error for the court to order alimony *pendente lite* without finding the facts with respect to the alleged adultery. *Creech v. Creech*, 356.

In an action for divorce, or for alimony without divorce, it is not required that a motion therein for alimony *pendente lite* be heard in the county during the term, but the judge holding the courts of the district may, after notice, hear the motion in chambers in any county of the district. *Joyner v. Joyner*, 588.

§ 21. Enforcement of Decrees for Custody and Support.

An appeal from order awarding custody of a child of the marriage to the wife removes the cause from the Superior Court to the Supreme Court, and the Superior Court thereafter is *functus officio* until the remand of the cause, and correctly holds that it is without jurisdiction, pending the appeal, to punish the husband for contempt, and its findings in regard to the wilful violation of the order are a nullity. However, the question of the wilful violation of the custody order may be investigated by the Superior Court after the cause has been remanded to that Court. *Joyner v. Joyner*, 588.

In the absence of *supersedeas*, order directing the husband to provide support of a child of the marriage may be enforced pending appeal by execution against defendant's property. *Ibid.*

The court's findings to the effect that defendant had wilfully refused to pay alimony as directed in a confessed judgment *is held* supported by the evidence, and the findings support the order of the court that defendant be confined in the county jail for a period of 30 days, with provision that defendant could purge himself of contempt by payment of the alimony then due into the office of the clerk of the Superior Court. *Pulley v. Pulley*, 600.

§ 22. Jurisdiction to Determine Right to Custody of Children.

A husband who attends and participates in the hearing to determine the right to the custody of a child of the marriage, held outside the county, but in the district, by the judge regularly holding the courts of the district, is bound by the judgment. *Joyner v. Joyner*, 588.

Rendition of absolute divorce does not oust the jurisdiction of court in which prior action was pending to adjudicate custody of children. *Blankenship v. Blankenship*, 638.

ELECTIONS

§ 1. Calling of Election and Time of Holding Election.

The succession of Governor and Lieutenant-Governor is fixed by the Constitution, and therefore when a Lieutenant-Governor dies during his term the Constitution excludes the right to have the vacancy in the office filled prior to the expiration of the term, and G.S. 163-7 does not apply in regard to the offices of Governor and Lieutenant-Governor. *Thomas v. Board of Elections*, 401.

ELECTRICITY

§ 2. Service to Customers.

Where, in an action by an electric membership corporation against a power company, the respective parties pray for injunctive relief but seek primarily

ELECTRICITY—*Continued*

a determination of their respective legal rights in regard to service to customers in a specified area, and there is no threat by either to interfere with the rights of the other as adjudicated by the court, the judgment of the court should adjudicate the right of each party, but the judgment should not contain sweeping injunctive provisions to protect rights which are not threatened, and on appeal from such judgment, the judgment must be vacated and the cause remanded. *Membership Corp. v. Light Co.*, 56.

Judgment is properly entered adjudicating that an electric membership corporation can continue to furnish service to those who were members and receiving service at the time the place where the service was rendered was annexed by a municipality but is not intitled to furnish service within such territory to those who were not members at the time of the annexation. The judgment should predicate the respective rights of the membership corporation and the power company to furnish service upon the basis of membership and place of service rather than the residence of the customers. *Power Co. v. Membership Corp.*, 62.

EMBEZZLEMENT

§ 1. Nature and Elements of the Offense.

The fact that the agent of the owner of property participated in a conspiracy to commit larceny of the property by trick does not change the purpose of the conspiracy from larceny to embezzlement or false pretense. *S. v. Terrell*, 232.

ESTOPPEL

§ 5. Parties Estopped.

The estoppel of a party whose conduct induces another to act to his detriment does not bind a stranger without notice of the facts constituting the facts constituting the basis for the estoppel. *Bank v. Rich*, 324.

EVIDENCE

§ 1. Judicial Notice of Public Acts and Facts.

The courts will take judicial notice of terms of Superior Court and entries of record. *Massenburg v. Fogg*, 703.

§ 3. Judicial Notice of Matters in Common Knowledge.

It is a matter of common knowledge that bottled carbonated drinks are frequently put in paper cardboard containers for the convenience of purchasers in carrying them from the retailer's store. *Phillips v. Bottling Co.*, 728.

§ 9. Burden of Proof on Defenses and Counterclaims.

The burden of proving an affirmative defense rests upon defendant. *Realty Co. v. Batson*, 298.

§ 15. Relevancy and Competency of Evidence in General.

In order to be relevant, evidence must have some tendency to prove or disprove a fact in issue, and evidence which is merely conjectural or remote, or has no tendency except to invite prejudice, ought not to be admitted and thus distract the attention of the jury from the material matters involved. *Corum v. Comer*, 252.

EVIDENCE—*Continued.*

In order to be relevant, it is not required that evidence bear directly on the issue, and evidence is relevant if it relates to a circumstance surrounding the parties which is necessary to understand their conduct or motives or weigh their contentions. *Doub v. Hauser*, 331.

§ 16. Experimental Evidence; Similar Facts and Transactions.

Evidence that a defendant drove at an unlawful speed or engaged in a speed competition at a different time and place than the occasion in suit, in order to be admissible must be accompanied by evidence from which the jury may reasonably infer that the speed or race continued to the scene of the accident, nor may the admission of such evidence be upheld as tending to show identity, proximity, or knowledge when there is no controversy as to the identity of the drivers or the place of the accident. *Corum v. Comer*, 252.

In an automobile accident suit it is prejudicial error to permit plaintiff to cross-examine a defendant as to whether he had been involved in prior and unrelated collisions. *Mason v. Gillikin*, 527.

§ 19. Evidence at Former Trial or Proceeding.

Ordinarily, evidence of an conviction or an acquittal in a criminal prosecution is not admissible in evidence in a purely civil action to establish the truth of the facts on which the verdict of guilty or an acquittal was entered, subject to an exception in those instances in which a convicted criminal seeks to take advantage of rights arising from the crime for which he had been convicted. *Trust Co. v. Pollard*, 77.

In an action by a client against his attorney for negligence in permitting a default judgment to be taken against the client, the attorney is not entitled to introduce in evidence the record denying the motion to set aside the default judgment because of want of meritorious defense, since, in the absence of estoppel by judgment, a finding by the court in one action, subject to certain exceptions, can be used as evidence of such fact in a subsequent action. *Masters v. Dunstan*, 520.

A statute which is relevant to the action may be read in evidence from the printed statute book, G.S. 8-1. *Equipment Co. v. Hertz Corp.*, 277.

§ 27. Parol Evidence Affecting Writings.

Liability policy specifies persons covered thereby, and parol evidence of statement by insured that policy covered purchaser of car until purchaser should obtain insurance, is incompetent. *Godwin v. Casualty Co.*, 730.

§ 35. Opinion Evidence in General.

Plaintiff sought to hold defendants liable as joint tort-feasors in wilfully enagaging in a speed competition resulting in a collision between one of the racing cars and a third car in which plaintiff was a passenger. Testimony on cross-examination of the driver of the car in which plaintiff was riding to the effect that defendants were "racing" is incompetent as opinion evidence invading the province of the jury, and is prejudicial to both defendants. *Mason v. Gillikin*, 527.

§ 51. Examination of Experts.

It is not required that an expert testify in response to hypothetical questions when the witness has himself examined the person in question and is giving his expert opinion based on facts which he himself had observed. *Bullin v. Moore*, 82.

EVIDENCE—*Continued.*

§ 55. Character Evidence.

While evidence of good character of a party is not ordinarily competent as substantive evidence in a civil action, where a party has testified as a witness, evidence of his good character is competent for the purpose of sustaining his credibility as a witness, and exclusion of character evidence offered for this purpose is prejudicial. *Lorbacher v. Talley*, 258.

EXECUTORS AND ADMINISTRATORS

§ 6. Title to and Control of Assets.

A right of action to recover for timber cut prior to the death of the owner of the land is an asset of the estate, and such action must be brought by the personal representative; as to timber cut subsequent to the death of the owner the right of action rests exclusively in the owner's heirs or devisees. *Paschal v. Autry*, 166.

Since title to the lands of a decedent vests immediately upon his death in his heirs, the personal representative of the decedent may not maintain an action to adjudicate and locate the boundaries of land which was owned by decedent in the absence of a provision in the will giving him such right. *Ibid.*

§ 24a. Right of Action for Personal Services Rendered Decedent.

Where a party declares upon a special contract to devise and bequeath property in consideration of personal services, and his evidence fails to establish a valid special contract but does tend to show that he rendered personal services under circumstances from which the jury might infer that the services were rendered and received upon expectation that compensation would be paid therefor, such party is entitled to have the issue of an implied con- any definite arrangement as to time for payment. *Ibid.*

§24b. Limitation of Action for Personal Services Rendered Decedent.

A cause of action to recover compensation for services rendered under an implied contract arises as the services are rendered when the agreement is for indefinite and continuous service without any definite arrangement as to time for compensation; where the agreement is that compensation will be provided in the will of the recipient, the cause of action accrues when the recipient dies without having made the agreed testamentary provision; when such agreement is abandoned, the cause of action accrues at the time of the abandonment of the contract. *Doub v. Hauser*, 331.

Where plaintiffs' evidence is to the effect that they rendered personal services over a number of years in reliance upon the recipient's agreement to compensate them by devising property to them, the action is not barred if brought within three years of the abandonment of the contract, and if defendant wishes to challenge the sufficiency of the evidence as to the agreement to make testamentary provision for compensation, he must in apt time request the submission of an issue as to whether the services were rendered without and definite arrangement as to time for payment. *Ibid.*

§ 24d. Claims for Personal Services — Amount of Recovery and Evidence of Value.

Where services are rendered with the parol understanding that compensation was to be made in the will of the recipient by devise of real estate, or real estate and personal property, the measure of damages, upon failure of compen-

sation is the value of the services rendered, less benefits received, and evidence of the value of recipient's estate is not competent on the issue of damages. *Doub v. Hauser*, 331.

In this action to recover the value of personal services rendered defendant in reliance of defendant's promise to devise plaintiffs property, which contract was abandoned when defendant ordered plaintiffs off his property, evidence that defendant received a large sum in compensation for a part of his lands taken by eminent domain a short time before he ordered plaintiffs from his property, is competent as tending to show that defendant ordered plaintiffs off his property not because of failure on their part to keep the agreement, but because he no longer needed them, there being evidence that defendant was without funds at the time the agreement was made. *Ibid.*

§ 31. Distribution of Estates under Family Settlements.

Where a will sets up an active trust for the benefit of the window, the minor child of testator, and contingent beneficiaries, and the widow files a dissent, which is opposed by the trustee on the ground that the widow received more than half the estate and was not, therefore, entitled to dissent, a settlement under which the widow withdraws her dissent upon the payment of a specified sum does not come under the family settlement doctrine, there being no specific finding supporting the conclusion that the settlement was to the benefit of the child, and the contingent beneficiaries not being represented. *Trust Co. v. Buchan*, 142.

A family settlement of an active testamentary trust will not be approved unless some exigency or emergency growing out of the trust itself or directly affecting the *corpus* thereof arises which makes action by the court indispensable to the preservation of the trust, and such settlement will not be approved unless the rights of infants and contingent beneficiaries are represented and protected. *Ibid.*

Findings held insufficient to support conclusion that settlement between widow and trustee would be advantageous to infant beneficiary and contingent beneficiaries. *Ibid.*

Contingent beneficiaries of a testamentary trust be made parties and their rights protected in an action seeking the approval of the court of a family settlement of the estate, and the Supreme Court, in the exercise of its supervisory powers will direct *ex mero motu* that a guardian *ad litem* be appointed to represent their contingent interests. *Ibid.*

§ 35. Personal Liabilities of Personal Representative.

Distributees may not maintain an action against the administratrix and the surety on her bond to recover for alleged mismanagement of the assets of the estate when it is alleged that the personal assets of the estate were insufficient to pay debts and costs of administration in the absence of allegation that by proper management the personal estate would have been sufficient to provide funds for distribution, since the distributees are entitled to share in the estate only in assets remaining after payment of all debts. *Parrish v. Brantley*, 541.

FALSE IMPRISONMENT

§ 2. Actions for False Imprisonment.

If the complaint does not allege that the warrant was invalid, it cannot state a cause of action for false imprisonment. *Greer v. Broadcasting Co.*, 382.

FOOD

§ 1, 2. Liability of Retailer and Manufacturer to Consumer.

Res ipsa loquitur does not apply to the falling of a bottled drink from a cardboard container while being carried by the purchaser from the retailer's store to the purchaser's home. *Phillips v. Bottling Co.*, 728.

The fact that while the purchaser was carrying a cardboard carton containing bottled drinks from the retailer's store to her home, one of the bottles fell to the sidewalk and broke or exploded, resulting in a piece of the glass cutting plaintiff's leg, *is held* insufficient to make out a case against the retailer or manufacturer for breach of implied warranty that the cardboard container was reasonably fit for its purpose, there being no evidence of any defect in the carton or that its bottom was rotten, or if rotten, why it was in that condition. *Ibid.*

FORGERY

§ 1. Nature and Elements of the Offense.

Forgery is the false making or alteration of an instrument in writing which is apparently capable of effecting a fraud, which making or alteration is with fraudulent intent. *S. v. Phillips*, 445.

If the signature to a check is that of a real person, the State, in order to make out a case of forgery, must prove that the signature was made without authority of such person, since otherwise authority will be presumed and the instrument would not be a false instrument, while if the signature is that of a fictitious person the signature must have been affixed of necessity without authority. *Ibid.*

§ 2. Prosecutions.

That the signature to an instrument is that of a fictitious person may be established by either direct or circumstantial evidence, and evidence that there was no account in the drawee bank in the name of the person purported to be the maker of a check is some evidence the purported maker is a fictitious person. *S. v. Phillips*, 445.

Evidence that defendant aided in the execution of a purported check sufficient in form to constitute a negotiable instrument payable to order, without evidence that the purported maker is a fictitious person but to the contrary that he was an actual person, and without evidence that the purported maker had not authorized defendant to make the check, is insufficient to be submitted to the jury on a charge of forgery. *Ibid.*

FRAUD

§ 12. Measure of Damages.

Where the sale of property is tainted with fraud, the purchaser has his election to rescind the sale or keep the property and recover the difference between its actual value at the time of the purchase and its value as represented. *Horne v. Cloninger*, 102.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing.

The execution of a will devising and bequeathing all of the estate to plaintiff, the will being revoked by the subsequent marriage of testatrix, cannot

FRAUDS, STATUTES OF—*Continued*

constitute a memorandum of an asserted special contract of deceased to devise and bequeath all of her property to plaintiff in consideration of services rendered, since the mere disposing of the estate does not tend to show that such disposition was made in consideration of services rendered. *McCraw v. Llewellyn*, 213.

§ 6a. Contracts Affecting Realty in General.

Where the remainderman conveys his interest to the life tenant under an agreement that the life tenant should sell the realty and reinvest the proceeds in other property, the remainderman cannot compel the life tenant to sell, but when the life tenant does sell and uses the proceeds in the purchase of other realty, the remainderman may assert a parol trust in such other property, since in such instances the remainderman is not attempting to engraft a trust upon his own deed, and the right of the remainderman to compel the life tenant to account for the proceeds of the sale does not come within the statute of frauds. *Hodges v. Hodges*, 536.

§ 6b. Contracts to Convey or Devise.

A contract to devise property consisting of both personalty and realty comes within the statute of frauds, G.S. 22-2, and may not be established by parol. *McCraw v. Llewellyn*, 113.

GUARDIAN AND WARD

§ 2. Appointment, Qualifications and Tenure of Guardian.

A guardian of a minor has no authority to act for his ward after the ward has attained his majority, even though the ward is at that time and remains thereafter mentally incompetent. *In re Simmons*, 184.

§ 4. Sale or Mortgaging of Ward's Estate.

After ward reaches majority, the guardian has no power to sell the ward's property even though the ward is at the time of majority, and remains, mentally incompetent, and the sale of the ward's estate on petition of such guardian is a nullity. *In re Simmons*, 184.

HIGHWAYS

§ 1. Power and Functions of Highway Commission in General.

The State Highway Commission is an administrative agency of the State to which the State has delegated the police power to establish, maintain, and improve the State and county highways, and the Commission has the power specifically delegated and such powers as are reasonably necessary for the effective discharge of such duties. *Equipment Co. v. Hertz Corp.*, 278.

§ 7. Construction of Highways, Signs and Warnings, and Liability of Contractor.

A contractor constructing a highway in conformity with plans and specifications prepared by the Highway Commission may not be held liable because a curve on a segment of such highway was too sharp to be traversed by a vehicle at a speed in excess of 25 miles per hour. *Gilliam v. Construction Co.*, 197.

HIGHWAYS—*Continued*

Where a portion of a highway is opened to public use after Highway Commission, in the exercise of its statutory duty, had erected such signs thereon as it thought proper, G.S. 136-30; G.S. 136-32, the duty of the company constructing the highway to maintain barricades, danger signals, and signs thereon terminates, and thereafter the contractor may not be held liable on the ground that the injury in suit was the result of its negligent failure to maintain a warning sign of a curve that could not be traversed by a vehicle traveling in excess of 25 miles per hour. *Ibid.*

While the Highway Commission may not prescribe for its contractor a different standard of care than that imposed by the common law in regard to the traveling public, the Commission does have the power, in the construction of an overpass, to authorize its contractor to place a dirt ramp across the highway for the protection of the highway from heavy equipment hauling dirt for the overpass, and to authorize its contractor to place warning signs along the highway and to station flagmen at the ramp to stop traffic along the highway and close that portion when in use by earth moving equipment. *Equipment Co. v. Hertz Corp.* 277.

Where, by the display of proper signals, a highway had been temporarily closed to the traveling public incident to highway construction, G.S. 20-156 (a) has no application to earth moving equipment entering and crossing the highway in the progress of the work. *Ibid.*

Drivers of contractor's equipment remain under duty to exercise due care for safety of motorists even though highway has been temporarily closed. *Ibid.*

Evidence held for jury on question of negligence of motorist in failing to stop in obedience to signals at point where highway under construction was closed. *Ibid.*

In an action to recover damages to an earth mover resulting from a collision between it and a vehicle on a highway under construction, upon evidence tending to show that the highway was temporarily closed to traffic by a flagman waving a red flag, G.S. 136-26 authorizing the Highway Commission and its appropriate employees to close a highway under construction is relevant and properly admitted in evidence. *Ibid.*

A contractor barricading that portion of a highway under construction and placing a sign pointing to another road as a detour may not be held liable for injury to motorists resulting from a defect in a secondary road, used as a detour, which is under the exclusive supervision and control of the State Highway Commission. *Reynolds v. Critcher, Inc.*, 309.

HOMICIDE

§ 15. Dying Declarations.

In a prosecution under an indictment charging an unlawful homicide, resulting from an unlawful abortion upon a pregnant woman, testimony that while the woman was *in extremis* she made repeated statements that she knew she was going to die, and that death ensued, *is held* sufficient predicate for the admission of her declarations that an abortion had been performed upon her and as to the name of the person who had performed the abortion. *S. v. Mitchner*, 620.

That deceased at the time of making the declarations introduced in evidence was under the influence of drugs administered to kill pain, that at times her mind was confused, and the fact of discrepancies in her dying declarations,

HOMICIDE—*Continued.*

all relate to the weight to be given by the jury to her declarations and not to the competency of the testimony. *Ibid.*

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant and deceased were sitting in his car in front of her house drinking late at night, that defendant "passed out," that when he regained consciousness some two hours later he was sitting in his car in a wooded area, that blood of a single type was on defendant's clothes, the deceased, and in the car and also on a cinder block, apparently the murder weapon, found at the secene, and that defendant left the scene, hid his clothes and the seatcovers of the car, and washed the blood from the car, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, notwithstanding the absence of evidence of motive. *S. v. Casper*, 99.

The evidence in this case held sufficient to be submitted to the jury and support the verdict of guilty of murder in the second degree. *S. v. Kea*, 492.

Evidence of defendant's identity as person performing criminal abortion resulting in death held sufficient to be submitted to jury. *S. v. Mitchner*, 620.

§ 26. Instructions on Manslaughter.

An instruction in a homicide prosecution that manslaughter is an unlawful killing of a human being with malice but without premeditation and deliberation must be held for prejudicial error upon appeal from conviction of murder in the second degree, notwithstanding that in other portions of the charge the court gave a correct definition of manslaughter as the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Kea*, 492.

HUSBAND AND WIFE

§ 15. Nature and Incidents of Estates by Entireties.

The wife has no claim on rents and profits from an estate by the entireties which had accrued at time of the husband's death. *In re Estate of Perry*, 65.

§ 17. Termination and Survivorship.

Where the wife feloniously slays her husband, equity will decree that she hold the rents and profits from lands theretofore held by them by the entireties as a constructive trustee for the benefit of the husband's distributees, at least during the full term of the husband's life expectancy, in accordance with the equitable principle that a person will not be permitted to benefit from his own wrong. *In re Estate of Perry*, 65.

INDICTMENT AND WARRANT

§ 5. Finding and Return of Grand Jury.

Where an indictment which has been quashed is amended so as to correct the defect therein and is then sent back to the grand jury in its amended form as a separate or new bill and is then returned a true bill, the amended bill is not rendered invalid because of the former quashal. *S. v. King*, 236.

§ 9. Charge of Crime.

A warrant charging that defendant did unlawfully and wilfully violate a municipal ordinance by operating a motor vehicle on the public highway in

INDICTMENT—*Continued.*

the municipality while under the influence of intoxicants "contrary to the ordinance and against the statute in such case made and provided" *is held* sufficient to charge defendant with the violation of G.S. 20-138, and the reference to the unspecified ordinance will be deemed harmless surplusage. *S. v. Broadway*, 608.

§ 15. Grounds for Motions to Quash.

A defendant charged with the violation of a criminal statute may challenge the constitutionality of the statute by demurrer or motion to quash. *S. v. Hales*, 27.

§ 17. Variance between Averment and Proof.

The fact that a six-year old child, the victim of the offense charged, is uncertain in his testimony as to the time or particular day the offense charged was committed, goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed, there being sufficient evidence that defendant committed each essential act of the offense. *S. v. King*, 236.

INFANTS

§ 1. Protection and Supervision of Infants by Courts in General.

The Superior Court has authority in its equity jurisdiction to protect the rights of infants, and will exercise this jurisdiction whenever necessary to preserve and protect the estate and interest of those who are underage. *Trust Co. v. Buchan*, 142.

§ 5. Appointment, Duties and Authority of Next Friend.

Neither the next friend nor guardian *ad litem* of an infant can consent to a judgment involving the interest of the infant without investigation and approval by the court. *Trust Co. v. Buchan*, 142.

Authority of guardian see *In re Simmons*, 184.

§ 6. Appointment, Duties and Authority of Guardian ad Litem.

Neither the next friend nor guardian *ad litem* of an infant can consent to a judgment involving the interest of the infant without investigation and approval by the court. *Trust Co. Buchan*, 142.

INJUNCTIONS

§ 2. Invasion of or Immediate Threat to Rights of Party Suing in General.

Injunctive relief will be granted only when irreparable injury is both real and immediate. *Membership Corp. v. Light Co.*, 56.

Injunction will not lie to restrain rabbit hunt with sticks when there is no allegation of defendants' intention to hold such hunts in the future. *Yandell v. American Legion*, 691.

§ 4. Enjoining Violation of Criminal Statute.

Ordinarily, injunction will not lie to enjoin the violation of a criminal statute, since prosecution under the statute is usually an adequate remedy. *Yandell v. American Legion*, 691.

INJUNCTIONS—*Continued.*

§ 11. Enjoining Institution or Prosecution of Civil Action.

A wife may enjoin her husband from instituting or prosecuting an action for divorce in another state until she can obtain judgment in her action for alimony without divorce. *Thurston v. Thurston*, 663.

§ 13. Continuance and Dissoluation of Temporary Order.

Ordinarily, a temporary restraining order will be continued to the hearing if there is probable cause for supposing plaintiff will be able to sustain his primary equity and if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if it appears that the restraining order is necessary to protect plaintiff's rights until the controversy can be determined on the merits. *Conference v. Creech*, 128.

The court has discretion to continue a temporary restraining order to the hearing upon the pleadings and affidavits alone, but the court should take into consideration the inconvenience and damage to defendant as well as the benefits which will accrue to plaintiff. *Ibid.*

In continuing a temporary restraining order to the hearing the court should not grant plaintiffs relief in excess of that to which they are entitled upon the facts alleged in their pleadings, and should seek to maintain the *status quo* as nearly as possible pending the determination of the cause upon the merits. *Ibid.*

Where a temporary restraining order is dissolved upon the hearing to show cause but the action is not dismissed, the findings of fact or recitals in the order, relating solely to whether the temporary order should be continued or dismissed, are not binding upon the trial on the merits if the parties thereafter file pleadings which raise issues of fact. *Vance v. Hampton*, 557.

§ 14. Judgment on the Merits.

The judgment in injunction proceedings should not contain sweeping injunctive provisions to protect rights which are not threatened. *Membership Corp. v. Light Co.*, 56.

Final judgment lessee was entitled to possession and enjoining lessor from interfering therewith, precludes lessor from moving in the cause for relief based upon violations of lease, since asserted violations prior to the institution of the action were adjudicated by the judgment, and asserted subsequent violations would be basis of new action but not motion in the cause. *Bowen v. Murphrey*, 681.

INSANE PERSONS

§ 2. Inquisition of Lunacy and Appointment of Guardian.

The fact that notice was served on a person only some half-hour before the hearing in which he was adjudged incompetent is in itself insufficient to invalidate the adjudication, the incompetent being present at the hearing and being examined by the jury, and no request for a continuance having been made. *In re Simmons*, 184.

Where neither the incompetent nor persons acting for him have challenged the validity of the adjudication of his mental incapacity, the proceeding being regular on its face, strangers to the proceeding may not collaterally attack the adjudication and the appointment of a guardian pursuant thereto, nor challenge the right of the guardian to institute proceedings to preserve the incompetent's estate. *Ibid.*

INSANE PERSONS—*Continued.*

§ 4. Control and Management of Estate by Guardian.

Guardian for minor has no authority after majority of minor even if he is and remains mentally incompetent, and sale upon petition of such guardian for inadequate price is nullity. *Simmons, In re*, 184.

It is the positive duty of a guardian to preserve the estate of his incompetent, and therefore it is proper for the guardian to institute an action to set aside on the ground of mental incapacity a deed executed by his incompetent to the defendant, and where in such action the guardian obtains a reconveyance of the land to the estate and at the same time a release from the defendant of any benefits she might receive by testamentary gift from the incompetent, as a settlement approved by the court, the defendant may not thereafter contend that the guardian was without authority to pay a valuable consideration for such release. *Stewart v. McDade*, 630.

§ 8. Validity and Attack of Contracts.

Evidence of plaintiff's mental incapacity to sign the release from liability executed by him *held* sufficient to take the issue to the jury. *Walker v. Walker*, 696.

INSURANCE

§ 1. Control and Regulation in General.

An insurable interest is required as a matter of public policy in regard to all kinds of insurance. *Guaranty Co. v. Reagan*, 1.

§ 3. Construction and Operation of Policies in General.

Where a contract of insurance is negotiated and executed in the state in which insured is a resident, such policy will be construed in accordance with the laws of that state in an action in this State on a claim arising here, since the *lex loci* governs the substantive provisions of the agreement. *Roomy v. Ins. Co.*, 318.

Pertinent statutory provisions in force at the time of the execution of an insurance contract entr into and form a part of the policy to the same extent as if they are actually written into it. *Crisp v. Ins. Co.*, 408.

§ 8. Agreements to Procure or Issue Life Insurance.

An action in tort will not lie against a loan company and an insurance company for negligent failure to deliver a policy of insurance on the life of a borrower, but an action may lie *ex contractu* for breach of agreement to procure or execute and deliver such policy, or on the policy upon proof of delivery of the policy as security for the loan to the agent of the loan company who was also an agent of the insurer. *Blackman v. Ins. Co.*, 261.

§ 49. Accidental Damage to Car other than by Collision.

An insurable interest in the automobile insured is required for the validity of a policy of fire and hail insurance on the vehicle, and when the insured has no such interest and the insurer pays loss under the policy under the mistaken belief that insured owned the vehicle, insurer may recover the amount paid as money had and received, even though the payment is used in the repair of the car. *Guaranty Co. v. Reagan*, 1.

INSURANCE—*Continued.*

§ 52. Auto Fire Policies.

Insured must have an insurable interest in the vehicle insured, and when insurer pays a loss under the mistaken belief that insured had an insurable interest, the insurer may recover the payment as money had and received even though it has been used in the repair of the vehicle. *Guaranty Co. v. Reagan*, 1.

§ 54. Vehicles Insured under Liability Policy.

Where, at the time of applying for a liability policy, insured owns but one vehicle which has a 1947 body and chassis and a 1948 motor, the fact that the policy, stating the crrect motor number, describes the vehicle as a 1948 model, is not fatal, the inference being permissible that the policy sufficiently described the automobile owned by insured at that time and that it was the intention of the parties that that particular vehicle be insured. *Crisp v. Ins. Co.*, 408.

§ 57. Drivers Insured under Liability Policies.

The persons covered by an automobile liability insurance policy must be determined by construction of the policy provisions, and therefore testimony of the purchaser of a car that the dealer told him he would be covered by the dealer's insurance until the dealer procured insurance for him, is properly excluded. *Godwin v. Casualty Co.*, 730.

A person injured as a result of the negligent operation of an automobile, who has recovered an unsatisfied judgment against the driver of the car, cannot recover against the insurer in a garage liability insuranc policy when at the time of the accident title to the car had passed from the dealer to the driver. *Ibid.*

A garage liability policy which expressly excludes from coverage employees of insured does not cover the liability of a prospect driving the car with insured's consent for negligent injury to an employee of the insured riding in the car with the prospect to demonstrate the vehicle, even though the prospect is an additional insured under the provisions of the policy and the policy contains a severability of interests clause. *Ins. Co. v. Ins. Co.*, 91.

§ 58. Exclusion from Liability Policy of Insured's Spouse or Employees.

The laws of the State in which the liability policy in suit was issued provided that no policy should cover liability of insured to his or her spouse unless the policy expressly so provided, and the policy in suit contained no such provision. *Held:* The policy may not be construed to cover insured's liability for injuries to his wife resulting from an accident occurring in this State. *Roomy v. Ins. Co.*, 318.

§ 61. Whether Liability Policy Is in Force at Time of Accident.

In an action by the injured person against insurer in an automobile liability policy, the burden is upon plaintiff to prove that insurer issued and delivered the policy to insured and that the policy covered the vehicle owned by insured and involved in the collision in which plaintiff was damaged. *Crisp v. Ins. Co.*, 408.

In an action by the injured person against insurer in an automobile liability policy, the burden is upon plaintiff to prove that insurer issued and delivered the policy to insured and that the policy covered the vehicle owned by insured and involved in the collision in which plaintiff was damaged. *Crisp v. Ins. Co.*, 408.

INSURANCE—*Continued.*

In an action by the injured person against insurer in an automobile liability policy, the burden is upon insurer to prove cancellation and termination of the policy prior to the collision when relied upon by it. *Ibid.*

Whether proof of payment of premium is an essential element of a cause of action against insurer or whether it is a matter of defense upon which insurer has the burden of proof, depends upon the provisions of the contract and the circumstances of the case; further, payment of premium as a condition for effective insurance may be waived. *Ibid.*

§ 65. Rights of Injured Person against Insurer after Judgment against Insured.

Where insurer, in accordance with G.S. 20, Art. 13, issues certificate FS-1 which is delivered to the Department of Motor Vehicles, insurer represents that everything requisite for a binding insurance policy has been performed, including payment or satisfactory arrangement for payment of premium, and thereafter nonpayment of the prmium is no defnse in an action by an injured third party against insurer. *Crisp v. Ins. Co.*, 408.

After insurer has issued certificates FS-1, insurer, in order to avoid liability to a third person injured by negligent operation of the vehicle insured, must allege and prove cencellation and termination of the policy in accordance with the applicable statute. *Ibid.*

The requirement of G.S. 30-310 that the notice of termination of insurance should contain a statement that proof of financial responsibility is required to be maintained and that operation of a motor vehicle without maintaining such proof is a misdemeanor, is mandatory and not directory, and when the substanc of the required statement does not appear anywhere in the notice of cancellation mailed to insured, the notice of cancellation is ineffective, especially in a suit by an injured third person against insurer. *Ibid.*

§ 86 Fire Insurance — Payment and Subrogation.

The destruction of insured property by a tortious act gives rise to a single indivisible cause of action, and when the insurer has paid the entire loss he is subrogated to the rights of the insured either by agreement in the contract or by equitable subrogation, and becomes the real party in interest with the sole right to maintain an action against the tort-feasor for the loss. *Ins. Co. v. Trucking Co.*, 722.

INTOXICATING LIQUOR

§ 1. Validity and Construction of Control Statutes in General.

The possession of alcoholic beverage on which the apposite taxes have not been paid, G.S. 18-48, the unlawful possession of intoxicating liquor, G.S. 18-2, and the possession of intoxicating liquor for the purpose of sale, G.S. 8-50, are separate and distinct offenses, and where a defendant is convicted in a municipal-county court of unlawful transportation and unlawful possession of non-taxpaid liquor, he may not be convicted in the Superior Court on appeal of possession of intoxicating liquor for the purpose of sale. *S. v. Simmons*, 688.

§ 4. Manufacture.

The first offense of unlawfully manufacturing whiskey in this State is a misdemeanor and the second or subsequent offense of unlawfully manufacturing whiskey is a felony. *S. v. Taft*, 441.

INTOXICATING LIQUOR—*Continued*

§ 13c. Sufficiency of Evidence of Possession and Possession for Purpose of Sale.

Evidence tending to show that 21 pints of whiskey were found on premises owned and operated by defendant as a supper club and that the whiskey was found on the floor of the kitchen near the refrigerator, with circumstantial evidence raising the inference that whiskey was being sold to patrons of the club, *is held* sufficient to be submitted to the jury on the question of defendant's constructive possession of the whiskey for the purpose of sale. *S. v. Thompson*, 593.

JUDGMENTS

§ 2. Time and Place of Rendition.

In an action for divorce, or for alimony without divorce, it is not required that a motion therein for alimony *pendente lite* be heard in the county during the term, but the judge holding the courts of the district may, after notice, hear the motion in chambers in any county of the district. *Joyner v. Joyner*, 588.

A husband who attends and participates in the hearing to determine the right to the custody of a child of the marriage, held outside the county, but in the district, by the judge regularly holding the courts of the district, is bound by the judgment. *Ibid.*

§ 6. Modification, Correction, or Vacation of Judgment in Trial Court.

A judgment is *in fieri* during the term, and the court has authority as a matter of law to vacate the judgment during the term and may do so on its own motion. *Ins. Co. v. Walton*, 345.

§ 8. Nature and Essentials of Judgments by Consent.

Neither the next friend or guardian *ad litem* of an infant may consent to a judgment without the approval of the court. *Trust Co. v. Buchan*, 142.

§ 27. Hearings and Determination of Proceedings Attacking Judgments.

Where, upon the hearing of a motion to set aside an order there is abundant and competent evidence to sustain a finding by the court, the fact that other evidence of doubtful competency was also admitted is not ground for disturbing the result, since it will be presumed that incompetent evidence was disregarded by the court in making its decision. *In re Simmons*, 184.

§ 28. Conclusiveness of Judgments and Bar in General.

A judgment is a bar to a subsequent action if the judgment is rendered by a court of competent jurisdiction and adjudicates the identical fact, question or right as between the identical parties, or persons in privity with a party or parties to the prior suit, so that the estoppel by judgment is of necessity mutual. *Masters v. Dunston*, 520.

In a suit by lessee to restrain lessor from interfering with his possession, judgment was entered on the final hearing that lessee had neither breached nor abandoned the lease and was entitled to possession and to restrain lessor from interfering with that possession. *Held:* The judgment was a final judgment and lessor is not entitled to maintain a motion in the cause for asserted violation of the lease, since asserted breaches occurring prior to the judg-

JUDGMENTS—*Continued.*

ment were concluded by the judgment and asserted breaches occurring subsequent thereto relate to a new cause of action which may not be engrafted upon the action by motion in the cause. *Bowen v. Murphrey*, 681.

§ 29. Parties Concluded.

Persons who are not parties to the action and whose rights are not devolved from a party, are not bound by the judgment. *Paschal v. Autry*, 166.

A party is in privity within the purview of the doctrine of estoppel by judgment if he has a mutual or successive relationship to the same rights of property as a party to the action and his interests have been legally represented at the trial, but a mere personal interest in the subject matter of the action or mere participation in the trial without being a party or privy thereto, does not bring him within the doctrine of estoppel. *Masters v. Dunstan*, 520.

Where a tortious act results not only in the loss of insured property, but also damage to the truck transporting the insured property and the death of the driver of the truck, and the insurer pays the entire loss of cargo, judgment for the recovery of damages to the truck and for the wrongful death in an action by the truck owner and the personal representative of the deceased driver does not bar insurer from thereafter maintaining an action against the tort-feasor for the value of the insured cargo. *Ins. Co. v. Trucking Co.*, 721.

§ 33. Judgments of Nonsuit as Res Judicata.

A judgment of involuntary nonsuit for the insufficiency of evidence is *res judicata* and bars a subsequent action if the allegations and evidence in the subsequent action are substantially identical with those of the first. *Walker v. Story*, 453.

§ 38. Plea of Bar, Hearings and Determination.

Since a judgment of involuntary nonsuit for the insufficiency of the evidence bars a subsequent action on the same cause only if the allegations and evidence in the second action are substantially identical with those of the first, the plea of *res judicata* in the second action is improperly sustained upon consideration of the pleadings alone without the introduction of evidence. *Walker v. Story*, 453.

JUDICIAL SALES.

§ 5. Validity and Attack of Sale, and Title of Purchaser.

A person appointed guardian of a minor has no authority to act for his ward after the ward has attained his majority, even though the ward is at that time and remains thereafter mentally incompetent, and, after the ward has attined his mjority, such guardian has no authority to seek the sanction of the court for sale of the ward's property, nor has the court authority to authorize a sale on petition of such guardian, and the sale may be set aside on motion in the cause, the lack of authority not appearing on the face of the record. *In re Simmons*, 184.

Where a person purporting to act as guardian for a minor or insane person in petitioning for sale of lands of the ward, acts not in the interest of the ward but for a third person, and sells the lands for a grossly inadequate price, the sale is voidable and is properly set aside on motion in the cause upon evidence disclosing the facts, and such sale becomes void when vacated and can pass no title to the purchaser. *Ibid.*

LARCENY

§ 1. Nature and Elements of the Offense.

The fact that the agent of the owner of property participated in a conspiracy to commit larceny of the property by trick does not change the purpose of the conspiracy from larceny to embezzlement or false pretense. *S. v. Terrell*, 232.

Felonious intent is an essential element of the crime of larceny without regard to the value of the stolen property, the phrase "felonious intent" in the law of larceny not necessarily signifying an intent to commit a felony. *S. v. Cooper*, 372.

§ 3. Degrees of the Crime.

The larceny of property of the value in excess of $200.00 is felony; the larceny of property of the value of $200.00 or less, except in those instances enumerated in the statute in which the statute does not apply, is a misdemeanor. G.S. 14-72, as amended. *S. v. Cooper*, 372.

The misdemanor of larceny is a less degree of the felony of larceny within the meaning of G.S. 15-170. *Ibid.*

§ 5. Presumptions and Burden of Proof.

Except in those instances where G.S. 14-72, as amended, does not apply, the burden is upon the State to prove beyond a reasonable doubt that the value of the goods exceeded $200.00 in order to convict the defendant of the felony of larceny. *S. v. Cooper*, 372.

§ 7. Sufficiency of Evidence and Nonsuit.

Where the evidence discloses that defendant took the pony of the prosecuting witness under an agreement that defendant was to break the pony, and that defendant was ready, able and willing to return the pony in good condition upon the payment by the prosecuting witness of the expense items incurred in connection with the care and upkeep of the pony, *is held* insufficient to show that the taking by defendant was with felonious intent, and nonsuit should have been entered. *S. v. Whitfield*, 704.

§ 8. Instructions.

In a prosecution upon an indictment charging the felony of larceny in those instances where G.S. 14-72, as amended, does not apply, the trial court is required to instruct the jury that the burden is upon the State to prove beyond a reasonable doubt that the value of the goods exceeded $200.00 and that if the jury should find beyond a reasonable doubt that defendant is guilty of larceny but failed to find beyond a reasonable doubt from the evidence that the value of the stolen property exceeded $200.00, the jury should return a verdict of guilty of larceny of property of a value not exceeding $200.00. *S. v. Cooper*, 372.

§ 9. Verdict.

In a prosecution for the felony of larceny it is not required that the jury fix the precise value of the stolen property but only whether its value exceeds $200.00. *S. v. Cooper*, 372.

LIBEL AND SLANDER

1. Nature and Essentials of Cause of Action in General.

Libel can be committed by defamatory pictures. *Greer v. Broadcasting Co.*, 382.

LIBEL AND SLANDER—*Continued*

It would seem that slander as well as libel can be committed by defamatory words broadcast by radio. *Ibid.*

§ 2. Words Actionable Per Se.

Any written or spoken words or pictures falsely imputing that a person is guilty of the crime of rape or robbery are actionable *per se*. *Greer v. Broadcasting Co.*, 382.

§ 11. Parties Liable.

All who take part in the publication of a libel, or who procure or command libelous matter to be published are jointly and severally liable, and persons entering into a common agreement or conspiracy to libel or slander another are jointly and severally liable. *Greer v. Broadcasting Co.*, 382.

§ 13. Competency and Relevancy of Evidence.

Where the complaint in an action for malicious prosecution alleges that defendants agreed and conspired together to libel and slander plaintiff, the rules governing the admissibility of evidence in prosecutions for criminal conspiracy are ordinarily applicable, and words and deeds of each conspirator in furtherance of the common purpose may be proved against both. *Greer v. Broadcasting Co.*, 382.

LIEUTENANT-GOVERNOR

When Lieutenant-Governor dies during his term, the office must remain vacant for the rest of the term with the duties and emoluments of the office devolving on the President of the Senate. *Thomas v. Board of Elections*, 401.

LIMITATION OF ACTIONS

§ 12. Institution of Action, Discontinuance and Amendment.

The statutory provision allowing a second action to be brought within a year after judgment of nonsuit extends the period of limitation but does not abridge it. *Walker v. Story*, 453.

Where the facts in regard to the accident in suit are alleged in the complaint, an amendment which characterizes defendant's conduct as amounting to gross negligence does not amount to a statement of a new cause of action notwithstanding that gross negligence may be essential to a recovery by plaintiff, since the conclusion of gross negligence may be deduced from the alleged facts, and therefore the action is not barred when the complaint is filed within the time limited even though the amendment is filed thereafter. *Kiser v. Bowman*, 565.

MALICIOUS PROSECUTION

§ 1. Nature and Elements of Cause of Action in General.

A law enforcement officer may be held liable as an individual for malicious prosecution if such officer acts in a corrupt and malicious manner, not in the interest of the public, and without probable cause. *Greer v. Broadcasting Co.*, 382.

MALICIOUS PROSECUTION—*Continued.*

§ 4. Want of Probable Cause.

Where a committing magistrate finds probable cause or when a defendant in a criminal action waives the preliminary hearing, a *prima facie* showing of probable cause is made, but such *prima facie* showing is not conclusive and the question of probable cause remains for the jury. *Newton v. McGowan*, 421.

The fact that a defendant in a criminal prosecution demanded a jury trial, which under the applicable statutes required the recorder to transfer the cause to Superior Court without investigation, has no relation to the question of probable cause and does not establish probable cause even *prima facie*. *Ibid.*

§ 8. Pleadings.

To make out a case of malicious prosecution the plaintiff must allege and prove that defendant instituted, or procured, or participated in a criminal proceeding against him maliciously without probable cause, and the termination of the prosecution in favor of plaintiff, and while it is not necessary to employ the term "want of probable cause," it is required that there be allegation of facts necessarily showing such want. *Greer v. Broadcasting Co.*, 382.

A complaint alleging that a law enforcement officer swore out a warrant charging of his own knowledge that plaintiff had committed certain specified crimes when he knew that the victim of the offenses had told him plaintiff was not the man who had committed the offenses, fails to state a cause of action against the officer for malicious prosecution, since the complaint fails to allege probable cause *ipsissimis verbis* or facts necessarily showing want of probable cause, it being possible that the officer had probable cause even though the victim could not identify plaintiff as the perpetrator. *Ibid.*

§ 12. Instructions.

Charge, construed contextually, held to have instructed jury as to facts which would require negative as well as affirmative finding and placed no burden of proof on defendant. *Newton v. McGowan*, 421.

In this action for malicious prosecution, the court's definition of "malice" held not prejudicial on authority of *Motsinger v. Sink*, 168 N.C. 548. *Ibid.*

§ 13. Damages.

A finding by the jury that defendant caused the arrest and prosecution of plaintiff and that the arrest and prosecution was without probable cause, establishes plaintiff's right of action and entitles him to nonminal damages, with the burden on plaintiff to show damages beyond a nominal sum, but such burden does not require plaintiff to show the amount of damage with mathematical certainty and he is required merely to offer evidence from which the jury can reasonably find damages in excess of a nominal sum. *Newton v. McGowan*, 421.

Where plaintiff in an action for malicious prosecution introduces evidence that he was arrested on false charges sworn to by defendant, and that the arrest was made in the presence of others and the fact of arrest reported in the local newspaper, the evidence is sufficient to justify the jury in awarding more than nominal damages without the necessity of plaintiff's producing witnesses to testify as to injury to plaintiff's reputation or decreased earning capacity, and the court in its charge properly submits these elements of damage. *Ibid.*

MANDAMUS

§ 1. Nature and Grounds of Writ in General.

Mandamus is authorized by statute to compel the officers of a corporation to divulge to a stockholder the names of other stockkholders in order that he may conduct an effective campaign in preparation for a stockholders' meeting. *White v. Smith*, 218.

Mandamus is an extraordinary writ which issues only when there is no other adequate remedy, and may be employed only to enforce a clear legal right or the performance of a ministerial duty at the instance solely of the party entitled to demand such performance against the party under clear legal obligation to perform the act or grant the relief. *Thomas v. Board of Elections*, 401.

MASTER AND SERVANT

§ 53. Injuries Compensable in General.

The North Carolina Workmen's Compensation Act does not provide compensation for an injury unless the injury is by accident. *Harding v. Thomas & Howard Co.*, 427.

An "accident" as used in the Compensation Act is an unlooked for and untoward event which is not expected or designed by the injured employee, or a result produced by a fortuitous cause. *Ibid.*

§ 60. Injuries on Way to and from Plant.

Evidence held to take cause out of usual rule that accident occurring while employee is going to or from his employer's plant does arise in course of employment. *Brewer v. Trucking Co.*, 175.

§ 63. Hernia and Back Injuries.

An injury to the back from a ruptured or slipped disc does not arise by accident if the employee at the time is merely carrying on his usual and customary duties in the usual way, and evidence that plaintiff suffered back injury as he picked up a 12 or 13 pound case of coffee in unloading operations just as he had been doing for some six years, is insufficient to support a finding that the injury arose by accident. *Harding v. Thomas & Howard Co.*, 427.

§ 73a. Reduction of Award Where Injury Results from Violation of Statutory Regulations.

The fact that the accident causing plaintiff's injury was the result of his violation of statutory regulation governing the operation of motor vehicles on the highway does not warrant the reduction of the award under G.S. 97-12 if such violation was not wilful but merely negligent, and the action of the Industrial Commission in striking out the finding and conclusion of the hearing commissioner in regard to the reduction of the award will not be disturbed even though the Commission does not specifically find that the violation of statutory duty was not wilful, there being evidence that claimant's injuries resulted primarily when a following vehicle crashed into the rear of his vehicle after it was immobilized in the accendent resulting from claimant's negligence. *Brewer v. Construction Co.*, 175.

§ 90. Proceedings before the Commission.

The industrial Commission has authority to review, modify, adopt, or reject findings of a hearing commissioner and may *ex mero motu* strike out a

MASTER AND SERVANT—*Continued.*

finding of the hearing commissioner and his conclusion of law based thereon in order to make the record comply with the law, even though there is no exception to the finding or conclusion. *Brewer v. Trucking Co.*, 175.

MONEY RECEIVED

An insurer who has been induced by a mistake of fact to pay a claim under a policy of insurance, which by the terms of the policy it is not required to pay, is entitled to recover such payment from the payee as money had and received, provided the payment has not caused such a change in the position of the payee that it would be unjust to require restitution. *Guaranty Co. v. Reagan*, 1.

That the payment has been used in the repair of the vehicle is not such a change in the position of the payee as to preclude recovery. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 28. Parties Who May Bid and Purchase at Sale.

A charge to the effect that if the trustee and the person making the last and highest bid at a foreclosure sale were both agents of the *cestui* the foreclosure sale is voidable, must be held for prejudicial error in the absence of evidence that the trustee had power to direct foreclosure or stipulate the amount which should be bid, since under such charge the *cestui*, a corporation, could not protect its interests by having an agent buy the property, and the charge fails to present the question whether the parties acted in good faith without any fraud and whether the *cestui* obtained any undue advantage. *Denson v. Davis*, 658.

§ 35. Waiver of Right to Attack Foreclosure.

If the debtor rents the land from the *cestui* after foreclosure and purchase of the property by the *cestui*, he recognizes the validity of the foreclosure and is estopped thereafter to attack same, and where there is conflict in the evidence as to whether the sum paid by the debtor to the *cestui* after foreclosure was rent or a payment on the purchase price, the issue of ratification of the sale is for the jury. *Denson v. Davis*, 658.

§ 39. Suits to Set Aside Foreclosure.

Where the questions of the validity of the foreclosure sale and the ratification of the sale by the debtor after foreclosure are presented by allegations and evidence the questions should be submitted under separate issues. *Denson v. Davis*, 658.

MUNICIPAL CORPORATIONS

§ 4. Legislative Control and Supervision and Powers of Municipalities in General.

A municipal corporation is a creature of the General Assembly and has only such powers as are expressly conferred upon it by statute or such as are necessarily implied from those expressly conferred. *Tastee-Freez v. Raleigh*, 208.

MUNICIPAL CORPORATIONS—*Continued*

§ 12. Injuries from Defects and Obstructions in Streets or Sidewalks.

The evidence in this case *is held* not to disclose contributory negligence as a matter of law on the part of a motorist in failing to anticipate that looose dirt, stones, and cinders around a manhole protruding some several inches above the surface of the street would give way and permit his car, when it was driven over the manhole, to drop on the manhole, throwing plaintiff against the door of the car, causing it to open, and plaintiff to fall to his injury. *Whitley v. Durham*, 106.

A municipal corporation is not an insurer of the safety of its sidewalks but is only under duty to exercise ordinary care to maintain them in a reasonably safe condition for travel by those using them in a proper manner and with due care, and the fact that there is a difference in elevation of approximately one inch between two adjacent concrete sections of a sidewalk does not constitute a breach of the municipality's legal duty. *Bagwell v. Brevard*, 465.

§ 24. Nature and Extent of Municipal Police Power in General.

Where a peddler of ice cream and similar products from a mobile freezer unit along the streets and highways has procured from the State a license to carry on such business within territory which includes a municipality, G.S. 105-53(d), the municipality has no authority by provision attached to its license ordinance, to prevent such licensee from peddling his products along the city streets. *Tastee-Freez v. Raleigh*, 208.

§ 39. Claims Against Municipality for Personal Injury.

Where a claim for personal injuries resulting from a defect in a sidewalk is not filed with the municipality within the time specified in its charter and there is no alelgation or evidence of incapacity or disability of claimant excusing the failure to file the claim within the time limited, an acton against the city on the claim is properly nonsuited. *Sowers v. Warehouse*, 190.

NEGLIGENCE

§ 1. Acts and Omissions Constituting Negligence in General.

Nuisance and negligence are distinct torts, and while the same act or omission may constitute negligence and a private nuisance *per accidens*, a nuisance *per accidens* may be created or maintained without negligence. *Watts v. Mfg. Co.*, 611.

§ 3. Sudden Peril and Emergencies as Affecting Question of Negligence.

A party is not entitled to the benefit of the doctrine of sudden emergency if he himself contributes to the creation of the emergency in whole or in part. *Rogers v. Thompson*, 265.

Evidence that defendants suddenly drove into fog held to require court to submit to jury the law relating to sudden emergency. *Lawing v. Landis*, 677.

5. Res Ipsa Loquitur.

The doctrine of *res ipsa loquitur* applies only when there is an injury which ordinarily does not occur without negligence on someone's part, and the instrumentality causing the injury is under the exclusive control of defendant. *Phillips v. Bottling Co.*, 728.

NEGLIGENCE—*Continued.*

§ 10. Doctrine of Last Clear Chance.

The doctrine of last clear chance is predicated upon a new act of negligence in failing to avoid danger after the negligence of plaintiff and the contributory negligence of defendant have canceled each other, and the doctrine may not be predicated upon the original negligence of the defendant. *Gunter v. Winders*, 263.

§ 11. Contributory Negligence in General.

Contrbutory negligence bars recovery if it is one of the proximate causes of the injury. *Ibid.*

Contributory negligence is an affirmative defense which must be alleged and proven. *Ibid.*

"Contributory negligence" *ex vi termini* implies negligence on the part of defendant. *Rogers v. Thompson*, 265.

§ 17. Imputed Negligence.

The doctrine that the negligence of the custodian of a child selected by a parent will be imputed to the parent can have no application in the absence of negligence on the part of the custodian. *Jeffreys v. Burlington*, 222.

§ 14. Sudden Peril or Emergency as Affecting Contributory Negligence.

Where defendants' negligence brings about a sudden emergency, and plaintiff's acts do not contribute in causing the emergency, either in whole or in part, plaintiff, while under duty to exercise ordinary care for his own safety, is not held to the standard of selecting the wisest course of conduct, but is required only to act as a reasonably prudent man would have acted under the same or similar circumstances. *Rogers v. Thompson*, 265.

Plaintiff may rely upon the doctrine of sudden emergency either if there is a real danger or the circumstances are such as to create the apprehension of danger in the mind of an ordinarily prudent person, but an instruction which permits plaintiff to rely upon the doctrine if plaintiff believed an emergency to exist, is error. *Ibid.*

§ 20. Pleadings in Negligence Actions.

The violation of G.S. 119-49 by the driver of a truck transporting liquid petroleum gas cannot be asserted as contributory negligence on the part of such driver in his action to recover for burns received as a result of a collision when defendants do not plead a violation of the statute or the applicable safety regulations. *Rogers v. Thompson*, 265.

Whether the facts alleged in the complaint, admitted by demurrer, are sufficient to constitute negligence is a question of law. *Bagwell v. Brevard*, 465.

A plea of contributory negligence must allege acts or omissions on the part of plaintiff which will support the conclusion that plaintiff was guilty of negligence constituting a proximate cause of the injury, and mere allegation that plaintiff was negligent is insufficient. *Maynor v. Pressley*, 483.

§ 21. Presumptions and Burden of Proof.

There is no presumption of negligence from the mere fact of accident and injury. *Phillips v. Bottling Co.*, 728.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence.

In order to be sufficient to be submitted to the jury, evidence of negligence must raise more than a mere conjecture. *Parker v. Flythe*, 548.

NEGLIGENCE—*Continued.*

§ 26. Nonsuit for Contributory Negligence.

Nonsuit may not be granted on the ground of contributory negligence unless plaintiff's own evidence establishes this defense as the sole reasonable conclusion. *Rogers v. Thompson*, 265.

Evidence held not to disclose contributory negligence as matter of law on part of plaintiff confronted with emergency. *Ibid.*

§ 28. Instructions in Negligence Actions.

The charge of the court in this case, construed contextually, held not subject to the objection that it required defendant to establish that plaintiff was guilty of each of the alleged negligent acts relied upon as constituting contributory negligence in order to answer that issue in the affirmative. *Scarborough v. Ingram*, 87.

A charge on the issue of contributory negligence which merely gives the contentions of the parties, without defining contributory negligence, and without explaining the law applicable to the facts in evidence, constitutes prejudicial error. *Therrell v. Freeman*, 552.

Instruction on question of sudden emergency as affecting question of contributory negligence held prejudiced. *Rogers v. Thompson*, 265.

Contributory negligence bars recovery if it is one of the proximate causes of the injury, and an instruction which repeatedly charges the jury to answer the issue in the affirmative if it found that negligence on the part of plaintiff was "the" proximate cause of the injury must be held prejudicial notwithstanding that in other portions of the charge the court used the words "a proximate cause." *Ibid.*

§ 34. Negligence in Condition and Maintenance of Sidewalks.

Ordinarily, an abutting property owner is not under duty to keep the sidewalk in a safe condition and may not be held liable for injuries resulting from a defect in the sidewalk unless the sidewalk was constructed by the property owner or the property owner causes or contributes to the existence of such defect. *Sowers v. Warehouse*, 190.

§ 37b. Duties of Proprietor to Invitees.

The proprietor of a swimming resort operated for hire, while not an insurer of his patrons' safety, is under duty to exercise due care to see that the place and the appliances incident to its use are reasonably safe. *Godley v. Whichard*, 467.

§ 37f. Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence that defendant operated a pier for public bathing, that along the pier were signs designating the various depths of the water, and that plaintiff dived to his injury in water some three and one-half feet deep at a point where a sign designated a depth of six feet, is sufficient to be submitted to the jury on the issue of negligence. *Godley v. Whichard*, 467.

NUISANCE

§ 1. Conditions Constituting Nuisance in General.

Nuisance and negligence are distinct torts, and while the same act or omission may constitute negligence and a private nuisance *per accidens*, a nuisance *per accidens* may be created or maintained without negligence. *Watts v. Mfg. Co.*, 611.

NUISANCE—*Continued.*

§ 2. Noise and Vibration.

If the operation of facilities on the lands of one person is unreasonable under the circumstances of the particular case and the noise and vibration attendant such operation cause substantial damage in interfering with the use and enjoyment of the lands of another, such operation constitutes a nuisance *per accidens* as an intentional non-trespassory invasion of the rights of the other, regardless of the absence of negligence or the degree of care exercised to avoid injury. *Watts v. Mfg. Co.*, 611.

Evidence held sufficient to be submitted to jury on question of whether noise and vibration from defendant's plant constituted nuisance *per accidens* in interfering with enjoyment of plaintiff's adjacent home, but instruction failing to charge as to what matters should be considered in determining issue, was prejudicial. *Ibid.*

PARENT AND CHILD

§ 2a. Contributory Negligence of Parent in Causing Injury to Child.

The doctrine that where the parents have employed a custodian for their child, the negligence of such custodian will be imputed to the parents, cannot apply unless such custodian is negligent, and such negligence will not be presumed from the mere fact of injury to the child while in the custodian's care. *Jeffreys v. Burlington*, 222.

Evidence held insufficient to show negligence in leaving child in custody of aunt or negligence on part of custodian. *Ibid.*

PARTIES

§ 1. Necessary Parties in General.

Where insurer has paid entire loss of cargo, it alone may bring action for its tortious destruction, and neither judgment in action by truck owner for damages to truck transporting cargo, nor judgment in action by administrator for wrongful death of passenger killed in collision bars insurer's action. *Ins. Co. v. Trucking Co.*, 721.

PAYMENT

§ 1. Transactions Constituting Payment.

A purchaser who gives a worthless check in payment for merchandise does not acquire title even though the merchandise is then delivered, and the seller may regain his property even against a *bona fide* purchaser in the absence of estoppel. *Bank v. Rich*, 324.

PERJURY

§ 1. Nature and Elements of the Offense.

That the false testimony be material to an issue or point in question is essential to constitute such false testimony the basis of a prosecution for perjury. *S. v. Chaney*, 255.

§ 3. Indictment.

An indictment for subornation of perjury should charge that defendant did unlawfully, wilfully, and feloniously procure another to wilfully and corrupt-

ly commit perjury, and an indictment which fails to charge that defendant procured such person to wilfully and corruptly commit perjury is fatally defective. *S. v. Watkins*, 606.

If the State contends that defendant committed perjury or subornation of perjury in regard to testimony in separate prosecutions, the better procedure is to obtain a separate bill of indictment as to each charge. *Ibid.*

§ 5. Sufficiency of Evidence and Nonsuit.

Proof that in a prosecution of her son for larceny defendant falsely swore that she, her son, and a third person were together at a time prior to and at a time subsequent to the time the theft was committed, is insufficient to support a prosecution for perjury when the State admits that such testimony did not tend to establish an alibi. *S. v. Chaney*, 255.

PLEADINGS

§ 1. Filing and Service of Complaint.

The clerk has authority to extend the time for filing a complaint to a date certain not to exceed 20 days from issuance of summons upon application and order stating the nature and purpose of the suit, G.S. 1-121, and the delivery of copies of the summons and order extending the time for the delayed filing, together with the filing of the complaint within the time limited, gives the court jurisdiction. *Roberts v. Bottling Co.*, 434.

A statement in the application and order extending the time for filing of the complaint that the nature of the action is to recover a specified sum for personal injuries received as the result of negligence of the defendant, sufficiently states the purpose of the action within the purview of G.S. 1-121, and prior to the time set for the filing of the complaint a motion by defendant to quash the summons and dismiss the action will not lie. *Ibid.*

Where plaintiff procures an order extending the time for filing complaint upon application stating that the nature and purpose of the action is to recover a specified sum for negligent injury, and within the time allowed he files a complaint stating a cause of action for breach of implied warranty arising out of the same transaction, the judge of the Superior Court may deny defendant's motion to quash the summons and dismiss the action on the ground the application and order did not authorize the filing of a complaint based on contract, since the matters are within the wide discretionary powers of amendment given the court. *Ibid.*

§ 2. Statement of Cause of Action in General.

The nature of the cause of action will be determined by the allegations of fact contained in the pleading as explained by the relief demanded, construing the pleading as a whole in favor of the pleader. *Greer v. Broadcasting Co.*, 382.

§ 8. Conterclaims and Cross-Actions.

Where the driver of one of three vehicles involved in a collision sues the other two drivers and the employer of one of them, a defendant driver may set-up a counterclaim against plaintiff and may allege therein the concurring negligence of plaintiff and the other defendant driver, but he may not set-up a cross-action against such defendant driver, since such cross-action is not germane to plaintiff's cause of action. *Jarrett v. Brogdon*, 693.

PLEADINGS—*Continued.*

§ 10. Office and Necessity of Reply.

An allegation in the answer which does not relate to a counterclaim is deemed controverted without necessity of reply. *Creech v. Creech*, 356.

§ 12. Office and Effect of Demurrer.

A demurrer admits the truth of factual averments well stated and relevant inferences deducible therefrom, but not legal inferences or conclusions. *Greer v. Broadcasting Co.*, 382; *Bagwell v. Brevard*, 465; *Sparks v. Trust Co.*, 478.

A demurrer presents the question of the sufficiency of a pleading as a matter of law for the court. *Parrish v. Brantley*, 541.

§ 18. Demurrer for Misjoinder of Parties and Causes.

Where the complaint alleges facts which might pertain to other causes of action, but which are alleged as bearing on the setting of the single cause of action alleged, and the facts alleged are sufficient to constitute only one cause of action, demurrer for misjoinder of parties and causes is properly overruled. *Greer v. Broadcasting Co.*, 382.

§ 19. Demurrer for Failure of Pleading to State Cause of Action.

Whether the facts alleged are sufficient to constitute a cause of action is a question of law. *Bagwell v. Brevard*, 465.

If the facts alleged in a complaint constitute a defective statment of a good cause of action, demurrer to the cmplaint should be sustained but plaintiff should be granted leave to amend. *Parrish v. Brantley*, 541.

If the facts alleged in the complaint disclose that plaintiff does not have a cause of action, demurrer thereto should be sustained and the action dismissed. *Ibid.*

§ 25. Scope of Amendment to Pleadings.

If a cause of action in tort and a cause of action on contract arise out of the same transaction or are connected with the same subject of action, plaintiff may join both in the same complaint, and if he alleges only one of the causes of action he is entitled as a matter of right before time to answer expires to amend by alleging the other or to amend by striking the one and substituting the other. *Roberts v. Bottling Co.*, 343.

Where the facts in regard to the accident in suit are alleged in the complaint, an amendment which characterizes defendant's conduct as amounting to gross negligence does not amount to a statement of a new cause of action notwithstanding that gross negligence may be essential to a recovery by plaintiff, since the conclusion of gross negligence may be deduced from the alleged facts, and therefore the action is not barred when the complaint is filed within the time limited even though the amendment is filed thereafter. *Kiser v. Bowman*, 565.

§ 28. Variance Between Allegation and Proof.

To establish a cause of action there must be *allegata* and *probata*, and the two must correspond. *Paschal v. Autry*, 166; *Parker v. Flythe*, 548.

§ 29. Issues Raised by Pleadings and Necessity for Proof.

Allegation alone cannot raise an issue for the determination of the jury it being required that there be both allegation and proof. *Gunter v. Winders*, 263.

PLEADINGS—*Continued.*

§ 33. Motions to Strike; Legal and Discretionary Right.

If motion to strike irrelevant and redundant matter from a pleading is made before answer or demurrer and before the expiration of time for answering or demurring, the motion is made as a matter of right. *Trust Co. v. Pollard*, 77.

§ 34. Whether Allegations are Irrelevant or Redundant.

Allegations are irrelevant if evidence to prove the facts therein alleged is incompetent, and allegations are redundant if the facts therein alleged are alleged with excessive fullness or are merely repetitious of the same facts theretofore alleged in the pleading, and the denial of a motion to strike will be reversed if the matter sought to be stricken is irrelevant or redundant, and its retention in the pleading would cause harm or injustice to movant. *Trust Co. v. Pollard*, 77.

Allegations in the answer which are insufficient to state a defense should be stricken on motion as irrelevant. *Maynor v. Pressley*, 483.

PRINCIPAL AND AGENT

§ 8. Knowledge of Agent as Knowledge of Principal.

The rule that the knowledge of the agent will be imputed to the principal does not apply when the circumstances are such as to disclose that the agent is acting in his own personal interest and adversely to that of the principal, or has a motive in concealing the facts from the principal. *Sparks v. Trust Co.*, 478.

PRINCIPAL AND SURETY

§ 1. Nature and Construction of Surety Contracts in General.

The obligee of a surety bond is not ordinarily under duty to disclose to the surety facts relating to the character of the risk unless the obligee knows a fact of vital importance to the risk and knows that the surety will not be able to discover such fact in the exercise of due diligence, so that the failure to disclose such fact amounts to a contrary representation. *Construction Co. v. Grain and Denbo, Inc.*, 110.

§ 9. Bonds for Private Construction.

The obligee of a surety bond is not ordinarily under duty to disclose to the surety facts relating to the character of the risk unless the obligee knows a fact of vital importance to the risk and knows that the surety will not be able to discover such fact in the exercise of due diligence, so that the failure to disclose such facts amounts to a contrary representation to the surety. *Construction Co. v. Crain & Denbo, Inc.*, 110.

Evidence held to support finding that there was no fraudulent concealment from the surety of fact materially affecting the risk. *Ibid.*

The fact that a contractor performs the contract for the construction of water, sanitary and storm sewer lines in accordance with the specfications and grades designated by the contractee's engineers does not estop the contractee from recovering against the contractor and the surety on its bond for defective conditions in the underground work caused by faulty construction and workmanship, nor is the contractor or surety entitled to nonsuit on the

PRINCIPAL AND SURETY—*Continued.*

ground that the contractee's inspector could have discovered the defects in the exercise of due diligence when the ability of the inspector to have thus discovered such defects is not established by plaintiff's evidence, or otherwise. *Realty Co. v. Batson*, 298.

The fact that the contractee accepts the work in the honest but mistaken belief that the contractor had satisfactorily performed his contract and advised the surety that the work had been satisfactorily completed, does not estop the contractee from asserting claim for damages for a latent defect in workmanship and construction. *Ibid.*

The bond and the construction contract it is given to secure will be construed together. *Ibid.*

The obligation of a surety is primary, and he is equally bound with the principal. *Ibid.*

The failure of the contractee to retain the full amount specified in the contract to be retained from payment to the contractor does not entitle the surety to a credit *pro tanto* when the payments have been made by the contractee under the honest but mistaken belief that the contractor had satisfactorily completed the work, the defects being latent, and the surety's motion for nonsuit on the affirmative defense of such overpayment is properly denied when the contractee's evidence does not establish as a matter of law that it was negligent in failing to discover the defects before accepting the work and paying the contractor without retaining the percentage of the contract price specified. *Ibid.*

Where the contract for the construction of water, sanitary, and storm sewer lines for a development stipulates that the work should be done in accordance with the standards prescribed by a specified municipality, a printed pamphlet released by the city and containing its specifications for such construction, is material and properly admitted in evidence, irrespective of whether the contractor and the contractee had examined or read the booklet prior to executing the agreement. *Ibid.*

PROCESS

§ 2. Issuance and Service in General.

Statutes authorizing substituted service of process are in derogation of the common law and must be strictly construed. *Byrd v. Piedmont Aviation*, 684.

§ 13. Service of Process on Foreign Corporation by Service on the Secretary of State.

A foreign corporation which has no process agent in this State may be served by service on the Secretary of State when it has carried on in this State regularly and systematically some of the functions or activities for which it was created. G.S. 55-145(c). *Babson v. Clairol, Inc.*, 227.

Evidence that a corporation manufacturing cosmetics regularly and systematically used agents in this State for the purpose of demonstration and promotion of its sales is sufficient to support a finding that it was doing business in this State so as to be amenable to service by service upon the Secretary of State. *Ibid.*

§ 15. Service in Actions Against Nonresident Auto Owner.

An airplane is not a "motor vehicle" within the purview of G.S. 1-105, even under the 1955 amendment, and service of process on the Commissioner of

PROCESS—*Continued*

Motor Vehicles in an action to recover for the negligent operation of an airplane owned by a non-resident is ineffectual. *Byrd v. Piedmont Aviation*, 684.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers to Individuals.

A law enforcement officer may be held liable as an individual for malicious prosecution if such officer acts in a corrupt and malicious manner, not in the interest of the public, and without probable cause. *Greer v. Broadcasting Co.*, 382.

QUASI CONTRACTS

§ 1. Elements and Essentials of Right of Action.

Where a person renders personal services in reliance upon a verbal agreement to devise property, the law will imply an agreement to pay the reasonable value of the services even though the action agreement cannot be shown in evidence because of the application of the statute of frauds. *McCraw v. Llewellyn*, 213.

The rule that there can be no implied contract with reference to a matter which is the subject of an express contract extends to instances in which goods or services which benefit one person are furnished under an express contract with another and in reliance upon the credit of such other, in which event there can be no implied promise to pay, based on the theory of unjust enrichment, on the part of the person benefited. *Concrete Co. v. Lumber Co.*, 709.

Therefore, where there is a sale of building material to one person upon a contract solely with such person, the seller may not recover upon implied contract against another even though the material was used in the construction of houses on the lands of such other and this increased the value of the land. *Ibid.*

§ 2. Actions.

Although evidence of the making of a contract with one person is ordinarily incompetent to prove the making of a contract with another, where plaintiffs' evidence is to the effect that defendant was in poor health and asked plaintiffs to live with him and look after him upon his promise to devise them property by will, evidence of a third person to the effect that defendant made a like agreement with him for like reasons is competent for the purpose of corroborating plaintiffs' evidence that defendant was in poor health and wanted someone to live with him. *Doub v. Hauser*, 331.

Where services are rendered with the parol understanding that compensation was to be made in the will of the recipient by devise of real estate, or of real estate and personal property, the measure of damages, upon failure of compensation is the value of the services rendered, less benefits received, and evidence of the value of recipient's estate is not competent on the issue of damages. *Ibid.*

In this action to recover the value of personal services rendered defendant in reliance of defendant's promise to devise plaintiffs property, which contract was abandoned when defendant ordered plaintiffs off his property,

QUASI CONTRACTS—*Continued.*

evidence that defendant received a large sum in compensation for a part of his lands taken by eminent domain a short time before he ordered plaintiffs from his property, is competent as tending to show that defendant ordered plaintiffs off his property not because of failure on their part to keep the agreement, but because he no longer needed them, there being evidence that defendant was without funds at the time the agreement was made. *Ibid.*

Evidence that defendant sold a quantity of his lands after plaintiffs had made demand for compensation for services rendered is competent as permitting an inference that defendant was seeking to avoid payment of a legal obligation. *Ibid.*

A cause of action to recover compensation for services rendered under an implied contract arises as the services are rendered when the agreement is for indefinite and continuous service without any definite arrangement as to time for compensation; where the agreement is that compensation will be provided in the will of the recipient, the cause of action accrues when the recipient dies without having made the agreed testamentary provision; when such agreement is abandoned, the cause of action accrues at the time of the abandonment of the contract. *Ibid.*

Where plaintiffs' evidence is to the effect that they rendered personal services over a number of years in reliance upon the recipient's agreement to compensate them by devising property to them, the action is not barred if brought within three years of the abandonment of the contract, and if defendant wishes to challenge the sufficiency of the evidence as to the agreement to make testamentary provision for compensation, he must in apt time request the submission of an issue as to whether the services were rendered without any definite arrangement as to time for payment. *Ibid.*

In an action to recover the reasonable value of personal services rendered upon implied contract to pay for same, a separate issue as to special benefits received is not necessary, but the court may properly instruct the jury to offset any amount which they should find to be the reasonable value of the services with the value of benefits received by plaintiffs and their families from the recipient of the services. *Ibid.*

RAILROADS

§ 5. Accidents at Grade Crossings.

The evidence in this case held sufficient to be submitted to the jury on the issue of the negligence of defendant railroad proximately causing a grade crossing accident, all doubts being resolved in plaintiff motorist's favor. *Carter v. R.R.*, 545.

Evidence tending to show that plaintiff was familiar with the grade crossing in question, that he did not stop his vehicle before entering on the crossing, that he became aware of the approaching locomotive when it was some 30 feet from the crossing, and that plaintiff then applied his brakes and skidded onto the tracks in front of the train, *is held* to disclose contributory negligence as a matter of law. *Ibid.*

§ 11. Damage to Property Along Right-of-Way.

A railroad company may not be held liable for injuries to cattle which break through the owner's fence and eat vegetation on the right-of-way, which had been sprayed by the railroad company with a poisonous weed-killer, nor may the railroad company be held under duty to seek out and

notify adjacent landowners of the time it proposes to spray the weeds and brush on its right-of-ways with poison. *Aycock v. R.R.*, 604.

RAPE

§ 6. Less Degrees of the Crime.

Assault with intent to commit rape is a less degree of the crime of rape. *S. v. Birckhead*, 494.

RECEIVING STOLEN GOODS

§ 1. Elements and Nature of Offense.

The receiving of stolen goods with the knowledge that they had been stolen is a felony when the value of the property received is in excess of $200.00 and is a misdemeanor when the value of the property is $200.00 or less. G.S. 14-71; G.S. 14-72, as amended. *S. v. Cooper*, 372.

REGISTRATION

§ 5. Parties Protected.

A nonresident gave a worthless check to a dealer in this State in payment of an automobile and took the vehicle to the state of his residence. Thereafter the vehicle was returned to the dealer in this State upon his demand, and the dealer then sold it to a resident purchaser without notice. *Held:* The resident purchaser is afforded protection under G.S. 44-38.1, and the contention that he was not protected by the statute because he was not a grantor, mortgagor, or conditional sales vendee from the nonresident purchaser, is untenable. *Bank v. Rich*, 324.

RELIGIOUS SOCIETIES

§ 2. Government, Management and Property.

A church may be congregational in some respects and connectional in others. *Conference v. Creech*, 128.

§ 3. Actions.

Civil courts have no jurisdiction over or right to supervise purely ecclesiastical questions or church polity, but the courts do have jurisdiction over contractual and property rights involved in a church controversy, in the decision of which the courts will inquire into matters of church government only to the extent of determining whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules. *Conference v. Creech*, 128.

Order restraining defendant from acting as a minister of particular church held properly continued to hearing upon *prima facie* showing that plaintiffs had authority to oust him. *Ibid.*

Where there is controversy between two factions of a congregation of a church as to the right to use and control the church property, the courts have authority to determine which faction is the true congregation of the church by reason of adherence to the articles of faith and polity and customs and usages of the denomination. *Ibid.*

RELIGIOUS SOCIETIES—*Continued.*

Upon the hearing of an order to show cause entered in an action to determine the right to use and control church property, the court should not grant exclusive control and use of the church property to either faction of the congregation, but should seek to maintain the *status quo* as nearly as possible and permit both factions to share the use and possession of the church properties on an equal basis until the hearing on the merits, and the court is without authority to prescribe rules or conditions upon which members of one faction might be restored to membership in the true congregation of the church, this being an ecclesiastical question. *Ibid.*

SALES

§ 3. Transfer of Title.

A purchaser who gives a worthless check in payment for merchandise does not acquire title even though the merchandise is then delivered, and the seller may regain his property even against a *bona fide* purchaser in the absence of estoppel. *Bank v. Rich*, 324.

Title of car passes when purchaser obtains possession and applies for certificate of title, notwithstanding that conditional sales contract is not filled in as to number and amount of installments. *Godwin v. Casualty Co.*, 730.

§ 6. Implied Warranties.

When seller sells parts of airplane with knowledge that buyer intends to use parts to rebuild airplane for use in flight, there is an implied warranty that seller had not made secret agreement with Air Force when he purchased the plane parts as surplus that plane reconstructed from the parts could not be used in flight. *Boy v. Airlines*, 392.

SHOPLIFTING

G.S. 14-72.1, making it a misdemeanor for a person, without authority, to wilfully conceal goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, and providing that the fact of concealment upon the person under such circumstances should be *prima facie* evidence that the concealment was wilful, is constitutional and valid, since the statute has a real and substantial relation to the evil of shoplifting which the statute seeks to suppress. Article I, § 17, Constitution of North Carolina; the Due Process Clause of the Federal Constitution. *S. v. Hales*, 27.

G.S. 14-72.1 defines the offense of shoplifting with sufficient clarity and definiteness to inform a person of ordinary intelligence and reasonable preception what act it intends to prohibit and omits no essential provisions which go to impress the inhibited acts as being wrongful and criminal, and therefore the statute cannot be declared void for vagueness of uncertainty. *Ibid.*

The term "wilful concealment" as used in G.S. 14-72.1 means that the concealing of goods under the circumstances set out in the statute must be voluntary, intentional, purposeful, and deliberate, without authority and in violation of the law, and such wilfulness is an essential element of the statutory offense of shoplifting. *Ibid.*

STATE

§ 5f. Review of Proceedings under Tort Claims Act.

Where, in a proceeding under the Tort Claims Act, there is sufficient evidence to support the Industrial Commission's findings of negligence on the part of a State employee which proximately caused the injury in question, such findings are conclusive, even though there be evidence that would support contrary findings. *Jordan v. Highway Comm.*, 456.

STATUTES

§ 4. Construction in Regard to Constitutionality.

There is a presumption in favor of the constitutionality of a statute, and a statute will be upheld unless it is in conflict with some constitutional provision. *S. v. Hales*, 27.

§ 5. General Rules of Construction.

A part of a statute is not to be interpreted out of context but the entire statute must be construed as a whole and harmonized to ascertain the intent of the legislature, the legislative intent being the guiding star in the interpretation of statutes. *Canteen Service v. Johnson*, 155.

Where a literal interpretation of the language of a statute would lead to absurd results and contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter thereof disregarded. *S. v. Burrell*, 288.

TAXATION

§ 2. Uniform Rule and Discrimination.

G.S. 105-164.1, *et seq.*, imposes a sales tax on all retailers as a class and applies alike in its exceptions and exemptions to all retailers, and therefore if incidents of trade lead to inequality or hardship in recoupment of the tax from customers because of the necessity of specifying the price ranges within which the retailer may require the purchaser to pay the one, two, and three cents, with no tax collected from the purchaser on sales of less than ten cents, such inequality is inherent in the application of any general rule and does not render the tax unconstitutional as violating the due process clause of the State Constitution or the 14th Amendment of the Federal Constitution. *Canteen Service v. Johnson*, 155.

§ 19. Exemption of Property and Transactions from Taxation in General.

One who claims an exemption or exception from a tax has the burden of bringing himself within the exemption of exception. *Canteen Service v. Johnson*, 155.

§ 23. Construction of Taxing Statutes in General.

An interpretative regulation by the Commission of Revenue will ordinarily be upheld if made pursuant to statutory authority and if not in conflict with the terms and purpose of the act pursuant to which it was made. *Canteen Service v. Johnson*, 155.

§ 29. Sales, Use and Excise Taxes.

Construing the North Carolina sales tax statute as a whole, it *is held* to impose a privilege or license tax upon retailers and not a purchasers' or con-

sumers' tax, and therefore a retailer is not exempt from liability for the tax on articles selling for less than ten cents even though he may not recoup the tax from the purchaser in such instances. *Canteen Service v. Johnson*, 155.

Facts stipulated held to support finding that charge paid by lessee was rent subject to use tax and not a service charge. *Ibid.*

Where the language of a statute expresses the legislature's intent in clear and unambiguous terms, the words must be taken as a final expression of the meaning intended unaffected by the legislative history of the statute. *Ibid.*

The incorporation into the sales tax statute of the bracket system for computing the amount of sales tax which should be collected from the customer in the purchase of articles costing less than a dollar made no material change in the statute, the regulation of the Commissioner of Revenue being already in effect prior to its incorporation into the statute. *Ibid.*

§ 36. Remedies of Taxpayer.

Only those whose personal, property, or constitutional rights are injuriously affected or threatened by a statute may challenge its constitutionality, and where a retailer does not make it appear that he had suffered any monetary damage by the method used in determining his right to recoup the tax from his customers, he is not in a position to challenge the constitutionality of the statute on the ground that the method of recoupment resulted in unjust discrimination between retailers. *Canteen Service v. Johnson*, 155.

TORTS

§ 3. Rights of Defendants Inter Se Prior to Judgment.

Where the driver of one of three vehicles involved in a collision sues the other two drivers and the employer of one of them, a defendant driver may set-up a counterclaim against plaintiff and may allege therein the concurring negligence of plaintiff and the other defendant driver, but he may not set-up a cross-action against such defendant driver, since such cross-action is not germane to plaintiff's cause of action. *Jarrett v. Brogdon*, 693.

§ 7. Release from Liability.

Allegations and evidence held insufficient to raise issue for jury as to whether release was procured by fraud. *Davis v. Davis*, 468.

Evidence of mental incapacity to sign release held for jury. *Walker v. Walker*, 696.

TRESPASS TO TRY TITLE

§ 1. Nature and Essentials of Action.

In an action in trespass in which the question of title is injected, all persons claiming an interest in the lands as heirs of a decedent should be made parties. *Paschal v. Autry*, 166.

§ 2. Presumptions and Burden of Proof.

While ordinarily the burden is upon the plaintiffs in an action to try title to realty to prove that they are the owners of the land, where plaintiffs introduce instruments constituting a chain of title from defendant, which instruments are valid on their face, defendant has the burden of proving his asserted invalidity of these instruments, based on matters *dehors* the record, as an affirmative defense. *Denson v. Davis*, 658.

TRESPASS TO TRY TITLE—*Continued.*

§ 5. Issues, Verdict and Judgment.

In an action in trespass, judgment may not be rendered that defendant had acquired title to a part of the *locus in quo* by adverse possession when there is no allegation of title by adverse possession in defendant's pleadings, regardless of proof introduced by defendant. *Paschal v. Autry*, 166.

TRIAL

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

A party does not lose his exception to the admission of testimony by failing to renew objection to a question when it is rephrased. *Equipment Co. v. Hertz Corp.*, 277.

§ 17. Admission of Evidence for Restricted Purpose.

Where evidence is competent for a restricted purpose, its general admission will not be held for error in the absence of a request at the time that its admission be restricted. *Doub v. Hauser*, 331.

§ 19. Office and Effect of Motion to Nonsuit.

Where the evidence on an aspect which is essential to make out a case against a defendant is insufficient to be submitted to the jury, such defendant's motion to nonsuit must be allowed notwithstanding the motion was not prosecuted on this aspect. *Equipment Co. v. Hertz Corp.*, 277; *Redden v. Bynum*, 351.

A motion for judgment of nonsuit is a demurrer to the evidence and presents the legal question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury upon the issue; judgment of nonsuit is also proper if it affirmatively appears from the evidence as a matter of law that plaintiff is not entitled to recover. *Walker v. Story*, 453.

§ 21. Consideration of Evidence on Motions to Nonsuit.

Where defendant introduces evidence and renews his motion to nonsuit, the court must consider all of the evidence, whether offered by plaintiff or defendant, in the light most favorable to plaintiff, but even so, only that evidence offered by defendant that tends to clarify or explain plaintiff's evidence and is not in conflict therewith may be considered, and defendant's evidence which tends to establish another or different state of facts or which tends to contradict or impeach plaintiff's testimony should not be considered, the credibility of defendant's evidence being a question for the jury. *Ammons v. Britt*, 248.

On motion to nonsuit, plaintiffs' evidence is to be taken as true and considered in the light most favorable to them, giving them the benefit of every reasonable inference to be drawn therefrom, and defendant's evidence which is favorable to plaintiffs or tends to explain and make clear plaintiffs' evidence may be considered, but defendant's evidence which tends to contradict or impeach plaintiffs' evidence is to be disregarded. *Bayer v. Teer Co.*, 509.

Defendant is a plaintiff in regard to his cross-action, and therefore upon motion to nonsuit a cross-action the evidence tending to sustain the cross-action must be considered in the light most favorable to defendant and evidence favorable to plaintiff must be disregarded. *Gillikin v. Mason*, 533.

TRIAL—*Continued.*

§ 22. Sufficiency of Evidence to Overrule Nonsuit in General.

Contradictions and inconsistencies in plaintiff's own testimony do not justify nonsuit but must be resolved in favor of plaintiff. *Redden v. Bynum*, 351.

§ 29. Voluntary Nonsuit.

The rule that a party may, as a matter of right, take a voluntary nonsuit at any time before verdict when no counterclaim or affirmative relief is demanded against him, obtains up to the time the verdict is accepted by the court or made known to any person other than members of the jury, the trial court, or a court official acting in the presence of the judge and under his direction with respect to the verdict, and a party's act in taking a voluntary nonsuit while a court official was taking the verdict from the jury to deliver it to the judge, is not reviewable. *Ins. Co. v. Walton*, 345.

§ 30. Form and Effect of Judgment of Nonsuit.

Where the court grants plaintiff's motion to nonsuit defendant's cross-action, and the trial of plaintiff's cause continues, the granting of plaintiff's motion to dismiss the cross-action is a final judgment of nonsuit on the cross-action notwithstanding the failure of the court to implement its ruling by formal judgment. *Gillikin v. Mason*, 533.

§ 31. Directed Verdict and Peremptory Instructions.

In those cases in which it is proper for the court to give a peremptory instruction in favor of the party having the burden of proof, the court, after instructions to answer the issue in the affirmative if the jury should find the facts to be as all of the evidence tends to show, should instruct the jury to answer the issue in the negative if they fail to so find, in order that the jury may pass upon the weight and credibility of the evidence. *Crisp v. Ins. Co.*, 408.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

The court is required to declare the law and apply the evidence thereto in regard to each substantial and essential feature of the case without any request for special instructions. *Rogers v. Thompson*, 265; *Therrell v. Freeman*, 552; *Bulluck v. Long*, 577.

Where statutory law is involved in an action, a simple explanation thereof is generally preferable to reading the statute to the jury, but in any event the court is required not only to charge the statutory law but also to apply the statutory law to the evidence in the case. *Therrell v. Freeman*, 552.

"Public highways" and "private driveways" are non-technical terms which the court is not required to define in the absence of specific request for instructions. *Equipment Co. v. Hertz Corp.*, 277.

Where the charge contains a summary of the material aspects of the evidence sufficient to bring into focus the controlling legal principles, and applies the law to the facts upon every substantial feature of the cause, the charge is sufficient, the court not being required to recapitulate the evidence witness by witness, nor to instruct on subordinate features of the case in the absence of proper request therefor. *Rubber Co. v. Distributor*, 561.

Even though the parties waive a recapitulation of the evidence, the court is under duty to declare and explain the law in its relation to the various aspects of the evidence and to point out, respectively, for each side the facts pre-

sented by his evidence which would justify an affirmative and would justify a negative answer to the issue in controversy. *Bulluck v. Long*, 577.

§ 34. Instructions on Burden of Proof.

Charge, construed contextually, held not to have placed burden of proof on defendant. *Newton v. McGowan*, 421.

When the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the terms "greater weight" or "preponderance of the evidence" in the absence of prayer for special instructions. *Rubber Co. v. Distributors*, 561.

§ 40. Form and Sufficiency of Issues.

The issues must present all material controversies arising on the pleadings and be sufficient to support a final judgment. *Mitchell v. White*, 437.

The issues are sufficient when they present all material controversies arising on the pleadings and are sufficient to support the judgment. *Rubber Co. v. Distributors*, 561.

Where the only issues of fact raised by the pleadings relate to whether plaintiffs are all the heirs of deceased and whether defendant executed the instrument in question, two issues addressed respectively to these two questions are sufficient, and, the effect of the instrument being a question of law for the court, are sufficient to support a judgment adjudicating the rights of the parties under the instrument. *Stewart v. McDade*, 630.

§ 45. Acceptance or Rejection of Verdict by Court.

A verdict is incomplete until it has been accepted by the court for record. *Ins. Co. v. Walton*, 345.

§ 48. Power of Court to Set Aside Verdict.

The action of the court in setting aside the verdict for error of law committed during the trial is reviewable, but where plaintiff has taken a voluntary nonsuit prior to acceptance of the verdict by the court, the act of the court in setting aside the verdict is without error, since, in such instance the court had no authority to accept or implement the purported verdict. *Ins. Co. v. Walton*, 345.

§ 54.1. Effect of Order of Mistrial.

Where the court orders a mistrial for inability of the jury to agree upon a verdict, the case remains on the civil issue docket for trial *de novo* unaffected by rulings made during the trial, except the order of mistrial does not affect a prior nonsuit of defendant's cross-action. *Gillikin v. Mason*, 533.

§ 56. Trial and Hearing by the Court.

Where voluminous evidence is introduced in a trial by the court under agreement of the parties, the fact that some of the evidence admitted is of questionable relevancy and some incompetent as hearsay does not require a new trial, since it will be presumed that the court disregarded the incompetent or irrelevant testimony in making its decision. *Construction Co. v. Crain and Denbo, Inc.*, 110.

TRUSTS

§ 1. Creation of Written Trusts in General.

A devise and bequest to testator's wife "knowing full well she will use the same for the benefit of herself and our children" does not create a trust in favor of the children. *Johnson v. Johnson*, 485.

§ 3. Active and Passive Trusts and Merger of Legal and Equitable Titles.

A trust which imposes duties upon the trustee in regard to the management and investment of the trust estate and the payment of the income therefrom to beneficiaries for an indefinite time, is an active trust. *Trust Co. v. Buchan*, 142.

§ 5. Modification of Trusts for Personal Beneficiaries.

Equity will modify a trust only when necessary to preserve the trust property and effectuate the primary purpose of the trust, and will not modify a trust merely to suit the convenience or wishes of the interested parties. *Keesler v. Bank*, 12.

§ 13. Creation of Resulting Trusts.

Agreement of owner to sell lands and divide or reinvest proceeds of sale may create a resulting trust. *Hodges v. Hodges*, 536.

§ 17. Presumptions and Burden of Proof.

Where plaintiff asserts a resulting trust pursuant to the agreement of the owner of land to sell same and invest the proceeds in other realty for the benefit of himself and plaintiff, plaintiff has the burden of establishing the agreement by clear, cogent, and convincing proof, and the burden of showing that the proceeds were in fact invested in the particular property against which the trust is asserted and the proportion of the purchase price which was derived from the sale of the land. *Hodges v. Hodges*, 536.

UTILITIES COMMISSION

§ 3. Jurisdiction and Authority of Commission.

The Utilities Commission has authority to order a carrier to provide uniform switching service to shipper's sidings regardless of whether the carrier or other carriers are the line-haul carrier. *Utilities Comm. v. R.R.*, 359.

§ 9. Appeal and Review.

An order of the Utilities Commission is *prima facie* just and reasonable, and where the findings of the Commission are supported by competent, material, and substantial evidence, an order which the Commission has authority to enter upon such findings will be affirmed. *Utilities Comm. v. R.R.*, 359.

VENDOR AND PURCHASER

§ 5. Condition of Property and Fraud in Representations as to Value and Condition.

Where the vendor of a house and lot fraudulently fails to disclose that the dwelling was constructed over a ditch filled with refuse and trash, which had been grassed over and landscaped so as to conceal its condition, and as a result thereof the foundation settles and gives way, the purchasers, electing

VENDOR AND PURCHASER—*Continued.*

to sue for damages, are entitled to recover the difference in the actual value of the property at the time of the sale and the value of the house and lot had it been as impliedly represented, and the cost of repairs, either at the time of discovery or at the time of the trial, is not the test of actual damage. *Horne v. Cloninger*, 102.

VENUE

§ 3. Actions Against Executors and Administrators.

An action against an executor or administrator must be instituted in the county in which the personal representative qualified unless there is statutory provision to the contrary, and an action is against the personal representative in his official capacity within the meaning of the rule if it involves a claim against the estate, settlement of the accounts of the personal representative, or the distribution of the estate. *Davis v. Singleton*, 596.

In an action by one beneficiary under a will against the other beneficiary thereunder alleging that plaintiff is entitled to one half a specified sum which had been bequeathed to the parties, and that defendant beneficiary, after filing her final account as executrix, had failed and refused to deliver to plaintiff her one-half interest, *is held* not an action against defendant in her representative capacity, and the denial of defendant's motion to remove, as a matter or right, to the county in which she qualified, is without error. *Ibid.*

WAIVER

§ 2. Nature and Elements of Waiver.

A party to a contract may excuse or waive nonperformance of a condition by the other party to the agreement, but waiver is a question of intent and does not obtain unless intended by the one party and so understood by the other, or one party has so acted as to mislead the other, and the question of intent to excuse nonperformance is ordinarily a question of fact and may rarely be inferred as a matter of law. *Construction Co. v. Crain & Denbo, Inc.*, 110.

WATER AND WATER COURSES

§ 2. Percolating Waters.

The common law rule that the owner of land, in the absence of malice or negligence or any contractual or statutory restriction, has the absolute right to intercept and use percolating waters has been modified by the "reasonable use" rule under which the land owner may use percolating water for any use which is reasonable and legitimate in the natural enjoyment or improvement of his own land, provided he does not waste the water, use it for purposes unconnected with the improvement or enjoyment of his land, or act maliciously or negligently, or intentionally contaminate or interfere with the supply of percolating waters on adjoining lands. *Bayer v. Teer Co.*, 509.

Pumping of water necessary in reasonable operation of rock quarry held not unreasonable interference with percolating waters. *Ibid.*

WILLS

§ 2. Contracts to Devise or Bequeath.

A contract to devise and bequeath property consisting of both personalty and realty comes within the statute of frauds. but, upon supporting evidence, the cause should be submitted to the jury on *quantum meruit*. *McCraw v. Llewellyn*, 213.

§ 4. Holographic Wills.

It is not required that the signature of a holographic will be witnessed, and testimony of three credible witnesses that the paper writing propounded was written and subscribed entirely in the handwriting of the author meets the requirements of G.S. 31-3.4. *In re Will of Gilkey*, 415.

The requirement that a holographic will be found after the death of testator among his valuable papers or papers considered by him to be valuable, is solely for the purpose of establishing *animus testandi*, and where testator places and leaves a holographic will among his valuable papers the fact that after the testator becomes incapacitated another finds and sees the papers and removes them to a place of safety does not affect the statutory requirement of G.S. 31-3.4(a) (3). *Ibid.*

Testimony that some three weeks prior to testatrix's death the paper writing probated as testatrix's holographic will was found in a metal box, containing other valuable papers, in the closet of testatrix's bedroom, that propounder moved the valuable papers to a lock box rented by him from a bank, and that the paper writing was found with testatrix's other papers in the lock box when inventoried after her death, together with evidence that at the time propounder found the papers testatrix was confined to a hospital incapacitated from her fatal illness, *is held* sufficient to be submitted to the jury on the question whether the paper writing was found among testatrix's valuable papers. *Ibid.*

Where the person appointed attorney in fact finds the paper writing propounded by him among testatrix's valuable papers while testatrix was confined to a hospital incapacitated by her last illness, it is not error for the court to fail to charge with respect to the duty imposed upon propounder by the power of attorney to take possession and custody of the will and all other valuable papers belonging to testatrix. *Ibid.*

§ 33. Fees, Life Estates and Remainders.

A devise of property by will is to be construed as one in fee simple unless the will contains plain and express language disclosing a contrary intent. *Basnight v. Dill*, 474.

A devise of land to husband and wife by the entireties with further provision that if the devisees should die in possession of the property it should descend to the heirs of testatrix's mother, *is held* to carry the fee to the husband and wife by the entireties, and the subsequent devise to the heirs of testatrix's mother is void as repugnant to the fee theretofore devised. Upon the death of the surviving wife in possession of the lands the property goes to the residuary devisee under her will. *Ibid.*

§ 59. Renunciation, Forfeiture and Acceleration.

Ordinarily, where the particular estate is terminated for any reason not contemplated in the will the enjoyment of the remainder is accelerated provided the remainder is vested and provided there is no express or implied provision in the will of the contrary. *Keesler v. Bank*, 12.

A legatee or devisee may disclaim or renounce his right under a will irrespective of statutory authority, in which event the devise or bequest never takes effect, but ordinarily such renunciation may not be partial unless the gift is separate and Independent from the benefits not renounced. *Ibid.*

Renunciation by life beneficiary of income from specified part of trust held not to accelerate remainder. *Ibid.*

§ 64. After-Born Children.

At the time of executing the will in suit testator had a wife and one child. The will devised and bequeathed all of testator's property to his wife, stating that testator knew she would use same for the benefit of herself and "our children," and that testator made this disposition in order that his wife might carry on the business without the necessity of a sale of any part of the property. *Held:* A child born after the execution of the will is not entitled to a share of the estate, since the will referred to "'children" and gave testator's reason for excluding them. *Johnson v. Johnson*, 485.

§ 66½. Release or Assignment of Prospective Benefits under Will.

Where the terms of a release of any interest in an estate are unambiguous, the legal affect of the language of the instrument is a question of law for the court. *Stewart v. McDade*, 630.

The requirement that parties relying upon a release by a prospective devisee of his share in an estate must prove that the release was not obtained by means of fraud or undue influence, is a policy of the law to protect heirs apparent and to prevent the improvident dissipation by children of a prospective inheritance, and does not apply where the person executing the release is a stranger to the blood of the prospective testator, and in such instance the burden is upon the person signing the release to allege and prove as affirmative defenses, gross want of consideration or fraud or undue influence if he would avoid the effect of the release. *Ibid.*

Where a stranger to the blood of the prospective testator has obtained a favored position so that it is apparent that the prospective testator may will property to her, a release of any possible benefit under the will of the prospective testator, executed for a valuable consideration, will be upheld even though the subject of the release is a mere possibility, especially when it appears that the prospective testator lacked mental capacity at the time he executed the will. *Ibid.*

A release renouncing any bequest and devise in a purported will of a prospective testator "or any other testamentary disposition" by the prospective testator, is sufficiently broad to cover not only the will then executed by the prospective testator but any other will executed by him. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-57. Insurer paying loss of cargo may sue in its name notwithstanding prior actions by owner of truck transporting cargo for damage to truck and action by administrator of passenger for wrongful death. *Ins. Co. v. Trucking Co.*, 721.

1-74; 28-172. Right to recover for timber cut prior to death of owner of land vests if personal representative; right to recover for timber cut after owner's death vests in his heirs. *Paschal v. Autry*, 166.

1-78. Action held not against executrix in official capacity. *Davis v. Singleton*, 596.

1-105. Airplane is not motor vehicle within purview of the statute. *Byrd v. Piedmont Aviation*, 684.

1-121. Statement of court that application met statutory provisions is conclusion of law and not finding of fact. *Roberts v. Bottling Co.*, 434. Where application for extension of time to file complaint is in proper form, court may allow filing of complaint even though it is not for cause stated in application for extension of time, *Roberts v. Bottling Co.*, 434.

1-123. Where guests sues both drivers, neither driver may set up counterclaim against the other. *Jarrett v. Brogdon*, 693.

1-131. Where complaint states cause of action in defective manner, demurrer should be sustained but plaintiff granted leave to amend. *Parrish v. Brantley*, 541.

1-153. Motion to strike before expiration of time for answering is made as matter of right. *Trust Co. v. Pollard*, 77.

1-159. Allegation of answer not relating to counterclaim deemed denied. *Creech v. Creech*, 356.

1-163. Court has wide discretion powers in regard to filing and amendment of pleadings. *Roberts v. Bottling Co.*, 434.

1-180. Court must explain law arising on all substantial features of case arising on evidence. *Therrell v. Freeman*, 552; *Bulluck v. Long*, 577. But court is not required to recapitulate the evidence witness by witness. *Rubber Co. v. Distributors*, 561. Charge held to amount to expression of opinion on evidence in manner in which court stated contentions of parties. *S. v. King*, 236.

1-285. Has no application to appeals from justice of the peace to the Superior Court. *Massenburg v. Fogg*, 703.

6-20. Where judgment is partly in favor of plaintiff and partly in favor of defendant, taxation of costs is in discretion of court. *Membership Corp. v. Light Co.*, 56.

GENERAL STATUTES CONSTRUED—*Continued.*

8-1. Pertinant statute may be read in evidence from printed book. *Equipment Co. v. Hertz Corp.*, 277.

8-54. Improper remark of solicitor on defendant's failure to testify held cured by court. *S. v. Lewis*, 430.

14-45. Actual miscarriage of woman is not essential to offense. *S. v. Mitchner*, 620.

14-71; 14-72. Before punishment for felony, trial court is required to charge jury that burden is on State to prove value of goods exceeded $200. *S. v. Cooper*, 372.

14-72.1. Is constitutional. *S. v. Hales*, 27.

14-223. Enforcement officer appointed by county board of alcoholic control may arrest in his county while discharging his duties. *S. v. Taft*, 441.

14-360. Evidence held not to show that rabbit hunt with sticks endangered health, safety or welfare of public. *Yandell v. American Legion*, 691.

15-41. Allegations held insufficient to state cause for false imprisonment of false arrest. *Greer v. Broadcasting Co.*, 382.

15-41; 18-22; 18-45(o). A.B.C. Officer may arrest without warrant person whom he sees aiding manufacturing of whiskey. *S. v. Taft*, 441.

15-146. Indictment which fails to charge that witness wilfully procured to testify falsely did wilfully and corruptly commit perjury, is defective. *S. v. Watkins*, 606.

15-152. After jury has been empaneled, another indictment may not be consolidated for trial. *S. v. Dunston*, 203. Count has discretionary power to consolidate for trial indictments charging offense of receiving stolen goods on separate occasions. *S. v. White*, 244.

15-170. Misdemeanor of larceny is less degree of felony of larceny. *S. v. Cooper*, 372. Assault with intent to commit rape is less degree of crime of rape. *S. v. Birkhead*, 494.

18-2; 18-48; 18-50. Possession of nontaxpaid liquor, unlawful possession of liquor, and possession of liquor for purpose of sale, are each separate and distinct offenses. *S. v. Simmons*, 688.

18-28. First offense of manufacturing whiskey is misdemeanor; second offense is felony. *S. v. Taft*, 441.

18-32. Evidence held for jury on charge of possession whiskey for purpose of sale. *S. v. Thompson*, 593.

20-129; 20-129.1. Violation of requirements in respect to lights is negligence per se. *Scarborough v. Ingram*, 87.

GENERAL STATUTES CONSTRUED—*Continued.*

20-138. Fact that warrant for drunken driving refers to unspecified municipal ordinance is not fatal. *S. v. Broadway*, 608.

20-138. Evidence of guilt of drunken driving held for jury. *S. v. Stroud*, 458.

20-140(a); 20-140(b). If motorist, in one continuous operation, violates both statutes, he is guilty of but single offense of reckless driving. *S. v. Lewis*, 430.

20-141(a) (c). Violation of provisions is negligence per se. *Bulluck v. Long*, 577; *Cassetta v. Compton*, 71.

20-141(e). Evidence held not to show contributory negligence as matter of law in hitting preceding vehicle on highway. *Scarborough v. Ingram*, 87.

20-141.3(b). Evidence held sufficient for jury on question of defendants engaging in automobile race. *Mason v. Gillikin*, 527.

20-146. Evidence held insufficient to be submitted to jury on question of defendant's culpable negligence. *S. v. Eller*, 706.

20-146; 20-148. Evidence held insufficient to show violation of either statute. *Parker v. Flythe*, 548.

20-154(a). It is negligence to turn left when reasonably prudent man would realize movement could not be made in safety. *Scarborough v. Ingram*, 87.

20-154(a). It is negligence *per se* to turn left without ascertaining that movement can be made in safety, or to turn left without giving statutory signal. *Mitchell v. White*, 437.

20-156(a). Has no application to earth moving equipment entering highway temporarily closed by appropriate signs. *Equipment Co. v. Hertz Corp.*, 277.

20-158(a). It is rebuttably presumed that stop sign was erected pursuant to authority. *Kelly v. Ashburn*, 338.

20-158(a). Failure of motorist on servient highway to stop before entering intersection with dominant highway is not negligence *per se*. *Johnson v. Bass*, 716.

20-310. Nonpayment of premium does not preclude recovery against insurer by injured party when insurer has not cancelled policy as required by statute. *Crisp v. Ins. Co.*, 408.

22-2. Contract to devise property comes within statute if any of the property is realty. *McCraw v. Llewellyn*, 213.

GENERAL STATUTES CONSTRUED—*Continued.*

24-5. Allowance of interest on claim for unliquidated damages is within discretion of court. *Construction Co. v. Crain and Denbo, Inc.*, 110.

28-10; 30-4; 52-19. Wife has no claim on rents and profits from estate by entireties which had accrued at time of husband's death. *In re Estate of Perry*, 65.

31-3.4. It is not required that holographic will be witnessed. *In re Will of Gilkey*, 415. Fact that after testator's incapacity another places holographic will in bank lock box does not affect its validity. *Ibid.*

31-5.5. Will held to evince intent that child born after its execution should not share in estate. *Johnson v. Johnson*, 485.

31-38. Devise will be construed to be in fee simple unless will discloses intent to contrary. *Basnight v. Dill*, 474.

46-70; 46-71. Where vehicle is returned to this State prior to registration of lien in another state our registration laws govern. *Bank v. Rich*, 324.

48-28. Does not obtain when parent or guardian is party to adoption proceedings, *Hicks v. Russell*, 34.

50-7(1). Fact that husband continues to provide support after separating self from wife does not negate abandonment. *Thurston v. Thurston*, 664.

50-11; 50-16. Rendition of absolute divorce does not oust jurisdiction of court in which prior action was pending to adjudicate custody of children. *Blankenship v. Blankenship*, 638.

50-16. Wife is entitled to security of court order notwithstanding husband was voluntarily providing support. *Thurston v. Thurston*, 664.

50-16. Court may not order alimony *pendente lite* without finding facts in regard to adultery asserted in answer. *Creech v. Creech*, 356.

55-37(a) (3); 55-64; 55-3(a); 55-37(b). Stockholders in building and loan association are entitled to mandamus to compel disclosure of names of other stockholders. *White v. Smith*, 218.

55-145(c). Cosmetic company held doing business in this State for purpose of service of process. *Babson v. Clairol, Inc.*, 227.

97-2(6). Back injury suffered while working in ordinary way is not compensable. *Harding v. Thomas & Howard Co.*, 427.

97-12. Unintentional violation of safety statute, even though causing injury, does not require reduction of award. *Brewer v. Trucking Co.*, 175.

97-85. Full Commission may *ex mero motu* strike out finding of hearing commissioner and his conclusions of law thereon in order to make the record comply with the law. *Brewer v. Trucking Co.*, 175.

GENERAL STATUTES CONSTRUED—*Continued.*

104-7. Where Federal Government has no accepted jurisdiction of crimes committed on Federal lands, State courts have jurisdiction. *S. v. Burell*, 288.

105-53(d). City may not prohibit activity authorized by State license. *Tastee-Freeze v. Raleigh*, 208.

105-164.1, *et seq.* Sales and use tax is imposed on all retailers alike and is constitutional. *Canteen Service v. Johnson*, 155.

105-164.6. Facts stipulated held to support finding that charge paid by lessee of vending machines was rent subject to use tax and not service charge. *Canteen Service v. Johnson*, 155.

105-164.10. Sales tax is license tax on retailers. *Canteen Service v. Johnson*, 155.

119-49. Violation of statute cannot be asserted as contributory negligence with the violation of the statute is not pleaded. *Rogers v. Thompson*, 265.

136-1; 136-18(1)1. Highway Commission has powers specifically delegated and powers reasonably necessary to discharge such duties. *Equipment Co. v. Hertz*, 277.

136-26. Commission may not prescribe for its contractor a different standard of care than that imposed by common law, but may authorize contractor to place dirt ramp over highway to protect it from earth-moving machinery. *Equipment Co. v. Hertz Corp.* 277.

136-30; 136-32. After Highway Commission has opened highway for public use and has erected highway signs, highway contractor's duty to maintain baracades and warning signs terminates. *Gilliam v. Construction Co.*, 197.

136-51; 136-25. Contractor may not be held liable for accident on detour under exclusive control of Highway Commission. *Reynolds v. Critcher*, 309.

163-7. Does not apply in regard to offices of Governor or Lieutenant-Governor *Thomas v. Board of Elections*, 401.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, §II, Introduction of evidence that stains on clothing worn by defendant at time of crime were blood stains does not violate defendant's right not to incriminate self. *S. v. Gaskill*, 652.

I, §17. "Law of the land" and "due process of law" are interchangeable terms. *S. v. Hales*, 27; law prescribing offense of shoplifting is constitutional. *Ibid.* Principle that no person should be put twice in jeopardy for same offense comes within purview of this section. *S. v. Birckhead*, 494.

III, §1. No appointment or election to fill unexpired term of Lieutenant-Governor. *Thomas v. Board of Elections*, 401.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

Fifth Amendment. Introduction of evidence that stains on clothing worn by defendant at time of crime were blood stains does not violate defendant's right not to incriminate self. *S. v. Gaskill*, 652.

Fourteenth Amendment. Statute imposes sales and use tax applies to all retailers alike and is constitutional. *Canteen Service v. Johnson*, 155. "Law of the land" and "due process of law" are interchangeable terms. *S. v. Hales*, 27.